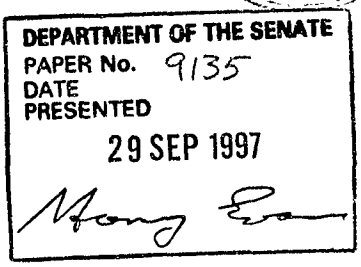
The Parliament of the Commonwealth of Australia

Joint Committee of Public Accounts



REPORT 353

An Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997

September 1997

Australian Government Publishing Service

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DUTIES OF THE COMMITTEE

The Joint Committee of Public Accounts is a statutory committee of the Australian Parliament, established by the *Public Accounts Committee Act 1951.*

Section 8(1) of the Act describes the Committee's duties as being to:

- examine the accounts of the receipts and expenditure of the Commonwealth including the financial statements transmitted to the Auditor-General under sub-section (4) of section 50 of the *Audit Act 1901*;
- examine the financial affairs of authorities of the Commonwealth to which this Act applies and of inter-governmental bodies to which this Act applies;
- examine all reports of the Auditor-General (including reports of the results of efficiency audits) copies of which have been laid before the Houses of the Parliament;
- report to both Houses of the Parliament, with such comment as it thinks fit, any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Parliament should be directed;
- report to both Houses of the Parliament, any alteration which the Committee thinks desirable in the form of the public accounts or in the method of keeping them, or in the mode of receipt, control, issue or payment of public moneys; and
- inquire into any question in connexion with the public accounts which is referred to it by either House of the Parliament, and to report to the house upon that question.

The Committee is also empowered to undertake such other duties as are assigned to it by Joint Standing Orders approved by both Houses of Parliament.

TERMS OF REFERENCE

(1) On 26 June 1997 the House of Representatives resolved that:

(a) the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997 be referred to the Joint Committee of Public Accounts for consideration and an advisory report by 4 September 1997;

(b) the terms of this resolution, so far as they are inconsistent with the standing and sessional orders, have effect notwithstanding anything contained in the standing and sessional orders; and

(c) that a message be sent to the Senate acquainting it of this reference to the Committee.

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LIST OF ABBREVIATIONS

ACEPS	*Achieving Cost Effective Personnel Services*
ACTU	Australian Council of Trade Unions
ANAO	Australian National Audit Office
APS	Australian Public Service
CAC	Commonwealth Authorities and Companies Bill 1996
CEOs	Chief Executive Officers
CPSU	Community and Public Sector Union
DWRSB	Department of Workplace Relations and Small Business
EEO	Equal Employment Opportunity
EM	Explanatory Memorandum
JSCs	Joint Selection Committees
MAC	Management Advisory Committee
MPRA	Merit Protection and Review Agency
PSMPC	Public Service and Merit Protection Commission
SES	Senior Executive salaries
CTA Bill	*Public Employment (Consequential and Transitional Amendment Bill 1997*
EEO(CA) Act	*Equal Employment Opportunities (Commonwealth Authorities) Act 1987*
WEL	Women's Electoral Lobby
WRA	*Workplace Relations Act 1996*
MOPS Act	*Members of Parliament (Staff) Act 1984*

FOREWORD

The Joint Committee of Public Accounts (JCPA) is pleased to present this advisory report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997.

The Public Service Bill is a very significant piece of legislation because it introduces new public service legislation after 75 years of the much amended 1922 Act, it redefines the nature of public service legislation and it embodies a new conceptual framework for public sector management.

While the JCPA supports the need for the 1922 Act to be replaced, and favours simplification, modernisation and the more accessible format of the Bill, its review has identified a number of areas where improvements can clearly be made. The key issues of concern to the JCPA were 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.

These areas are the subject of recommendations in this report.

The review has also revealed a number of issues on which JCPA members have not been able to agree. These differences of opinion, which were the result of fundamentally divergent policy approaches, are highlighted in the report for the information of Members and Senators.

This is the fourth occasion during the course of this Parliament on which the JCPA has been asked by the House to review Bills. On each occasion the Committee has been frustrated by the lack of time in which to conduct its reviews. The Public Service Bills attracted a significant degree of public interest and many witnesses were able to make suggestions for improvements to the Bills. The Committee was not, however, able to give as much consideration to each of these suggestions as it would have liked. All of the suggestions, however, have been tabulated in Appendix IV and I urge Members and Senators to use this table as a key to further information when debating the Bills in the Chambers.

The timetable difficulties facing the Committee were compounded by the fact that draft versions of the subordinate legislation were not available at the beginning of the review period, and by the fact that re-drafted versions were being given to the Committee right up to the last moments of its review. As most of the detail of this legislative scheme is provided in the subordinate legislation, it has been extremely difficult for all parties (witnesses and Committee members) to offer fully informed and considered comments on the Bills.

On behalf of the Committee, I extend our appreciation for the assistance given to this review by all who provided submissions or gave evidence at public hearings - particularly to those who contributed multiple submissions and attended more than one of the hearings. I am personally indebted to my colleagues on the Committee who dedicated so much time and effort to completing this review in the short time-frame. I also acknowledge the motions moved in the House by the Minister Assisting the Prime Minister on Public Service Matters, the Hon Dr David Kemp MP, allowing the JCPA two extensions of its original reporting period.

I would also like to thank the Public Service Commissioner for agreeing to make available one of his senior officers, Richard Collis, to assist the Committee and its secretariat in the review.

Alex Somlyay MP

Chairman

1

INTRODUCTION

Referral of the Bills

1.1 The Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997 were introduced into the House of Representatives on 26 June 1997 to replace the current legislative framework for the establishment and management of the Australian Public Service (APS).

1.2 The Public Service Bill is a key element in the Government's public service reform agenda which is being implemented within the new workplace relations framework that has been set out in the *Workplace Relations Act 1996*.[1]

1.3 Both the Public Service Bill and the Public Employment (Consequential and Transitional) Amendment Bill were referred after their second reading to the Joint Committee of Public Accounts (JCPA) for consideration and an advisory report to be presented to the House by 4 September 1997 (later amended to 29 September 1997).[2]

Development of the Public Service Bill 1997

1.4 In November 1996 the then Minister Assisting the Prime Minister for the Public Service, the Hon Peter Reith MP, issued a discussion paper entitled *Towards a Best Practice Australian Public Service*. The Public Service and

1 Public Service and Merit Protection Commission & Department of Workplace Relations and Small Business (PSMPC&DWRSB), *Submission*, p.S239.

2 See House of Representatives, Votes and Proceedings, Wednesday 3 September 1997; and House of Representatives, Votes and Proceedings, Monday 22 September 1997.

Merit Protection Commission (PSMPC) and the then Department of Industrial Relations (now the Department of Workplace Relations and Small Business (DWRSB)) invited submissions and undertook an extensive consultation program with Commonwealth public servants, State and Territory Government representatives, management consultants, unions and academics. More than 100 group discussions were held involving over 1500 participants. The PSMPC received 240 written submissions, and over 4700 individuals and organisations accessed information from the PSMPC's World Wide Web Home Page.

1.5 In May 1997 the PSMPC and the then Department of Industrial Relations issued a further document entitled *The Public Service Act 1997 - accountability in a devolved management framework*. Submissions and comments were again invited from public servants and members of the public. Over 2000 individuals and organisations accessed the information on the PSMPC's Home Page and more than sixty written submissions were received.[3]

1.6 The consultation process established broad agreement for a move to a short, principles-based Act which would facilitate a more flexible managerial environment.

Objectives of the Bill

1.7 The main objectives of the Public Service Bill (the Bill) are:

- to establish an apolitical public service that is efficient and effective in servicing the Government, the Parliament and the Australian public (clause 3(a));
- to provide a legal framework for the effective and fair employment, management and leadership of Australian Public Service (APS) employees (clause 3(b); and
- to establish rights and obligations of APS employees (clause 3(c)).

3 PSMPC&DWRSB, *Submission*, p.S239.

1.8 Specifically, the Bill sets out to:

- define the character and purpose of public service;
- define the ethos of public service;
- acknowledge the need for a non-partisan and apolitical public service;
- prohibit ministerial direction of public service staffing decisions, except in areas where a direction is provided for, eg employment of Heads of Mission;
- express the principle of merit as a fundamental value for the APS;
- introduce a code of conduct into the principal legislation;
- set out clearly the respective roles, responsibilities and powers of Ministers, Secretaries and the Public Service Commissioner; and
- provide explicitly for the Public Service Commissioner to report through the Minister to the Parliament.[4]

Significance of the Bill

1.9 The Bill, although retaining the same title, represents a substantial change from the legislation it seeks to replace, the *Public Service Act 1922* (the 1922 Act).[5] It is significant because it:

- introduces *new public service legislation* after 75 years of the much amended 1922 Act;
- redefines the *nature* of public service legislation; and
- embodies a *new conceptual framework* for public sector management.

4 PSMPC&DWRSB, *Submission*, p.S241.

5 Professor Roger Wettenhall applauded the decision to retain the title on the grounds that it was less misleading than titles recently adopted by State legislatures in rewriting counterpart legislation. *Submission*, p.S175.

New Public Service Legislation

1.10 The Bill seeks to replace the 1922 Act that has laid the foundation for the terms and conditions of employment within the APS for 75 years. The current legislation has sustained over one hundred amendments. The Public Service Commissioner, Dr Peter Shergold, stated that:

> *you would not expect any employer in this country to be able to compete with equipment, machinery and a workplace that was 75 years old. This legislation is our machinery. We have patched it and we have oiled it and we have lubricated it but, quite frankly, it is not appropriate to take the Public Service into the next century.*[6]

1.11 Professor Wettenhall's submission reflected a generally held view that:

> *the old Public Service Act with its many amendments ... over the years had become extremely difficult to use, so that the effort to rewrite it thoroughly is to be welcomed.*[7]

Redefining the Nature of Public Service Legislation

1.12 Dr Shergold put forward the view that there is no constitutional necessity for the legislation:

> *We could operate as an employer with no public service act. The purpose of a public service act is to define public expectations of what a public service should perform.*[8]

1.13 Accordingly, the Bill:

> *sets out the purpose of the public service in its objects clause; the ethos of public service in the values clause; the conduct expected of public servants in a code within the legislation; and, the respective roles and responsibilities of ministers, agency heads and the Public Service Commissioner.*[9]

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6 Dr Peter Shergold, *Transcript*, p.3.

7 Professor Roger Wettenhall, *Submission*, p.S174.

8 Dr Peter Shergold, *Transcript*, p.4.

9 Dr Peter Shergold, *Transcript*, p.5.

1.14 While the 1922 Act contains regulation, prescription and detailed processes relating to terms and conditions of employment, the Bill is characterised by general statements of administrative principle. The Committee noted Dr Phillipa Weeks' comment on the Bill:

> *Not least of its virtues is the admirably direct and succinct statement of the essential characteristics of public service ... Praise is due not only to the drafters, who have produced a Bill which is almost breathtaking in its lucidity and simplicity ... but also to the policy-makers who, in conceptualising this streamlined public service regulation, have perceived the importance, both in practical and symbolic terms, of crystallising fundamental principles, conventions and standards.*[10]

1.15 The philosophical underpinnings of the Bill, in defining public expectations of what a public service should perform, have distinguished between the public interest of citizens and the private interest of employees. Accordingly, the private interests of employees, for example, terms and conditions of employment, are not defined in the Bill.

1.16 Instead, much of the detail in relation to the private interests of employees will either be specified in subordinate legislation (the two key elements of which are the Public Service Commissioner's Direction and the Public Service Regulations) or will be devolved to departmental secretaries and agency heads.

A New Framework for Public Service Management

1.17 The 1922 Act, notwithstanding its numerous amendments, is no longer considered appropriate to the needs of a contemporary public service. The PSMPC&DWRSM stated that it is:

> *riddled with unnecessary prescription and detail. It creates a regulatory environment and an emphasis on process which is inconsistent with contemporary management philosophy and acts as an inhibitor to innovation and best practice.*[11]

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10 Ms Phillipa Weeks, *Submission*, p.S424.

11 PSMPC&DWRSB, *Submission*, p.S240.

1.18 Mr Steve Sedgwick, Secretary of the Department of Employment, Education, Training and Youth Affairs, supported this assessment, arguing that:

> *we really do need the flexibility within the public service to manage people well and to do it on pretty much the same kinds of rules that a lot of our private sector competitors have ... The problem for us is that our people management framework thus far has encouraged an excessively rule based legalistic approach to the management of people within an organisation.*[12]

1.19 It is intended that the provisions of the Bill will enable the public sector to be placed on a similar footing to the private sector, with a framework that gives secretaries and agency heads employment powers in their own right.

1.20 Moreover, it provides for the APS to operate, to the maximum extent possible consistent with its public responsibilities, within the same industrial relations framework as apply to the rest of the Australian workforce.[13]

Context of the Bill

1.21 The proposed legislative reform is one element in the continuing process of public sector reform. Other key elements include financial and people management reform, the move to accrual budgeting and the introduction of government service charters.[14]

1.22 The proposed legislation encapsulates changes that have occurred under the much amended 1922 Act which reflect a variety of approaches to administrative reform over the years.[15] Mr Lionel Woodward, Chief Executive Officer, Australian Customs Service, observed:

12 Mr Steve Sedgwick, *Transcript*, p.247.

13 PSMPC&DWRSB, *Submission*, p.S240.

14 Dr Peter Shergold, *Transcript*, p.247.

15 Professor Roger Wettenhall, *Submission*, p.S174.

> *I have seen a lot of changes over the last 36 years ... I personally do not see the changes that are included in this bill as being as dramatic as some would suggest ... I see them as a natural evolution of what started, I think, during the 1980s and continued in the early 1990s. The changes are a recognition of the inevitability of the evolution of public administration.*[16]

1.23 While most submissions placed the proposed legislation in the context of continuing and *evolutionary* public sector reform, it is clear from the evidence that this perception is not shared by all. To some, the legislation proposes *revolutionary* reform. The Australian Council of Trade Unions (ACTU), for example, believes that the Bill envisages major changes in the APS and its relationship with Government, Parliament and government authorities.[17]

Commissioner's Direction and Public Service Regulations

1.24 The Public Service Commissioner's power to issue the Commissioner's Direction is described in clause 11 of the Bill (in relation to the APS Values) and in clause 36 (in relation to Senior Executive Service employment matters). The Commissioner's Direction is a new type of instrument which has no equivalent in the 1922 Act.

1.25 It seems that a Commissioner's Direction will only be issued where it is deemed essential to establish a process framework within which agency heads must operate. If necessary, the direction will be able to:

- deal with the circumstances of a particular agency; or
- determine the scope or application of a particular value.

16 Mr Lionel Woodward, *Transcript*, pp.253-254.

17 Australian Council of Trade Unions (ACTU), *Submission*, p.S138.

1.26 In this way the Commissioner would, where necessary, be able to:

- resolve any conflicts that arise in practice between APS Values;
- support programs for particular groups, for example, youth, Aboriginal and Torres Strait Islander peoples;
- ensure fairness, for example, that the claims of those most needing training are properly considered;
- ensure appropriate selection procedures for different types of work, for example, casual employment; and
- address specific requirements for particular jobs, for example, restrictions on 'persons actively engaged in electoral or political affairs' for certain jobs in the Australian Electoral Commission.[18]

1.27 The Committee was told that the Commissioner's Direction will be limited to a small range of issues. To date directions have been drafted in relation to:

- diversity in employment (clause 10: APS Values);
- merit in employment (clause 10: APS Values);
- Senior Executive Service (SES) employment (Division 2); and
- public interest whistleblowing (clause 16).

1.28 The Bill provides a general power to make regulations (clause 72) and identifies a number areas where regulations may prescribe certain action. For example:

- clause 15 states that regulations may prescribe sanctions which may be imposed on employees who are found to have breached the Code of Conduct;

18 *Public Service Bill 1997, Explanatory Memorandum*, (3.6 - 3.8), pp.17-18.

- clause 26 states that regulations may deal with the voluntary movement of employees between agencies; and
- clause 33 states that regulations may establish review procedures for APS employees employment.

1.29 Regulations establishing review procedures for APS employees have been drafted, while regulations in relation to the other matters described above are being prepared.

The Public Employment (Consequential and Transitional) Amendment Bill 1997

1.30 The Public Employment (Consequential and Transitional) Amendment Bill 1997 (the CTA Bill) deals, as the name suggests, with the consequential and transitional matters arising from the proposed repeal of the 1922 Act and its replacement by the legislation set out in the Public Service Bill.

1.31 Following the establishment of the new legal framework for Australian Public Service employees set out in the Public Service Bill, certain provisions will be necessary to:

- facilitate the transition to the new employment framework;
- validate actions and decisions taken under the former legislation; and
- make consequential amendments to many other Commonwealth Acts which refer to the 1922 Act or to provisions or terms contained in that Act.

1.32 These provisions are contained in the CTA Bill and it is intended that this Bill will commence on the same day as the new Public Service Act, subject to any special requirements in relation to particular consequential amendments.

Transitional Provisions

1.33 The transitional provisions of the CTA Bill fall into three broad areas:

- a series of provisions which will operate when the Public Service Bill commences to convert the status that existing APS staff have under the 1922 Act into their corresponding status under the new Bill;
- provisions which have the effect of preserving certain parts of the 1922 Act; and
- provision for the continuation of processes already commenced under relevant parts of the 1922 Act or the *Merit Protection (Australian Government Employees) Act 1984* (which is being repealed by the CTA Bill) that have not been completed by the time the new Act is proclaimed.

Consequential Amendments

1.34 Schedule 1 of the CTA Bill specifies the Acts that will be amended or repealed consequent on the commencement of the Public Service Bill. These amendments include:

- changes to the staffing provisions of APS statutory agencies to reflect the new employment framework of the Public Service Bill which confers certain powers on agency heads;
- changes to the role of the Remuneration Tribunal in determining the remuneration and allowances of Secretaries and employees in the Senior Executive Service salaries;
- removal of references to the officers' mobility arrangements set out in Part IV of the 1922 Act; and

- amendments to the *Ombudsman Act 1976* and the *Privacy Act 1988* which will enable complaints lodged under these Acts to be transferred to the Public Service Commissioner (rather than the Merit Protection and Review Agency) in certain circumstances.

Conduct of the Review

1.35 The JCPA's review was advertised in the national press on 4 and 5 July 1997, inviting submissions from interested parties by 18 July (extended to 25 July). A list of the submissions received by the Committee is located at Appendix I.

1.36 The Committee heard evidence on the Bill at public hearings in Canberra on 6 and 7 August 1997. The hearings included a 'round table' discussion. In addition, the JCPA took evidence for the first time by electronic communication from a witness located in Melbourne.

1.37 It was apparent at the initial hearings that the Public Service Bill 'does not exist in isolation from the subordinate legislation'.[19] This, of course, reflects the intention of the Bill to exclude employees' private interests from the primary bill and to present a streamlined expression of principles.

1.38 The Committee found that there were many references in the new legislation to accompanying Public Service Regulations and the Commissioner's Direction which were to supplement and offer guidance on the provisions of the Bill. In evidence, the Public Service Commissioner also foreshadowed much of what was proposed for the directions and regulations. At that stage, however, the subordinate legislation had not been drafted.

19 Dr Peter Shergold, *Transcript, p.5.*

1.39 The Committee found it unsatisfactory that it should be expected to review the Bill on the basis of *proposed* inclusions in the legislative package, pending drafting. While normally the Committee would focus on the provisions of the primary legislation, the intrinsic nature of this particular Bill meant that the Bill cannot be judged without considering the details of the delegated legislation.

1.40 The Committee therefore concluded that it could not properly review the Bills until the subordinate legislation was available for examination.

1.41 Four draft directions and the regulations relating to review of actions were subsequently made available to the Committee on 21 August 1997. Other regulations were provided only in the form of draft drafting instructions from the PSMPC to the Office of Legislative Drafting.

1.42 Given the scope of matters to be addressed in subordinate legislation, the Committee sought an extension to the tabling date of the report of its review.

1.43 The Public Service Commissioner made a presentation on the four directions and the review regulations to the Committee on Monday 25 August 1997. The presentation was given in a public hearing forum to which interested parties were invited; copies of the draft documents were made available to them for comment. A further 'round table' public hearing, specifically to examine the Commissioner's Direction and the Regulations, was conducted on Tuesday 9 September 1997.

1.44 Also at that hearing, six current departmental secretaries and agency heads appeared before the Committee to express their perceptions of the proposed legislation.

1.45 The Committee also took evidence from the Secretary of the Department of the Prime Minister and Cabinet on his perceptions of the potential impact of the new legislation.[20]

20 A full list of witnesses to the inquiry is located at Appendix II.

Committee Comment

1.46 Although the Bills had been referred on 26 June, to all intents and purposes the Committee was unable effectively to commence its review of the package of legislation until after 21 August when available draft subordinate legislation was forwarded to the Committee.

1.47 This situation impeded the Committee's normal processes of inviting comment from interested parties within a reasonable time-frame. Many of the people who had furnished a (qualified) submission by the due date submitted further submissions in the light of the directions and regulations. The Committee appreciates the time and effort which those people devoted to this review.

1.48 The Committee concluded that this circumstance had resulted in inefficient use of the brief time that was accorded by the Parliament for reviewing the Bill, not only for the Committee but also for those who contributed to the review.

Structure of the Report

1.49 The contents of this report broadly follow the order of the clauses of the Public Service Bill. Many of the matters raised by the review, however, cover several clauses and so, to avoid the duplication which would occur if the report strictly adhered to the ordering of clauses in the Bill, they are discussed within an issues framework, with cross-referencing where necessary.

1.50 Chapter 2 of the report addresses a number of overarching issues, including a discussion of the general statements of support and the main issues of concern which were presented to the Committee.

1.51 Chapters 3 deals with comments, both general and specific, which were raised in relation to the APS Values and the Code of Conduct proposed in the Bill.

1.52 Chapter 4 discusses how the Bill proposes to reflect the long standing concept of merit in APS selection.

1.53 The provisions of the Bill requiring agency heads to establish workplace diversity programs are considered in Chapter 5.

1.54 Chapter 6 discusses Clause 16 of the Bill, which proposes to establish a limited form of 'whistleblower' protection for APS employees.

1.55 Chapter 7 addresses the employment arrangements, categories of employment and tenure of APS employees, while Chapter 8 deals with the termination provisions for both SES and non-SES employees.

1.56 The review procedures for APS employees are discussed in Chapter 9.

1.57 The next chapter, Chapter 10, reviews issues relating to the appointment, termination and remuneration of agency heads, as set out in Parts 6 and 8 of the Bill.

1.58 Chapter 11 discusses the changes which are proposed in relation to mobility between the APS and other areas of public sector employment, including employment in the parliamentary service.

1.59 The final chapter, Chapter 12, draws together all the conclusions and recommendations contained in this report.

2

OVERARCHING ISSUES

Introduction

2.1 Much of the discussion at the Committee's public hearings focussed on general or overarching issues of concern in relation to the proposed legislative framework. This chapter draws together the more significant of these concerns, which relate to the impact of the legislation on the traditional roles and values of the APS.

2.2 The chapter begins, however, by drawing attention to the general support that was expressed during the review for the modernisation of the 1922 Act.

