Submission to the Independent Review of the APS

**Introduction**

There is a natural division between the objectives of Ministers of State and of the Westminster-Whitehall model of the Australian public service that is meant to guide its work. The public service is meant to advance the public interest. Ministers have a similar goal but it is secondary to what ministers see to be the superior goal of seeking re-election.

Unless this division is acknowledged and properly managed, the public service will become increasingly politicised, notwithstanding legislative requirements for an apolitical public service.

The introduction of “contracted” heads of departments – while well intended – has exposed the public service to politicisation. Ministers use loyalty as the pre-eminent virtue for choosing departmental heads, and this virtue – if it is one - can modify other important qualities.

This risk of politicisation has been illustrated and compounded by the actions of several Prime Ministers who have terminated departmental secretaries for political purposes.

And the division of goals is made worse because there is no clearly accepted function for the non-administrative arm, what was the policy advising part, of the public service. Because ministers are not generally known to establish differentiated roles for their offices and departments, ministerial offices have tended to overshadow the public service.

The Commonwealth thus now has a public service that uncomfortably straddles the “formal” Whitehall-Westminster system for the APS and the United States of America SES arrangements. The concept “apolitical” in APS legislation is increasingly being misinterpreted to mean that the public service should not only be politically aware but should work in an unbiased and even enthusiastic manner to advance the political interests of whatever government is in power.

There are options to reduce risks of APS politicisation – if that is what the Review would want to recommend. A major contribution would be to restore tenure to departmental heads. This can be done without reverting to a sinecure arrangement. This issue deserves consideration unless the Review accepts the current and future extent of politicisation.

**Politics and the Public Interest**

It is accepted that the pursuit of public interest must rest on the judgement of Ministers. However, it would be puerile to believe that all ministerial decisions, even those that are within ministerial powers, are made to advance the public interest. There are many examples across Australian jurisdictions where governments made decisions to advance the government’s prospects of re-election by appealing to local interests or to minority interests. As the former NSW Premier, Barrie Unsworth, attests, he would not have introduced restrictions on firearm use, a policy supported by the overwhelming majority of NSW voters and probably by his NSW public service, had he known beforehand that five per cent of voters would change their vote against the government because of that policy.

There are also many examples where ministers have made decisions that are outside their powers but where it is expected that the public service will fully implement those (unlawful) decisions. The author can detail several such matters, including an order that the department drop criminal charges against union members; that the department make a decision favouring an officer of interest to the minster; that the department refrain from advising the minister on a particular matter; that the department frame its advice solely to suit the interests of the minister; that the department withdraw unpalatable advice.

We should not expect that serving heads of departments would publicly admit to the drift away from frank and fearless advice and towards a politicised service. (Although, a former head of the prime minister’s department, Mr Max Moore-Wilton, is on record as saying that his attendance at Liberal Party functions was explicable because of the “changing nature of the public service”.)

Those who have left the service have fewer restraints on their commentary. It is noteworthy that Professor Peter Shergold’s 2015 report, Learning from Failure, expresses views that he disavowed when he was Public Service Commissioner and head of the prime minister’s department. Professor Andrew Podger now expresses views about the federal public service that he failed to advance when he was the Public Service Commissioner.

The Review would profit from interviewing recently retired departmental heads. It should also strive to identify the agency that today offers its minister draft advice so it can be withdrawn if it is found to be politically unacceptable. The Review can examine annual and other reports of departments to see whether the exercise of that statutory power has been independent as intended or whether it has been unlawfully constrained or influenced by political expectations.

(For example, there is wide scepticism about, even disbelief in, wage growth forecasts and projections in recent Treasury and Budget documents. It is also relevant that the Opposition Leader and opposition Treasurer both publicly state that Treasury has been politicised to such an extent that important functions – such as macroeconomic forecasts - should be transferred to the Parliamentary Budget Office.)

