

Submission to Reform of Australian Government Administration: Building the world's best public service

This submission considers the issues raised in the Advisory Group's Discussion Paper with respect to 'A Values Driven Culture that retains Public Trust'.

I have addressed these issues in a much more substantive way and with appropriate documentation in a recent publication prepared for the Australia and New Zealand School of Government. I refer the Advisory Group to this publication.¹

Recommendations:

Recommendation 1: The employee questionnaire for the annual State of the Service Report should be expanded to give a clearer picture of both the types of ethical challenges experienced by employees and the sources of these challenges, along the following lines: 'In the past 12 months, have you faced an ethical challenge in dealing with any of the following issues?

- Dealing with Ministers and/or their offices
- Dealing with politicians other than Ministers and/or their offices
- Dealing with senior agency staff on matters relating to Ministers and/or their offices
- Dealing with senior staff from another agency on matters relating to Ministers and/or their offices
- Contract management
- Funding decisions
- Managing staff
- Managing program guidelines
- Gifts and/or hospitality
- Dealing with the media
- Other'

Recommendation 2: Individual performance assessment and pay systems should be reviewed to ensure that they do not distort the proper balance of responsiveness and apolitical professionalism. Other human resource management disciplines should be evaluated to see if there is an over-emphasis on the role of managerial prerogative, and an under-emphasis on ethical guidance. Agency advice to staff should also make it clear that senior managers take political impartiality as seriously as they take responsiveness.

¹*Whatever Happened to Frank and Fearless? The impact of new public management on the Australian Public Service*, Australian and New Zealand School of Government Monograph Series, Canberra, 2008.
<http://epress.anu.edu.au/frank_fearless_citation.html>

Recommendation 3: Every agency should be required to have in place agreed written processes for resolving staff concerns that may arise about the nature of requests from ministerial offices, whether these requests are received directly from ministerial offices or indirectly through senior departmental managers. These protocols should be communicated to all staff.

Recommendation 4: Responses to the State of the Service agency questionnaire relating to types of misconduct should separately specify over-responsiveness to Government as a distinct type of misconduct, and the Australian Public Service Commission should report annually on the number of employees investigated for this type of misconduct, the percentage of cases where a breach was found, and the number of agencies with finalised investigations.

Submission

The Public Service Act requires the APS to deliver apolitical ‘frank and fearless advice’ to government. Public servants are also required to be responsive to the government of the day. Increasingly, there have been doubts about the ability of public servants to maintain the balance between being responsive and being impartial, and there have been debates about the politicisation of the APS.

Two separate sets of circumstance have fed these debates. The first of these is a series of developments at the political level that occurred during the incumbency of the previous Government, including Weapons of Mass Destruction, Children Overboard and AWB, the cases of Cornelia Rau, Vivian Solon and Mohamed Haneef, and the role of a senior public servant as the face of the government’s ‘Know where you stand’ media campaign. The second is the introduction into the public service of the new models of management known as New Public Management or NPM. These two sets of circumstances are not unrelated.

NPM emerged in the 1980s, in Australia and overseas. Its overall aim was to make the public service flexible and efficient, and more responsive to government. It introduced new disciplines: contestability, performance assessment and pay, increased managerial prerogative, contract-based models of industrial relations and outsourced service delivery. Like many system changes, these disciplines were introduced gradually, applied unevenly, and were the work of a number of governments. Most analysts reflecting on the impact of NPM have accepted that there were overall improvements in flexibility and efficiency. Over time, however, some of the disciplines of NPM were ratcheted up to the point of effectively blurring the difference between responsiveness and political bias.

One of these disciplines was contestability, which became an increasing focus in the years following the 1996 change of government. The then new Government made it clear that it was now up to public servants to prove that they could offer the services

the Government required as efficiently and effectively as the private sector. At the same time, as if illustrating the point, it reduced the size of the public service by around 30 000 people in the three financial years following the election.

For the remaining public servants, the question was, how should contestability work in practice? Where should individual public servants draw the line between offering advice that was responsive to government and consistent with its policies, and advice that downplayed, ignored or dismissed problems with those policies? After all, public servants were now meant to be in competition with private sector consultants and lobby groups, who were free to target their policy advice to the political interests of ministers.

Senior public servants argue publicly that the impartiality of public service advice makes it uniquely useful to government. But in ongoing day to day practice, does impartiality really represent a competitive edge in getting the attention of ministers in a contestable system? The answer to that question is likely to depend on the quality of the minister and the nature of the circumstances.