General support for the proposed legislation

2.3 Very few witnesses argued that the Bill was so deficient that the Bill should be scrapped and the 1922 Act preserved. Most witnesses accepted that the 1922 Act was in desperate need of an overhaul.

2.4 Steve Russell encapsulated the sentiments of most witnesses when he argued that the current Act is unwieldy, disjointed and overly legalistic:

> *in short it is not user-friendly, particularly in a devolved environment.*[1]

2.5 A number of people contrasted the 1992 Act with the Bill and argued that the Bill has the considerable advantage of being succinct and easy to read.[2]

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1 Mr Steve Russell, *Submission*, p.S199.

2 Mr Derek Volker, *Submission*, p.S181.

2.6 The Australian National Audit Office (ANAO), for example, supported the straightforward and 'plain English' presentation which characterises the legislation.[3]

2.7 Some of the other comments in support of the Bill were that:

- the Bill complements the revised financial management and accountability framework outlined in the proposed package of legislation to replace the Audit Act 1901;[4]
- the Explanatory Memorandum for the Bill was said to be more helpful than most such documents, in fact, it is 'uncommonly intelligible and informative';[5] and
- the decision to present a streamlined, principles based Bill enables considerable simplification to be introduced into the primary legislation, by relegating detailed statements of administration practice to subordinate legislation.[6]

2.8 A number of current and former secretaries of Commonwealth departments spoke strongly in support of the general direction of the Bill, arguing that it would introduce much needed flexibility in APS organisational and employment arrangements.[7]

3 At the time of tabling this report, the legislation was still before the Senate. ANAO, *Submission*, p.S57.

4 At the time of tabling this report, the legislation was still before the Senate. ANAO, *Submission*, p.S57.

5 Mr Derek Volker, *Submission*, p.S181 and Phillipa Weeks, *Submission*, pS424.

6 Professor Roger Wettenhall, *Submission*, p.S175; Mr Denis Ives, *Submission*, p.S109.

7 Mr Derek Volker, *Submission*, p.S181. See also Alan Rose and the departmental secretaries and agency heads.

Common issues of concern

2.9 Notwithstanding these general expressions of support, there were a good number of witnesses who urged the committee to consider the possibility that the Bill would undermine values traditionally thought to be important in the APS. It was put to the Committee that the Bill would:

- change the APS from a *public* service to a *government* service;
- destroy the APS as a *career* service;
- erode the *quality of advice* provided to Government;
- increase the risk that the APS would be *politicised*;
- destroy the *cohesion* of the APS;
- result in a *loss of public service values*;
- ignore the *qualities of people* who choose public service as a career; and
- significantly *weaken the Parliament*.

2.10 One of the principal advocates of these concerns was Sir Lenox Hewitt, a former Secretary of the Prime Minister's Department and Chairman of QANTAS. Sir Lenox argued passionately that the Bill would destroy the APS as a career service 'with inevitable consequences.'[8] In his view the provisions in the Bill which allow the Prime Minister to dismiss secretaries of departments 'at any time' (see clause 52) will undermine the willingness of the APS to provide frank and honest advice. He also expressed concerns about secretaries having the same power over APS employees. In Sir Lenox's view, the threat of dismissal will have serious consequences for good governance in Australia.[9]

8 Sir Lenox Hewitt, *Submission*, p.S14, S421.

9 Sir Lenox Hewitt, *Submission*, p.S14.

2.11 These sentiments were shared by Harry Evans, the Clerk of the Senate, who submitted that the Bill proposed a 'new model' of public service, and that if enacted the Bill will establish a service which 'belongs, body and soul, to the ministers of the day'.[10]

2.12 This, he argued, could have significant consequences for the relationship between the APS and the Parliament and for the capacity of the Parliament to scrutinise the Executive. Currently the public service is still a valuable source of independent advice to the Parliament, with many public servants recognising that they have a duty to assist the Parliament by cooperating with parliamentary inquiries and by answering frankly and freely questions put to them in the course of parliamentary inquiries. Mr Evans contends that the employment regime proposed in the Bill will make it difficult for public servants to fulfil this responsibility and that Members of Parliament are increasingly likely to be confronted with ministers and their (dismissible) employees 'all singing the same well-orchestrated song'.[11]

2.13 Mr Richard McPhee also expressed concern that, by extinguishing the notion that the APS is a career service, the Bill would jeopardise the institutional underpinnings of traditional APS ethics.[12]

2.14 Related concerns were expressed by:

- G Pesce, who argued that by 'deconstructing' the public service and 'replacing it with a series of mini-public services, that is one for each agency' a considerable potential for inconsistent and arbitrary exercise of power emerges; [13] and
- the ACTU, which submitted that the Bill will result in the destruction of a cohesive APS and a significant loss of corporate memory over time as the notion of a career service is rapidly destroyed.[14]

10 Mr Harry Evans, *Transcript*, p.115.

11 Mr Harry Evans, *Submission*, p.S67.

12 Mr Richard McPhee, *Submission*, p.S98. See also Lee Bolderman, Submission, pS403 and Phillipa Weeks, Submission, p S424-425.

13 G Pesce, *Submission*, pp.S192-93.

14 ACTU, *Submission*, p.S132.

2.15 Other witnesses warned against what they saw as an unhealthy reliance in the Bill on private sector models of employment.

2.16 Professor Roger Wettenhall, for example, argued that while private sector models can supply some answers to public sector employment and management problems, not all private sector practices are relevant or appropriate:

> *it requires a sophisticated understanding of the essential differences between the sectors and the strengths and weaknesses of each to determine which feature of the one may usefully be applied to the other.*[15]

2.17 These concerns were shared by Phillipa Weeks who suggested that private sector employment law barely recognises, still less protects, the standards and values which are regarded as essential to public sector employment:

> *I have less enthusiasm* [than the Commissioner] *for the transplantation of private sector values, and am sceptical about the capacity of the private sector employment paradigm to accommodate and satisfy the APS Values of merit, equity, participation, fairness, diversity and so on.*[16]

2.18 Ms Weeks argues that these public sector standards and values are currently enforceable only because of the detailed legislative prescription in the 1922 Act and in an administrative law package of merits review and judicial review: 'That's what makes public sector employment different' from the private sector.[17]

2.19 Ms Weeks' concern is not there will be an outbreak of arbitrary, tyrannical, unfair employment decisions by public sector managers, but that a shift to an employment regime of unenforceable values inevitably jeopardises public service values:

15 Professor Roger Wettenhall, *Submission*, p.S175.

16 Ms Phillipa Weeks, *Submission*, p.S430.

17 Ms Phillipa Weeks, *Submission*, p.S431.

Merit, equity and fairness involve costs, and in an era when economic considerations dominate public policy and the public sector budget is shrinking, those values [are] ... *vulnerable to comprise.*[18]

2.20 In material presented as evidence to the Committee Ms Weeks quoted from an American academic in debating how far public employment should differ from private employment:

To many, especially those familiar with private sector personnel administration, it is difficult to understand why public sector employees should be treated any differently from private sector employees ... the answer is simple. It is because their employers are governmental entities.[19]

2.21 The Committee also heard concerns that the drive to incorporate private sector management practices and philosophies into the public sector does not recognise the special qualities of people who are motivated by a commitment to public service over and above private profit. It was suggested that this commitment was possible in an environment where tenure was secure.

Committee comments on general support and concerns

2.22 The Committee notes, but does not share, all of the general concerns that have been raised about the Bill.

2.23 Committee members differed in their views on how radical a change the Bill represents.

2.24 The Bill is dramatically different in form and content from the 1922 Act. However, many of the employment and management relationships proposed in the Bill do not differ substantially from the employment and management relationships currently operating in the APS. For example, nearly all secretaries of Commonwealth departments are

18 Ms Phillipa Weeks, *Submission*, pp.S431-432.

19 YS Lee, *Public Personnel Administration and Constitutional Values*, Quorum Books, 1992, cited in Ms Phillipa Weeks, *Submission*, p.S432.

appointed on contracts with 5 year terms - the notion of permanency or tenure no longer exists for departmental heads. On the other hand, the proposals to allow the Prime Minister to determine remuneration of agency heads, and the extended powers of agency heads in relation to employees, constitute significant departures from current practice.

2.25 In large part, the Bill seeks to give a contemporary legislative basis for employment and management practices which have evolved in the APS over the last ten years, and to incorporate into the public sector the current Government's industrial relations reforms.

2.26 The Committee agrees with those who argue that there are some fundamental differences in the responsibilities of public servants and responsibilities of employees of private companies. These differences are important and are worth preserving.

2.27 The Bill seeks to change, in some cases dramatically, some aspects of the public sector employment framework. The most contentious provisions in the Bill tend to be those where the changes proposed are most significant. For example, the provisions dealing with the review of employment decisions attracted much critical comment.

2.28 While the Committee supports the need for the 1922 Act to be replaced, and favours simplification, modernisation and the more accessible format of the Bill, its review has identified a number of areas where improvements can clearly be made. These areas are the subject of recommendations in this report.

2.29 The review has also revealed a number of issues on which Committee members have not been able to agree. These areas are highlighted in this report for the information of Members and Senators.

Concerns about the annual reporting provisions

2.30 Under sub-section 25(6) of the 1922 Act, departmental secretaries are required to submit an annual report on the operation of their department to the responsible Minister between 30 June and 15 October to enable the Minister to present the report to the Parliament before 31 October of that year.

2.31 These annual reports must be prepared in accordance with requirements from time to time presented to the Parliament by the Prime Minister after approval by the JCPA.

2.32 The Bill, at clauses 56 and 63, also requires secretaries of departments and heads of executive agencies to prepare an annual report on the activities of the department or agency. However, as noted by the ANAO, the Bill is silent on the timing and content of such reports.[20]

2.33 The annual reporting scheme is explained further in the Explanatory Memorandum (para 6.17) which states that *as a matter of practice*, the annual report will be in accordance with any directions by the Prime Minister following *consultations* with the JCPA.

2.34 The ANAO contrasted this proposal with the arrangements for Commonwealth authorities. The Commonwealth Authorities and Companies (CAC) Bill 1996 describes in broad outline the annual report requirements for authorities and provides that annual reports are to be consistent with details specified in subordinate legislation. The ANAO contends that the Public Service Bill should deal in a similar fashion with the annual report obligations of secretaries and agency heads.

20 ANAO, *Submission*, p.S58.

Committee comments

2.35 The Committee considers that downgrading the status of the annual report requirements for Commonwealth departments is a retrograde step.

2.36 Annual reports are key accountability documents. It is through annual reports to Parliament that agencies account for their past year's financial results and program performance.

2.37 As Parliament is the main user of the information reported in annual reports, it is appropriate that Parliament have an assured and central role in determining the guidelines against which annual reports are prepared. It is not adequate that the annual report guidelines be prepared at the discretion of executive agencies after consultation with the Parliament.

2.38 A desire to achieve a streamlined Act is not sufficient reason to change the current arrangements.

Recommendation 1

Clauses 56 and 63 of the Public Service Bill should be amended to require that annual reports from secretaries of departments and heads of executive agencies be prepared in accordance with guidelines approved by the Joint Committee of Public Accounts on behalf of the Parliament.

3

APS VALUES AND CODE OF CONDUCT

Introduction

3.1 The Public Service Bill proposes to legislate, for the first time, the values of the APS and to establish a code of conduct for APS employees.

3.2 Clause 10 of the Bill lists 11 values which are designed to preserve the traditional ethos, conduct and values of the public service.[1] Clause 11 requires the Commissioner to issue directions in relation to the APS Values to ensure they are incorporated in the APS and to determine their scope. Agency heads are required by clause 12 to uphold and promote the Values.

3.3 The Code of Conduct for APS employees is described in clause 13. Clause 14 provides that agency heads are bound by the Code in the same way as APS employees, while clause 15 establishes the framework for dealing with breaches of the Code of Conduct. In accordance with clause 15(3), an agency head must establish procedures for determining whether or not an APS employee has breached the Code. These procedures must have due regard for procedural fairness.

3.4 According the Explanatory Memorandum, the APS Values have been designed to:

- provide the philosophical underpinning for the APS;
- reflect public expectations of the relationship between public servants and the Government, the Parliament and the community;

1 The Hon Mr Peter Reith, Minister for Industrial Relations, Second Reading Speech, Hansard 26.6.97, p.6064.

- articulate the culture and operating ethos of the APS; and
- support and inform the Commissioner's Direction issued under the Bill.[2]

3.5 The Explanatory Memorandum explains the value of establishing a statutory Code of Conduct as being to 'ensure that the Code is legally enforceable and strengthen its role as a public statement of the standards of behaviour and conduct' expected of APS employees.[3]

General Comments

3.6 Most witnesses supported the proposal that the APS Values and the Code of Conduct be spelled out in legislation.[4] Some, however, expressed uncertainty about the meaning and effect of the Values. For example, it was argued that:

- organisational culture and behaviour is more likely to influence the result of ethical dilemmas than a list of prescribed values;[5]
- it is unclear whether the Values are descriptive statements of fact or sentiments to which the APS aspires;[6]
- the Values are characterised by 'a very high level of generality' and that 'the key terms are not defined';[7] and
- a further level of uncertainty is introduced by clause 11(2) which allows the Commissioner to restrict the effect of any of the Values.[8]

2 Explanatory Memorandum, paragraph 3.4, p.15.

3 Explanatory Memorandum, paragraph 3.12, p.18.

4 However, see the comments of Ms Helen Coventry, *Submission*, p.S69.

5 Mr Howard Whitton, *Submission*, p.S218-219.

6 Mr Denis Ives, *Submission*, p.S111.

7 Mr Howard Whitton, *Submission*, p.S224.

8 Mr Denis Ives, *Submission*, p.S111.

3.7 Concerns about the uncertain meaning of some of the Values are given heightened significance by the Commissioner's confirmation that, in accordance with the Code of Conduct, the Values are enforceable. They are 'not simply a rhetorical flourish representing aspiration; these are values which public servants and agency heads are committed by the legislation to upholding'.[9]

3.8 Mr Whitton indicated to the Committee that he did not believe that the Values in their present form would be enforceable in any practical way. He drew attention to comments of the Queensland Parliamentary Committee for Electoral and Administrative Review that a system which seeks to enforce high-level abstractions of ethical principle is open to abuse.[10] He suggested that the Commissioner should make use of the power to be conferred by clause 11 to clarify the Values, so that the standards that APS employees are expected to meet are clear.[11]

Committee comment

3.9 The Committee believes that the expectations that clause 10 imposes on APS employees must be clear. An APS employee could have his or her employment terminated as a result of not complying with the Values. In view of the potential seriousness of allegations of failing to uphold these values, it is vital that they be easily interpreted.

3.10 The Committee notes that the Commissioner's power to issue directions in relation to APS Values is non-discretionary: clause 11 states that the Commissioner 'must issue directions in writing'. The Committee would expect the Commissioner's Direction on the APS Values to clarify the meaning and intent of the Values, to the extent that the Values are unclear.

9 Dr Peter Shergold, *Transcript*, p.21.

10 Mr Howard Whitton, *Submission*, p.S225.

11 Mr Howard Whitton, *Submission*, p.S225

Comments on specific clauses

Introduction

3.11 During its review the Committee received a number of suggestions for changes to the wording of specific sub-clauses within clauses 10 and 13. These suggestions have been tabulated in Appendix IV. The most significant issue of debate concerned the extent to which the merit principle should be recognised in the legislation. This issue is examined in detail in Chapter 4. Some of the other specific suggestions are considered in the sections that follow.

Clause 10(e): the APS is accountable for its actions

3.12 The ACTU believed that the value described at sub-clause 10(e) should be amended by adding the words 'within the framework of Ministerial responsibility' at the end of the sub-clause.[12] In response to being asked whether this clause should be amended to read 'the APS is accountable for its actions within the framework of Ministerial responsibility to the government, parliament and the public,' Mr Harry Evans told the Committee that:

> *There has been enormous neglect of accountability to parliament and total silence about accountability to the public. It would be useful to put that change in as a corrective to the sort of signal that this bill sends to people.*[13]

3.13 Mr Alan Rose stated that he had no difficulty with making such a change.[14]

3.14 The Commissioner believed that the objects clause of the Bill makes it clear that the lines of accountability are in serving the Government, the Parliament and the Australian public.[15]

12 ACTU, *Submission*, p.S141.

13 Mr Harry Evans, *Transcript*, p.122.

14 Mr Alan Rose, *Transcript*, p.168.

15 Dr Peter Shergold, *Transcript*, p.55-56.

3.15 The Committee is of the view that it is vital that the APS Values clearly state to whom the APS is accountable. It therefore makes the following recommendation.

3.16 **Recommendation 2**

Clause 10(e) of the Public Service Bill 1997 be amended so as to add the words 'within the framework of Ministerial responsibility to government, parliament and the public' after the word 'actions' in line 17 of page 7.

Clause 10(f): the APS is responsive to the Government in providing timely advice ...

3.17 It was noted that this value requires advice to be 'timely', but does not refer to the quality of the advice itself.[16] The ACTU in particular recommended that the words 'frank and fearless', or, as an alternative, 'honest and comprehensive' follow 'timely' in this clause.[17] Mr Harry Evans agreed that the word 'fearless' should be included.[18] Other witnesses agreed that the existing requirement of 'timely' was too narrow and should be extended.[19]

3.18 Along similar lines were suggestions in submissions that the Values include 'honesty', 'transparency' and/or 'integrity'.[20]

16 ACTU, *Submission*, p.S141; Mr Derek Volker, *Submission*, p.S183, *Transcript*, p.21; ACTU, *Transcript*, p.54.

17 ACTU, *Submission*, p.S141, *Transcript*, p.54.

18 Mr Harry Evans, *Transcript*, p.123.

19 Mr Jack Waterford, *Transcript*, p.56; Dr John Uhr, *Transcript*, p.56. See also Mr Alan Rose, *Transcript*, p.168, who said that he had no difficulty with the additional words 'frank, honest, comprehensive and accurate' being added.

20 Mr Howard Whitton, *Submission*, p.S225; Mr Denis Ives, *Submission*, p.S112.

3.19 The Commissioner conceded that there was a number of other terms that could have been used to describe the type of advice that should be given. He said that he personally had 'no problems with frank, fearless, good, honest and a number of other terms' but did not think it was necessary to include them because they are set out in the guidelines on official conduct.[21]

3.20 The Deputy Commissioner added that the first Value, which requires the APS to carry out its functions in an impartial and professional manner, makes this expectation clear.[22] This view was supported by Mr Woodward, CEO of Customs, and Mr Carmody, the Commissioner of Taxation. Mr Woodward stated that he did not see that 'the mere addition of a couple of words is going to add significantly to the strength of advice'.[23]

3.21 The Values set out the philosophical underpinning of the APS. The Committee believes that the provision of 'frank and fearless' advice is one of the most fundamental responsibilities of the APS. Such an important principle should be stated clearly alongside the other values, not implied indirectly through other provisions.

3.22 The need for a clear statement of this value is even more compelling in the context of changes that the Bill will introduce to the nature of employment in the APS. During the course of the review, the Committee received a wealth of evidence on the relationship between employment security and the willingness to deliver frank and fearless advice. This matter is considered in detail in Chapter 10. In light of the concerns that the Bill reduces the employment security of some APS employees and that this could lead to a culture in which it is more difficult to deliver honest advice, the Committee feels that a statutory expression of the duty to provide honest and frank advice is vital. This will provide a clear statutory protection to APS employees in the event that they are dismissed, or suffer some other form of detriment as a result of providing frank and fearless advice to government.

21 Dr Peter Shergold, *Transcript*, p.21-22.

22 Mr Peter Kennedy, *Transcript*, p.21-22.

23 Mr Lionel Woodward, *Transcript*, p.266.

3.23 The Committee is convinced that a clear expression of the nature of advice required to be provided by the APS is vital for good, accountable government. Accordingly, the Committee recommends:

3.24 **Recommendation 3**

Clause 10(f) of the Public Service Bill 1997 be amended to insert the words 'frank, honest, comprehensive, accurate and' before the word 'timely' in line 18 on page 7.

Clause 10(i): the APS establishes co-operative workplace relations based on consultation and communication

3.25 The ACTU believes that this sub-clause is too limited and does not acknowledge the constructive role played by unions and democratically elected employee representatives. The ACTU sought an amendment to this sub-clause which adds 'negotiation' to the existing characteristics of consultation and communication.[24] The Australian Services Union, Taxation Officer's Branch recommended a similar change.[25]

3.26 The Commissioner responded to these recommendations by suggesting that such an amendment could be 'at odds' with the Workplace Relations legislation, which requires communication and consultation with staff, but does not require any more than that.[26] Mr Stewart-Crompton, from the Department of Workplace Relations and Small Business, expressed the opinion that 'the values is not the right place to introduce the concept of negotiation.' He went on to say that:

24 ACTU, *Submission*, p.S141.

25 They recommended that the words 'and employee participation in decisions which effect their employment' be added following 'communication'. *Submission*, p.S99.

26 Dr Peter Shergold, *Transcript*, p.55.

I think there would be perhaps some unfortunate confusion between the aims and the purposes of the new Public Service Act and the Workplace Relations Act if we had the concept of negotiations sitting as a value of the Public Service with no further explanation.[27]

3.27 The Committee notes that there is no equivalent in the Bill to the provisions in the 1922 Act which require agencies to have an industrial democracy plan,[28] or which provide for a Joint (management/union) Council to consider matters of general interest to the APS.[29]

3.28 The Committee notes that the Public Service Bill is consistent with the Government's policy on workplace relations and acknowledges that there are different views on this matter.

Agency based procedures for determining breaches of the Code of Conduct

3.29 Some submissions were concerned about the fact that agencies would develop their own procedures under clause 15(3) in relation to determining whether or not a person has breached the Code of Conduct. The ACTU believed that there should be common core procedures in relation to dealing with breaches of the Code, rather than agency specific procedures. The ACTU expressed a concern that each agency may simply reinvent the wheel, and that it was not efficient or fair to have substantial deviation from a common standard.[30]

3.30 In similar vein, another submission thought it inappropriate to establish common values and standards throughout the APS on the one hand, and then have different procedures and degrees of sanction when dealing with employees who fail to uphold these standards.[31]

27 Mr Robin Stewart-Crompton, *Transcript*, p.57.

28 *Public Service Act 1922*, Section 22C.

29 *Public Service Act 1922*, Section 23, Public Service Regulations, 72B, 72E.

30 ACTU, *Submission*, p.S144.

31 Mr Steve Russell, *Submission*, p.S201.

3.31 The Committee agrees that this a matter on which consistency would be desirable.

3.32 **Recommendation 4**

The Public Service Commissioner should monitor the procedures developed by Agencies under clause 15(3) of the Public Service Bill 1997 to ensure that they are reasonable and fair.

Other suggested changes

3.33 As noted above, the Committee received many suggestions for changes to the wording of particular sub-clause in clauses 13 and 15. The Commissioner should review all of the suggestions and advise the Government on whether they should result in amendments to the Bill.

3.34 **Recommendation 5**

The Public Service Commissioner should review all suggested amendments to clauses 13 and 15 of the Public Service Bill 1997, as tabulated in Appendix IV of this report, and advise the Government on whether they should result in changes to the Bill.

