

Chapter 7. Reforming the reforms?

The ‘public interest’ is a term with many meanings, some of them legislative and many contested.¹ According to the Australian Public Service Commission’s *Supporting Ministers, Upholding the Values*, so far as Australian public servants are concerned, ‘the elected Government alone has the authority to determine the public interest in terms of policies and programmes, while public servants assist Governments to deliver that policy agenda and those priorities’.² This makes the public interest look very like the policy and program interests of Government. The Commission does, however, introduce a broader notion of public interest when it advises that public servants also:

... have a responsibility for protecting the public interest in terms of ensuring the integrity of government processes, including compliance with the law and fair and impartial decision-making in accordance with approved guidelines.³

This is the point—the integrity of government processes—at which the public service has to make decisions about the public interest that have not already been made in government policy objectives. Some of those decisions are being made for public servants, inappropriately, by the systems implementing the NPM drivers of contestability, performance management, devolution, human resource management and outsourcing. These systems serve to increase the risk of over-responsiveness and a predisposition to identify and serve political as well as policy ends—what Mulgan calls ‘the unforced eagerness of officials to assist their government’s case’.⁴ This is not to argue that the public service as a whole has been politicised—in the sense considered in Chapter 1 of having crossed the ‘line between proper responsiveness to the elected government and undue involvement in the government’s electoral fortunes’—just that the systems themselves, in their operation, do not strike a balance between managing for the government’s desired outcomes and ‘performing its functions in an impartial and professional manner’, as public servants are required to do under s. 10(1)(a) of the Act.

The systems implementing NPM also underpin substantial gains in efficiency⁵ and sometimes in effectiveness. Not only is it impossible to return to the arrangements of the 1980s and early 1990s, it is also undesirable. Some aspects of NPM are now uncontested—for example, the reduction in internal regulation and the focus on organisational performance more generally. The problem, then—at least the problem from the point of view of a sustainable public service in a Westminster system—is to retain the flexibility and performance orientation of NPM but to reduce the negative impact of existing drivers or to introduce more balanced drivers. These are not mutually exclusive alternatives.

There is certainly scope to review the systems considered in the course of this monograph for their impact on the capacity of the public service to perform its functions in a way that is apolitical, avoiding 'the crossing of a line between proper responsiveness to the elected government and undue involvement in the government's electoral fortunes'.⁶ In the case of contestability, such change would have to be driven mainly from the political level, and aimed at moderating the use of contestability to landscape the level playing field. Change at this level is proposed following the 2007 election, including the issuing of guidance on the relationship between ministers and lobbyists,⁷ and changes to the independence of advisory bodies such as the Australian Research Council.⁸ How these changes work in practice over time remains to be seen. From the public service end, however, there is still a need to increase the consistency and the transparency of portfolio-wide practices around appointments and grants. The same general observations apply to outsourcing. Again, changes have been foreshadowed at the political level to contract provisions gagging service providers or requiring government clearance of media releases, government submissions and reports⁹—undoubtedly a critical step in making contestability work as a means of democratising policy advice. From the public service end, some administrative practices could also be revisited, including guidance discouraging advocacy or encouraging competition between providers rather than collaboration between them. In addition, Public Value Management strategies applied to operational decision making may provide a means of enriching service delivery relationships at the purchaser/provider and provider/delivery interfaces.

Agency workplace relations arrangements are both political and bureaucratic in design and change needs to be driven at both levels. At the industrial relations level this means reviewing the balance between individualised and collective arrangements in the workplace; at the human resource management (now often called 'employee relations') level, it means revising the strategies for employee alignment that are likely to contribute to the development of an assumption culture. Following the 2007 election the AWAs are to be phased out,¹⁰ but it would also be worth examining broader 'psychological contract', including the current over-emphasis on the role of managerial prerogative, and the under-emphasis on workplace consultation around the conduct of work and the exercise of discretion in public service decision making.

In terms of individual performance assessment and pay arrangements themselves, system design is mainly driven at bureaucratic level and could be reviewed at that level against a whole range of rhetoric/reality issues. These should include those thrown up by 'soft HRM' assurances and 'hard HRM' practices, and the overarching question asked by Allan Hawke about whether rhetoric/reality concerns are endemic to any system of linking pay to performance management

in a public service employment framework. It would be worth beginning with a new question, namely, what performance review mechanism would help maintain the balance between conflicting values, so that 'being apolitical does not remove an employee's obligation to be responsive to the Government and to implement its policies and programs, nor does responsiveness permit partisan decisions or decisions that are not impartial'.¹¹ The answer might involve some form of performance agreement, but it is likely to be one 'based on building performance through feedback and a developmental focus—without scores and ratings'.¹²