Take something as nominally straightforward as data collection. If the Government asks for data and if the numbers provided by the relevant public service agency do not support its preferred position, a public servant can be directed by the minister to buy in a new data collection. If the minister is dissatisfied with a departmental legal opinion, a public servant can be directed to commission a legal opinion from a nominated lawyer in a private sector firm. Where it might be useful, the minister can also use the reputation of the public service for impartiality to establish the independence of those alternative inputs ('research commissioned by my department has found...').

This is not a problem for the Government: a Government is entitled to look for other opinions and there are many cases where it does so. It can, however, become a critical problem for the public service. All that a public servant may gain from insisting on the integrity of departmental data and the reliability of departmental legal advice is an irritated minister and an increased likelihood of being bypassed in future when advice is required. If, conversely, the department sees its way clear to editing its factual or legal advice to support the government's anticipated preferences, then it has effectively compromised its long-term strategic role to enhance its short-term contestability.

The employee survey conducted for the *2003-04 State of the Service Report* found that, of those public servants who had been in contact with ministers and their advisers over the previous year, 35 per cent had faced a 'challenge in balancing the need to be apolitical, impartial and professional, responsive to the government and openly accountable in dealing with ministers and/or ministers' offices'. This number remained remarkably stable as long as the question continued to be asked during the period of the Howard Government.

The question was re-introduced into the State of the Service Employee questionnaire following the 2007 change of Government. Twenty per cent of respondents reported

that they had faced such a challenge in 2007–08.² This finding is significantly lower than the one-third of employees who had reported facing the same challenge in 2004–05 and 2003–04, at least partly because the number of ministerial advisers and extent of their interaction with public servants was also lower, but possibly also because of the increased availability of clear guidance on appropriate conduct.³

Surveys have also established a direct correlation between public servants' confidence in their ability to be apolitical, impartial and professional as well as responsive, and their views on whether the senior managers in their agency lead by example in ethical behaviour. In 2007 only 59 per cent of those surveyed agreed that their senior managers did this—and that is averaged out across both 'happy' and 'unhappy' agencies. Twenty-eight per cent neither agreed nor disagreed; 13 per cent actively disagreed.

In response to a second question on whether, in their experience, the most senior managers in their agency acted in accordance with the APS Values, a quarter of public servants did not agree—8 per cent actively disagreed, 13 per cent neither agreed nor disagreed, and a further 5 per cent reported that they did not know. Nevertheless, in a devolved public service environment, the most senior managers in an agency are responsible for providing guidance on what is appropriate professional behaviour, and what is not. They are also responsible for systems and processes for managing breaches of the APS Values and code of conduct.

² 2007-08 State of the Service Report, 191.

³ Ibid, 192: 'Possible factors behind the large decline in those employees who reported facing a challenge in balancing the Values in 2007–08 compared to 2004–05 include: the lower proportion of employees who report having direct contact with Ministers and ministerial advisers in 2008 (17% in 2007–08 compared with 20% in 2004–05); and the significant fall in the number of ministerial advisers under the new government. It is also likely that the Commission's activities in this area (for example, the release of Supporting Ministers, Upholding the Values and the presentations to new Ministers and ministerial staff following the November 2007 federal election), as well as the new government's requirements for its Ministers and advisers have enhanced employees' confidence in balancing these Values.'

Recommendation 1: The employee questionnaire for the annual State of the Service report should be expanded to give a clearer picture of both the types of ethical challenges employees experience and the source of these challenges, along the following lines: 'In the past 12 months, have you faced an ethical challenge in dealing with any of the following issues?

- Dealing with Ministers and/or their offices
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The devolution that took place under NPM has also given agency heads and senior managers enhanced disciplines for managing public servants. Principal among these is performance assessment and pay.

Performance assessment and pay systems call for a line of sight between what ministers expect, what agency senior managers expect, and what public servants are meant to do. Agency goals are often agreed with ministers and used as a basis for individual performance plans. Public servants may even be told that 'our Ministers are our customers—they are always our first priority and we aim to exceed their expectations in the services that we provide'.⁴ What happens, then, when public service decision-making meets ministerial political expediency—as has happened in the cases of immigration and welfare? Are agency staff meant to conduct their decision-making as if they are dealing with 'refugees' or 'terrorists', 'unemployed jobseekers' or 'welfare cheats'? In the absence of clear direction from their senior managers, they may not find out which set of performance criteria really apply until they are given their next performance rating.