4

MERIT

Introduction

4.1 The Explanatory Memorandum to the Public Service Bill notes that provisions reflecting merit principles have appeared in Commonwealth public service legislation since Federation. These have been based on open competitive entry to the APS and promotion based on merit.[1]

4.2 However, the 1922 Act does not contain a definitive explanation of merit. It describes arrangements in relation to the selection of people for vacancies which are based on openness and fairness and the absence of patronage, favouritism and unjustified discrimination. It also includes a number of different interpretations of what is commonly referred to as the application of the merit principle in terms of defining who can apply for jobs and in assessing the relative suitability or efficiency of the applicants for a particular job.

4.3 These different interpretations reflect at least in part the quite different systems of recruitment that have traditionally been a feature of the APS - appointment at the base level, promotion within a career stream, transfers usually only by agreement and more recently the opening up of all SES vacancies to the community at large.

Relevant provisions of the Public Service Bill

4.4 Clause 10(b) of the Bill provides that 'the APS is a public service in which employment decisions are based on merit'. Clause 11 provides that the Public Service

1 Explanatory Memorandum, paragraph 3.5.3, p.15.

Commissioner must issue Directions in writing in relation to the Values listed in clause 10, and there is to be a Direction dealing with merit in employment in the APS.

4.5 The concept of merit is reinforced by a number of other provisions of the Bill, including:

- clause 10(c) of the APS Values which refers to the APS providing a workplace that is free from discrimination and recognises the diverse backgrounds of its employees;
- clause 17 which prohibits patronage and favouritism in the engagement and treatment of APS employees; and
- clause 19 which proscribes Ministerial interference in staffing decisions.

Merit in Employment Direction

4.6 The Public Service Commissioner's draft Direction on Merit in Employment requires agency heads to develop measures which ensure that certain employment decisions (namely promotions and the engagement of persons for a period of, or periods totalling, more than twelve months) are based on merit, while at the same time contributing to the effective and efficient operation of the agency.

4.7 Merit is defined in terms of an assessment of a person's relative suitability based on the relationship between the person's work related qualities (examples of which are identified) and those genuinely required to perform the work, and the draft Direction provides that this assessment must be taken into account in making an employment decision.

4.8 The draft Direction also:

- defines the term 'promotion';
- specifies minimum advertising and notification requirements for relevant employment decisions; and

- provides that certain employment decisions and programs to encourage the employment of certain groups are exempted from merit selection and/or advertising requirements.

Issues

4.9 This section discusses the following issues:

- the inclusion of merit in the APS Values;
- whether merit should be defined in the Bill itself or in the Public Service Commissioner's Direction; and
- how merit should be defined.

Merit as an APS Value

4.10 Under the approach proposed in the Bill, the principle of merit in employment decisions is given legislative recognition in the APS Values. In addition, persons exercising powers in relation to the engagement of APS employees must do so without patronage or favouritism.

4.11 The importance of merit is reinforced in the Minister's Second Reading Speech which states that merit will remain a cornerstone of public service and that the employment decisions for which secretaries are responsible must be made without nepotism, patronage, administrative favouritism or political influence.[2]

Committee Comment

4.12 The Committee strongly supports the principle that merit continue to be the primary basis for employment decisions in the APS. As noted in the McLeod Report:

2 Hon Peter Reith, Minister for Industrial Relations, Second Reading Speech, Hansard, 26.6.97, p.6064.

Application of the merit principle is essential for the preservation of an impartial APS in which staffing decisions are not influenced by nepotism or patronage. It is also central to the aim of enhancing the efficiency of the APS by selecting the best people for employment and advancement.[3]

4.13 The Committee also supports the inclusion in the legislation of specific prohibitions on patronage and favouritism and Ministerial interference.

Definition of merit - legislation or directions

4.14 The PSMPC believes that the Bill reinforces the notion that merit selection will remain a fundamental principle in APS staffing decisions. Its importance is reflected in the inclusion of merit in the Values contained in the Bill which define the public interest as it relates to the APS employment framework.

4.15 The PSMPC argued that the value of merit in the Bill has a potentially wider application than in the 1922 Act. This Act applies the 'merit principle' to a limited set of staffing decisions only. The Bill applies the value of merit to employment decisions broadly.[4] However, as the PSMPC also notes, the Commissioner's Direction will define merit and determine how it is to be applied, generally, and to particular staffing decisions. A key feature of this approach is to provide a more flexible framework for APS agencies by allowing them to be able to streamline the amount of process associated with selections.

4.16 While strongly agreeing that merit should continue to be the cornerstone of employment decisions in the APS, a number of other submissions, including those from the MPRA, the ACTU and the Women's Electoral Lobby (WEL) expressed concerns that the merit principle is not defined in the primary legislation itself.

3 *Report of the Public Service Act Review Group*, December 1994, p.39.

4 PSMPC&DWRSB, *Submission*, p.S248.

4.17 The MPRA strongly believes that, since the notion of merit is fundamental to the new-look public service, the term should be defined in the legislation. The MPRA's experience is that perceptions of unfairness in selection is the single most common source of grievances and, with the proposed abolition of promotion appeals, it expects that 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.[5]

4.18 Comments by various witnesses at the public hearings were also generally supportive of the proposition that the merit principle be defined in the legislation.

4.19 Dr John Uhr commented that one of the indicators of the importance of putting merit in the primary legislation comes from the Minister's Second Reading Speech where the Minister identified the importance of a clear, unambiguous, uncontested definition of merit. Dr Uhr went on to say that he thought that the Minister's identification of this priority should be supported by making sure that the definition is included in the legislation and not left to the discretion of the Commissioner at some later stage.[6]

4.20 This view is supported by Mr Denis Ives who commented that the legislation should carry within it the fundamental principles - not necessarily all the details - that the Public Service should aspire to and put in practice. He made the important point that the Commissioner's draft Direction has a very strong sunset clause which leaves its future operation uncertain. Mr Ives considers it is quite surprising that principles of merit are being left to a subordinate instrument which does not have durability.[7]

4.21 The Public Service Commissioner conceded that it would be possible to incorporate a definition of merit in the Bill and then, in the Commissioner's Direction, detail how that interpretation is to be applied with respect to the range of engagement and employment decisions in the APS.

4.22 This approach was supported by a number of other participants, including Mr Doug Lilly of the Community and

5 MPRA, *Submission*, p.S64.

6 Dr John Uhr, *Transcript*, p.47.

7 Mr Denis Ives, *Transcript*, p.295.

Public Sector Union (CPSU) who commented that, provided there is an enshrining of the core definition of merit in the legislation, the detailed application of the processes surrounding selection, et cetera, can quite adequately be covered in either the Commissioner's Direction or Regulations.[8]

Committee Comment

4.23 The Committee believes that the inclusion of a specific reference to the principle of merit in employment decisions in the APS Values should be supported by the inclusion of a clear and unambiguous definition of merit in the Bill. The Committee considers that this approach would enhance community understanding of the importance of merit in APS employment decisions by providing a definition of merit that cannot be varied except with the direct authorisation and participation of the Parliament.

4.24 **Recommendation 6**

The Public Service Bill 1997 should include a definition of merit.

How merit should be defined

4.25 While the Minister said in his Second Reading Speech on the Bill that merit will remain a cornerstone of APS employment, he also noted that the concept is difficult to define. The Minister agreed with a suggestion by WEL that the most appropriate definition to adopt is that of the *CCH Australian and New Zealand Equal Opportunity Law and Practice*, namely 'the relationship between a person's job-related qualities and those genuinely required for performance in particular positions'. The Minister stated that this needs to be reflected as the standard that agency heads employ when seeking the person most suitable for a position.[9]

8 Mr Doug Lilly, *Transcript*, p.52.

9 Hon Peter Reith, Minister for Industrial Relations, Second Reading Speech, Hansard, 26.6.97, p.6064.

4.26 A number of participants in the Inquiry, including the CPSU and Dr Marian Sawer, also indicated their broad agreement with the CCH definition, although Dr Sawer believes the principle should be supplemented by a consideration of complementarity as a means of minimising 'cloning' in selections.[10]

4.27 The MPRA believes that the essential attributes of a definition of merit include recognition that the concept is only ever subjectively assessed, and a clear and demonstrable relationship between a person's qualities and those required to perform the job well. In the interests of achieving diversity, the MPRA also considers that relevant experience should provide evidence to demonstrate the possession of required skills and attributes, rather than itself being a selection criterion.

4.28 The Public Service Commissioner's draft Direction on Merit in Employment includes the following definition:

> *An Agency Head must put in place measures directed at ensuring that employment decisions, while contributing to the effective and efficient operation of the Agency, are based on merit.*
>
> *An employment decision about a person is based on* ***merit*** *if:*
>
> - *an assessment is made of the relative suitability of the person; and*
> - *the assessment is based on the relationship between the person's work-related qualities and the work-related qualities identified by the Agency as genuinely required for the duties concerned; and*
> - *the assessment is taken into account in making the decision.*
>
> *Examples of work related qualities:*
>
> *1. skills and abilities*
>
> *2. qualifications, training and competencies*

10 Complementarity emphasises recruiting skills which are complementary to those already present in the organisation - see Dr Marian Sawer, *Submission*, p.S1.

3. standard of work performance

4. capacity to produce outcomes from effective performance at the level required

5. relevant personal qualities

6. demonstrated potential for further development

7. ability to contribute to team performance.[11]

4.29 The Public Service Commissioner indicated in public hearings conducted by the Committee that this definition is based on the one that was proposed by WEL in its submission to Minister Reith, and that the approach of identifying examples of work related qualities is an important step forward in terms of merit in employment in the APS.[12]

4.30 The Commissioner also highlighted a significant change in the advertising requirements specified in the draft Direction. Under the new arrangements, where it is proposed either to promote a person to a particular vacancy or engage a person for a period of, or periods totalling, more than twelve months, all Australians must be given the opportunity to apply for the relevant employment, or similar employment.

4.31 In Dr Shergold's view, this will lead to the opening up of the merit process as never before. To highlight the significance of this change, the Commissioner noted that at present only about 20 to 25 per cent of the 8,000 to 9,000 vacancies currently advertised in the *Commonwealth Gazette* are advertised as open to members of the Australian community generally, whereas under the new arrangements, the community will have access to all of these jobs.[13]

4.32 However, numerous concerns were identified by other participants in this review, both with the definition of merit proposed by the PSMPC and with other aspects of the draft Direction. The major concerns are:

11 Public Service Commissioner's draft Direction, Chapter 3-Merit in Employment, paragraphs 3.1(2) & 3.1(3).

12 Dr Peter Shergold, *Transcript*, p.190.

13 Dr Peter Shergold, *Transcript*, p.190.

- the wording of the definition, and in particular the inclusion of certain provisions that may be seen as qualifiers to the operation of merit; and
- the advertising requirements imposed on agency heads.

Qualifiers to the operation of merit

4.33 The major concerns relate to:

- the wording in clause 3.1(2) of the draft Direction on Merit which provides that agency heads must put in place measures directed at ensuring that employment decisions, *while contributing to the effective and efficient operation of the Agency*, are based on merit; and
- the third dot point of clause 3.3(3) which requires that an assessment of relative suitability need only be *taken into account* in making an employment decision.

4.34 The Public Service Commissioner explained that the intention of these provisions is to recognise that there will necessarily be some negotiations about the terms and conditions of employment (including such matters as salary, removal expenses etc) under which a person is willing to come to the agency, and that if these issues are unable to be satisfactorily resolved, the end result may be that the person regarded as the most suitable does not end up being either promoted to, or engaged in, the position in question.

4.35 However, it would appear that these qualifiers are being interpreted more broadly than perhaps is intended. WEL is gravely concerned about definition of merit, and the serious qualifiers limiting the application of merit, both in the draft Direction and implicit in the draft classification rules.[14] It considers that the phrases *while contributing to the effective and efficient operation of the Agency*, and *the assessment is taken into account in making the decision* opens the way for a substantial diminution in the application of the merit principle. WEL strongly recommends that they be deleted.

14 WEL, *Submission*, p.S458.

4.36 This view is shared by a number of other parties including the ACTU, the CPSU, Ms Phillipa Weeks and Mr Denis Ives. Ms Weeks commented that these qualifiers raise serious doubts about the value of this definition of merit,[15] while Mr Ives supported the development of alternative wording which would give stronger recognition to merit assessment and strengthen the reference to achieving outcomes.[16]

4.37 In the light of the definition of merit included in the draft Direction, WEL has developed an amended definition addressing its concerns for consideration by the Committee.[17]

4.38 There were also a number of comments relating to the examples of work related qualities specified in the draft Direction:

- Ms Ann Forward noted that the seven listed components ought to be, in some way, made components together. In her view, picking out only one of these items will not lead to an adequate comprehension of what is commonly understood by merit in employment.[18]

- WEL, on the other hand, prefers that there not be any listing of work-related qualities at all. It has particular concerns about the inclusion of two of the examples: training, which it considers is not relevant to merit assessments; and relevant personal qualities, which it believes could well be used to exclude persons who do not fit the clone mold.[19]

- The ACTU also disagrees with the inclusion of relevant personal qualities, although the Committee notes that personal qualities are included in definitions of relative suitability/efficiency in the 1922 Act.

15 Ms Phillipa Weeks, *Transcript*, p.295.

16 Mr Denis Ives, *Submission*, p.S481-482.

17 WEL, *Submission*, p.S460.

18 Ms Ann Forward, *Transcript*, pp.296-297.

19 WEL, *Submission*, p.S459.

Committee Comment

4.39 The Committee notes the commitment given by the Public Service Commissioner in hearings conducted by the Committee that a more appropriate form of words will be developed which would remove any ambiguity in relation to the application of merit to identified employment decisions. The Commissioner also noted that he would consider the revised definition put forward by WEL.

4.40 The Committee agrees that the inclusion of the phrases 'while contributing to the effective and efficient operation of the Agency' and 'the assessment is taken into account in making the decision' in the current draft definition of merit could be seen as a substantial diminution of the application of the merit principle in relation to relevant APS employment decisions and considers that they should be deleted.

4.41 The Committee believes that it is important that there be a transparent definition of merit included in the primary legislation based on the generally accepted *CCH Australian and New Zealand Equal Opportunity Law and Practice* definition.

4.42 The Committee also considers that it is appropriate that the Public Service Commissioner's Direction on Merit specify the range of employment decisions to which a merit assessment must apply, identify examples of work related qualities that may be relevant to such assessments, recognise that there may be certain cost related decisions that might be relevant considerations in employment decisions, and set out a range of other matters in relation to the application of merit in the APS.

4.43 The Committee believes that this approach will assist in meeting the objectives of a more streamlined and flexible approach to the application of merit in the APS while at the same time ensuring that relevant employment decisions continue to be made on the basis of merit and without patronage and favouritism.

4.44 **Recommendation 7**

The definition of merit to be included in the Public Service Bill 1997 should be as follows:

An employment decision about a person is based on merit if:

- ***an assessment is made to establish the best applicant for the job(s);***
- ***the assessment is based on the relationship between the applicants' work related qualities and the work related qualities genuinely required for performance in the job(s); and***
- ***the assessment focuses on the capacity of applicants to achieve job outcomes.***

Advertising requirements

4.45 The draft Direction on Merit in Employment provides that where it is proposed either to promote a person to a particular vacancy or engage a person for a period of, or periods totalling, more than twelve months, all Australians must be given an opportunity to apply for the relevant employment or similar employment.

4.46 The draft Direction also provides that all vacancies must, as a minimum requirement, be notified in the *Commonwealth Gazette* and it establishes a twelve month currency period for advertisements.

4.47 Dr Shergold indicated that the purpose of the provision is to widen merit and to open up the APS to the community. He noted that this proposal builds upon a gradual process that has been in train for some years: since 1984, all SES jobs have been advertised as open to all persons outside the APS, and secretaries already have the flexibility to advertise other jobs in the same way if they wish. However,

Dr Shergold added that there is a view that whatever has been done on merit until now has been extremely restricted because the field of applicants is often restricted to current APS employees.[20]

4.48 WEL supported the opening up of vacancies as proposed but is concerned that the minimum requirement of advertising only every twelve months could result in selections being made from out of date fields. It also comments that advertising only in the *Commonwealth Gazette* will do little to open up fields as most Australians are not familiar with this Gazette.

4.49 Mr Paul Barratt, Secretary of the Department of Primary Industries and Energy also supported the proposal as did Mr Ken Baxter, who saw a potential additional advantage in terms of increasing mobility between the Commonwealth and State public services.

4.50 Mr Denis Ives, who agreed that there is considerable flexibility now for APS agencies to advertise their jobs widely, noted that it is at the junior levels that the new approach may cause problems. He warned that it could open up an opportunity for very large numbers of applications, especially for lower level vacancies. Mr Ives suggested a more practical approach might be to adopt an optional rather than a mandatory approach to advertising.[21]

4.51 This view is supported by a number of others including Ms Wendy Caird of the CPSU and Messrs Gourley and Volker. Mr Gourley commented that the question of outside advertising is best left to the discretion of secretaries who are able in individual circumstances to make a judgement on the basis of internal supply and the outside labour market.[22]

20 Dr Peter Shergold, *Transcript*, p.283.

21 Mr Denis Ives, *Transcript*, p.287.

22 Mr Patrick Gourley, *Transcript*, p.285.

Committee Comment

4.52 The Committee supports the requirement in the draft Direction on Merit in Employment in relation to advertising which provides that where it is proposed to either promote a person to a particular vacancy or to engage a person for a period of, or periods totalling, more than twelve months, an opportunity to apply for the relevant employment, or similar employment in the agency, is notified in the *Commonwealth Gazette.*

4.53 However, the Committee considers that it would be consistent with the general trend established by the Bill to allow agency heads some flexibility in deciding whether individual vacancies, particularly at lower levels, need to be advertised as being open to all Australians. Accordingly the Committee believes that the draft Direction on Merit in Employment should be amended to allow agency heads the discretion to determine that particular vacancies are to be advertised as only open to current APS employees.

4.54 **Recommendation 8**

The Public Service Commissioner's Direction on Merit in Employment should be amended to allow agency heads the discretion to decide whether individual vacancies are to be advertised as open to all Australians.

5

WORKPLACE DIVERSITY

Introduction

5.1 The APS Values expressly state that the APS provides a workplace that is free from discrimination and recognises the diverse background of APS employees.[1] Clause 18 of the Bill requires an agency head to establish a workplace diversity program which gives effect to the APS Values.

Workplace Diversity plans

5.2 The Government believes that the existing Equal Employment Opportunity (EEO) requirements are 'too compliance-oriented and prescriptive' for today's environment.[2] Section 22B of the 1922 Act, which provides for the development of EEO Programs, occupies over four pages of legislation and is accompanied by many more pages of guidelines. These programs are designed to ensure that appropriate action is taken to eliminate unjustified discrimination against women and persons in designated groups.[3] They must include mechanisms which identify discriminatory practices and patterns of inequality of opportunity, collect and record information regarding the operation of the program and assess the program's effectiveness. Section 22B requires that secretaries consider the views of relevant staff organisations on the program and provide a copy of a statement outlining the program to the Commission. The Commission has the power to require

1 Clause 10(c).

2 PSMPC and DWRSB, *Submission*, p.S249.

3 Designated groups are defined in section 7 of the *Public Service Act 1922* as: Aborigines and Torres Strait Islanders, people from non-English speaking backgrounds and persons who are physically or mentally disabled.

Secretaries to report on the program. It also has the ability to make recommendations to the secretaries about action that should be taken to improve the effectiveness of the program. If a secretary chooses not to implement the recommendations, he or she must inform the Minister of the Department in writing of the reasons for this decision.

5.3 Clause 18 of the Bill, entitled 'Promotion of employment equity', requires agency heads to establish a workplace diversity program to assist in giving effect to the APS Values. According to the Explanatory Memorandum, the clause will be supplemented by a Commissioner's Direction which will set out the substantive requirements of the program.[4]

5.4 The Committee has been provided with a draft of the Public Service Commissioner's Direction. Chapter 2 of that Direction, Diversity in Employment, requires that:

- agency heads develop and implement measures which prevent all forms of either direct and indirect discrimination;
- certain measures be included in the workplace diversity programs (one of which is to ensure that the program helps remedy any employment-related disadvantages of current and potential employees because of Aboriginality, ethnicity, race, gender or disability); and
- agency heads evaluate the effectiveness of the program annually and to report on the evaluation in the agency's annual report.

Adequate accountability?

5.5 The ACTU did not believe that the workplace diversity programs established by clause 18 provide a sufficient commitment to EEO. It submitted that there needed to be a legislative imperative for the development, implementation and monitoring of EEO programs for women and people in certain designated groups.[5]

4 Explanatory Memorandum, paragraph 3.23 at p.24.

5 ACTU, *Submission*, p.S147.

5.6 The ACTU also recommended that the *Equal Employment Opportunities (Commonwealth Authorities) Act 1987* (The *EEO(CA) Act*) and the *Affirmative Action (Equal Employment Opportunity for Women) Act 1996* be extended to cover all agencies.[6]

5.7 The *EEO(CA) Act* requires authorities to develop and implement an EEO program. This program is designed to ensure that appropriate action is taken to eliminate discrimination against and promote equal opportunity for women and people in designated groups.[7] The *EEO(CA) Act* has some similar requirements to section 22B of the current Public Service Act with regard to the collection and recording of statistics,[8] and the assessment of the effectiveness of the program.

Reporting requirements

5.8 The need for effective reporting and monitoring of equity issues was of concern to some witnesses. Some witnesses were particularly concerned that there be adequate reporting requirements because they were of the view that some of the reforms included in the Bill could have a detrimental effect on women and some designated groups. One concern was the potential for gender bias in performance management systems and the effects of performance pay on women.[9] Both WEL and Dr Marion Sawer advocated that there should be scrutiny by the Public Service Commissioner of the gender equity effects of these reforms.[10]

5.9 The evidence taken by the Committee suggests that there will be two facets of reporting on the effectiveness of workplace diversity programs:

6 ACTU, *Submission*, p.S147.

7 *Equal Employment Opportunities (Commonwealth Authorities) Act 1987* sections 3, 5(1).

8 However note that the *Equal Employment Opportunities (Commonwealth Authorities) Act 1987* includes a more specific requirement that the statistics in question include the number of and the types of jobs undertaken by persons in designated groups.

9 Dr Clare Burton, *Transcript*, p.58, Dr Marion Sawer, *Transcript*, p.130.

10 WEL, *Submission*, p.S26-27, Dr Marion Sawer, *Submission*, pp.S1-2.

(a) self evaluation by an agency, to be reported on in the agency's annual report;

(b) comparative evaluation of Agencies by the Public Service Commission through the application of an appropriate equity index.

Self evaluation

5.10 The mechanism for self evaluation is clearly spelt out in paragraph 2.4(1) of the draft Commissioner's Direction. This provision requires the agency head to evaluate the effectiveness of the agency's workplace diversity program each year and to report on the evaluation in the agency's next annual report.

5.11 There was some concern about the appropriateness of an agency evaluating its own performance in this area.[11] It was unclear what sort of criteria should be used when making the evaluation.[12]

5.12 Mr Denis Ives and Mr Derek Volker suggested that the Public Service Commissioner could issue broad guidance on what criteria an agency head could use when evaluating the effectiveness of the program.[13] Denis Ives also suggested that paragraph 2.4(1) of the draft Direction should specifically require agency heads to report on 'outcomes'.[14]

5.13 Dr Shergold felt that it was important to recognise the great diversity between agencies and the consequential need for agencies to evaluate their programs in terms of their own particular interests.[15] He referred to the existing legislative requirements with respect to access and equity and stated that he would be 'very loath to start to move down this

11 *Transcript*, pp.276-280.