**Politics and Departmental Heads**

We have seen many instances where departmental heads have had their positions terminated for political reasons. Prime Minister Hawke, for example, dismissed two heads of the immigration department. The late Dr Peter Wilenski, the Public Service Commissioner who was meant to have a statutory role in these matters, advised one of these secretaries, the late Mr Bill McKinnon, that his dismissal as head of immigration (in 1987) was not because of any concerns as to his competence. Mr McKinnon’s successor, Mr Ron Brown, was dismissed in 1990 against the wishes of his former or then current minister.

The 1999 dismissal of Paul Barratt, Secretary of the Department of Defence, demonstrated that a departmental secretary could legally be dismissed where the minister lacked confidence in the secretary for any reason, whether the reason was right or wrong. Federal Court proceedings also showed that, notwithstanding the legislated “apolitical service”, a secretary could validly be appointed or dismissed for political reasons.

The then Treasurer’s move effectively to dismiss his Treasury head, Tony Cole, in 1993 was motivated by the Treasurer’s concern at the political import of evidence that Mr Cole gave to a Parliamentary Committee.

Mr Tony Ayers was reportedly transferred from his position as head of the department of social security because he declined to implement his Minister’s instruction to appoint a person nominated by the minister as deputy secretary.

The 1996 sacking of six departmental secretaries was one of the first acts of the newly elected Howard government. Those sackings raised the question – answered in the affirmative – as to whether they were politically motivated. (See, for instance, Department of the Parliamentary Library, Research Paper No. 3, 1998-99, “Politicising the Australian Public Service?”)

If these actions are concerning, consideration might also be given to those heads of departments who have avoided dismissal notwithstanding the questionable quality of their ministers. The APS environment gives little confidence that those departmental heads that report to ministers with weak understanding about an apolitical public service can effect what the law requires.

The links between lack of tenure and politicisation of public services had been foreseen in separate reports made in the 1990s by the auditors-general for South Australia, Victoria and NSW. They had reported on the adverse consequences of introducing an SES, as proposed, in those states.

The Review can access an abundance of evidence to guide it on this matter.

**Politics and the Public Service**

It is reasonable to expect that when the security of employment of the agency head is subject to politics, the whole agency will be infected by politicisation. Public servants will not advance advice if that is perceived as being against the interests of the government, even where the advice is in the best interests of the public. In these circumstances, the eloquent legislation and codes guiding the public service are mere unachievable aspirations.

**Tenure without Sinecure**

One option to help mitigate the adverse affects from the dichotomy of goals that exists between ministers and public officers is to re-introduce a level of tenure in the public service. There must be a number of options allowing this without risking a troublesome degree of sinecure.

One option is to allow that a public servant’s substantive or secure position is at one level below the current level. A Deputy Secretary would thus have tenure – in that department or another agency - at the level of First Assistant Secretary or its modern equivalent. A Secretary would have an entitlement to a Deputy Secretary position in that or another department.

The maximum short-term cost to a Secretary when he or she does not oblige the invalid wishes of the minister would thus be a reduction to the next level below the secretary level.

**The Impact of an ICAC**

Typically, state legislation for an ICAC obliges public officers to identify to the ICAC any unlawful or corrupt act. (In Australia, such integrity agencies have no power to intervene when ministers give lawful instructions that are against the public interest. In some European countries, there are agencies that may investigate ministerial or governmental actions that appear to fail a national interest test.) But it is a valid question to ask whether anti-corruption legislation would offer public officers adequate protection by acting as a restraint on corruption by ministers.

The experience in NSW, a state that at the time had model anti-corruption legislation, suggests that such laws offer public officers inadequate protection, even when combined with “whistle-blower protections”. The NSW ICAC did not stop corrupt behaviour by a raft of ministers, of both political persuasions. It has become clear that even in NSW, senior executives (they too can be – and are routinely - fired for any or no reason at any time) who knew of the existence of corruption declined to advise the ICAC because of the consequences such action would have on their employment or career.

**Conclusion**

The Review will have many areas where it can offer advice on how to ready the Commonwealth public service for the period ahead. However, overcoming the growth and extent of politicisation in the federal arena offers good returns.

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