Little wonder then, that an ANAO survey of public servants detected a perception among public servants of 'a substantial gap between the rhetoric and the reality' of performance expectations.⁵ Little wonder also that around 57 per cent per cent of

⁴ Department of Finance, *Annual Report 2001* <<http://www.finance.gov.au/pubs/annualreport00%2D01/fin%5Fannual%5Freport/ch2/chp2%5Ftxt2.htm>>.

⁵ Australian National Audit Office, *Performance Management in the Australian Public Service*, ANAO Audit Report No 6, 2004–05 <http://www.anao.gov.au/uploads/documents/2004-05_Audit_Report_6.pdf, p.14, para 9>.

public servants responding to the 2006–07 state of the service employee survey did not agree that the performance pay system in their agency contributed to a workplace culture that upholds the APS values.

Devolution has also given agency heads the power to reinforce top-down control by putting into their hands the power of settling agency industrial arrangements, and workplace relation changes have tended to privilege managerial prerogative and discretionary human resource management decisions. If the senior public servants making these decisions are unaccustomed to striking a balance between responsiveness to Government and apolitical professionalism, then it is unlikely that the public servants they manage will do so either. The problem of politicisation will continue to reproduce itself through their decision-making into successive cohorts of public servants.

Overall, while NPM may have increased the capacity of the public service to deliver results, its disciplines have left public servants much less protected against pressures towards politicization. There are, however, ways of reforming the reforms, so that the public service can seek a better balance between responsiveness and impartiality. Some of these reforms are the responsibility of politicians, and some are the responsibility of public servants, as the Advisory Committee's Discussion Paper indicates.

There has already been some action at the political level. As indicated above, the number of ministerial advisers has been reduced. There is now a Code of Conduct for Ministerial Staff that requires them to acknowledge that they 'do not have the power to direct APS employees in their own right and that APS employees are not subject to their direction'. It is not yet clear how seriously that element of the Code is being taken; the 2008-09 State of the Service report might provide some indication of public servants' experiences of the changes. If it does not, the next report and those thereafter should.

Contestability is being rebalanced. There is a Lobbying Code of Conduct. Steps have been taken to strengthen the independence of the Australian Research Council and to clarify the rights and responsibilities of researchers based in publicly funded research agencies. Contract provisions gagging service providers have been rewritten.

Other NPM disciplines are being revisited. There are new procedures for appointing agency heads (other than departmental secretaries) and they are to be offered longer term contracts. The Government has established, among other things, merit-based selection for agency heads, new arrangements to make FOI more meaningful, and a lobbying code of conduct. The Public Service Commission is providing an Ethics Advisory Service.

However, unless agency systems and the assumptions of longstanding senior managers about proper levels of responsiveness are also reconsidered, reforms at the political level will be ineffective.

Recommendation 2: Individual performance assessment and pay systems should be
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reviewed to ensure that they do not distort the proper balance of responsiveness and apolitical professionalism. Other human resource management disciplines should be evaluated to see if there is an over-emphasis on the role of managerial prerogative, and an under-emphasis on ethical guidance. Agency advice to staff should also make it clear that senior managers take political impartiality as seriously as they take responsiveness.

The guidance on Key Elements of Ministerial Responsibility applying under the previous and current governments specifies that ‘Ministers should be scrupulous in avoiding asking public servants to do anything that the APS principles do not permit, and in particular should not ask them to engage in activities which could call into question their political impartiality.’ According to new guidance from the Australian Public Service Commission, ‘If such a request were ever made of a public servant by a Minister or his/her staff, the public servant must refuse. This is a legal obligation deriving from sections 10 and 13 of the Public Service Act, which set out the APS Values and the APS Code of Conduct respectively.’

The new Commission guidance means that public servants have explicit grounds for refusing to engage in activities which could call into question their political impartiality. They have reason to ask for advice about impartiality and to ensure that senior managers have formal responsibility for any advice that they provide to public servants about appropriate conduct on any given occasion. Public servants also have grounds to ask, in critical and difficult circumstances, for written protocols. As Tables 8.8 and 8.9 from the 2007-08 State of the Service Report make clear, in many agencies relevant protocols do not exist, or only exist in an unwritten form, and/or are not effectively communicated to employees.

TABLE 8.8: Agency processes for resolving concerns with ministerial offices, 2003–04, 2004–05 and 2007–08

Agency protocol	Year	% of agencies with protocol in place ^(a)
Agreed unwritten process for resolving staff concerns that may arise about the nature of requests from ministerial offices	2003–04	NA
	2004–05	56
	2007–08	72
Agreed written process for resolving staff concerns that may arise about the nature of requests from ministerial offices	2003–04	NA
	2004–05	10
	2007–08	22

^(a) Percentage of agencies that provide regular (i.e. monthly or more) services/advice to Ministers.