12 Mr Derek Volker *Transcript*, p., 277; Mr Denis Ives, *Transcript*, pp.282-283.

13 Mr Denis Ives, *Transcript*, p.282-283; Mr Derek Volker, *Transcript*, pp.277-278.

14 Mr Denis Ives, *Transcript*, p.282.

15 Dr Peter Shergold, *Transcript*, p.277.

path again of being so prescriptive within the legislation'.[16] He stated that:

> *This initiative challenges departments and agencies to draw the link between performance they are trying to achieve and managing workplace diversity effectively. Indeed, it goes beyond that because it emphasises that workplace diversity is a source of innovation and creativity, if properly managed. That is why the notion of a workplace diversity program is set within the legislation. It does, of course, stand out within the Public Service Bill. It is one of the few key pieces of prescription which are actually placed within the legislation, and that reflects the high importance which is given to it.*[17]

5.14 The Committee accepts that the policy underpinning the Bill is to be to be less prescriptive in the reporting required of agencies. However the Committee is of the view that it is a matter of public accountability that agencies properly evaluate their workplace diversity programs in a way which is meaningful. It therefore makes the following recommendation.

5.15 **Recommendation 9**

The Public Service Commissioner's Direction on Diversity in Employment should be amended to:

(a) expressly require agency heads to evaluate the 'outcomes' of their workplace diversity programs; and

(b) to specify the performance indicators and criteria which should be used by agencies in carrying out these evaluations.

5.16 There was concern that a mere reference to the workplace diversity program in the annual report would be sufficient to satisfy the requirement of the draft Direction.[18] The Commissioner's response to this concern was that parliamentary committees should be able to pick up on inadequate reporting.[19]

16 Dr Peter Shergold, *Transcript*, p.278.

17 Dr Peter Shergold, *Transcript*, p.279-280.

18 Senator John Faulkner, *Transcript*, p.279.

19 Dr Shergold, *Transcript*, p.279.

5.17 With respect to the Commissioner, it should not be left to parliamentary committees to maintain an adequate standard of reporting by agencies. The Committee believes that the Commissioner should take on the role of ensuring that the evaluations of agency workplace diversity plans which appear in annual reports are adequate. The Commissioner has broad powers under clauses 41 and 43 to investigate issues which relate to the implementation of the APS Values. The Committee recommends:

5.18 **Recommendation 10**

The Public Service Commissioner should monitor the evaluations of agency's workplace diversity plans, and should use his or her powers of evaluation and inquiry under clauses 41 and 43 of the Public Service Bill 1997 to ensure that these reports are adequate.

5.19 There is no express provision regarding action to be taken if the evaluation is found to be inadequate. It became clear during questioning by the Committee that there is no specific mechanism which enables the Commissioner to make recommendations regarding an agency's workplace diversity program.[20]

5.20 **Recommendation 11**

The Public Service Commissioner should make recommendations to an agency head whose workplace diversity plan is found to be deficient. If the agency head fails to implement the recommendations without sufficient reason, the Public Service Commissioner should bring this to the attention of the relevant Minister/s and, if necessary, the Parliament.

20 Dr Peter Shergold, *Transcript*, p.197.

Comparative evaluation

5.21 Dr Sawer was of the view that a mechanism should exist which provides for the collection and analysis of data from agencies in a form which enables a comparison of equity between the agencies. She referred the Committee to some existing equity indices which could be used to ensure that gender equity could be measured in a meaningful way.[21] Dr Sawer and WEL believed that this reporting process should be a component of the Public Service Commissioner's annual State of the Service report.[22]

5.22 The Commissioner seemed to concur with these views. When addressing the draft Direction before the Committee, the Commissioner referred to workshops that have been conducted on workplace diversity programs aimed at identifying from each agency what it believes are the key ingredients of a reporting regime. The two prominent requirements which emerged were:

- confidence that the Commissioner will request information on how the existing four EEO groups progress over the course of a year; and
- the development of an appropriate equity index which will enable a simple comparison of the performance of all agencies with respect to employment equity and workplace diversity.[23]

5.23 This, and other evidence the Commissioner provided to the Committee,[24] shows an intention that the Commissioner co-ordinate the collection of statistical information from each agency, analyse it and report on it in a manner which enables a simple comparison between agencies. He told the Committee that he would like to investigate existing equity indices to

21 Dr Marion Sawer, *Submission*, p.S1-2, *Transcript*, p.130-131. See also WEL, *Submission*, p.S288.

22 Dr Marion Sawer, *Transcript*, p.130, WEL, *Submission*, p.S288.

23 Dr Peter Shergold, *Transcript*, p.190.

24 Dr Peter Shergold, *Transcript*, pp.196-198; 277-280.

decide which would be the most appropriate for use in the APS.[25]

5.24 However, the draft Direction and the Bill as they currently stand, do not contain any express requirement that the Commissioner carry out this role in relation to the workplace diversity programs. The Commissioner indicated that the mechanism through which the reporting will occur is the Commissioner's annual 'State of the Service' report required by clause 44 (2).[26]

5.25 **Recommendation 12**

That the Public Service Commissioner's Direction on Diversity in Employment should be amended to make it clear that the Public Service Commissioner will:

(a) ***collect from agency heads the information that is necessary to carry out comparisons on the outcomes of agencies' workplace diversity programs;***

(b) ***develop an appropriate analytical framework to ensure that these comparisons are meaningful; and***

(c) ***publish the results of these comparisons in the Commissioner's annual State of the Service report.***

25 Dr Peter Shergold, *Transcript*, pp.278.

26 Dr Peter Shergold, *Transcript*, pp.196-198; 277-280.

6

WHISTLEBLOWERS

Introduction

Clause 16

6.1 The Public Service Bill endeavours to provide for the first time protection for APS employees who are whistleblowers. Clause 16 prohibits victimisation of or discrimination against an APS employee who has reported a breach of the Code of Conduct. This disclosure can be made to either the Commissioner or an agency head, or other persons authorised to receive such reports for the purposes of the clause. Clause 41(c) lists among the Commissioner's functions the role of inquiring into reports made to him or her under clause 16.

Commissioner's Direction

6.2 Minimum procedures for dealing with reports of breaches of the Code of Conduct are to be established by the Public Service Commissioner's Direction.[1] In the draft Direction which has been provided to the Committee the chapter on Public Interest Whistleblowing occupies less than one page. The draft Direction provides that the procedures must:

- limit the circumstances where a person can report directly to the Commissioner to situations where the employee considers it to be inappropriate to report to the agency head;

1 Explanatory Memorandum, paragraph 3.19.3, p.23

- ensure that all reported breaches are investigated (unless the report is considered to be frivolous or vexatious);
- provide information about the protection available to persons who make reports;
- enable a person who is unsatisfied with the result of the investigation by the agency to refer the issue to the Commissioner; and
- ensure that findings of an investigation are dealt with as soon as practicable.

Overview of issues

6.3 Most witnesses were pleased that some form of protection for whistleblowers had been included in the Bill. However, a number of people identified potential problems or weaknesses in the scheme created by clause 16.[2] These perceived weaknesses are outlined below.

No obligation to report

6.4 There is no obligation placed on APS employees to report misconduct of which they become aware. Some people were concerned that the Bill does not go far enough in actively encouraging or obliging APS employees to report a breach of the Code of Conduct.[3] One submission asserted that 'whistleblowers need active assistance to come forward with allegations of serious misconduct, not vague statutory protections against discrimination'.[4]

2 Mr Peter Moylan, *Transcript*, p.75; Mr R Alessio, *Submission*, pp.S3-5; MPRA *Submission*, p.S63; ASU Tax Officers' Branch, *Submission*, p.S 99, L F Mahony, *Submission*, p.S104; ACTU, *Submission*, pp.S145-146; G Pesce, *Submission*, p.S194, Mr Howard Whitton, *Submission*, pp.S213-216; ARC *Submission*, p.S233.

3 Mr Chris Hunt, *Transcript*, p.76; Mr Greg Bunnett, *Submission*, p.S76; Mr Howard Whitton, *Submission*, p.S21; ASU Taxation Officers' Branch, *Submission*, p.S99.

4 ASU Taxation Officers' Branch, *Submission*, p.S99.

Recipients of reports

6.5 It was noted in some submissions that potential whistleblowers may have a limited choice of legitimate avenues through which they can make their report.[5] The scheme allows for reports to be made to the Commissioner (or person authorised by the Commissioner) or an agency head (or person authorised by an agency head). As it currently stands, clause 16 will not enable an APS employee to legitimately make a report to the police, the Director of Public Prosecution, the Ombudsman, the Auditor-General or the Attorney-General.

Ambiguity

6.6 There are a number of potential ambiguities flowing from the certain phrases used in clause 16.

6.7 One submission suggested possible alternative interpretations of the phrase 'A person performing functions in or for an Agency...'. These words could mean 'a person, in the course of performing functions', or 'a person who performs functions'. The former narrow interpretation would greatly limit the sorts of activities that are subject to the prohibition in the clause.[6]

6.8 Ambiguity could flow from problems in applying the Code of Conduct to practical situations. It has been pointed out that the language used in the Code of Conduct and the APS Values (failure of which to uphold is a breach of the Code - clause 13(11)) is general and lacks 'conceptual clarity'. A potential whistleblower must first make an initial determination about whether or not the activity constitutes a breach of the Code.[7] This uncertainty could be a disincentive to report a perceived breach.

5 Mr Chris Hunt, *Transcript*, p.75; Mr Howard Whitton, *Submission*, p.S214; L F Mahony, *Submission*, p.S104, G Pesce, *Submission*, p.S194.

6 Mr Howard Whitton, *Submission*, p.S215.

7 Mr Howard Whitton, *Submission*, pp.S224-225.

6.9 In addition, the term 'victimise' has not been defined and could be interpreted in a highly subjective manner.[8] It is not certain that a threat to carry out a particular action will fall within the terms 'victimisation' or 'discrimination'.

Scheme limited to APS employees who report a breach of the Code of Conduct

6.10 There were a number of comments about the restricted nature of the protection available under the scheme established by clause 16. The protection is triggered only once an APS employee has reported a breach of the Code of Conduct. This means that the clause leaves some categories of people unprotected, while the misconduct of some other categories of people remains outside its scope.

6.11 The prohibition against reprisal applies only to 'a person performing functions in or for an Agency'. Mr Howard Whitton has suggested that 'in practice, such victimisation is as likely as not to be undertaken by a relative or friend of an APS employee affected by disclosure'.[9] A whistleblower in these circumstances would not be protected by clause 16.

6.12 The words 'because the APS employee has reported breaches' means that some people could be left without clause 16's protection. These words fail to include action taken by a person against an APS employee under a mistaken belief that the APS employee has reported a breach of the Code of Conduct.

6.13 The protection also fails to extend to a person who is contemplating making such a report, but has not yet done so. A person in this position may be particularly vulnerable to threats of harassment, or retaliation which is aimed at preventing them person from making any disclosure in the first place.[10]

8 Mr Howard Whitton, *Submission*, p.S214.

9 Mr Howard Whitton, *Submission*, p.S214.

10 Mr Howard Whitton, *Submission*, p.S214.

6.14 The Code of Conduct binds APS employees. It does not extend to Ministers or their staff, contractors or agencies. This means that these parties cannot 'breach' the Code of Conduct, and that there is no procedure through which a person can report misconduct, corruption or fraud committed by these non APS employees.[11]

Sanctions against reprisal

No specific sanction

6.15 Some submissions noted that there was no explicit sanction against a person who victimises or discriminates against a whistleblower.[12] The only way in which the prohibition in clause 16 can be enforced is through the sanctions available in clause 15 for breaches of the Code of Conduct. An APS employee who breaches clause 16 would be in breach of clause 13(4) which states that an APS employee must comply with the law when acting in the course of APS employment.

6.16 Howard Whitton submitted that this approach is open to doubt.[13] The clause 13(4) requirement is limited to behaviour carried out 'when acting in the course of APS employment.' This means that any actions of victimisation by a person who is at the time construed to be acting outside the course of employment would not be a breach of the Code, and fail to trigger clause 15 sanctions. The only other possible way in which clause 15 could be triggered is if the behaviour was in breach of the clause 13(11) requirement that APS employees uphold the values, integrity and good reputation of the APS.

11 Mr Peter Moylan and Mr Chris Hunt, *Transcript*, p.75; ARC, *Submission*, p.S234; ACTU, *Submission*, p.S145-146; Mr Howard Whitton, *Submission*, p.S213-214. See also Mr Ken Baxter, *Transcript*, p.321.

12 ARC, *Submission*, p.S233.

13 Mr Howard Whitton, *Submission*, p.S215.

Some escape sanction

6.17 The way in which the scheme is based on the Code of Conduct has the effect of limiting the application of sanctions against those who breach clause 16. The use of the words 'a person performing functions in or for an Agency' suggests an intention to extend the clause 16 prohibition beyond APS employees. However, because the Code of Conduct binds only APS employees, only APS employees can have sanctions brought against them for breaching it. So while clause 16 prohibits contractors and other non-APS employees from victimising or discriminating against a whistleblower, it seems unlikely that there are any sanctions which can be used against them in the event that they engage in the prohibited behaviour.[14]

A scheme open to abuse?

6.18 There is no clear disincentive to making a false report. Some people were concerned that the clause 16 protection could be used inappropriately. Howard Whitton gave an example of an employee who defends disciplinary action by making an opportunistic disclosure so as to enable him or her to claim 'discrimination' or 'victimisation' under clause 16.[15]

6.19 The ANAO also suggested that there was a danger that APS employees could take advantage of the clause 16 protection for their own ends. To discourage this, they suggested that the Explanatory Memorandum could state that an employee who seeks to use clause 16 in bad faith is in breach of the Code of Conduct.[16]

14 Mr Howard Whitton, *Submission*, p.S215.

15 Mr Howard Whitton, *Submission*, p.S214.

16 ANAO, *Submission*, p.S59.

The role of protector

6.20 The Administrative Review Council (ARC) were concerned about the way in which whistleblowers would be protected. The ARC considered that the body investigating the disclosure should be also able to offer some protection for whistleblowers against retaliation.[17] The ARC noted the Explanatory Memorandum's reference to Commissioner's Directions on minimum procedures for handling reports of breaches and assumed that these directions would ensure that the position of people making such reports were safeguarded.[18]

6.21 The MPRA also referred to an 'expectation' that the Directions would provide adequate means of protection of whistleblowers.[19] They had expressed a concern that the 'protection' role should be carried out by a body that is not able to be influence an investigation or the people carrying out the investigation.[20] They were of the view that should their recommendation for the creation of the Commonwealth Employment Ombudsman be adopted, that body should be responsible for the protection of whistleblowers.[21]

Adequate protection?

6.22 These problems which have been raised regarding clause 16 and its accompanying draft Directions have caused a number of people to doubt the level of real protection that it offers whistleblowers. One submission stated that that the clause has been included as 'lipservice' submitted that 'the Executive and higher echelons of the APS have no interest in encouraging revelations of departmental mismanagement.[22] Another referred to the whistleblower provisions as being 'woefully inadequate'.[23]

17 ARC, *Submission*, p.S233.

18 ARC, *Submission*, p.S233.

19 MPRA, *Submission*, p.S453. See also MPRA, *Submission*, p.S63.

20 Mr Chris Hunt, *Transcript*, p.75; MPRA, *Submission*, p.S63.

21 Ms Ann Forward, *Transcript*, p.321.

22 ASU Taxation Officers' Branch, *Submission*, p.S99.

23 Mr Jack Waterford, *Transcript*, p.308.

6.23 Howard Whitton expressed the view that:

any public sector that is committed to accountability and transparency can have no real reason for not endorsing a whistleblower protection mechanism of some workable kind. In my view, as I have said in the submission, the model proposed here is so minimal as to be unworkable.[24]

6.24 Mr Whitton submitted that a workable whistleblowers scheme relies heavily on whistleblowers believing that their concerns will be taken seriously. 'Independent advice, arms-length investigation, and effective protection against reprisal' are essential in an effective scheme.[25]

6.25 The ACTU advocated the need for an 'independent protector'.[26] They drew the Committee's attention to the Report of the 1994 Senate Select Committee on Public Interest Whistleblowing. This report recommended the establishment of an independent statutory agency to investigate and protect people making public interest disclosures.[27]

The Commission's response

6.26 Dr Shergold acknowledged that clause 16 is 'partial', but made the point that it is a new initiative, providing for the first time 'a clear recognition' that the public servant has a role to identify fraud or misconduct, and a protection for those who come forward.[28]

24 Mr Howard Whitton, *Transcript*, p.320.

25 Mr Howard Whitton, *Submission*, p.S216.

26 Mr Peter Moylan, *Transcript*, p.75.

27 Report of the 1994 Senate Select Committee on Public Interest Whistleblowing paragraph 7.47.

28 Dr Peter Shergold, *Transcript*, p.76.

6.27 He also stated that:

You do not have before you a whistleblowers protection act. This is not meant to be it. It is a matter that the government is considering. This is purely to deal with public servants in the APS who wish to blow whistles.[29]

6.28 However, clause 16 of the Bill clearly endeavours to provide for the protection of whistleblowers. In the absence of other legislation which provides for a whistleblowers protection scheme, clause 16 provides the sole protection for APS employees who make disclosures about misconduct within the APS. It is important that the clause facilitates these reports, and provides the most effective protection possible within the framework of the Bill.

The Committee's dilemma

6.29 The Committee faces a dilemma in relation to clause 16 of the Bill. A number of serious weaknesses have been identified in the scheme established by clause 16. The Committee is concerned that APS employees may not be prepared to make reports if they believe that adequate protection is not available. The Committee therefore believes that the protection ought to be strengthened on a number of levels. However, the Committee feels that it is limited in the sorts of recommendations that it can make for the following reasons:

- There has not been sufficient consultation and debate on the issue. There are many complex philosophical and practical issues related to whistleblowing. Clause 16 is only one clause in the Bill, and this review was not the appropriate forum in which to thoroughly examine these issues.

- In considering this issue, it has become evident to the Committee that there are considerable limitations to any whistleblowers protection scheme which is based within the Public Service Bill. It would take a significant number of amendments, many of which would involve changing basic characteristics about the Bill, to provide a

29 Dr Peter Shergold, *Transcript*, p.321

comprehensive whistleblowers scheme. The Committee does not feel that the sorts of recommendations necessary to fully overcome the weaknesses in the scheme are consistent with the philosophy and the framework of the legislation.

6.30 For these reasons the Committee has decided not to make major recommendations for change in relation to clause 16.

6.31 The Committee recognises that the Public Service Bill 1997 is not the ideal framework within which to provide extensive whistleblower protection scheme. The Committee is of the view that it would be preferable for the government to introduce whistleblowers protection legislation along similar lines to that which already exists for the public sector in other Australian jurisdictions. In the event that such legislation is passed by the Parliament, the whistleblowers protection contained within the Public Service Act could be removed. Accordingly, the Committee makes the following recommendation.

6.32 **Recommendation 13**

The Government consider introducing whistleblowers protection legislation along similar lines to that which already exists for the public sector in other Australian jurisdictions. Any such legislation should be the subject of scrutiny by a parliamentary committee prior to its passage through the Parliament.

7

EMPLOYMENT ARRANGEMENTS, CATEGORIES OF EMPLOYMENT AND TENURE

Introduction

7.1 The 1922 Act distinguishes between two separate categories of APS staff - officers and employees - and specifies separate engagement and termination provisions for these categories. It also includes separate provisions for the SES and for secretaries of departments.

7.2 Termination arrangements for SES and non-SES employees are dealt with separately in Chapter 8 while the specific provisions dealing with the appointment and termination of agency heads (including secretaries) and their remuneration arrangements are discussed in Chapter 10.

7.3 Officers (including SES officers) are generally appointed to the APS on probation after a merit selection process while employees are engaged for certain identified periods, without necessarily having to compete on merit. Certain eligibility requirements are set out in the 1922 Act in relation to appointment to the APS (Australian citizenship, health, character) while others (such as qualifications) may be determined by the Public Service Commissioner.

7.4 Under the 1922 Act, employment powers are divided between the Public Service Commissioner and secretaries of departments. For example, in relation to non-SES levels, secretaries have powers to promote, transfer and retire staff while the appointment power nominally remains with the Commissioner, although secretaries exercise this power under delegation. The Commissioner retains most of the powers in relation to SES employment arrangements.

7.5 Responsibility for APS pay and conditions matters rests with the Department of Workplace Relations and Small Business. Remuneration arrangements have traditionally been determined centrally while conditions of employment are set out in a variety of instruments including Commonwealth Acts, determinations made under section 82D of the Public Service Act, awards and APS-wide, and agency specific, agreements.

Relevant provisions of the Public Service Bill

7.6 Clause 9 of the Bill provides that the Australian Public Service consists of agency heads and APS employees.

7.7 In relation to APS employees, the Bill continues to distinguish between SES and non-SES employees but there is no longer any distinction drawn between officers and employees.

7.8 The Bill does not identify detailed categories of employment, such as whether new employees are employed on a continuing basis or a fixed term basis or whether they are full-time, part-time or casual. It is intended that these issues will be addressed at the agency level and specified in the engagement advice.

7.9 Clause 22 of the Bill places employment powers with agency heads who, on behalf of the Commonwealth, will exercise all the rights, duties and powers of an employer, including in relation to the SES. However, under clause 36, the Public Service Commissioner must issue directions about SES employment matters.

7.10 Under clause 22, agency heads are able to engage persons as APS employees and to determine conditions applying to these engagements including in relation to probation, citizenship, qualifications, security/character clearances and health clearances. Persons engaged as APS employees are expected to be Australian citizens unless the agency head considers that this requirement is not appropriate.

7.11 The Bill also includes separate powers in relation to:

- agency heads determining remuneration and other terms and conditions applying to their employees (clause 24);
- agency heads assigning duties to an employee of the agency, and determining the place where those duties are to be performed (clause 25); and
- agency heads entering into agreements with staff to move between agencies (clause 26).

7.12 The Public Service Commissioner's draft Direction on SES employment includes certain minimum requirements which agency heads must follow in relation to the engagement and promotion of SES employees.

Issues

7.13 A number of matters have arisen out of the submissions to the Review and the public hearings dealing broadly with employment arrangements, categories and employment and tenure. This chapter concentrates on the following issues:

- agency heads assuming full employment powers in relation to the staff of their agency;
- the revised arrangements in relation to remuneration and terms and conditions of employment; and
- employment categories and tenure arrangements for APS employees.

