



**SENATE  
FINANCE AND PUBLIC ADMINISTRATION  
LEGISLATION COMMITTEE**

**CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE**

**PROVISIONS OF THE  
*PUBLIC SERVICE BILL 1997*  
AND THE  
*PUBLIC EMPLOYMENT (CONSEQUENTIAL AND TRANSITIONAL)  
AMENDMENT BILL 1997***

**OCTOBER 1997**

**The Parliament of the Commonwealth of Australia**

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## **MEMBERS OF THE COMMITTEE**

Senator the Hon Brian Gibson, Chairman (Tasmania)  
Senator Andrew Murray\* (Western Australia)  
Senator Bill Heffernan (New South Wales)  
Senator Kate Lundy (Australian Capital Territory)  
Senator the Hon Robert Ray (Victoria)  
Senator John Watson (Tasmania)

### **Substitute Member**

\*Senator Lyn Allison replaced Senator Murray for the consideration of the provisions of the Public Service Bills.

### **Participating member who attended the public hearing on the bill:**

Senator the Hon John Faulkner

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**REPORT ON THE PROVISIONS OF THE  
PUBLIC SERVICE BILL 1997 AND THE  
PUBLIC EMPLOYMENT (CONSEQUENTIAL AND TRANSITIONAL) AMENDMENT BILL 1997**

**Referral of the Bills**

1 The Senate Selection of Bills Committee recommended in Report No.13 of 1997 on 4 September 1997 that the bills be referred to the Senate Finance and Public Administration Legislation Committee for consideration and report by 29 September 1997. The Selection of Bills Committee's report was adopted by the Senate on the same day. On 25 September 1997 the Senate granted the Committee an extension of time to 2 October 1997 to report.

**Conduct of the inquiry**

2 The Committee's consideration of these bills was limited both by the time available and because the same bills were the subject of an extended and detailed inquiry by the Joint Committee of Public Accounts (JCPA). The bills were referred to the JCPA on 26 June 1997 and it reported on Monday 29 September 1997. In the absence of a final report from that Committee which could be considered prior to this Committee's hearing or any indication from the government of changes to the legislation which might flow from the JCPA report the Senate Committee was in the invidious position of examining issues which were fluid. The Public Service Commissioner in his evidence to this Committee indicated that changes to the legislation as a result of the JCPA report were possible. An additional degree of uncertainty was provided by the continuing negotiations between various parties on the form of regulations to be made under the legislation which meant that revised drafts of these regulations and other subordinate legislation were becoming available on a regular basis. This subordinate legislation is absolutely central to the workings of various parts of the legislation thus it is difficult to consider key parts of the bill without it. As a result of this overall situation some members of both the major parties took the view that it was neither appropriate nor practical to participate in this Committee's examination of the bills at the Committee's public hearing held in Canberra on 24 September 1997 other than to maintain a quorum.

3 Senator John Watson noted that 'normally, the work of one committee in one house is not duplicated by the work of another committee' and that there was no concern with the evidence taken by JCPA or that new evidence had become available which it had not considered and which might justify a separate inquiry. He expressed his 'concern and displeasure' that the Parliament was 'effectively running two committees on the same subject in parallel'.

4 Senator John Faulkner recognised that Independent and Democrat Senators could not participate in the JCPA hearings and supported their right to have matters considered by a Senate committee. However he noted that the JCPA was actually considering its draft report on the Public Service legislation on the same day that this Committee held its public hearing and that this placed Senators who were members of both Committees in an impossible position.

5 The Committee believes that the Selection of Bills Committee should not have referred this bill to a Senate committee while it was being examined by another committee. This is particularly so where the other committee is a joint committee of the Parliament which has some overlap of membership. While the Committee supports the selection of bills process it believes that the Selection of Bills Committee, in making a decision to refer a bill to a committee, should have regard to external circumstances such as constraints of timing or

concurrent inquiries which are likely to militate against a productive outcome by a Senate committee inquiry.

6 In this case the Senate had no opportunity to consider the report of the JCPA or the extent to which that inquiry had dealt with the subject adequately before deciding whether further examination of the legislation by another committee would add anything to the process. Where a political party or individual Senators seek the referral of legislation to a committee they should consider whether any productive outcome will flow from such a referral.

7 The bills under consideration are not yet before the Senate thus the chamber will have the opportunity to consider the bills, any amendments adopted by the House of Representatives as a result of the JCPA report and, presumably, a definitive set of draft regulations and Public Service Commissioner's directions. The JCPA noted that its inquiry was hampered by the absence of final drafts of the subordinate legislation. This Committee endorses that view and seeks the assurance of the Government that a comprehensive draft of the subordinate legislation will be available to the Senate when it comes to consider this legislation.

### **Purpose of the Bills**

8 Clause 3 of the Public Service Bill sets out the objects of the legislation as,

(a) to establish an apolitical public service that is efficient and effective in serving the government, the Parliament and the Australian public; and

(b) to provide a legal framework for the effective and fair employment, management and leadership of APS employees; and

(c) to establish rights and obligations of APS employees.