The impact of devolution is also determined partly at the political level and partly by agency executive. Recent studies have already identified a number of system changes at the government/ministerial level that promise to reduce the impact of drivers encouraging over-responsiveness. Anne Tiernan has put forward some proposals relating to the conduct of ministerial advisers.¹³ Andrew Podger has put forward others in relation to the duration of secretarial appointments and the performance management arrangements associated with them.¹⁴ The new Government has signalled its intention to act on both of these areas, putting in place a ministerial code,¹⁵ appointing agency heads and department secretaries for fixed five-year periods unless the appointee has a preference for a shorter period,¹⁶ and requiring full merit-based appointment processes for most non-secretarial agency heads.¹⁷ In addition, it has foreshadowed moving away from performance-based pay arrangements for agency heads and departmental secretaries, and restoring the jurisdiction of the Remuneration Tribunal to fix their pay and conditions.¹⁸ Depending on how these policies are implemented over time, these changes could have considerable flow-on implications for public servants down the line in particular agencies. For many of the agency systems currently in place, there would be new assumptions underpinning their operation. Public servants would be less likely to believe that political statements, or even political intimations, were to be understood as informal policy directives.

Another means of addressing the downside of devolution would be the introduction of more public forms of accountability, particularly at senior levels, than those currently provided for through devolved systems and individual performance agreements. These would have the effect of increasing the leverage of public servants who are resisting expectations of politically motivated behaviour from ministers' offices or from their own senior managers. Agency heads could, for example, be required to outline in annual reports what they have done to publish, promote and support the use of agency protocols in dealing with ministers and their advisers. They could also be asked to outline the nature and regularity of guidance provided to agency staff on due process and the exercise of individual discretion—particularly what they have done at times

when such decision making is the subject of high profile political and media attention. For many agency heads, such a requirement would mean no more than formalising existing practice. For others, it might call for considerable changes to existing practice. Agency heads, like most senior public servants, are accomplished at selective reporting, but such a requirement would also have the benefit of routinely exposing them to relevant questioning at Senate Estimates.

More broadly, agency heads could be required to collect data from employees on the implementation of the APS Values in agency management practices. Public servants could be asked whether, in their view, middle and senior managers behave ethically and in ways that are consistent with the APS Values. The *State of the Service Employee Surveys* cannot gather statistically reliable data from smaller agencies, and in any event the continuance of the surveys would be threatened if they were made the vehicle for possibly invidious comparisons of this nature. The outcomes of these agency-specific surveys could also be made part of an agency's annual reporting process. Such an approach may be subjective, but it is no less so than the downward performance ratings currently enforced through performance assessment and pay systems.

Finally, there is the issue of enforcement. If the *State of the Service* reports are a good indicator, agencies do not—with the one exception of pursuing leaks—appear to have identified or investigated misconduct that is particularly associated with APS Values relating to subsections 10(1)(a) and (f) of the Public Service Act ('the APS is apolitical, performing its functions in an impartial and professional manner'; and 'the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs'). The types of conduct pursued in 2005–06—and in the two other years for which such data was gathered—are laid out in Table 5. Although these types of misconduct are clearly important, they do not go to the difficult issues of politicisation and responsiveness.¹⁹ The type of misconduct included here that is most likely to intersect with subsections 10(1)(a) and (f) of the Public Service Act is 'unauthorised disclosure of information', which is not a difficult matter to isolate and pursue, being usually contrary to the government's political interests rather than inappropriately aligned with them. But as this study has argued, over-responsiveness is at least as much of an issue for the public service, and for effective government, as disaffection.

Table 5. Number of employees by types of misconduct in investigations finalised during 2005–6

Type of misconduct	Employees investigated for this type of misconduct (Number) ⁽¹⁾	Cases where a breach was found (%)	Agencies with finalised investigations (Number)
Improper access to personal information (e.g. browsing)	792	82	10
Conflict of interest	755	80	9
Improper use of Internet/email	283	78	29
Inappropriate behaviour of employees (other than harassment or bullying) during working hours (e.g. treating clients or stakeholders disrespectfully)	133	70	33
Harassment and/or bullying	72	53	27
Improper use of resources other than Internet/email (e.g. vehicles)	52	75	13
Unauthorised disclosure of information (e.g. leaks)	41	20	12
Fraud other than theft (e.g. identity fraud)	40	80	13
Improper use of position status (e.g. abuse of power, exceeding delegations)	28	50	10
Private behaviour of employees (e.g. at social functions outside working hours)	21	57	12
Theft	20	60	11
Misuse of drugs or alcohol	9	78	6

⁽¹⁾ 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: 2005–06 *State of the Service Report*, Table 4.5.

There is, however, new guidance from the Australian Public Service Commission that has been issued to ‘implement the Government’s policy commitment not to use public servants in government advertising’. It probably should be asked whether or not guidance on the application of the APS Values should vary with the policy commitments of new Governments, but in this case the change is not one of meaning but of the seriousness with which the APS Values are to be applied. The guidance cites Chapter 6 of the previous Government’s *Guide on Key Elements of Ministerial Responsibility*, which stipulates 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’. The Ministerial guidance is then applied by the Commission to public servants as follows:

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.²⁰

This has always been a legal obligation, but the *State of the Service* data does not suggest that any agencies have ever had such a breach brought to their attention, or, if they have, have ever decided to pursue it.²¹ Nevertheless, the guidance means that public servants have explicit grounds for refusing to engage in activities which could call into question their political impartiality. They also have explicit grounds for questioning whether or not particular activities are likely to call into question their political impartiality. They have reason to ask for formal advice and to ensure that senior managers have formal responsibility for any advice that they provide. They have grounds to ask, in critical and difficult circumstances, for written protocols. What is new is that they now also have grounds to expect that where the activities of individuals appear to call into question their political impartiality, those matters will be pursued with at least as much seriousness as fraud and improper use of the internet.