Agency head employment powers

7.14 The new arrangements are expressed as follows in the Minister's Second Reading speech on the Bill:

> *Agency Heads will be given the power, on behalf of the Commonwealth, to engage persons as employees. Within the law, it is they who will determine many of the conditions which attach to employment. It is they who will determine the remuneration and other terms of employment. It is they who will assign duties or terminate employment.*[1]

7.15 The Explanatory Memorandum to the Bill sets out the range of powers that agency heads will have, which includes such matters as establishing appropriate employment and management arrangements for the agency, determining arrangements in relation to resignation, engaging in employment outside the agency and dealing with underperformance. The Explanatory Memorandum notes there is no separate statutory authority for these general powers of an employer.[2]

7.16 These provisions confirm that the primary employment relationship is between the agency head (on behalf of the Commonwealth as employer) and APS employees at the agency level. This approach is consistent with Government policy that employment matters should generally be left to the same workplace processes that apply to the rest of the community and that such matters as Agreement making and the determination of wages and conditions should be determined at the agency level to the maximum extent possible.

7.17 The PSMPC has stated that the proposed devolution of employment powers is vital if APS agencies are to have the management flexibility necessary to become high performance organisations.[3]

1 Hon Peter Reith, Minister for Industrial Relations, Second Reading Speech, Hansard, 26.6.97, p.6065.

2 Explanatory Memorandum, paragraph 4.3, p.25.

3 PSMPC&DWRSB, *Submission*, p.S242.

7.18 However, Dr Shergold also noted in the public hearings that:

> *Agency heads will be considerably constrained in the powers that have been devolved to them ... Of course, just like employers in the community, they will be subject to the constraints within the Workplace Relations Act. They will also, as now, be subject to policy constraints.*[4]

7.19 Agency head powers will also be supported by, and in some cases subject to, the Public Service Commissioner's responsibilities for setting standards in the APS and for developing, promoting, reviewing and evaluating APS employment practices.

7.20 The emphasis in the Bill to devolve employment powers to agency heads was supported by the range of current secretaries who appeared before the Committee. Many saw the directions established in the Bill as being consistent with other reforms in the industrial relations and financial management areas which emphasise the accountability of agency heads for how their agencies are managed.

7.21 Mr Paul Barratt, Secretary of the Department of Primary Industries and Energy, commented that:

> *it places the onus squarely on me as chief executive officer of the organisation to organise work in the workplaces for which I am responsible and ... to do so in accordance with clearly defined expectations about behaviour and conduct.*[5]

7.22 Mr Michael Carmody, Commissioner of Taxation, commented that:

> *This suite of changes enables us in the Tax Office to better tailor our recruitment and staffing practices to the tasks that we have in providing a public service.*[6]

4 Dr Peter Shergold, *Transcript*, p.8.

5 Mr Paul Barratt, *Transcript*, p.250.

6 Mr Michael Carmody, *Transcript*, p.251.

7.23 Mr Lionel Woodward, Chief Executive Officer of the Australian Customs Service considered that:

> *The changes are a recognition of the inevitability of the evolution of public administration; that is putting responsibility where it should lie - close to the point of action, close to the people we serve, our customers.*[7]

7.24 The ACTU does not support the proposed approach:

> *The Government's overall approach is premised on the ideologically driven assumption that devolution is good and central or consistent is bad. Rather than address any perceived failings in common processes, it proposes that nearly all of these be abolished and replaced with whatever the relevant Agency Head determines is appropriate for their Agency.*[8]

7.25 While recognising that this will sometimes occur within a framework of directions or guidelines issued by the Public Service Commissioner, the ACTU believes that in other areas it will give agency heads largely unfettered powers to hire and fire and to dispense rewards and punishments to their employees, without scope for independent review on the exercise of those powers.[9]

7.26 The ACTU is concerned that agency heads exercise these employment powers within a consistent and equitable APS-wide employment framework that does not inhibit mobility.[10]

Committee Comment

7.27 The Committee accepts that placing the necessary employment powers with agency heads is consistent with the Government's broader policy on workplace relations and the proposed changes in the area of financial management.

7 Mr Lionel Woodward, *Transcript*, p.254.

8 ACTU, *Submission*, pp.S134-135.

9 ACTU, *Submission*, p.S135.

10 ACTU, *Submission*, p.S149.

7.28 The Committee notes that the exercise of these powers will be regulated to a certain extent by relevant provisions of the Bill and the subordinate legislation, as well as by the Workplace Relations Act, other relevant legislation and by certified agreements negotiated between agency heads and employees. The role of the Public Service Commissioner in monitoring and evaluating employment practices will also be relevant in this regard.

Remuneration and terms and conditions of employment

7.29 The joint PSMPC/DWRSB submission indicates that the drafting of the Bill is consistent with the Government's new workplace relations and agreement making arrangements. Pay and conditions of employment will not be regulated by the Bill but will be mainly be included in agreements made by the Workplace Relations Act (WRA), underpinned by Awards. In addition, agency heads will be able to make determinations under clause 24 of the Bill about the remuneration and terms and conditions of employment of APS employees in the particular agency.[11]

7.30 The Explanatory Memorandum to the Bill explains that the power provided in clause 24 is:

> *one of the ordinary powers of an employer but is explicitly stated to emphasise the change from the current employment framework where these matters are determined centrally.*[12]

7.31 The Explanatory Memorandum also indicates that:

> *While agreements made under the WRA are expected to establish most remuneration and conditions entitlements, Agency Heads may wish to continue to use this authority to determine specific matters, for example, conditions for SES, or for Australia-based employees working overseas or in remote localities.*[13]

11 PSMPC&DWRSB, *Submission*, p.S246.

12 Explanatory Memorandum, paragraph 4.11.3, p.29.

13 Explanatory Memorandum, paragraph 4.11.4, p.29.

7.32 The Public Employment (Consequential and Transitional) Amendment Bill 1997 provides that any existing determinations made under section 82D of the 1922 Act which continue to have effect will become the responsibility of each agency head. Agency heads will have twelve months to amend or adopt the provisions of these determinations for their own purposes before they lapse.

7.33 The ACTU believes that there should be continuing capacity under the legislation for Service-wide determinations to be made in relation to certain employment conditions.[14] It also has concerns about the lapsing of existing section 82D determinations after twelve months and considers that an assurance should be given through the legislative process that the transition from Service-wide to agency level determinations will not result in the removal of legal authority for existing conditions unless it is agreed between the parties.[15]

7.34 According to Mr Stewart-Crompton of the Department of Workplace Relations and Small Business:

> *Much of the changes that we are seeing in terms of the determination of wages and conditions of employment of employees in the APS has to do with the policy of the government and the framework provided by the Workplace Relations Act ... There is a clear government policy that departments and agencies should take advantage of the Workplace Relations Act to develop terms and conditions of employment for employees in those departments and agencies that are suitable for the particular circumstances in which they find themselves.*[16]

7.35 While conceding that the Bill provides powers for the making of determinations about wages and conditions, Mr Stewart-Crompton notes that these are subject to awards and to agreements under the Workplace Relations Act, which are the main mechanisms for the determination of enforceable terms and conditions of employment.

14 ACTU, *Submission*, p.S153.

15 ACTU, *Submission*, p.S167.

16 Mr Robin Stewart-Crompton, *Transcript*, pp.84-85.

7.36 Mr Stewart-Crompton went on to say:

> *it would be misleading if the committee were to think that the Public Service Bill or the new Public Service Act was going to be the main determinant of that policy or how it is implemented. I think in fact the much more important elements are the approach taken by the government towards the determination of wages and conditions and the instructions that are given to all departments and agencies by the government on how they are to go about the process of implementing its approach towards employment conditions. For that, I think the framework of the Workplace Relations Act is a much more important element.*[17]

Committee Comment

7.37 The Committee notes that the changes proposed by the Bill in relation to remuneration arrangements and terms and conditions of employment for APS employees are consistent with the broader reform agenda in relation to workplace relations and agreement making which place responsibility for these matters at the agency level.

Employment categories and tenure

7.38 The Bill does not specify either the employment categories or status of APS employees.

7.39 Relevant provisions of the Public Employment (Consequential and Transitional) Amendment Bill 1997 convert existing APS staff to APS employees under the new Act. However, the tenure arrangements of existing staff are not altered by force of the legislation.

7.40 While the distinction between officers and employees is removed, staff members who are currently officers will become continuing employees under the new Act, while employees will be converted either to continuing or fixed term employees depending on their employment status under the current arrangements.

17 Mr Robin Stewart-Crompton, *Transcript*, p.85.

7.41 The employment status for persons engaged as APS employees after the Bill is enacted will be determined by the agency head. The Explanatory Memorandum to the Bill states that:

> *it will be important for Agency Heads to spell out when engaging staff the basis on which they are engaged. In particular, they will need to spell out in the notice of engagement whether the staff member is engaged on a continuing, fixed-term or casual basis and if their engagement is subject to a probationary period - as this will be a major factor in determining the entitlements of the staff member under other legislation, such as superannuation, long service leave and access to remedies in relation to termination of employment under the WRA, as well as under industrial awards and agreements (e.g. eligibility for redundancy benefits).*[18]

7.42 The joint PSMPC/DWRSB submission confirms that APS employees will continue to be engaged under the relevant provisions of the new legislation and that their employment status, be it either continuing or fixed term, will not be able to be altered by the employer unless an employee agrees to resign and be re-engaged on a different basis. Similarly, agreements made under the provisions of the Workplace Relations Act cannot change the tenure arrangements of APS employees unless allowed by a specific regulation made under that Act.[19]

7.43 Sir Lenox Hewitt expressed concern at the approach adopted in the Bill. He stated:

> *The core matter in this bill is to remove the sine qua non of a career - that is to say tenure, that is to say a permanent appointment subject to the sanctions, such as good behaviour, efficiency and proper conduct.*[20]

18 Explanatory Memorandum, paragraph 4.9.2, p.26.

19 PSMPC/DWRSB, *Submission*, p.S254.

20 Sir Lenox Hewitt, *Transcript*, p.142.

7.44 This view is shared by the Australian Services Union who claim that:

> *The institutional underpinnings of traditional APS ethics: secure employment in a career service ... will be finally extinguished by this Bill.*[21]

7.45 Mr Denis Ives noted that a key consideration is:

> *the balance envisaged in the legislation between flexibility in employment and tenure ... the new package provides a framework under which the concepts of tenure and a career service could largely disappear. This is not something to pass over lightly as tenure considerations bear directly on the stability of the APS over time, politicisation issues, protection of the public interest and continuity in knowledge and effective administration.*[22]

7.46 The ACTU points out that under the Workplace Relations Act, employment categories are an allowable matter for inclusion in Awards.

7.47 The ACTU's view is that unless agreement can be reached on the inclusion of appropriate provisions relating to categories of employment in an APS-wide Award, the new Act should retain the notion of employment categories which:

- state that the concept of permanent employment will remain as the usual basis for staffing functions in the APS and an essential element of a career based Service; and
- include tests to determine the need to engage employees under defined arrangements on a temporary basis.[23]

21 Australian Services Union, Taxation Officers' Branch, *Submission*, pp.S98-99.

22 Mr Denis Ives, *Submission*, p.S108.

23 ACTU, *Submission*, p.S151.

Committee Comment

7.48 The Committee supports the inclusion of relevant provisions in the Public Employment (Consequential and Transitional) Amendment Bill 1997 which preserve the employment status and tenure of existing APS staff.

7.49 The Committee notes that employment categories are an allowable matter for inclusion in Awards under the Workplace Relations Act, and believes it is appropriate that these matters therefore be specified in an Award rather than in the Bill itself.

7.50 The Committee also supports the initiative inherent in the new arrangements which gives agency heads greater flexibility in developing a suitable 'staffing mix' of continuing and fixed term employees for their agencies.

7.51 However, the Committee believes that it will be important for agency heads to adopt a strategic approach to developing necessary employment policies for their agencies which balances the need for flexibility against a recognition that there is likely to be a continuing requirement for the ongoing employment of persons to maintain a degree of stability and continuity of corporate knowledge.

8

TERMINATION OF EMPLOYMENT OF APS EMPLOYEES

Introduction

8.1 As noted in Chapter 7, the 1922 Act distinguishes between two separate categories of staff - officers and employees. This Act also distinguishes between SES and non-SES employees.

8.2 The termination of employment provisions of the 1922 Act provide that officers (including SES officers) can only be terminated on certain identified grounds and after due process, while temporary employees (other than continuing temporary staff with tenure) are generally expected to cease at the conclusion of their employment contract, and can be terminated earlier in certain circumstances.

8.3 The termination provisions in relation to officers and continuing employees establish an extensive set of grounds on which employees may have their services terminated including age retirement, invalidity retirement, inefficiency, misconduct, loss of an essential qualification or being excess to requirements. Certain of these provisions are also governed by industrial awards and agreements.

8.4 The 1922 Act also includes certain appeal rights against termination decisions as well as disciplinary dismissals. However, since September 1995, these matters have been dealt with under the termination of employment provisions of the Workplace Relations Act.

Relevant provisions of the Public Service Bill

8.5 Clause 29 of the Bill provides that an agency head may terminate the employment of an APS employee in the agency at any time. This power relates to both SES and non-SES employees regardless of whether they are employed on a fixed term or continuing basis.

8.6 Specific grounds for termination of APS employees are not set out in the Bill, although clause 15(2) provides that one of the sanctions for breaching the Code of Conduct is termination of employment. Clauses 13 to 15 of the Bill are dealt with separately in Chapter 3.

8.7 Certain termination actions will continue to be subject to industrial awards and agreements - for example the provisions of the *APS General Employment Conditions Award 1995* will continue to apply to the handling of non-SES excess staff situations in the APS.

8.8 The Bill does not include any specific protections for staff against termination decisions. However, the Note to clause 29 indicates that the Workplace Relations Act has rules and entitlements that apply to termination of employment, although clause 38 of the Bill provides that the relevant provisions of the Workplace Relations Act do not apply to the termination of employment of an SES employee.

8.9 However there are a number of additional provisions in the Bill and in the subordinate legislation which are specific to SES employees:

- Clause 37 provides for an incentive payment to be made to an SES employee who agrees to retire within a specified timeframe. This is a similar provision to section 76R of the 1922 Act, except that the notice is now to be given by an agency head rather than the Public Service Commissioner.

- The Public Service Commissioner's draft Direction on SES employment sets out certain minimum requirements which agency heads must follow in relation to the giving of notices under clause 37 as well as termination of employment and involuntary assignment to a lower level.

8.10 The Bill does not include any maximum age retirement provisions.

Comparison of the provisions relating to SES and non-SES employees

8.11 The Bill includes a quite streamlined termination provision which simply provides that an agency head is able to terminate the employment of an APS employee at any time (clause 29). The Explanatory Memorandum to the Bill states there will be no further prescription in Bill and no lengthy processes will be mandated.[1]

8.12 The joint PSMPC/DWRSB submission states that the absence of detailed grounds and processes in the Bill dealing with termination of employment makes the legislation much easier to understand.[2]

8.13 However, while clause 29 of the Bill provides a single head of power for termination of employment which apply to both non-SES and SES employees, in effect the termination provisions for these two groups are quite different.

Non-SES employees

8.14 Non-SES employees will have the same protections against termination available to them as do other members of the Australian workforce, namely those provided in the Workplace Relations Act.

8.15 No grounds for termination are specified either in the Bill or in the subordinate legislation for non-SES employees. Instead, section 170CK of the Workplace Relations Act prohibits termination on the following grounds:

- *temporary absence from work because of illness or injury within the meaning of the regulations;*

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1 Explanatory Memorandum, paragraph 4.23, p.31.

2 PSMPC&DWRSB, *Submission*, p.S254.

- *trade union membership or participation in trade union activities outside working hours, or, with the employer's consent, during working hours;*
- *non-membership of a trade union;*
- *seeking office as, or having acted in the capacity of, a representative of employees;*
- *the filing of a complaint, or the participation in proceedings, against an employer involving allegation of violation of laws or regulations or recourse to competent administrative authorities;*
- *race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
- *refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;*
- *absence from work during maternity leave or other parental leave.*

8.16 It will not be lawful for an agency head to terminate employment on any of the grounds set out above, except as allowed by that section in relation to the inherent requirements of the job. Dismissals which are harsh, unjust or unfair will be open to review by the Australian Industrial Relations Commission with the possibility of reinstatement or compensation if an application is successful.

SES employees

8.17 SES employees, on the other hand, are not covered by the termination of employment provisions of the Workplace Relations Act by virtue of clause 38. The Bill includes a number of specific provisions in relation to SES terminations, including clause 36 which mandates that the Commissioner must issue directions in relation to SES employment matters and clause 37 which provides for an incentive payment to be made to SES employees who elect to retire. The Public Service Commissioner's draft Direction on SES employment sets out a range of matters in relation to termination of employment, including the grounds for termination for SES employees as well as certain procedural steps which must be followed.

8.18 The grounds for termination identified in clause 4.6 of the draft Direction are:

- unsatisfactory work performance (having regard to the function of the SES and the nature of the employees duties); or
- physical or mental incapacity; or
- loss of qualifications; or
- a breach of the Code of Conduct that justifies termination; or
- being excess to the requirements of the agency.

8.19 The draft Direction also includes a requirement that there be procedural fairness in making any assessments and requires the certification of the Public Service Commissioner that the termination is in the best interest of the APS before it can proceed.

8.20 Dr Shergold explained that the draft Direction puts in place the substantive restrictions which are presently set out in legislation in section 76L of the Public Service Act in relation to SES terminations. Dr Shergold noted that the protections are in fact strengthened by the requirement that the Public Service Commissioner must certify that the termination is in the best interest of the APS.[3]

8.21 Dr Shergold explained that the intent of this requirement is to ensure that before an agency head is able to proceed with the termination, the matter has to be discussed with the Commissioner who would have to identify that it was in the best interest of the service. The process may also involve identifying with the agency head if there are any alternative positions available in the Service or providing an SES employee with the opportunity to be placed elsewhere for some period.[4]

8.22 The exclusion of SES employees from coverage by the termination of employment provisions of the Workplace Relations Act represents a loss of an existing entitlement for these staff. No alternative legislative provisions are contemplated other than what is contained in the Commissioner's draft Direction.

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3 Dr Peter Shergold, *Transcript*, pp.190-191.

4 Dr Peter Shergold, *Transcript*, p.326.

8.23 According to the joint PSMPC/DWRSB submission this approach is consistent with that taken by State Governments and the private sector in relation to executives.[5]

8.24 This policy was further explained by Mr Stewart-Crompton as follows:

> *the policy behind this has been the one which reflects the government's view that as far as possible the public sector should be operating on a similar basis to the private sector. It takes the view that for the most senior public servants - of whom there are about 1500 - the unfair dismissal provisions of the Workplace Relations Act should not be available. Just as one would find in the private sector, under the Workplace Relations Act it would be rare for a senior executive to have their wages and conditions covered by an Award. Therefore, those people do not have access to the Workplace Relations Act remedies.*[6]

Concerns with the proposed approach to termination

8.25 Numerous concerns were raised during the course of the Review about the proposed termination of employment provisions applying to APS employees and these have been categorised as follows:

- the lack of any detail in the Bill identifying grounds for termination of employment or other procedural steps which must be followed; and
- the removal of SES employees from the protections afforded by the termination of employment provisions of the Workplace Relations Act and the effect this might have on the level of frank and fearless advice given to Government.

5 PSMPC&DWRSB, *Submission*, p.S254.

6 Mr Robin Stewart-Crompton, *Transcript*, p.63.

Termination - Grounds and Processes

Non-SES employees

8.26 The structure imposed by the Bill in relation to non-SES employees whereby grounds for termination are unspecified but which recognises the authority of the Workplace Relations Act in prohibiting termination on certain grounds is not supported by the ACTU.

8.27 The ACTU commented that a simple power to terminate employment without reference to any grounds or process is unacceptable. It considers that the new Act should contain all the grounds for employment separation with detailed process either in regulations or awards/certified agreements. The grounds specified should be resignation, redundancy, invalidity, inefficiency, disciplinary dismissal, loss of essential qualifications and abandonment of employment.[7]

8.28 Mr Lilly of the CPSU voiced similar concerns. He commented in the public hearings that:

> *What we do take issue with, though, is the lack of process in relation to matters which could result in termination and are being removed from the legislation.*
>
> *There are currently a number of provisions which go through the steps which might result in termination either through misconduct or through inefficiency, both of which are in the current legislation or are the subject of industrial agreements, particularly the inefficiency provisions. Although we do accept the appeal at the end of the process as the appropriate one and consistent with that that applies to the rest of the community, we believe there should be a proper process which should be service wide leading up to any decision which might result in termination of employment.*[8]

7 ACTU, *Submission*, p.S155.

8 Mr Doug Lilly, *Transcript*, p.42.

SES employees

8.29 There were also a number of concerns expressed about the draft Direction.

8.30 Mr Derek Volker considered that the Commissioner should also be required to certify, in addition to the termination being in the interest of the Service, that the minimum requirements specified in the draft Direction in relation to terminations have been met.

8.31 Mr Denis Ives pointed to a lack of clarity in the draft Direction about the relationship between incentive payments to SES employees and terminations on certain grounds such as being excess to requirements. Mr Ives also expressed concerns about the level of any payout being at the discretion of the agency head rather than, as is the case currently, being coordinated by the Public Service Commissioner. His view is that a coordinated approach is more likely to result in consistency and reasonability.[9]

General concerns

8.32 There were a number of concerns expressed which relate to both the SES and non-SES provisions.

8.33 Mr Derek Volker considered that it would seem reasonable to include a requirement that an agency head terminating the employment of an APS employee give the employee reasons for the termination.[10] This view is supported by Mr Patrick Gourley and Mr Greg Bunnett who commented that it is incumbent on an employer to state quite clearly why a person's services are being terminated and the Service should be a model employer in this regard.[11]

9 Mr Denis Ives, *Transcript*, p.327-328.

10 Mr Derek Volker, *Submission*, p.S184.

11 Mr Greg Bunnett, *Submission*, p.S77.

8.34 Sir Lenox Hewitt noted that it is an:

> *oddity of drafting that in the termination provisions of a secretary, the Prime Minister's authority in the Act is qualified at least by the need to secure a report. In the case of termination of APS employees, it said that the agency head may do this by notice in writing at any time - no qualification at all in the act as there is in the case of the Prime Minister's powers. Then the very important qualification is written here in the commissioner's directives. The agency head cannot in fact terminate an SES employee unless the commissioner has certified that ... it is in the interests of the service. At the very least I would have thought that ought to go in the body of the act itself consistently with the qualification on the power of the Prime Minister.*[12]

Protection against unfair dismissal

8.35 Mr Doug Lilly of the CPSU commented in evidence before the Committee that:

> *We have accepted for some time that the unfair dismissal provisions in the Workplace Relations Act should be the appeal mechanism that governs termination within the Australian Public Service.*[13]

8.36 However, Ms Phillipa Weeks pointed out that although non-SES APS employees will generally have access to the termination of employment protections afforded by the Workplace Relations Act, the Bill envisages that certain APS employees will in the future be engaged as fixed term employees and such employees are one of the categories of employees that are excluded from the Workplace Relations Act scheme.

12 Sir Lenox Hewitt, *Transcript*, p.330.

13 Mr Doug Lilly, *Transcript*, p.42.

8.37 Ms Weeks' submission suggests that there may be some uncertainty about whether such employees would be covered by the Workplace Relations Act and argues that there needs to be clear guidance issued on parameters for the adoption of fixed term contracts and notice provisions in employment contracts.[14]

8.38 In relation to the SES, there was a range of views expressed on the removal of the SES from the protections of the Workplace Relations Act. There was a prevailing view that that the effect of the proposed exclusion will weaken the level of protection available to these employees.