9 In his evidence to the Committee Dr Peter Shergold, the Public Service Commissioner, expanded on this statement noting that the purpose of the bill was,

to strip away the plethora of central prescription and to provide far greater freedom for public servants to manage their own workplaces. Equally important, the objective of the legislation is to preserve and provide statutory protection for Public Service values, traditions and standards of behaviour which are required in the public interest. It is the aim of the legislation to balance the devolution of employment powers to individual agencies with the strengthening of public accountability for the service as a whole.<sup>1</sup>

10 The bill seeks to achieve these objects by transferring to agency heads direct responsibility as employer for agency staff and placing employment practices on a similar footing to those applying in the private sector. The bill also includes a statement of Australian Public Service (APS) values and a code of conduct for APS employees. The Public Service Commissioner will retain overall responsibility for monitoring the application of the APS values, compliance with the Code of Conduct, supervision of employment conditions and development of the APS generally. The Commissioner will also have the power to review agency decisions with regard to the employment of any APS employee.

### **Issues considered**

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<sup>1</sup> Senate *Hansard*, 24 September 1997, pp. F&PA 3-4.



11 The Committee considered the bills in general terms, focussing on the definition and protection of merit in the appointment and promotion of public servants, the desirability of an independent review mechanism separate from the Public Service Commissioner for employment decisions, the protection of whistleblowers, the method of appointment and dismissal of agency heads and whether those positions should be tenured and the content and timing of agency annual reports to Parliament.

### *Definition of merit*

12 The question of the inclusion of a definition of merit in the legislation has exercised many commentators. Merit is a key principle in the appointment, transfer and promotion of members of the APS. Employment decisions based on merit is one of the APS values set out in clause 10 of the bill. The only definition of merit in the bill is limited to the statement that powers should be exercised without patronage or favouritism.<sup>2</sup> In its submission to this Committee, the Merit Protection and Review Agency (MPRA) stated that

merit is far more than the absence of nepotism and favouritism. Fairness and natural justice should apply, and there should be a requirement that the successful applicant must possess skills and attributes that are relevant to the role to be performed.<sup>3</sup>

13 The Committee endorses that view and believes that a definition of merit should be included in the bill. The wording of the definition has been considered at length before the JCPA and this Committee endorses the wording contained in recommendation 7 of that Committee's report.

### *Independent review of employment decisions*

14 The need for independent review of employment decisions was canvassed at length. Clause 33 of the bill provides that APS employees are entitled to review of employment decisions. The nature of that review will be set out in the regulations. The draft regulations currently allow for internal review following application by an employee to the agency head or review by the Public Service Commissioner if internal review by the agency is inappropriate. The agency head may also refer an application for review to the Commissioner. The Commissioner also has a 'second tier' review function where an applicant is dissatisfied with a review conducted by application to an agency head. It should be noted that the avenues of review do not permit an agency head's decision to be set aside. The outcome of any review will be a product of negotiation and conciliation. However if the Commissioner is not satisfied with the outcome of a review then he has the option of reporting on the matter to the relevant Minister and to Parliament.

15 Various witnesses, including the MPRA, have argued that the Commissioner's review function should be vested in an independent body on the grounds that the present proposal is neither independent nor external. The Clerk of the Senate in his evidence to this Committee argued that the absence of clearly independent review could increase the complexity and cost of the review process as disgruntled appellants sought other avenues of redress. The MPRA has proposed an 'employment ombudsman' which would provide for 'accountability to parliament and for public confidence in the true independence of external review'. The MPRA

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<sup>2</sup> Public Service Bill 1997, cl 17.

<sup>3</sup> MPRA submission, p. 12.

has argued that its proposal is simpler than either the existing system or that proposed under the new legislation.

16 Members of the Committee also expressed concern that the draft regulations defining actions which are not reviewable are so broadly expressed as to leave a significant discretion in the hands of the agency head whether to proceed or not.

17 Dr Shergold did not accept that the proposed structure was inadequate. He argued that the review function sat comfortably with the responsibilities of the Commissioner to set and uphold the standards of the APS. However if a separate review agency was to be contemplated Dr Shergold favoured a refinement of the current system in which an independent Merit Protection Commissioner was appointed within the administrative structure of the Public Service Commission.<sup>4</sup>

18 The new APS employment environment is one in which agency heads exercise a large measure of independent authority and many of the terms and conditions of employment are determined under the Workplace Relations Legislation. In that context this Committee is sympathetic to the creation of a clearly independent review mechanism to deal with employment matters.

#### *Protection of whistleblowers*

19 The bill, at clause 16, gives protection to APS employees who report breaches of the APS code of conduct to the Public Service Commissioner or agency head. The clause in a sense poses more questions than it answers. Witnesses to the JCPA, while broadly supporting protection for whistleblowers, were concerned that the clause was inadequate in defining whistleblowing, in the degree of protection it offered and in the process for dealing with the issue raised. The JCPA considered this matter in some detail in its report<sup>5</sup> and concluded that general whistleblowing protection legislation for the public sector would be preferable to the approach taken in this bill. This Committee supports that approach.