Source: Agency survey

TABLE 8.9: Employees' awareness of processes for resolving concerns with ministerial offices, 2003–04, 2004–05 and 2007–08

Agency protocol	Year	Aware of protocol (% employees) ^(a)	
		Low	High
Agreed unwritten process for resolving staff concerns that may arise about the nature of requests from ministerial offices ^(b)	2003–04	21	33
	2004–05	16	29
	2007–08	15	47
Agreed written process for resolving staff concerns that may arise about the nature of requests from ministerial offices ^(c)	2003–04	NA	NA
	2004–05	8	32
	2007–08	17	25

^(a) Results include only those employees who, in the last 12 months, have had direct contact with Ministers and/or ministerial advisers.

^(b) The results include only those large agencies (more than 1,000 employees) that report having this protocol in place *and* that had statistically valid results from the employee survey (10 agencies in 2003–04, 9 agencies in 2004–05 and 10 agencies in 2007–08).

^(c) The results include only those large agencies (more than 1,000 employees) that report having this protocol in place *and* that had statistically valid results from the employee survey (2 agencies in 2004–05 and 3 agencies in 2007–08).

Recommendation 3: Every agency should be required to have in place agreed written processes for resolving staff concerns that may arise about the nature of requests from ministerial offices, *whether these requests are received directly from ministerial offices or indirectly through senior departmental managers*. These protocols should be communicated to all staff.

Public servants now also have grounds to expect that where the activities or directions of individuals appear to call into question their capacity to balance responsiveness and apolitical professionalism, those matters will be pursued. This applies to over-responsiveness to Government as well as conduct that undermines the Government's interests. These expectations have not been given sufficient foundation in agency systems or in service-wide monitoring arrangements. State of the Service data does not suggest that any agencies have ever had a breach of the APS Values relating to over-responsiveness brought to their attention, or, if they have, have ever decided to pursue it. Given the number of cases of such conduct alleged in the press, and the importance of public trust in the impartiality of public administration, this is a worrying omission.

The types of conduct pursued in 2007–08—and in the previous years for which such data was gathered—are laid out in the Table below, taken from the *2007–08 State of the Service Report*.

TABLE 7.5: Number of employees by types of misconduct in investigations finalised during 2007–08

Type of misconduct	No. of employees ^(a) investigated for this type of misconduct (Number)	Percentage of cases where a breach was found (%)	No. of agencies with finalised investigations (Number)
Improper use of internet/email	350	84	20
Inappropriate behaviour of employees (other than harassment or bullying) during working hours (e.g. treating clients or stakeholders disrespectfully)	163	61	28
Improper access to personal information (e.g. browsing)	150	70	9
Harassment and/or bullying	118	47	28
Fraud other than theft (e.g. identity fraud)	86	44	10
Improper use of position status (e.g. abuse of power, exceeding delegations)	74	20	11
Improper use of resources other than internet/email (e.g. vehicles)	60	60	17
Conflict of interest	41	46	13
Private behaviour of employees (e.g. at social functions outside working hours)	30	53	15
Unauthorised disclosure of information (e.g. leaks)	25	40	8
Theft	16	31	6
Misuse of drugs or alcohol	1	100	1

^(a) An individual employee may be counted against more than one type of misconduct.

Note: Agencies were asked for data on employees who were the subject of formal investigations, and were specifically asked not to include data on initial investigations that did not proceed to formal misconduct procedures. However, it is possible that some agencies may have provided information on elements of the Code that were suspected of being breached in both formal and informal investigations.

Source: Agency survey

Although the types of misconduct that have been pursued are clearly important, they do not go to the difficult issues of politicisation and responsiveness. The conduct most likely to intersect with the issue of politicisation is ‘unauthorised disclosure of information’, which is usually contrary to the incumbent government’s political interests rather than inappropriately aligned with them. But over-responsiveness is at least as much of an issue for the public service as disaffection.

Recommendation 4: Responses to the State of the Service agency questionnaire relating to types of misconduct should separately specify over-responsiveness to Government as a distinct type of misconduct, and the Australian Public Service Commission should report annually on the number of employees investigated for this type of misconduct, the percentage of cases where a breach was found, and the number of agencies with finalised investigations.