Breaches of subsections 10(1)(a) and (f) of the Public Service Act are likely to come in shades of grey, but the penalties for misconduct are equally variable; and if these values are to have any meaning then they should be enforced as well as promoted. In fact, to continue promoting the APS Values, as agencies are exhorted to do, will only bring them into disrepute if public servants see that they are not taken seriously, or only selectively so.

Because the public service cannot, in Westminster systems, determine the public interest, its capacity to serve that interest is vested in the integrity of its own processes. Institutional change is partly in the hands of government, but it is also partly in the hands of public servants. Over time, Governments settle in and begin to see institutions from the perspective of incumbency rather than of Opposition. This being the case, the public service should take whatever measures are open to it to maintain the integrity of its own processes.

ENDNOTES

- ¹ See, for example, R. A. W. Rhodes and John Wanna, 'The Limits to Public Value, or Rescuing Responsible Governments from the Platonic Guardians', *Australian Journal of Public Administration* 66(4) (2007), 415ff.
- ² Australian Public Service Commission, *Supporting Ministers, Upholding the Values* (Canberra, 2006), 11.
- ³ *Ibid.*
- ⁴ Richard Mulgan, 'Truth in Government and the Politicisation of Public Service Advice', *Public Administration* 85(3) (2007), 578.
- ⁵ See Ch. 4, notes 17, 18, 19.
- ⁶ Mulgan, 'Truth in Government', 570.
- ⁷ Penny Wong, 'Labor's Approach to the Australian Public Service', speech to the Institute of Public Administration Australia, 20 Sept. 2007, p. 5.
- ⁸ Senator Kim Carr, Labor Senator for Victoria and Shadow Minister for Industry, Innovation, Science and Research, 'Building a Strong Future for Australian Research', 15 Nov. 2007, at <http://www.chass.org.au/media/MED20071115KC.php>.
- ⁹ Matthew Franklin, 'Labor to Lift Gag on Critics', *Australian*, 9 Jan. 2008, at <http://www.theaustralian.news.com.au/story/0,25197,23026526-12332,00.html>, viewed 28 Feb. 2008.
- ¹⁰ ABC News, 'Govt "Leading by Example" in AWA Abolition', 13 Feb., at <http://www.abc.net.au/news/stories/2008/02/13/2162103.htm>, viewed 28 Feb. 2008.
- ¹¹ Public Service Commission, *APS Values and Code of Conduct in Practice: Guide to Official Conduct for APS Employees and Agency Heads* (revised 2005), Ch. 1, at <http://www.apsc.gov.au/values/conductguidelines3.htm>, viewed 22 June 2007.
- ¹² Allan Hawke, then Secretary of Defence, quoted in Michael O'Donnell and John Shields, 'Performance Management and the Psychological Contract in the Australian Federal Public Sector', *Journal of Industrial Relations* 44(3) (2002), 445.
- ¹³ See Anne Tiernan, *Power without Responsibility* (University of New South Wales Press: Sydney, 2007).
- ¹⁴ See Andrew Podger, 'What Really Happens: Department Secretary Appointments, Contracts and Performance Pay in the Australian Public Service', *Australian Journal of Public Administration* 66(2) (2007), 145.
- ¹⁵ See Senate Finance and Public Administration Committee, Hansard, 18 Feb. 2008, pp. 48ff.
- ¹⁶ Wong, 'Labor's Approach to the Australian Public Service', 7.
- ¹⁷ Australian Public Service Commission, 'Merit and Transparency: Merit-based Selection of APS Agency Heads and Statutory Office Holders', 5 Feb. 2008, at <http://www.apsc.gov.au/publications08/meritandtransparency.htm>, viewed 25 Feb. 2008.
- ¹⁸ Wong, 'Labor's Approach to the Australian Public Service', 7.
- ¹⁹ Section 13 of the Act sets out the Code of Conduct. Section s.13(11) of the Act explicitly links the Code to the APS Values by specifying that 'an APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS'. This provision is often applied in concert with other provisions to because it broadens coverage (see the *2004–05 State of the Service Report*, p. 128); nevertheless, the types of misconduct found are as set out in Table 4.5.
- ²⁰ Australian Public Service Commission, 'Guidelines on the Involvement of Public Servants in Public Information and Awareness Initiatives', 12 Dec. 2007, at <http://www.apsc.gov.au/publications07/publicinformation.htm>, viewed 27 Feb. 2008.
- ²¹ The 2004–05 and 2005–06 reports provide comparable data against the same 12 types of misconduct.