#### *Tenure of departmental secretaries and agency heads*

20 The issue of whether agency heads required security of tenure to guarantee their independence and ensure that they provided 'frank and fearless advice' to government received a great deal of publicity. The Committee notes that agency heads are already on contracts of up to five years and those contracts may be terminated early. The Committee generally supported the view of Dr Michael Keating, a former Secretary of the Prime Minister's Department, that 'if you felt you could be dismissed willy-nilly at whim, that would be corrosive of the independence of the Public Service'.<sup>6</sup> However, while there should be protection against wilful dismissal 'neither should people have a guarantee of employment'.<sup>7</sup>

21 Dr Keating suggested that a process of consultation be put in place involving advice to the Prime Minister from the relevant portfolio minister and a report from a small committee of departmental secretaries. He also recommended that the final decision be taken by the Governor-General in Council rather than the Prime Minister. These processes would not limit

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<sup>4</sup> Senate *Hansard*, 24 September 1997, p. F&PA 5.

<sup>5</sup> Joint Committee of Public Accounts, Report 353, (September 1997), Chapter 6.

<sup>6</sup> Senate *Hansard*, 24 September 1997, p. F&PA 17.

<sup>7</sup> Senate *Hansard*, 24 September 1997, p. F&PA 17.

the government's ability to dismiss a secretary or other agency head but they would provide a protection against arbitrary or wilful dismissal.

### *Agency annual reports*

22 Annual reporting to Parliament by publicly funded agencies is a key element of the accountability process. The Parliament, and particularly this Committee, has, over many years, worked to improve the quality and usefulness of annual reports by prescribing matters with regard to content and timing. It is therefore disappointing to see that this bill does no more than require departmental secretaries (clause 56) and agency heads (clause 63) to give ministers an annual report for presentation to Parliament on their activities during the year.

23 This committee supports recommendation 1 from the JCPA that annual reports continue to 'be prepared in accordance with the guidelines approved by the Joint Committee of Public Accounts on behalf of the Parliament'.<sup>8</sup>

24 The annual reports of the Public Service Commission will be referred to this committee under Senate Standing Order 25 (21). This Committee will consider the reports in detail and will work with the Commission to ensure that the 'report on the state of the APS' is comprehensive and independent.

### *The proposed Parliamentary Service Bill*

25 The Public Service Bill does not include the Parliamentary Departments in the 'new' APS. A separate Parliamentary Service Bill creating a new parliamentary service has been drafted and will be introduced into the Parliament in the near future. While this proposed legislation is not part of this Committee's inquiry the Public Service Bill does have significant implications for the Parliamentary Service Bill.

26 It is desirable that the two services have broadly similar structures to facilitate mobility between the two. Thus concerns raised with regard to the parliamentary service are broadly similar to those raised with regard to the 'new' APS. These have been listed in a paper prepared by the Senate Corporate Links Committee and provided to the Committee by the Clerk of the Senate. The matters raised include the following: tenure and independence for the Clerks; mobility between the two services; independent review of staffing decisions; the appointment of a Parliamentary Service Commissioner; and maintaining a career service embodying the merit principle.

27 The Committee notes that the Parliamentary Services Bill will be examined by the Senate's Appropriations and Staffing Committee.

### **Conclusion**

28 Because of the circumstances discussed earlier in this report the Committee has not had before it proposed amendments to the legislation and is not in a position to make specific recommendations with regard to the clauses of the bills.

29 The Committee, recognising that the legislation is still before the House of Representatives and may be subject to amendment there, commends the principles and the objects of the legislation to the Senate and recommends that it be proceeded with. This

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<sup>8</sup> JCPA, op cit, p.23.

recommendation should be read only in conjunction with the recommendations of Report 353 of the Joint Committee of Public Accounts.

**Senator Brian Gibson**  
**Chairman**

## APPENDIX 1

### PUBLIC MEETINGS ON THE LEGISLATION

#### Public Hearing

24 September 1997  
Committee Room 1S3  
Parliament House  
CANBERRA

#### Attendance

*Committee Members*            Senator the Hon Brian Gibson  
                                         Senator Lyn Allison  
                                         Senator Bill Heffernan  
                                         Senator Kate Lundy  
                                         Senator the Hon Robert Ray  
                                         Senator John Watson

*Participating Member*        Senator the Hon John Faulkner

#### *Witnesses*

Mr Bill Blick, Deputy-Secretary, Department of the Prime Minister and Cabinet  
Dr Peter Shergold, Public Service Commissioner  
Mr Peter Kennedy, Deputy Public Service Commissioner  
Ms Ann Forward, Merit Protection Commissioner  
Mr Chris Hunt, Member, MPRA  
Mr Robin Stewart-Crompton, Deputy Secretary, Department of Workplace Relations and Small Business  
Ms Kate Bosser, Assistant Secretary, Pay Policy Branch, Australian Government Employment Group, Department of Workplace Relations and Small Business  
Mr Harry Evans, Clerk of the Senate  
Dr Michael Keating, Research School of Social Sciences, Australian National University and former Secretary, Department of the Prime Minister and Cabinet  
Mr John Wood, Deputy Commonwealth Ombudsman  
Mr Ian McPhee, Australian National Audit Office  
Mr Peter Moylan, Australian Council of Trade Unions  
Mr Doug Lilly, Assistant National Secretary, Community and Public Sector Union  
Ms Philippa Weeks, Faculty of Law, Australian National University