8.39 Many participants were also concerned about the impact this loss of protection would have on the quality of advice that is offered by senior staff.

8.40 Mr Doug Lilly of the CPSU noted that:

> *We think it is a significant deficiency in the values that there is no reference to advice being frank, fearless or honest. That combined with the ability for SES employees - principal APS employees who are responsible for providing frank and fearless advice - to be dismissed without any recourse makes us particularly concerned about the fact that, despite including a value about the apolitical nature of the APS, some of these changes are going to make the Public Service more political and that people in those positions are only going to provide the advice that their political masters want to hear because they will have no recourse or remedy if their employment is terminated ... We believe that removing those rights ... will contribute to a greater politicisation of the SES in particular and the APS as a whole as people are more fearful of losing their job if they give unpalatable advice.*[15]

8.41 The Women's Electoral Lobby agreed that access to unfair dismissal protections are an essential guarantee for a professional, independent Service providing frank and impartial advice[16], while Mr Patrick Gourley of the Institute

14 Ms Phillipa Weeks, *Submission*, p.S427.

15 Mr Doug Lilly, *Transcript*, p.43.

16 WEL, *Submission*, p.S28.

of Public Administration also believed that the lower the levels of protection on tenure then the more difficult it will be to maintain the traditions of frank and fearless advice.[17]

8.42 Similar concerns were also expressed by a number of others, including Sir Lenox Hewitt[18], Mr Harry Evans[19], Mr Denis Ives[20] and Mr Jack Waterford.[21]

8.43 A number of alternate views were also expressed. For example, Dr Shergold commented that:

> *the legislation, by setting out clearly the values and conduct of public servants which clearly underpin the provision of frank and fearless advice, would make it somewhat harder for a secretary to punish in some way a senior executive who is providing that frank and fearless advice. ... we are moving to a senior executive service which has terms and conditions more like their colleagues in the private sector and subject to the same protections. I do not believe that moving in that direction is likely to diminish their willingness to provide frank and fearless advice.*[22]

8.44 Similar views were expressed by Dr Boxall who commented that:

> *I think that people in the SES are quite capable of standing up, are quite capable of doing their job - which they are being paid for under contract or they are being paid under an AWA or something like that - and they will give the advice ... an agency head is not going to dismiss people who say things they do not like. An agency head wants to be in a position to give the best possible advice to their Minister.*[23]

17 Mr Patrick Gourley, *Transcript*, p.65.

18 Sir Lenox Hewitt, *Transcript*, p.66.

19 Mr Harry Evans, *Transcript*, p.118.

20 Mr Denis Ives, *Submission*, pp.S108-109.

21 Mr Jack Waterford, *Transcript*, pp.66-67.

22 Dr Peter Shergold, *Transcript*, p11.

23 Dr Peter Boxall, *Transcript*, p.66-67.

8.45 Mr Max Moore-Wilton commented as follows:

I do not believe that loss of tenure per se really should or needs to impact upon professional advice in the public sector. I think that tenure, whether it be in the public sector or whether it be in the universities or whether it be in the parliament, has very little to do with intelligence or honesty ... Very few people ... have real tenure ... So I do not necessarily accept that there is a diminution in the need for what I call intellectual rigour and honesty.[24]

Committee Comment

8.46 The Committee supports the removal of the maximum retiring age provisions from the legislation.

8.47 In relation to *non-SES employees*, the Committee accepts that the protections afforded by the Workplace Relations Act against termination of employment provide an adequate safeguard against unfair termination decisions which are commensurate with the protections afforded to workers in the private sector. However the Committee also notes that the situation in relation to fixed-term non-SES employees having access to these provisions may need to be clarified.

8.48 In relation to *SES employees*, the Committee also notes that many of the concerns which were expressed in the submissions to the Review and in the public hearings on 6 and 7 August about SES termination provisions were made before the Commissioner's draft Direction on Senior Executive Service employment was available for scrutiny.

8.49 The Committee notes the advice from the Public Service and Merit Protection Commission that the draft Direction puts in place the substantive restrictions which are presently set out in section 76L of the 1922 Act and believes that this will at least partially address some of the concerns that have been identified in relation to SES terminations.

24 Mr Max Moore-Wilton, *Transcript*, p.220.

8.50 In addition, the Committee believes that the acceptance of the Recommendation in relation to the inclusion of the words 'frank, honest, comprehensive and accurate' in clause 10(f) of the APS Values will at least partially address concerns that have been raised about the impact of these termination provisions on the nature and quality of advice given to Government.

8.51 The Committee also notes that there were a number of other concerns raised during the course of the Review about various aspects of the termination of employment provisions. The Committee has identified a number of possible amendments to the Bill which were raised during the Review by various parties as suggestions for addressing some or all of these concerns. These are:

- to include specific grounds for termination in the Bill which would apply to all APS employees. The grounds could be those specified in the Public Service Commissioner's draft Direction of SES Employment;
- to include a requirement in the Bill for reasons for the termination to be given to affected employees;
- to include a requirement in the Bill that an agency head must obtain a report about the proposed termination from the employees supervisor or another appropriate employee before the power is exercised;
- in relation to SES employees, that the requirement that the Public Service Commissioner certify that the termination is in the best interests of the APS be included in the Bill itself rather than in the Direction, and that this be supplemented by a requirement for the Commissioner to certify that the termination meets the minimum requirements set out in the Direction.

8.52 The Committee has not reached a consensus on the inclusion of any of these suggestions. The Committee notes however that it is a matter of Government policy that SES employees should be excluded from coverage by the termination of employment provisions of the Workplace Relations Act.

9

REVIEW OF ACTIONS

Current grievance and appeal mechanisms

9.1 Under current arrangements APS employees have access to a range of review mechanisms through internal agency grievance investigation powers and the Merit Protection and Review Agency (MPRA)'s Promotion Appeal Committees, Disciplinary Appeal Committees, Redeployment and Retirement Appeal Committees.

9.2 A two-stage process generally applies, whereby the grievance is firstly considered by the secretary and in the event that the staff member remains dissatisfied, the matter is referred to the MPRA. Staff members may apply direct to the MPRA for a grievance investigation if they believe that they are being harassed because of the lodgement of a grievance or if the subject is so serious or sensitive that it would not be appropriate for the secretary to conduct the investigation.

9.3 The following external review bodies and powers have some application to APS personnel management decisions:

- the Administrative Appeals Tribunal;
- the Human Rights and Equal Opportunity Commission;
- the Sex, Racial and Disability Discrimination Commissioners;
- the Privacy Commissioner;
- the Ombudsman; and

- powers under the *Administrative Decisions (Judicial Review) (AD(JR)) Act 1977*, the *Freedom of Information (FOI) Act 1982* and the Australian Industrial Relations Commission.[1]

Proposed arrangements

9.4 The arrangements proposed under clause 33(1) of the Public Service Bill entitle an APS employee to review, in accordance with the Regulations, of any APS action that relates to his or her APS employment. Clause 33(2) and 33(3) provide for the Regulations to prescribe exceptions to the entitlement and for the powers available to the Public Service Commissioner, or any other person or body, when conducting a review under the Regulations.

9.5 The proposed system would continue the current emphasis on problems being resolved at agency level. The draft regulations provide for an 'affected employee' to make application, in the first instance, to his or her agency head. Should the matter remain unresolved, the matter could be referred to the Commissioner for review. Provision exists for an employee to make application for review of an action direct to the Commissioner in certain circumstances.

9.6 The draft regulations provide for either an agency head or the Commissioner to appoint an independent reviewer if considered appropriate.

9.7 A particular feature of the proposed review processes is that, if the review is conducted by the Commissioner or an independent reviewer, the status of the outcome of the review (if not declined) is a recommendation to the agency head for decision. The decision is not binding.

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1 PSMPC, *Submission*, p.S508.

9.8 The Commissioner pointed out that the draft regulations represent:

> *a significant shift because, although it provides for external review through the Public Service Commissioner and makes it quite clear about the grounds for review and what action is and is not reviewable action, it does not allow the external review authority to overturn the primary decision.*[2]

9.9 If the Commissioner is not satisfied with the action taken by the relevant agency head in relation to the recommendation, the Commissioner must advise the agency head and include details of the recommendation, any decision about the recommendation, and any other relevant information in a report to the agency Minister and in the next annual report or in a separate report to the Parliament.[3]

Rationale for the proposed arrangements

9.10 The review provisions under the Bill are based on the PSMPC's view that the responsibility to afford public servants a right of review of employment decisions needs to be balanced against the need to reduce the costs associated with an appeals culture.[4]

Costs

9.11 According to the Public Service Commissioner, the current appeal processes impose a very high cost on the public service and on management.[5] In support of his assertion, Dr Shergold furnished the conclusions of the Management Advisory Board's report, *Achieving Cost Effective Personnel Services* (ACEPS)[6] which concluded that personnel services in the APS cost on average 2.5 times more to deliver than a private sector 'best practice' organisation.

2 Dr Peter Shergold, *Transcript*, p.313.

3 Draft Public Service Draft regulation 30.

4 PSMPC&DWRSB, *Submission*, p.S250.

5 Dr Peter Shergold, *Transcript*, p.203.

9.12 In relation to selection and recruitment ACEPS found that in 23 APS agencies in 1993-94, $27.6 million (or 9 per cent of HR resources) were spent on managing and administering competitive selection processes. This figure does not include line management time in preparing documentation, nor does it include time devoted to the selection process by individual selection advisory committee members and line managers.

9.13 ACEPS found that, compared with 'best practice' spending of $8 million, APS costs for recruitment and selection are more than three times that of the 'best practice' organisation. Put another way, the average cost per staff member per year for selection activity is $239 in the APS and $75 in the 'best practice' organisation.

9.14 The report also found that filling positions took three times as long in the APS: 96 days in the APS and 30 days in the best practice organisation.[7]

9.15 The MPRA told the Committee that the survey report upon which the ACEPS Report was based stressed:

> *It is important to note that this survey forms the basis of information for a diagnostic review. It was not a detailed activity based costing exercise, and the information provided by organisations (both private and public sector) ... is intended to be indicative only ... The overwhelming focus in the survey collection and analysis has been the qualitative questions and information provided.*[8]

9.16 The MPRA submission drew attention to the costs of the four main personnel activities benchmarked in the study. The MPRA observed that, contrary to the Commissioner's claim that a promotions appeal culture is one of the key reasons for the cost of APS personnel management exceeding

6 Management Advisory Board Report No 18, *Achieving Cost Effective Personnel Services* (ACEPS).

7 PSMPC, *Submission*, p.S508.

8 MPRA, *Submission*, p.S514.

best practice by 2.5 times, the fact is that, of the four activities studied, APS recruitment and selection activity came closest to 'best practice'.

9.17 According to the MPRA, the cost differential identified between the APS and the unidentified private sector 'best practice' relates primarily to human resource administration and administrative processing of items related to pay and conditions, for example, leave forms, and to occupational health and safety for which the APS has a better reputation than the private sector. The MPRA commented that 'it has little if anything to do with review processes'.[9]

Grievance Mentality

9.18 The proposed arrangements stem in part from a belief that a grievance mentality is prevalent within the APS. The PSMPC&DWRSB submission stated that:

> *There is a belief that the APS suffers from a grievance mentality. This appears to be a long standing malaise. This was certainly identified as an issue by the Report to Government of the National Commission of Audit which characterised the APS as "heavily bound in a grievance mentality". This view is not necessarily the sole province of academics but has credence among many HR practitioners, for example, a senior officer remarked that " ... perhaps today too many staff think in terms of rights and entitlements and not enough in terms of obligations and responsibilities."*[10]

9.19 The MPRA, however, told the Committee that a key finding of the ACEPS Report was that:

> *An initial view that grievances take up a large percentage of line manager time was not supported by the findings of this study. The overwhelming response from participants was why is there this focus on grievances? In their view, a formal grievance is only lodged if the line manager has not been doing their job and nipping trouble in the bud in the early stages.*[11]

9.20 The MPRA claims that quite the opposite from contributing to a grievance mentality in the APS, the MPRA has worked to reduce any tendency towards this mentality, having taken practical steps towards reducing dependence on grievance mechanisms, through its effective conciliation and mediation services, and through its introduction of joint selection committees (JSCs). JSCs both minimise and streamline selection processes, and generally do not allow appeals from their decisions. The MPRA believes that wider use of JSCs would be cost-effective for departments and for the Government.[12]

9.21 Under the proposed new arrangements, however, the *Merit Protection (Australian Government Employees) Act 1984* will be repealed and the MPRA will be abolished.

9.22 The Committee notes that the MPRA, comprising the Merit Protection Commissioner and four part-time members has, in the context of public sector reform, proposed to the Government the abolition of the Agency and some of its statutory functions. In its place, the Agency proposed the establishment of a Commonwealth Employment Ombudsman with a limited range of streamlined external review functions.[13]

Issues of concern

9.23 Clause 33 proved to be the most contentious clause in the Bill. The significant number of issues of concern which were expressed stemmed, firstly, from the *lack of detail* in the Bill and, secondly, from the *excessively detailed* draft regulations flowing from clause 33, as set out in the draft Regulations.

9 MPRA, *Submission*, p.S504.

10 PSMPC&DWRSB, *Submission*, p.S250.

11 Quoted in MPRA, *Submission*, p.S504.

12 MPRA, *Submission*, p.S504.

13 MPRA, *Submission*, p.S61.

9.24 Issues of concern raised in evidence to the review included:

- abolition of the MPRA;
- independence of the Public Service Commissioner;
- independence of the 'independent reviewers';
- immunity from suit;
- determining a reviewable action;
- conciliation and mediation;
- assumptions about the nature of grievances;
- blurred lines between internal and external review;
- standard for assessing review application;
- reporting to agency minister and Parliament;
- time scales for review; and
- protection for privacy and secrecy.

Abolition of the Merit Protection and Review Agency

9.25 The ACTU strongly opposes the repeal of the *Merit Protection (Australian Government Employees) Act 1984* and the substitution of what it regards as a totally inadequate review process:

> *We are being provided with a scheme which would enhance the powers of agency secretaries quite considerably and yet, at the same time, remove the checks and balances in the system, such as those available through the MPRA, from the process. The Public Service Commissioner has made it quite clear that all existing appeal rights would be abolished and that it is not intended to provide a mechanism to overturn any primary decisions as a result.*[14]

14 Mr Doug Lilly, *Transcript*, p.34.

The Independence of the Public Service Commissioner

9.26 The draft regulations provide the Public Service Commissioner with an external review role. However, concerns were raised that, as executive officer to the Management Advisory Committee (clause 57 of the Bill), the Commissioner would be bound up with the management processes across the whole public service and would not, therefore, be genuinely independent.

9.27 It was considered that there is an inherent bias in having the executive officer of the Management Advisory Committee also the judge of the conduct of his or her colleagues on that committee who are the people responsible for the actions which are subject to review.

9.28 Concerns were also expressed that the Commissioner has responsibility for both setting standards and for reviewing those standards.[15] Mr Chris Hunt observed that:

> *the difficulty in terms of public confidence and the perception of employees ... is going to arise when an employee wishes to complain ... about the standard itself.*[16]

9.29 The Commissioner, however, believes that there is an advantage in the Commissioner setting the standards and having the responsibility for upholding those standards in part through the mechanism of external review.[17]

9.30 Nonetheless, the MPRA believes that external review ought to be separated from the management of the public service if it is to be truly independent, and thus contribute to a credible climate of public accountability.[18]

15 Ms Helen Coventry, *Submission*, p.S70.

16 Mr Chris Hunt, *Transcript*, p.79.

17 Dr Peter Shergold, *Transcript*, p.79.

18 MPRA, *Submission*, p.S495.

Independence of the 'independent' reviewer

9.31 Considerable concern was raised about the review process set out in the draft regulations in which an agency head or the Commissioner can appoint an external independent reviewer. In view of the provision that in certain circumstances an agency head can refer a matter to the Commissioner, Mr Harry Evans observed that:

> *An application for a review may, after, in effect, passing from Caesar to Caesar, go to a person referred to as an independent reviewer. There is no guarantee, however, that such a person will actually be independent.*[19]

9.32 According to the MPRA, the provisions relating to an independent reviewer should allow for the fact that a reviewer is not 'independent' if selected by the person or delegate who is responsible for the action under review, for example:

- a potential reviewer would not be independent if he or she were required or able to negotiate a payment for work to be performed;
- a reviewer would not be seen to be independent if there was a possibility of 'return business'.[20]

9.33 Under the draft regulations it is the Commissioner's prerogative to judge whether the person appointed has the qualities and experience necessary to carry out the duties of an independent reviewer (draft regulation 31(1)(2)(3)).

Immunity from Suit

9.34 The MPRA argues that without immunity from suit, it would be difficult to find people willing to investigate cases.

9.35 Sections 80 (agency not to be sued) and 82 (protection from civil actions) of the current Merit Protection Act provide protections which the MPRA believes are absolutely necessary to the effective conduct of case work.

19 Mr Harry Evans, *Submission*, p.S464.

20 MPRA, *Submission*, p.S502.

Under current arrangements staff and Agency Members cannot be sued if they have acted in good faith.

9.36 There is no provision for such immunity in the proposed review arrangements.[21]

Determining a reviewable action

9.37 Action is reviewable action if an APS employee is entitled, under clause 33(1) of the Act, to review the action. The draft regulations, however, make no distinction between various 'actions' which may be the subject of review.

9.38 The current legislative framework distinguishes between general employment related grievances and appeals which relate to promotion, temporary transfer and misconduct decisions.

9.39 The ACTU agrees with the intent of the Bill that there should be a stronger emphasis on promptly resolving general grievances at the agency level as this is an important responsibility of management. This could include more widespread use of conflict resolution or other dispute resolution strategies or procedures as included in industrial Awards and Certified Agreements. It may also result in more satisfactory outcomes if conciliation and mediation rather than investigation were part of the resolution.[22]

9.40 The following comments were submitted with respect to the draft regulations on 'sweeping exclusions from the review process'.

21 MPRA, *Submission*, p.S502.

22 ACTU, *Submission*, p.S477.

Draft regulations 7,8,9 and 10

9.41 The MPRA believes that establishing whether action is reviewable could be a complex, technical and confusing process.[23] In contrast to the simple formula for entitlement to review at clause 33, the draft regulations provide a complex formula, namely:

- 'Grounds for review' set out in draft regulation 8;
- an 'affected employees' concept in draft regulation 7; and
- an 'eligible employees' concept in draft regulation 10.

9.42 Mr Volker pointed out that, as regards draft regulation 8(a), an issue is whether the present wording gives the impression that the action is to be set aside or varied if there is a breach of the Code of Conduct. The action to appoint, promote or otherwise may still be the right decision in accordance with the merit principle even if there is a breach of the Code of Conduct.

9.43 Mr Volker told the Committee that a separate issue is whether what is intended is that there is a breach of the APS Values, which provide for such requirements as employment decisions being based on merit and a workplace that is free from discrimination. At the same time there are some elements of the Code of Conduct which should be applied, for example, (1) and (4), in respect of employment-related decisions. Mr Volker believes that there should be a reference to both the APS Values and the Code of Conduct.[24]

9.44 Mr Volker also raised the issue of what is meant by a 'serious defect' in draft regulation 8(b). He presumes that this is meant to indicate that the defect materially affected the decision. Use of the word 'serious' could give rise to considerable disputation.

9.45 A further concern raised by Mr Volker was that draft regulation 9(2)(c) would have the effect of saying that reviewable action becomes not reviewable if the application is

23 See also Ms Wendy Caird, *Transcript*, p.288; Sir Lenox Hewitt, *Submission*, p.S421.

24 Mr Derek Volker, *Submission*, pp.S492-3.

frivolous or vexatious: surely the action continues to be reviewable action. There could be provision for a review not to proceed, however, if the application is found to be frivolous or vexatious. The same considerations apply to (g).[25]

9.46 According to the MPRA, draft regulation 10(1) introduces a basic test which is worded differently from the grounds for review described in draft regulation 8.

9.47 The MPRA pointed out that an addition to draft regulation 9 in the latest draft (4 September) heightened concerns previously held about rigidly prescribing rights to a review at the outset rather than leaving the matter to the discretion of the reviewer. Draft regulation 9(2) lists actions which are not reviewable actions (which confusingly overlap with another list at Schedule 1). Draft regulation 9(2)(g) states:

9(2) However, the action is not reviewable action if:

... (g) review, or further review, of the action is not justified in all the circumstances.[26]

9.48 In the MPRA's view, there is little guidance in the draft regulations as to the possible basis for such a decision and the way this is drafted would result, as a matter of law, in an unnamed person pronouncing that 'in all the circumstances' an employee has no right to a review. Since the proposed reviewers' powers are recommendatory only, it is the MPRA's strong view that it would be more sensible, practical and cost effective to have a broad entitlement to review, such as that set out in clause 33, leaving the range of tests currently described in draft regulation 9 in the hands of the reviewer rather than prescribed in such detail.[27]

9.49 It was further contended that the requirement in draft regulation 10(1) for an employee to be 'materially' affected would seem to exclude psychological effects such as would follow from actions such as bullying and harassment.

25 Mr Derek Volker, *Submission*, p.S493.

26 MPRA, *Submission*, p.S497.

27 MPRA, *Submission*, p.S493.

This draft regulation as worded would simply give scope to an agency to determine that a case of bullying or harassment was not actionable unless the victim could prove financial or other tangible or material loss.[28]

Schedule 1

9.50 Schedule 1 lists actions for which there is no entitlement for review. The ACTU suggests that the schedule should make clear if there are alternative avenues for review of these actions.[29]

9.51 The MPRA expressed the view to the Committee that:

> *It is clear that the intent of the draft regulations is not to provide meaningful avenue for review of employment actions or decisions. There are no less than twelve specific exemptions, many of which are questionable in principle. All proceed on an assumption that the review jurisdiction should be 'tied down' in a prescriptive fashion, rather than the preferable model of placing trust in the sensible discretion of reviewers.*[30]

9.52 The following comments were submitted in relation to Schedule 1.

9.53 According to the MPRA, *Exemption 1* is a general 'catch all' exclusion: it is hard to imagine actions which could not be argued to be 'about the policy, strategy, nature, scope, resources or direction of the APS or an Agency'. Why, asks the MPRA, should not, for example, the 'policy of the APS' be reviewable if its application affects an employee adversely and unfairly? It should never be an absolute answer that otherwise unfair action is not reviewable because it is 'policy'. The MPRA argues that, if a review recommendation is utterly unrealistic or too broad-ranging, there will be a sound basis for not accepting that recommendation.[31]

28 MPRA, *Submission*, p.S497. Also see Ms Wendy Caird, *Transcript*, p.309.

29 ACTU, *Submission*, p.S479.

30 MPRA, *Submission*, p.S497.

31 MPRA, *Submission*, p.S497.

9.54 Mr Harry Evans also contended that, as virtually any action could be held to be caught by this catch-phrase, there may be little scope for review in any case:

> *These provisions re-enforce the character of the new public service as an organisation in which the role of the employees will be to do as the master instructs and not raise scruples about propriety or proper processes.*[32]

9.55 The MPRA raised the question of whether *Exemption 4* means that the *effect* of a direction is not reviewable (for example, if an unforeseen consequence of a particular action was unfairly discriminatory)? If so, the MPRA concluded, the exemption goes too far.