## **DISSENTING REPORT AUSTRALIAN DEMOCRATS**

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### **Conduct of the inquiry**

1 The Democrats reject the assertion in the majority report that the Selection of Bills committee should not have referred the Bill to the Senate Finance and Public Administration Legislation Committee while it was being examined by another committee (in this instance the Joint Committee on Public Accounts (JCPA). Prior to the Bills being referred to the JCPA, the Democrats had made it clear to both the Government and the Opposition our intention of referring the Bill to a Senate committee. We were also advised prior to the referral of the Bills to the JCPA that the relevant subordinate legislation and directions would not be ready in time for consideration by the JCPA. (Only after the initial hearings did the JCPA receive four draft directions and regulations relating to the review of actions, as well as some drafting instructions.) In these circumstances, the Democrats believed a Senate legislative committee was the most appropriate and practical venue for consideration of the legislation.

2 We remain unable to see the necessity for the referral of the Bills to the JCPA. The Democrats do not believe the JCPA was an appropriate body to examine what is essentially employment - not finance - legislation. What is more, as there is no representation on the JCPA from the Democrats, Greens or independent MPs and Senators, deliberations by the JCPA were restricted to the Government and Opposition parties.

3 As the majority report notes, the JCPA extended its reporting date from 4 September to 29 September. The Senate Finance and Public Administration Legislation Committee extended its reporting date to Thursday 2 October. The Democrats believe it would have been appropriate for the Committee to seek a further extension of its reporting date, particularly in light of the fact that the Committee is reporting on a Bill which is likely to undergo substantial changes before it is passed by the House of Representatives.

4 The majority of the Committee notes that there are continuing negotiations between various parties on the form of the regulations, that it is difficult to consider key parts of the Bill without final versions of subordinate legislation and that the Public Service Commissioner indicated in his comments to the committee that changes to the legislation as a consequence of the JCPA report were possible. Despite those concerns, the Committee has chosen to conclude its investigation into the Bill. The Democrats view this as an unsatisfactory outcome and one which the Committee could have avoided through the simple process of seeking an extension of its reporting date.

5 The Democrats also do not consider the JCPA investigation to have been a satisfactory process. The JCPA conducted only two days of hearings in Canberra and the Committee's Chairman Mr Alex Somlyay noted in his foreword to the report that despite the Bill attracting "a significant degree of public interest", the JCPA "was not ..... able to give as much consideration to these suggestions as it would have liked".

6 Mr Somlyay further noted that the Committee was hampered "by the fact that draft versions of the subordinate legislation were not available at the beginning of the review period,

and ..... that redrafted versions were being given to the Committee right up to the last moments of its review". Mr Somlyay concluded that "as most of the detail of this legislative scheme is provided in the subordinate legislation, it has been extremely difficult for all parties ..... to offer fully informed and considered comments on the Bill".<sup>9</sup>

7 As a consequence of the unsatisfactory and unresolved nature of the investigations undertaken by both the JCPA and the Senate Finance and Public Administration Legislative Committee, the Democrats are unable to join in the majority recommendation that the bill proceed to debate and we note that significant debate and examination of the Bill will now need to take place on the floor of the Senate.

### **The purpose of the Bills**

8 The Democrats see little point in canvassing again the history, purpose and detail of the Bills. The JCPA has already set out these matters in some detail in its report of 29 September.

9 However, we make the observation that the shortage of detail in the *Public Service Bill 1997* makes it difficult to determine how the reform process will evolve and where it might end up. The full and final impact of the Bill is difficult to assess while final versions of subordinate legislation and directions remain uncertain. While the Committee now has drafts of much of the relevant subordinate legislation, we do not know whether those drafts will be the final versions. The Committee was advised by Dr Shergold that changes had already been made to the regulations as a consequence of comments raised during the JCPA hearings<sup>10</sup>.

10 The Democrats note and accept the comments of the JCPA that "very few witnesses argued that the Bill was so deficient it should be scrapped and the 1922 Act preserved"<sup>11</sup>. However, we also note the JCPA's identification of the deeply felt and serious concerns raised in relation to both the content and context of the Bill.

11 The Democrats are concerned the Bill in its present form signals a shift away from a Westminster style public service able to give independent, frank and fearless advice to both government and parliament, towards a new 'private sector' model of public service which 'belongs' to the government of the day.

### **Issues of concern**

12 The Democrats note the five "key issues of concern" identified by the Joint Committee of Public Accounts (JCPA) report on the *Public Service Bill*. These are the need to:

- strengthen some of the APS Values described in the Bill (particularly in relation to the provision of frank and honest advice);
- strengthen the references in the Bill to merit as a fundamental principle of APS employment (by the inclusion of a definition of merit);
- enhance the level of scrutiny and reporting of agency workplace diversity programs;
- consider further the extent of whistleblower protection afforded to APS employees; and
- secure mobility rights for the staff of the parliamentary departments and staff of members of parliament.

The Democrats share these concerns and make the following additional comments.

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<sup>9</sup> Joint Committee of Public Accounts, Report 353, (September 1997), Foreword, p.xvi.

<sup>10</sup> Committee Hansard, 24 September 1997, p.5.

<sup>11</sup> JCPA, Report 353, (September 1997), Chapter 2, p.15.



### *Public service values*

13 While the Bill proposes to legislate, for the first time, a set of 'APS values', the Democrats are concerned that its focus on 'agency based services' and a more 'private sector style' of management may have the effect of undermining important public service values. The Democrats are of the view that it is often appropriate and desirable - in the wider national or public interest - for the public service to express and abide by values which differ from those of the private for-profit sector.

14 The Democrats support the inclusion of APS Values and a Code of Conduct in legislation. However, we note the many comments and concerns on the APS Values set out in Appendix IV of the JCPA report. We are concerned that the APS Values currently expressed in the Bill are vague, far from comprehensive and rendered almost meaningless by clause 11(2) which allows the Public Service Commissioner to restrict their effect. We also note there is some dispute about whether the Values are enforceable.

15 We do not believe the APS Values reflect the wider role of the APS in implementing legislation passed by the parliament and serving both the public and the public interest.

### *Principle of merit*

16 The Democrats strongly endorse the principle that merit must remain the primary basis for employment decisions within the APS. We endorse the comments of the Merit Protection Agency in its submission to the Committee that "merit is far more than the absence of nepotism and favouritism" as 'defined' in clause 17 of the Bill<sup>12</sup> and that "with the proposed abolition of promotion appeals ..... it will be most important to have a definition of merit included in the Bill where it is most visible and as such most clearly a public interest matter".<sup>13</sup>

17 As such, we endorse the conclusion of the majority report and the JCPA that a definition of merit should be included in the legislation and not left up to the discretion of the Commissioner at some later date.

### *External review of employment decisions*

18 The Democrats strongly oppose the removal of public service employees' appeal rights to an independent (or external) body. The Democrats note that the draft regulations dealing with the review of employment actions provide for most reviews to take place within a particular agency, with a limited opportunity for a public servant to seek a review by the Public Service Commissioner (although the Commissioner cannot overturn the primary decision). We reject such a structure as being unfair, unaccountable and counter-productive to the development of an effective world-class public service.

19 We are unable to accept a situation in which the framework being established by the Bill considerably increases the powers of department heads/agency secretaries while removing an employee's right to appeal to an independent body. Such an approach is almost certain to lead to unfair, arbitrary and improper decisions.

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<sup>12</sup> MPRA submission, p.12.

<sup>13</sup> MPRA submission, p. 13

20 We note and support the comments made in the June 1996 Report to the Commonwealth Government of the *National Commission of Audit* that "referees shouldn't be players as well, and vice versa".<sup>14</sup>

21 We strongly endorse the comments of the MPRA that "for there to be genuine accountability, the importance of independent, external review of administrative decisions increases in an environment where there are fewer other controls over primary decision makers".<sup>15</sup> We also strongly endorse the MPRA's observation that "external review ought to be separated from the management of the public service as it is to be truly independent, and thus contribute to a credible climate of public accountability".<sup>16</sup> We support the recommendations made by the MPRA in its submission to the Committee.

22 We again note the difficulty in determining a position on these matters because of the Committee's inability to examine final versions of regulations and Directions. The Public Service Commissioner Dr Shergold told the Committee on 24 September that the relevant regulations were "changing literally day by day".<sup>17</sup>

#### *Termination of employment*

23 While the Democrats accept the need for some reform of APS termination processes, the Bill as it stands fails to address a number of concerns. These include the lack of a service wide process for dealing with decisions leading up to termination, the absence of a requirement to give reasons for termination and the failure to clarify the rights of fixed-term employees (who are excluded from the *Workplace Relations Act*).

24 We share the view expressed to the Committee by Mr Doug Lilly of the Community and Public Sector Union of the need to ensure that "the processes leading to termination are transparent and fair".<sup>18</sup>

25 Despite some movement in relation to the review and termination of SES employees, the Democrats remain dissatisfied with these processes. We note that the Bill still excludes SES employees from the termination of employment provisions of the *Workplace Relations Act* and we believe it is unsatisfactory to replace that removal of that existing right with a Direction from the Commissioner (rather than an alternative legislative provision).

#### *Workplace diversity and the removal of the term 'equal employment opportunity' from the legislation*

26 Equal employment opportunity has been an important principle of APS personnel management for many years and the Democrats view the removal of this term from the legislation as a reduction in the obligation of the APS to ensure selection, employment and promotion in the APS is non-discriminatory. We do not accept that the replacement term 'workplace diversity' carries the same meaning. We note that 'workplace diversity' is neither defined in the legislation nor is its meaning explained in the *Explanatory Memorandum*.

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<sup>14</sup> National Commission of Audit, June 1996, p.

<sup>15</sup> MPRA submission, p. 2.