9.56 *Exemption 6* excludes actions resulting from machinery of government changes. The MPRA believes it unfair and unreasonable that an employee has no right to review of a manifestly unfair or unreasonable action.

9.57 The MPRA also questioned whether *Exemption 8* means that an employee cannot complain about any aspect of his or her *own* engagement.

9.58 *Exemption 11* excludes promotion action to or within the Senior Executive Service. Elsewhere, draft regulation 10(2) specifically excludes all SES employees from eligibility to seek review of any action that affects his or her employment. The MPRA reported that in its experience SES officers rarely pursue concerns through the grievance mechanism but when they do choose to do so, such complaints are often serious and sensitive. The draft regulations would give SES employees no avenue for redress other than the courts.[33]

9.59 Mr Volker commented that it is not clear why the promotion of a non-SES employee to the SES should be an action for which there is no entitlement for review. He believes that there is no evident reason why such situations should not be subject to review.[34]

32 Mr Harry Evans, *Submission*, p.S465.

33 MPRA, *Submission*, p.S497.

34 Mr Derek Volker, *Submission*, p.S494.

9.60 The MPRA stated that *Exemption 12* seeks to place yet another restriction on the grounds for review; that there may be circumstances beyond those defined in (a) - (c) where there is a legitimate basis for seeking review of original duties that are considered to be, for example, unfair, anomalous or discriminatory. The MPRA stressed that under its current processes, unrealistic or too broad-ranging recommendations resulting from review can be legitimately rejected.[35]

Conciliation and Mediation

Draft regulation 6(3)

9.61 Despite the insertion of a broad statement of intent at draft regulation 6(3) that 'the process is intended to be consistent with the use of alternative dispute resolution methods to reach satisfactory outcomes where appropriate', the MPRA believes that the draft regulations set out detailed and prescriptive processes which are entirely adversarial, and appear to rule out any conciliation or mediation.[36]

Assumptions about the nature of grievances

Draft regulations 16 and 29

9.62 Draft regulations 16 and 29 provide for review of 'actions' and 'recommendations' which assume that only a relatively narrow category of grievances will be lodged, that is, those capable of having the original action or decision confirmed, varied or set aside. What is written might suit complaints about promotion decisions, but is absurd if the complaint is, for example, one of bullying.[37]

35 MPRA, *Submission*, p.S498.

36 MPRA, *Submission*, p.S498.

37 MPRA, *Submission*, p.S499.

Blurred lines between internal and external review.

Draft regulations 13-27, 9 and 32

9.63 The MPRA told the Committee that traditional and widely accepted review models provide for two-tiered systems:

- internal review (maximum discretion and flexibility for the Agency to set up its own procedures); and
- external review (on a more formal statutory basis).

9.64 The draft regulations, according to the MPRA, provide a potentially confusing mix of internal review by agency heads, 'independent reviewers' and the Commissioner, with various procedural relationships between these three. Under draft regulations 16, 20 and 22 the agency head, the Public Service Commissioner and the 'independent reviewer' all seem to have an obligation to determine first the threshold question of whether the application for review is an 'entitled' action.

9.65 Draft regulation 15 enables an agency head to refer a matter to an 'independent' reviewer. The MPRA strongly advises that, for the review process to have credibility, if an application for review cannot be dealt with internally by an agency for whatever reason, it ought to go to the independent *external* reviewer. For a range of reasons, a reviewer engaged by the agency which is the subject of the application for review may not be perceived to be truly independent.

9.66 The MPRA added that it is only the Commissioner who can take action if a recommendation is not implemented (draft regulation 30), but the Commissioner may have had little or no involvement in the investigation and development of those recommendations if the independent reviewer course has been followed. The reviewer is not subject to direction, including by the Commissioner (draft regulation 35).

9.67 Draft regulations 9(2)(e) and (f) seem to accept implicitly that neither the Public Service Commissioner nor the so called independent reviewers are genuinely external review bodies.[38]

By what standard will the merits of review application be assessed?

9.68 The MPRA pointed out that there are no general criteria for assessing the action which is the subject of complaint (compare with the Ombudsman Act s.15); if draft regulation 8 is intended to fulfil this role it is potentially too constraining. For example, it is not clear whether a breach of APS Values is encompassed in the grounds for review, although section 13(11) of the Public Service Bill might achieve this.

9.69 The MPRA also raised the question: 'what if the action is in accordance with an existing law, direction or policy, but that law, direction or policy produces an unfair or anomalous result?'

9.70 The MPRA suggests the inclusion of a 'sweeper' provision similar to section 15 (1)(a)(v) of the Ombudsman Act ('otherwise, in all circumstances wrong').[39]

Reporting to Agency Minister or Parliament

9.71 If the Commissioner is not satisfied with a decision made by an agency head, he or she must include details in a report to Parliament.

9.72 The MPRA believes that draft regulation 30 compares very unfavourably with the robust powers and procedures in, for example, sections 15-17 of the Ombudsman Act and sections 52-53 of the *Merit Protection (Government Employees) Act 1984*. Under the proposed draft regulations:

- the Commissioner 'tells' the agency head that he or she is 'not satisfied' (draft regulation 30(a)); nothing in particular follows from this;

38 MPRA, *Submission*, p.S499.

39 MPRA, *Submission*, p.S500.

- draft regulation 30, far from providing a robust reporting sanction simply says that details' and 'information' are to be 'included' in reports to the Minister and Parliament.[40]

9.73 The Administrative Review Council, however, believes that this power will provide greater transparency and independence to the review processes.[41]

9.74 Nonetheless, the MPRA believes that the Commissioner's powers, where a recommendation is not acted upon, need to be substantially upgraded.

Time scales for review

9.75 There was concern that draft regulation 16 does not appear to require agency heads to make a decision within any particular time frame which raised the question of what sanctions should be applied if an agency head fails to come to a decision.[42]

Protection for privacy and secrecy

9.76 The MPRA recommends the inclusion of secrecy provisions. The draft regulations do not provide for privacy issues to be taken into account. These are all currently provided for in the Merit Protection Act, in a manner which is both more strict and more relevant than the Privacy Act.

9.77 It is important to the credibility of a process of review of actions affecting individuals that personal information concerning all parties should be kept private. Without such protection, material facts may not be provided, thus distorting the process and its outcomes.

40 MPRA, *Submission*, p.S500.

41 Professor Marcia Neave, *Submission*, p.S405.

42 MPRA, *Submission*, p.S ; Ms Wendy Caird, *Transcript*, p.309; ACTU, *Submission*, p.S478.

9.78 Contrary to the assumption underlying the note to draft regulation 34 that 'an independent reviewer is subject to the *Privacy Act 1988'*, the Privacy Act is not considered adequate for the purpose.

9.79 The MPRA stated that:

> *It is clear that the Parliament anticipated the problems which unqualified access to personal information would create, and explicitly envisaged that the way to prevent these problems was to have secrecy provisions in other Commonwealth legislation.*[43]

Non-binding nature of recommendations

9.80 The ACTU believed that in the absence of a formal, independent and binding appeal mechanism, it is inevitable that the courts will be used to challenge sanctions imposed on APS employees under Clause 15. Such an approach is costly and uncertain for both employees and management.[44]

The ACTU strongly advocates an independent statutory office holder responsible for external appeals matters. The ACTU therefore suggested that the bill be amended to maintain independent, binding appeal mechanisms in relation to selection, misconduct, inefficiency and grievances.[45]

Commonwealth Employment Ombudsman

9.81 The Committee found little support for the draft regulations in their current stage of drafting.[46] Considerable support existed, however, for the establishment of a Commonwealth Employment Ombudsman.[47]

43 MPRA, *Submission*, p.S

44 ACTU, *Submission*, p.S479.

45 *Transcript*, p.31.

46 WEL. *Submission*, p.S462.

47 MPRA, *Submission*, p.S61; Dr John Uhr, *Submission*, p.S15-16; Ms Helen Coventry, *Submission*, p.S434.

> *The MPRA, in support of its proposed model of a Commonwealth Employment Ombudsman as an effective model for external review submitted that:*[48]
>
> *our proposed Commonwealth Employment Ombudsman, either as a stand-alone statutory office, or incorporated within a suitable independent review agency, would achieve this objective much more effectively than the current draft legislation, while fitting comfortably within the broad philosophical framework of devolution which underlies the new Public Service Bill.*[49]

9.82 The primary function of a Commonwealth Employment Ombudsman would be to investigate, and to seek to resolve, employment related complaints from individual Commonwealth employees about any breaches of public service standards that could not be resolved within relevant departments or agencies.[50]

9.83 The members of the Agency believe that, in such a model, complaints should be able to be made about action relating to the person as an employee, which would be akin to the general jurisdiction in the Ombudsman Act. Such broad jurisdiction should be counterbalanced by key features in the Bill such as:

- statutory requirement for agency heads to develop effective internal review procedures (with an expectation that most matters would be settled at this level);
- obligation on complainant to make out a *prima facie* case;
- provision for rejection of frivolous or vexatious complaints; and

48 MPRA, *Submission*, p.S

49 MPRA, *Submission*, p.S455.

50 Dr John Uhr, *Submission*, p.S22.

- robust criteria by reference to which the merits of a complaint would be assessed (for example, that the processes to which the employee had been subject were in breach of the Public Service Act, the Draft regulations, or the Commissioner's Directions).[51]

9.84 The MPRA believes that a jurisdiction along these lines would reduce the 'grievance mentality'. It believes that it would also minimise arguments and litigation about whether situations were or were not within jurisdiction, and provide a useful early detection system for agencies to learn of developing problems and, in the longer run, for the Public Service Commissioner to have a more comprehensive view of the State of the Service.

9.85 The MPRA provided in evidence a comparison of different models for conduct of external review of public service management (see Appendix V).

The Need for Robust Mechanisms

9.86 Draft Regardless of whatever review mechanisms are adopted, it was generally accepted that there is a need to maintain robust mechanisms of independent external review of employment decisions. As Dr John Uhr observed:

> *... community confidence in government administration will be weakened if this Bill passes unamended: that is, without a robust and credible mechanism to assure taxpayers that public service employment contains appropriate checks and balances against inappropriate employment practices.*[52]

9.87 Dr Uhr observes that Australia has a distinct advantage in its system of open and accountable public administration. Australia illustrates best international practice in its recognition of the rights of individuals to obtain independent external review of government decision-making.

51 MPRA, *Submission*, p.S61.

52 Dr John Uhr, *Submission*, p.S16.

9.88 The public interest is protected by employee rights to fair treatment as well as citizen rights to reviewable decisions. Thus the community has a legitimate and valid interest in protecting the integrity of its taxation-derived investment in the internal management of public administration.[53]

Conclusion

9.89 The Committee concluded that, on the basis of the evidence to its review, there is a clear need for a revision of the current grievance and appeal mechanisms which exist under the 1922 Act. The Committee also concluded that there are shortcomings in the *Public Service Draft Regulations* relating to Clause 33 of the Bill.

9.90 Some Committee members believe that the objective of streamlining the review processes has not been achieved. It would appear to those members that the PSMPC has set up far more complex layers of processes than those that they seek to replace.

9.91 The Committee's review of the regulations was frustrated by the fact that the regulations concerning review of APS actions had not been drafted when the Public Service Bill was referred to the Committee for review. As a result of the regulations not being available to the Committee until 21 August, the Committee was unable to obtain comments on the regulations until late in the review.

9.92 This situation was compounded by the PSMPC subsequently submitting revised draft regulations to the Committee. While the Committee commends the Commission for its responsiveness to suggestions made to the JCPA review, the Committee is critical that, given the importance of the review provision, it has been denied the ability to conduct a proper review of the subordinate legislation.[54]

53 Dr John Uhr, *Submission*, p.S16.

54 The Committee received a further revised version of the draft regulations at the time the Committee was finalising its report. The Committee was therefore unable to take the revised version into account.

9.93 The Committee is concerned about the level of dissatisfaction with the proposed regulations.

9.94 The draft regulations provide the Public Service Commissioner with an external and independent review role. There is a perception however that, by virtue of his role as the APS standard setter and as the Executive Officer to the Management Advisory Committee, the Commissioner is not well placed to exercise independence in reviewing APS employment decisions.

9.95 A review mechanism which builds on the current model of a separate statutory officer within the structure of the PSMPC may offer a more independent review process than is proposed in the current version of the Regulations.

9.96 The Committee notes that at the public hearing of the Senate Finance and Public Administration Committee's review of the Public Service Bill,[55] Dr Shergold stated:

> *I am not convinced of the need to establish a separate statutory office. Indeed if that was being considered, I would have thought a refinement of the present model where, within the one administrative organisation, there is both a Public Service Commissioner and a Merit Protection Commissioner with separate independent statutory powers woukld probably be as effective. However, I am not convinced that there is a need for such a separation.*[56]

9.97 In the JCPA's view such a separation seems a sensible solution to a complex issue.

9.98 There was little evidence of consultation over the development of the subordinate legislation. The Committee noted that the draft regulations had been 'workshopped' with departmental secretaries but no real consultation had yet occurred with the body involved in current review processes, the MPRA. The Commissioner acknowledged:

55 24 September 1997.

56 Draft transcript, 24 September 1997.

> *There have certainly been discussions. I have certainly seen the submissions that they have made to this committee and at least some of the proposals that they have put to the minister. To some extent the version that you have in front of you now I think addresses some of the earlier concerns raised by the MPRA.*[57]

9.99 The Committee also recognises the importance of reducing costs to a minimum and some members are concerned that higher costs will be generated as a result of litigation.

9.100 The Committee concluded that the draft regulations do not reflect the simplicity of the Bill. The Committee believes that it is desirable that the draft regulations are clear and concise and are not open to ambiguity.

9.101 The Committee recognises that the draft regulations are still in the process of development. It is important that whatever review mechanism they ultimately contain they be drafted in a simple, clear and concise fashion.

9.102 **Recommendation 14**

The Public Service Regulations dealing with review of Australian Public Service employment actions must be redrafted, in a way which is, at least, simple, clear and concise.

57 *Transcript*, p.312; 317.

10

AGENCY HEADS - APPOINTMENT AND TERMINATION PROVISIONS AND REMUNERATION ARRANGEMENTS

Introduction

10.1 The 1922 Act includes provision for both indefinite and fixed term appointments of secretaries of departments. However, since 1993 such appointments have, as a matter of Government policy, been made on a fixed term basis.

10.2 Secretaries are appointed by the Governor-General on the basis of a recommendation from the Prime Minister, who in turn receives a report from the Secretary, Department of the Prime Minister and Cabinet (or from the Public Service Commissioner in relation to an appointment to that office). Consultation is required with the relevant departmental minister in preparing the report. The 1922 Act provides that decisions relating to appointments to positions of secretary are exempted from the provisions of that Act dealing with the application of merit and prohibition of patronage, favouritism and unjustified discrimination.

10.3 Under section 37(5) of the 1922 Act, a fixed term secretary is retired from APS on expiration of the fixed term or where the office is abolished or where the Governor-General directs that the appointment be terminated. Early termination by the Governor-General is subject to the same procedural requirements as for appointments.

10.4 Division 8A of Part III of the 1922 Act also includes provisions for the retirement and redeployment of secretaries of departments. These provisions would cover any remaining 'permanent' secretaries.

10.5 In accordance with the *Remuneration Tribunal Act 1973*, salaries for secretaries are currently set by the Remuneration Tribunal. The relevant determination by the Tribunal deals with secretaries' salaries as well as certain allowances including loss of tenure allowance. It also sets out the arrangements which apply in respect of early termination of appointment. These provide for the payment of one third of a month for each full month of service foregone and subject to a maximum payment equivalent to twelve months salary.

Relevant provisions of the Public Service Bill

10.6 Secretaries, along with heads of executive agencies and heads of statutory agencies are defined in clause 7 of the Bill as being agency heads.

10.7 Part 6 of the Bill sets out arrangements for the appointment and termination of agency heads which are similar to those applying to fixed term secretaries under the 1922 Act. The most significant difference is that the power to make and terminate appointments has been 'transferred' from the Governor-General to the Prime Minister.

10.8 It is proposed that the Prime Minister will be able to appoint a person as secretary for a period of up to five years, and terminate that appointment at any time, after having received a report from the Secretary of the Prime Minister's Department (or from the Public Service Commissioner in relation to that office). This termination power is in addition to the automatic termination of a secretary on the abolition of a department

10.9 The Bill also makes provision for the creation of executive agencies by the Governor-General, who may also identify the minister responsible for such an agency. The agency minister is able to appoint a person as head of an executive agency for a period of up to five years and to terminate the person's appointment at any time. Terminations of secretaries and executive agency heads are also not subject to the termination of employment provisions of the Workplace Relations Act.

10.10 As is the case currently appointments at the agency head level are not subject to merit selection requirements or to the provisions prohibiting patronage, favouritism or ministerial interference in employment decisions.

10.11 Clause 54 of the Bill provides that the remuneration and other conditions of appointment of a secretary will be as determined by the Prime Minister, while clause 61 provides that an agency minister will have these powers in relation to the remuneration and other conditions of appointment of executive agency heads.

Issues

10.12 This chapter focuses on:

- the changes to the appointment and termination provisions for agency heads involving the removal of the Governor-General's role;
- the lack of tenured appointment for secretaries and any consequent impact on 'frank and fearless' advice;
- the role and status of executive agencies and their heads; and
- the changes to the way in which the remuneration of agency heads is determined.

Procedures for appointment and termination

10.13 The Bill proposes that the responsibility for appointing secretaries and for terminating such appointments will rest with the Prime Minister.

10.14 The Public Service Commissioner, Dr Shergold, noted that the substantive provisions of this Bill are the same as in the 1922 Act. The change is that the appointment and termination powers are proposed under the Bill to rest with the Prime Minister. Under the 1922 Act they rest with the Governor-General, who must act in accordance with advice that is consistent with the recommendation of the Prime Minister.[1]

10.15 The Committee heard a number of differing views on the impact of the proposed 'transfer' of powers from the Governor-General to the Prime Minister.

10.16 Mr Derek Volker observed that:

> *What is proposed changes the method of appointment which has applied since the Commonwealth came into being. Under section 67 of the Constitution "Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority".*[2]

10.17 Mr Volker went on to say that while it may be argued that what is proposed recognises the reality of the arrangements that currently apply, he feels that there is a very significant symbolism attached to the present arrangements.[3] He noted that:

> *While the Public Service serves the Government of the day in terms of providing policy advice and putting the policies and programs of the Government into effect, it also has a wider role in implementing legislation passed by the Parliament and assented to by the Governor-General. It also has been seen as being the Public's service It is not owned by the Government of the day even though it must do the bidding of the Government of the day consistent with the law. It has been seen as having an ongoing role in serving the public, in applying ethical standards of impartiality and professionalism in a non-partisan way. It is an institution of continuity providing stability across changes of Government and changes in Prime Minister.*

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1 Dr Peter Shergold, *Transcript*, p.212.

2 Mr Derek Volker, *Submission*, pp.S181-182.

3 Mr Derek Volker, *Transcript*, p.175.

Having appointments of Secretaries vested in the Governor-General in Council has demonstrated the ownership of the Public Service by the community and the non-partisan basis of public service appointments, terminations and operations.[4]

10.18 Mr Volker concluded that the decision to vest the power in the Prime Minister warrants substantive consideration by the Parliament which has a specific role to play under section 67 of the Constitution in deciding whether or not to change the arrangements set down in the Constitution.[5]

10.19 This view is shared by Mr Harry Evans, Clerk of the Senate who commented that appointments could continue to be for a fixed term but that there:

needs to be some mechanism which is a statutory signal, if you like, that these people are not simply the creatures of the Prime Minister of the day ... You can say that the Governor-General will always be bound by the Prime Minister's advice and so on but there is a difference between the Prime Minister signing a piece of paper to get rid of a departmental secretary and putting something up to the Executive Council with an explanation to the Governor-General as to why this departmental secretary should go.[6]

10.20 On the other hand Mr Max Moore-Wilton, Secretary of the Department of the Prime Minister and Cabinet considered that the issue is very much a matter of judgement or perception at the end of the day.[7] He indicated that:

4 Mr Derek Volker, *Submission*, p.S182.

5 Mr Derek Volker, *Submission*, p.S183

6 Mr Harry Evans, *Transcript*, p.119.

7 Mr Max Moore-Wilton, *Transcript*, p.233.

The government has taken the view that the employment relationship within the Public Service, at the head of agency level, is clearly with the government of the day ... I think it is a device, if you will, having the Governor-General in Council appoint a head of department, when in fact the reality is that the Prime Minister of the day makes a decision ... It is part of the evolution of the way in which the Australian Public Service has been managed.[8]

10.21 Mr Alan Rose, President, Australian Law Reform Commission expressed similar views:

The reality is that it is the Prime Minister of the day and his interaction with his colleagues and their judgement on an individual which is important. The fact that - if I can be a little flippant - the piece of paper comes from Yarralumla is really a matter of form and ceremony. But the reality of getting the job done is the confidence that that particular Prime Minister and his senior ministers have in the individual that is important.[9]

Arrangements for appointment and termination of appointment of the Public Service Commissioner

10.22 The only area under the Bill where the Governor-General will continue to have a role in relation to executive appointments is in relation to the Public Service Commissioner. The provisions proposed in the Bill are very similar to those contained in the 1922 Act and provide for fixed term appointments of up to five years and removal from office on certain identified grounds.

10.23 Dr Shergold explained the thinking behind the development of these provisions as follows:

The conditions are as they are in order to preserve the statutory independence of the Public Service Commissioner, because a great deal of this bill, which removes so much of the prescription, relies upon the independence of the Public Service Commissioner in order to protect the public interest. That is why the conditions are different from those which apply to secretaries or chief executives or heads of executive

8 Mr Max Moore-Wilton, *Transcript*, p.233.

9 Mr Alan Rose, *Transcript*, p.166.

agencies. However, they are similar to the sorts of arrangements in place for the Commonwealth Ombudsman and the Auditor-General.[10]

10.24 The inclusion of separate employment arrangements and for the Commissioner was supported by Mr Sedgwick, Secretary of the Department of Employment, Education, Training and Youth Affairs who commented that, having regard to the Commissioner's role in managing the Public Service:

as part of the checks and balances within the system, it is, I think, a quite useful protection to have someone who has the time to plan ahead and to provide leadership and guidance to the rest of us in circumstances where there is no concern about tenure and no perception that the exercise of their independent powers can be subject to outside influence.[11]

Committee Comment

10.25 The Committee agrees with the comment expressed by Mr Volker that the proposed changes to the appointment and termination processes for secretaries warrant substantive consideration by the Parliament because they involve a change to the arrangements set down in section 67 of the Constitution.

10.26 However, the Committee accepts that in practice the current process of appointment and termination of secretaries being made by the Governor-General is heavily influenced by the power only being able to be exercised in accordance with advice that is consistent with a recommendation by the Prime Minister.

10.27 The Committee accepts that the approach proposed in the Bill reflects the reality that such matters rest with the Prime Minister of the day and therefore supports the proposed changes.