<sup>16</sup> MPRA submission, p.3.

<sup>17</sup> Committee Hansard, 24 September 1997, p.12

<sup>18</sup> Committee Hansard, 24 September 1997, p.21.

27 We agree with the comments of Dr Marian Sawyer in her evidence to the JCPA that references to the prohibition of direct and indirect discrimination under the Commonwealth Disability Discrimination Act, Racial Discrimination Act and Sex Discrimination Act should be included within the Bill.<sup>19</sup>

28 We endorse Dr Sawyer's call for a major independent review of the new legislation to be carried out after three years and for provision for such a review to be included within the Bill.<sup>20</sup>

29 We also note the submission to the JCPA from the Women's Electoral Lobby and the comments made by Ms Helen Coventry of the School of Administrative Studies, Faculty of Management, University of Canberra which suggest that women may be disadvantaged by variations in employment conditions between agencies.

### ***Inadequate protection for whistleblowers***

30 While the Bill endeavours, for the first time, to provide protection for APS whistleblowers, the inadequacy of the protection offered to whistleblowers by clause 16 of the Bill is a demonstration of how little the Government understands this issue. It represents not so much a genuine attempt to develop a statutory structure to deal with whistleblowing as a half-hearted effort to insert into the Bill little more than mere recognition of the existence of a 'problem'. Clause 16 is inadequate for a number of reasons:

31 It does not provide for a separate independent authority to receive reports or allegations of wrongdoing. The Government's faith in internal agencies has been shown to be entirely misplaced by the results of the Queensland Whistleblower Study. In that study, whistleblowers reported that 83% of their immediate superiors were ineffective in dealing with their disclosures and the effectiveness rating only marginally increased as whistleblowers went up the chain of command in the public sector unit.<sup>21</sup> These results suggest a culture of obstruction and indifference operates within the public service. Yet the Bill maintains a model in which responsibility for whistleblower investigation and protection is grafted onto existing agencies.

32 The protection offered by this legislation is contingent upon good faith disclosures to the Commissioner or an agency head. The legislation would benefit from a more flexible model which affords protection to whistleblowers that fail to disclose to the appropriate authority. In the NSW legislation<sup>22</sup>, for example, a disclosure may be made to a member of parliament or a journalist and remain protected by the Act.

33 The legislation is limited to breaches of the Code of Conduct contained in the Act. This may circumscribe the opportunity for what whistleblowers legislation commonly describes as 'public interest disclosures'.

34 There legislation lacks detail in exactly how it proposes to afford whistleblowers protection. There is no mention of protection from unlawful reprisals by co-workers or management-condoned or overlooked processes of harassment. Nor is there any detail of the effect of a whistleblower's report or allegation.

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<sup>19</sup> JCPA Committee Hansard, 7 August 1997, p.PA131.

<sup>20</sup> JCPA Committee Hansard, 7 August 1997, p.PA130.

<sup>21</sup> De Maira, W., *Unshielding the Shadow Culture*, April 1994, pp. 22-23

<sup>22</sup> *Protected Disclosures Act 1994*

35 The legislation also fails to address questions about involuntary disclosures by a public official, for example under oath before Royal Commissions, Senate Select Committees and courts of law in such a way as to disclose wrongdoing and thereby embarrass, if not harm, the government.

36 Whistleblowing on corrupt politicians is also a particularly relevant issue at this time. The only scheme which specifically protects whistleblowing on corrupt politicians is in the South Australian statute. The Bill is silent on whether APS employees will be protected if they disclose corruption which (often) involves a loss of public funds.

37 The legislation also fails to indicate whether whistleblowers will be granted civil and/or criminal indemnification under the PS Bill. This is particularly important given the existence of secrecy enactments which provide for civil or criminal prosecution should they be contravened. Providing legal protection against charges of contravening secrecy enactments is essential in the public service.

38 Finally there is no indication in the legislation of the provision of any support services to whistleblowers such as counselling; administrative compensation; entitlement to damages; right to relocation; or whistleblower feedback of the progress of the complaint/ report/ allegation.

39 The Democrats note the JCPA's recommendation that the Government introduce separate whistleblowers protection legislation, but believe such protection can - and should - be fully offered within the *Public Service Bill*.

### ***The impact on service delivery***

40 Despite the Government giving lip service to the idea of improving service to the public as being one of the aims of these reforms, the Bill is not focussed on improving service quality. It barely mentions service quality and is much more in the nature of *industrial relations* legislation rather than *public service* legislation.

41 The Bill is silent on the question of maintaining standards, accountability and quality in services which are contracted out.

42 There is no indication in the Bill of how APS pay will operate in the new environment. Dr Michael Keating of the Institute of Public Administration Australia told the Committee that IPAA "did not accept that agencies' capacity to pay necessarily reflects priorities or even performance".<sup>23</sup> As Dr Keating pointed out, the capacity of agencies to pay "reflects their success in the budget round rather than ..... their merit or some view of priorities". This is likely to lead to some agencies being able to offer higher salaries than others, irrespective of the nature, value or priority of the work being undertaken by the agency. Such an approach is unlikely to lead to better quality service. It is also likely to erode morale in those agencies with less capacity to pay.

43 In her evidence to the JCPA, Ms Helen Coventry of the University of Canberra also commented on the value of some common or base standards across the APS. She made the point that while change always produces productivity losses, such losses can be minimised

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<sup>23</sup> Committee Hansard, 24 September 1997, p.15.

if there are common features on which to build amongst the units which are being combined. In the past the mechanism which facilitated this type of change in the public sector was the common terms and conditions of employment. We did see different cultures, but at least there was a strong base from which to effect such change. In addition, members of the APS identified with membership of the APS. There has always been a stronger sense of belonging to the public service than belonging to a particular agency..... This identification can be attributed to a belief in the role of government and wanting to serve government.<sup>24</sup>

44 The Democrats note that morale within the APS is already low through a combination of job losses (27,000 public service jobs have gone in the past 18 months), 'downsizing' and 'change fatigue'. We can see little in these Bills likely to improve APS morale.

### ***The impact on the APS as 'a career service'***

45 Concerns have been expressed that the Bill seriously undermines the APS as 'a career service' for employees wishing to make a career out of serving the government and the public. The Democrats believe those concerns are valid. We note, in particular, the variations in employment conditions and salaries which are likely to occur between the different agencies,

46 The Bill does not provide for mobility between APS agencies. In future, staff who wish to take up non-APS employment will have to resign or seek leave from their agency. Not only may this discourage people from pursuing public service careers, but it may also prove to be detrimental to the agencies themselves. As Dr Keating noted in his evidence to the Committee, it is very beneficial to the APS to "get fresh insights by getting somebody else, often from a related agency" and to break down a situation where people spend their entire lives in one department.<sup>25</sup>

47 While accepting that existing right to return arrangements are complex and in need of reform, the Democrats support the ACTU's suggestion of retaining such mobility rights in defined circumstances.<sup>26</sup> We can see merit in removing the automatic safety net of a right to return to the APS, provided there are clear guidelines for granting applications for leave without pay (and an avenue for external review should such applications be refused).

48 However, the Democrats believe reductions in mobility rights need to be weighed very carefully against the possible detrimental impact on those employees who are keen to make a public service career.

49 We support the JCPA's recommendation of an extension in the transitional period for people with current mobility rights.

50 A further problem results from the separation of the Parliamentary Service from the APS. In evidence given to the JCPA, Mr Harry Evans argued that

without that ready mobility [between the APS and the Parliamentary Service], the Parliamentary Service will wither on the vine. We rely on getting good people coming from the public service into the Parliamentary Service.....If they do not feel they can

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<sup>24</sup> JCPA Hansard, 7 August 1997, p.PA133.

<sup>25</sup> Committee Hansard, 24 September 1997, p.17.

<sup>26</sup> JCPA Report 353, (September 1997), Chapter 11, p.139.

readily move to the Parliamentary Service and go back again, we will not get the quality of staff that we have been getting in the past.<sup>27</sup>

51 The Democrats endorse the recommendations of the JCPA that reciprocal mobility arrangements should be established between the Parliamentary Service and the APS.

### ***Other employment related matters***

52 We note Mr Lilly's call for the inclusion within the Bill of a "clause on the rights and entitlements of employees" to match the code of conduct<sup>28</sup>.

53 The Democrats are concerned about the Bill's approach to the remuneration of departmental and agency heads. We have great concern about the removal of public scrutiny from these arrangements. This particular concern was voiced by Mr Lilly in his evidence to the Committee.<sup>29</sup> It was also expressed by Mr Harry Evans, Mr Volker and others in their evidence to the JCPA.<sup>30</sup> The Australian National Audit Office has also expressed concern about this aspect of the Bill arguing that

it is important for any revised arrangements in this area to include mechanisms for the aggregate remuneration and benefits of such positions to be open to public scrutiny.<sup>31</sup>

### ***Costs and benefits of the reforms***

54 There is little indication in the Bills that the improvements are going to contribute significantly to improved efficiency or effectiveness within the APS.

55 The Financial Impact Statement included in the *Explanatory Memorandum* lists neither the possible costs nor the possible benefits of the reforms. The Democrats believe that, given the extent of the reforms, the government has some obligation to set out a reasonable account of the costs and benefits of its proposals.

### **The 'politicisation' of the APS**

#### ***Appointments of departmental heads***

56 Under the Bill, department secretaries will no longer be appointed by the Governor General, with the corresponding implication of owing loyalty to the Commonwealth of Australia and not to the government of the day. Instead, department secretaries will be appointed by the Prime Minister.

57 The Democrats accept some of the arguments for what has been called 'an American style' or 'change of shift style' of public administration (where appointments - usually senior ones - change along with the government and rarely endure the life of the government). We also acknowledge that the Bill is building upon recent trends in removing tenure in senior positions and eliminating the principle of continuity during changes of minister and/or government.

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<sup>27</sup> JCPA Report 353, (September 1997), Chapter 11, p.136.

<sup>28</sup> Committee Hansard, 24 September 1997, p.22.

<sup>29</sup> Committee Hansard, 24 September 1997, p.22.

<sup>30</sup> JCPA Report 353, (September 1997), Chapter 10, p.128.

<sup>31</sup> ANAO submission to the JCPA, p.S58.

58 However, we do not accept allowing such appointments to be based upon political patronage or given as rewards for party service, with little regard for competence and little capacity for independent review of performance or a decision to terminate. We have grave concerns about accepting legislation which allows an APS career to be terminated by prime ministerial decree alone, rather than as a consequence of some sort of due process.

59 We agree with the comments made by the Clerk of the Senate, Mr Harry Evans, in evidence to the JCPA that there needs to be

some mechanism which is a statutory signal .... that these people [department secretaries] are not simply the creatures of the Prime Minister of the day. They have a higher public function".<sup>32</sup>

60 We note the evidence of Mr Derek Volker to the JCPA that

having appointments of Secretaries vested in the Governor General has demonstrated the ownership of the public service by the community and the non-partisan basis of public service appointments, terminations and operations.<sup>33</sup>

61 The risk of politicisation is further increased by the fact that the only other individual involved in senior appointments is the Secretary to the Department of the Prime Minister and Cabinet.

#### *Relationship between the APS and the parliament*

62 We note the concerns raised by Mr Harry Evans in his evidence to the JCPA regarding the impact of these changes on the public service's relationship with the parliament. Mr Evans made the important point that part of the duties of a professional public service is to assist the parliament. Mr Evans told the JCPA that he believed that

the concept of some distinction between the professional public service and the ministers of the day, on the basis of which they have a professional duty to assist the parliament and to cooperate with parliamentary inquiries and so on, can no longer be maintained.<sup>34</sup>

#### *Frank and fearless advice*

63 The JCPA expressed concerns about the fact that the Bill chooses to exclude the obligation to offer frank and fearless advice. The Democrats also note that it will be difficult, if not impossible, when appointment is within the gift of the prime minister, to give such advice consistently and in the face of ministerial or prime ministerial opposition.

64 Further down the ranks, the granting of wide ranging employment powers to department and agency heads is also likely to undermine the provision of frank and fearless advice by less senior APS employees.

## **Conclusion**

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<sup>32</sup> JCPA Committee Hansard, 7 August 1997, p.PA119.

<sup>33</sup> JCPA, Report 353, (September 1997), Chapter 10, p.118.

<sup>34</sup> JCPA Committee Hansard, 7 August 1997, p.PA115.

65 When the Government released its Discussion Paper on public service reform, the Democrats indicated we welcomed reform which was aimed at improving service delivery and reducing unnecessary bureaucratic impediments standing in the way of the APS delivering more responsive and flexible services and programs. We also indicated we welcomed reform designed to improve work practices within the APS. We are not satisfied that the Bill delivers a positive outcome in either of these respects.

66 We are concerned that this Bill goes too far in one direction and will result in a shift towards a less accountable public service, one over which Australian taxpayers (through the federal parliament) will be unable to exercise adequate scrutiny and one in which APS employees will have difficulty obtaining fair access to redress for wrongful actions and decisions.

67 We are concerned that the Bill fails to draw a clear line of responsibility and accountability from the public service to government, parliament and the Australian public.

68 We are concerned that the Bill fails to recognise that improvements in work practices should also take into account the role of the APS in serving both the public and the wider public interest. We note the comments of Dr Michael Keating of the Institute of Public Administration of Australia that there needs to be a distinction made between "supporting private sector practices which make sense rather than just because they are private sector practices".<sup>35</sup>

69 The workings of a combination of features within the proposed reform framework leads the Democrats to conclude that the Bill is flawed in both content and context.

70 In a recent article in the *Canberra Bulletin of Public Administration*, Peter Hennessy (Professor of History at the University of London), observed that a cornerstone of a successful public service was the giving of "fearless advice resting on top-class analysis." He expressed the view that in the current climate of globalisation, "the prizes go the flexible and the intelligent. And governments can be neither of those things if the outcome of policy making is the precooked, the palatable and the convenient".<sup>36</sup>

71 The government has allowed its preconceptions and prejudices about the public sector to stand in the way of delivering world-class public service reform. The *Public Service Reform Bill 1997* will ensure the government receives from the APS the advice it wants to hear, not the advice it needs to hear - and that is an outcome which will lead inevitably to a 'precooked, palatable and convenient' result which will do little to serve Australia's interests.

### ***Recommendation(s)***

The Democrats recommend that the *Public Service Bill 1997* not proceed in its present form, that the Bill be withdrawn and rewritten, taking into account the recommendations of the JCPA and the concerns raised in both the majority and minority reports of this Committee.

If the Bill does proceed, the Democrats strongly recommend that the Bill not be debated until all of the subordinate legislation is available in final draft version.

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<sup>35</sup> Committee Hansard, 24 September 1997, p.15.

<sup>36</sup> *Canberra Bulletin of Public Administration*, August 1997, p.2.



We reserve our right to amend the Bill.

**Lyn Allison**  
**Democrat Senator for Victoria**