10 Dr Peter Shergold, *Transcript*, p262.

11 Mr Steve Sedgwick, *Transcript*, p.263.

10.28 As regards the situation of the Public Service Commissioner, the Committee accepts that, in view of the particular role set out for the Commissioner in the new Bill, it is appropriate that the Governor-General continue to have a role in the appointment of the Commissioner and the termination of that appointment.

Tenure and the quality of advice

10.29 Legislative amendments made in 1993 to the current Public Service Act formally introduced fixed-term employment arrangements for secretaries. Since that time, appointees at this level have not been given the option of tenured appointment.

10.30 According to a report entitled *Departmental Secretaries: Appointment, Termination and their Impact* by Patrick Weller and John Wanna of Griffith University, incumbent secretaries were offered the choice of a 20% pay rise in their pay in exchange for giving up their tenure and signing a limited term agreement with the Government. The figure of 20% was recommended by a committee of secretaries and confirmed by the remuneration tribunal which also sets the compensation arrangements for early termination of a fixed term appointment. The report notes that all but two secretaries agreed to move to the new arrangements.

10.31 There was considerable discussion in the hearings conducted by the Committee as to whether the limited term nature of secretary appointments and the ability of the Prime Minister to terminate such appointments at any time, will have an adverse effect on the quality of forthright and independent advice being given to Ministers and the Government.

10.32 Sir Lenox Hewitt expressed strong opinions on this issue which he described as:

> *the intention to change, indeed to destroy, the Australian Public Service and to convert it into a series of appointments at pleasure - at the whim, in the case of secretaries of the Prime Minister; in the case of agency heads, of the minister ... That to me is a fundamental change in the service that was established.*[12]

10.33 Sir Lenox went on to say that:

> *what we are dealing with here, too, is not the dismissal; it is the treat hanging over. You will destroy frank, fearless, honest advice if you are party to this proposal of the executive.*[13]

10.34 Mr Patrick Gourley, representing the Institute of Public Administration, expressed similar views. He commented that arbitrary removal of secretaries at ministerial whim for casual reasons will do great damage to the capacity of the service to provide frank and fearless advice to Governments and the effectiveness of Government itself.[14]

10.35 These views were challenged by a number of other participants in the Review.

10.36 Dr Shergold commented that he saw no evidence whatever that the move from permanent secretaries - who after all could also be removed at whim overnight from their position - to a fixed term contract has reduced the quality, the frankness or the fearlessness of the policy advice provided by secretaries.[15]

10.37 This view is endorsed by the current Secretary of the Department of Employment, Education, Training and Youth Affairs, Mr Steve Sedgwick who commented:

12 Sir Lenox Hewitt; *Transcript*, p.140.

13 Sir Lenox Hewitt, *Transcript*, p.145.

14 Mr Patrick Gourley, *Transcript*, p.65.

15 Dr Peter Shergold, *Transcript*, p.69.

> *Frankly, if we are not prepared without tenure to give the kinds of forthright advice and to provide the kinds of long term leadership and management that we need to, we should not have the job.*[16]

10.38 Another current Secretary, Mr Paul Barratt questioned the validity of the view being put forward that the employment of secretaries was at the pleasure of the Government, the Prime Minister or the Minister. He noted that the current and future arrangements provide for a term appointment of up to five years with a requirement for a conscious act of termination.[17]

10.39 Mr Derek Volker, who was one of the secretaries who elected to move to fixed term arrangements, commented as follows:

> *I think those of us who did take term appointments ... did so with out eyes open and in the knowledge that we could continue to give frank and fearless advice ... In fact I could see no difference in the advice and the performance given by the very few people who remained under the old arrangements compared with that given by those who took the term appointments.*[18]

10.40 Mr Volker expressed the view of a number of other commentators when he went on to say that:

> *Giving frank and fearless advice has been said really to be a matter of character rather than of the form of appointment or tenure. I think there is something in that.*[19]

16 Mr Steve Sedgwick, *Transcript*, p.263.

17 Mr Paul Barratt, *Transcript*, p.264.

18 Mr Derek Volker, *Transcript*, pp.174-175.

19 Mr Derek Volker, *Transcript*, p.175.

10.41 Mr Alan Rose stated that:

> *too much has been made out of permanency and out of the notion of public sector employment being a career or a vocation. The key element of a secretary's role is the relationship that he/she can maintain with the minister and the government of the day. It is a mutual respect that has to be maintained. To the extent that it is not, there is only one thing that has to happen, and that is that the secretary of the day gives way.*[20]

10.42 On the subject of frank and fearless advice, Mr Rose commented that:

> *frank and fearless advice is rhetoric. Realistic, practical, workable and politically feasible advice is what successful secretaries have always delivered to their ministers and to governments ... It has never been the case that simply because it was difficult to remove someone that was some guarantee that they gave frank and fearless, competent - and so forth - advice.*[21]

Committee Comment

10.43 The Committee notes that it is a matter of fact that the arrangements proposed in the Bill in relation to secretaries are a continuation of the limited term appointment arrangements introduced in 1993.

10.44 The Committee supports the continuation of the present arrangements that secretaries be offered fixed term appointments up to a maximum period of five years.

10.45 As to the question of the effect of these arrangements on the quality and nature of advice provided, the Committee notes the differing views put forward by participants in the Review. The Committee does not believe however that there is any reason the alter the limited term arrangements and termination provisions in relation to appointments at the secretary level.

20 Mr Alan Rose, *Transcript*, p.163.

21 Mr Alan Rose, *Transcript*, p.164.

The role and status of executive agencies and their heads

10.46 The Bill provides for the establishment by the Governor-General of executive agencies and for the relevant agency minister to be responsible for appointment, termination and remuneration of the head of such an agency.

10.47 The Australian National Audit Office's submission suggests that:

> *the overall understanding of the Bill could be improved by the inclusion in the Explanatory Memorandum (EM) of the rationale for certain key elements of the Bill. For example, while the Bill provides for the establishment of Executive Agencies, the EM does not explain the need for such provisions, although it does note at para 8.1 that there are no equivalent provisions in the existing Act.*[22]

10.48 The ACTU is concerned that executive agencies could be established to circumvent the Parliament on important matters of public policy concerning the delivery of public services. It believes the provision could be used to further fragment the APS as a precursor to contracting out or privatisation.[23]

10.49 The ACTU agrees with the ANAO that the Explanatory Memorandum to the Bill does not adequately explain or justify the purpose of these agencies. The ACTU believes there should be clear criteria for the establishment of such agencies and some method of Parliamentary scrutiny of the process.[24]

10.50 The ACTU has also expressed concern that heads of executive agencies may be terminated without even the limited process that applies to termination of secretaries. It points out that there is no requirement for a report from the Secretary of the Department of the Prime Minister and Cabinet, or from any other person, in relation to an agency minister's powers of appointment and termination.

22 ANAO, *Submission*, p.S59.

23 ACTU, *Submission*, p.S162.

24 ACTU, *Submission*, p.S162.

10.51 A number of current secretaries, including Mr Sedgwick, Dr Hawke and Mr Woodward expressed views that it is likely that there would be consultations with other relevant parties when these sorts of decisions were being made. Mr Sedgwick conceded however that as a personal preference he would be a lot more comfortable if there were another person - the Prime Minister - or someone else involved in these matters.[25]

Committee Comment

10.52 The Committee agrees with the comments made by the ANAO that the rationale for the establishment of executive agencies is unclear and supports the view that the Explanatory Memorandum to the Public Service Bill should include a more complete explanation.

10.53 The Committee also believes that the powers of an agency minister to appoint and to terminate the appointment of the head of an executive agency should be subject to the same limitations that are imposed on the Prime Minister in relation to the appointment and termination of appointment of secretaries.

10.54 **Recommendation 15**

The Explanatory Memorandum to the Public Service Bill 1997 should provide a clearer explanation of the purpose of executive agencies.

10.55 **Recommendation 16**

The provisions relating to the appointment and termination of heads of executive agencies should be amended to include a requirement that the agency minister only be able to exercise the relevant powers after having received a report from the Secretary of the Prime Minister's Department.

25 Mr Steve Sedgwick, *Transcript*, p.260.

Remuneration of agency heads

10.56 Under the arrangements proposed in the Bill, the Prime Minister will have independent power to set the remuneration and other terms and conditions of appointment of secretaries, while the relevant agency minister will have equivalent powers in respect of the head of an executive agency and the Public Service Commissioner.

10.57 The Public Employment (Consequential and Transitional) Amendment Bill 1997 proposes that the necessary changes to the *Remuneration Tribunal Act 1973* be made to give effect to this change.

10.58 The Explanatory Memorandum to the Bill notes that as a matter or practice, the Prime Minister would normally only exercise the power in this area after consultation with the Remuneration Tribunal.[26] The Explanatory Memorandum also indicates that this would also be the norm in relation to setting the salary of executive agency heads and the Public Service Commissioner.

10.59 A number of commentators have expressed concern at this change.

10.60 Mr Doug Lilly of the CPSU is concerned that there is a shift away from the Remuneration Tribunal being the body which sets these salaries. The CPSU believes it will be sending the wrong signal to the rest of the work force if these salaries are set by a process that is not as transparent as the Remuneration Tribunal provides and that it could lead to some very significant increases paid to those people 'through the backdoor and not publicly able to be scrutinised' through the Remuneration Tribunal.[27]

26 Explanatory Memorandum, paragraph 6.12, p.51.

27 Mr Doug Lilly, *Transcript*, pp.70-71.

10.61 Mr Harry Evans commented that:

> *remuneration of secretaries should be set by an independent tribunal and be alterable only by the independent tribunal. Under this legislation, secretaries will know that not only does their tenure of office depend entirely on the will of the Prime Minister but so does their remuneration, which is another factor against the giving of frank and fearless advice.*[28]

10.62 Mr Derek Volker had a similar view about the role of the Tribunal. He stated that in his view, as a matter of principle as well as practical politics, it would be sensible and desirable that terms and conditions of appointment of agency heads be set by an independent body.[29]

10.63 While noting that the Explanatory Memorandum indicates that as a matter of practice it would be the norm for the Prime Minister to consult the Remuneration Tribunal in these matters, Mr Volker commented that it does not require the Prime Minister to seek advice, or having sought that advice, to take account of the advice or act in accordance with the advice.[30]

10.64 The Australian National Audit Office is particularly concerned about the issue of public scrutiny of these matters. It notes that:

> *currently the remuneration for Secretaries and agency heads is open to public scrutiny through remuneration tribunal processes and, in a less direct manner, through current Minister for Finance guidelines for financial statements for disclosure of remuneration levels in salary bands in the financial statements of departments and agencies. In the interests of transparency and accountability, the ANAO considers 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.*[31]

28 Mr Harry Evans, *Transcript*, p.121.

29 Mr Derek Volker, *Transcript*, pp177.

30 Mr Derek Volker, *Transcript*, p.179.

31 ANAO, *Submission*, p.S58.

10.65 A number of other participants in the Review support the proposed changes. Mr Moore-Wilton stated that it is:

> *a question of clearly ascribing responsibility. ... The Remuneration Tribunal should be seen as an advisory body to the government, not a determining body for the government ... There is a view that, providing there is a transparency in appointment and providing that the government, through the Prime Minister, is prepared to account to parliament for its action, it is an appropriate change.*[32]

10.66 Mr Patrick Gourley (providing a personal view, rather than necessarily the view of the Institute of Public Administration) commented that:

> *the Remuneration Tribunal was established, at least in part, in an attempt to depoliticise the fixing of remuneration for secretaries and senor statutory officers. It would be difficult to mount a case that the tribunal has been overwhelmingly successful in meeting that objective, and in these circumstances it seems that the proposal that is now on the table is probably sensible.*[33]

10.67 Many of the current secretaries also spoke out in support of the change, noting at the same time that their current remuneration compares unfavourably with equivalent levels in other public services. There was general support for the Remuneration Tribunal having an advisory role and for the aggregate value of agency heads' remuneration packages be open to public scrutiny.

10.68 Mr Barratt considered that the current process does not produce the right sort of outcome because the frame of reference has been more to do with movements in the community generally and the inflation rate rather a market rate for chief executive officers.[34] Mr Sedgwick considered that

32 Mr Max Moore-Wilton, *Transcript*, p.234.

33 Mr Patrick Gourley, *Transcript*, p.71.

34 Mr Paul Barratt, *Transcript*, p256.

the involvement of the Prime Minister in the issue of remuneration is consistent with the general approach of the Bill regarding Prime Ministerial powers in relation to secretaries.[35]

Committee Comment

10.69 The Committee notes the differing views put forward by participants in the Review about the role of Remuneration Tribunal in relation to setting the remuneration and other terms and conditions of appointment of agency heads and the Public Service Commissioner.

10.70 The Committee considers that the options are:

- to retain the current system whereby the Remuneration Tribunal is responsible for setting the salary and other terms and conditions of these persons; or
- to adopt the approach suggested in the Bill which places the responsibility with the Prime Minister (in relation to secretaries) and agency ministers (in relation to other agency heads and the Public Service Commissioner).

10.71 The Committee has not reached a consensus view on this matter. The Committee notes that it is a matter of Government policy that the power to determine the remuneration and other terms and conditions of employment of agency heads should rest with the Prime Minister, in the case of secretaries, and with agency ministers, in respect of other agency heads and the Public Service Commissioner, with the Remuneration Tribunal playing an advisory role.

35 Mr Steve Sedgwick, *Transcript*, p.258.

10.72 The Committee believes however that whatever method is introduced for determining remuneration, it is important that, consistent with the Guidelines on *Financial Statements of Commonwealth Departments* issued by the Minister for Finance in June 1997, there continue to be mechanisms for the aggregate remuneration and benefits of persons in agency head positions to be open to public scrutiny.

10.73 **Recommendation 17**

The aggregate remuneration of agency heads and the Public Service Commissioner should continue to be open to public scrutiny and published in the annual financial statements of Commonwealth agencies.

11

MOBILITY ARRANGEMENTS

Introduction

11.1 The 1922 Act sets out quite detailed and complex mobility arrangements for APS staff. These provisions are contained in Part IV of that Act and confer certain rights on APS officers who gain employment with Commonwealth statutory authorities which are not staffed under the Public Service Act.

11.2 These mobility arrangements apply to APS officers who voluntarily move to jobs in a Commonwealth authority, and to officers who are compulsorily transferred as a result of a Government decision to transfer a function from the APS to a Commonwealth authority. They also apply to APS officers who wish to take up employment under either the *Governor-General Act 1974* or the *Members of Parliament (Staff) Act 1984* and to officers appointed to statutory offices.

11.3 The Part IV mobility provisions adopt a two tier approach, although this terminology does not appear in the legislation. 'First tier' arrangements generally continue for the first three years and staff are regarded as being on deemed leave of absence (without the need for a formal grant of leave by the agency). They can continue to apply for APS jobs advertised in the *Commonwealth Gazette*. They also have an automatic right of return to their original agency at their substantive level without being required to give a period of notice.

11.4 Under 'second tier' arrangements, staff retain indefinite rights to continue to apply for APS jobs as if they were officers of the APS and also have certain re-appointment rights, for example if they become excess to requirements in the Commonwealth authority, or in other special circumstances. APS officers who are compulsorily transferred with a function to a non-APS Commonwealth authority are covered by the Second Tier arrangements from the date of transfer.

11.5 Commonwealth office holders, including most statutory appointments as well as persons who take up appointments under the *Governor-General Act 1974* or the *Members of Parliament (Staff) Act 1984* are covered by first tier arrangements for the duration of their appointments.

Relevant provisions of the Public Service Bill

11.6 The Public Service Bill does not include any substantive mobility provisions. It is proposed in the future that APS employees who wish to take up non-APS employment, including statutory appointments, either will have to resign or seek leave from their agency to take up such employment.

11.7 The Public Employment (Consequential and Transitional) Amendment Bill 1997 (the CTA Bill) includes transitional arrangements relating to current and former APS officers who are covered by the mobility provisions. Clause 6 of the CTA Bill sets out the transitional arrangements for first tier staff (and for persons still covered by the provisions of the *Officer's Rights Declaration Act 1928*) while clause 7 deals with transitional arrangements for second tier staff. Both of these clauses continue the rights of staff for a finite period, the duration of which is to be prescribed in the Public Service Regulations.

11.8 The CTA Bill also includes amendments to the *Governor-General Act 1974* and to the *Members of Parliament (Staff) Act 1984* (the MOPS Act) which have the effect of removing the mobility arrangements for APS employees who may wish to take up employment under either of these Acts.

11.9 The removal of the parliamentary departments from coverage under the Public Service Bill also raises the issue of future mobility between the APS and the Parliamentary Service.

Issues

11.10 This chapter focuses on:

- the creation of a separate Parliamentary Service;

- the arrangements that should apply in the future in relation to movement between the APS and other non-APS Commonwealth agencies;
- the need for special arrangements for people working on the staff of members of Parliament and on the staff of the Governor-General; and
- the need for transitional provisions to cover persons covered by the current mobility arrangements.

A separate Parliamentary Service

11.11 At present the five parliamentary departments are covered by the 1922 Act. Section 9 of that Act creates the parliamentary departments and establishes the legislative basis for the Speaker of the House of Representatives and the President of the Senate (either individually or jointly) to exercise powers in respect of the parliamentary departments which Ministers and the Public Service Commissioner exercise in the case of executive departments.[1]

11.12 Under the proposed arrangements it is intended that employees of the parliamentary departments will not be covered by the Public Service Act, but instead, by a Parliamentary Service Act.

11.13 Mr Bolton, Secretary of the Joint House Department, told the Committee:

> *the removal of the parliamentary service from coverage under the Public Service Act has been forced upon us. Without consultation the parliamentary departments were cut off.*[2]

1 Department of the Parliamentary Reporting Staff, Department of the Parliamentary Library & Joint House Department, *Submission*, p.S186.

2 Mr Mike Bolton, *Transcript*, p.184.

11.14 The rationale provided to the Presiding Officers for this decision was that:

> *it would be more appropriate for the parliamentary departments to be covered by their own legislation in the future because this would recognise the unique position of the staff of the departments providing services to the Parliament and the independence of the Presiding Officers.*[3]

11.15 The proposal to introduce the separate Parliamentary Service Bill raises questions about possible disadvantages to each of the Services.

11.16 Mr Bolton argued that the close relationship and commonality of interest between the two services should be preserved. Both the Australian Public Service and the Parliament serve the entire Australian public. The issues raised in both areas on a great many occasions require consideration or action by both parties. The development of Government policy is brought to the Parliament for consideration by way of legislation.

11.17 Mr Bolton expressed his belief that both the APS and the Parliamentary Service can better serve their respective constituents and the public if the existing arrangements which provide for mobility and interchange of staff are preserved.

11.18 Staff of the parliamentary departments are not arguing for retention of 'right of return' provisions but for the ability to take entitlements to positions gained on merit in the Public Service and for similar provision to be made for public servants to take up positions in the Parliamentary Service.

11.19 According to Mr Harry Evans:

> *Without that ready mobility, the parliamentary service will wither on the vine, because it relies for recruitment on the Public Service very heavily. We rely on getting good people coming from the Public Service into the parliamentary service ... If they do not feel that they can readily move to the parliamentary service and go back again, we will not get the*

3 Mr Mike Bolton, *Transcript*, p.184.

quality of staff that we have been getting in the past. So that mobility is absolutely crucial. The absence of it would so cripple the parliamentary departments that it would cripple the parliament.[4]

11.20 The Committee notes that the Parliamentary Service Bill is currently in draft. Clause 25 of that Bill provides for mobility between the Parliamentary Service and the APS:

(1) A Parliamentary Service employee is eligible for engagement in any position, or at any classification or level, as an employee of a Department of State or of an Executive Agency under the Public Service Act 1997 on the same terms and conditions, but subject to the same restrictions (for example, a restriction limiting an engagement to a person who has particular qualifications) if any, as would apply to an APS employee seeking to be employed in the position or at the classification level.

(2) An APS employee is eligible for engagement in any position, or at any classification or level, as an employee of a Department on the same terms and conditions, but subject to the same restrictions (for example, a restriction limiting an engagement to a person who has particular qualifications) if any, as would apply to a Parliamentary Service employee seeking to be employed in the position or at the classification level.

(3) A person who moves from:

(a) employment in the Parliamentary Service to employment in the Australian Public Service; or

(b) employment in the Australian Public Service to employment in the Parliamentary Service;

retains his or her existing or accruing rights in respect of matters relating to his or her employment to the same extent as if he or she were moving from employment in one Department of State to employment in another Department of State.

11.21 Staff of the parliamentary departments have been told that these provisions should be sufficient to ensure mobility without any complementary provisions in the Public Service Bill.[5]

4 Mr Harry Evans, *Transcript*, p.127.

5 Mr Harry Evans, *Transcript*, p.127; Mr Mike Bolton *Transcript*, p.185.

11.22 The Public Service Commissioner has also noted that the Parliamentary Service Bill includes specific provision which will have the effect of allowing reciprocal mobility between the parliamentary departments and the APS. Dr Shergold considers this to be a workable solution which should be supported.[6]

Committee Comment

11.23 The Committee supports the establishment of the Parliamentary Service as a separate service.

11.24 However, the Committee considers that it is essential that reciprocal mobility arrangements between the two services be introduced. These mobility arrangements should allow for movement on merit between the two services and for portability of relevant entitlements.

11.25 The Committee notes the advice that inclusion of necessary provisions in the Parliamentary Service Bill will be sufficient to ensure that this reciprocal mobility is in place. However, the Committee is concerned that if the Parliamentary Service Bill is not introduced at the same time as the new Public Service Bill, there will be no provisions authorising mobility between the two services.

11.26 **Recommendation 18**

The Parliamentary Service Bill should provide for reciprocal mobility arrangements between the Parliamentary Service and the Australian Public Service which enable staff of either service to compete on merit for jobs in the other service and to carry over relevant entitlements.

If the Parliamentary Service Bill is not enacted at the same time as the Public Service Bill 1997, relevant provisions should be included in the Public Service Bill 1997 to ensure this mobility.

6 Dr Peter Shergold, *Transcript*, p.206.

Future mobility arrangements between the APS and other non-APS bodies

11.27 The following justification for the removal of the current mobility arrangements appears in the Explanatory memorandum to the CTA Bill:

> *The arrangements are extremely complex ... Such conditions represent a considerable liability for public service agencies. In the private sector, such mobility arrangements are normally dealt with on the basis of management agreeing to extend unpaid leave to employees for a set period. This should also be the model for the APS. It is proposed that under the new Act Secretaries have the discretion to determine arrangements that best meet the needs of their organisations. They will be able to grant periods of leave with or without pay and to decide whether it counts as service. This will provide a low cost, easily administered arrangement to enable mobility between the APS and non-APS public employment.*[7]

11.28 Mobility was also addressed in the McLeod report which commented as follows:

> *These provisions are complex and impose requirements on departments to release and accept staff with minimal notice, which inhibits effective staff management. They were introduced in a significantly different environment to that which exists now. In particular there has been:*
>
> - *an increase in the diversity of Commonwealth employment outside the APS;*
> - *large scale redundancies in organisations employing staff with re-entry rights to the APS; and*
> - *downsizing in many departments.*[8]

7 *Public Employment (Consequential and Transitional) Amendment Bill 1997*, Explanatory Memorandum, paragraph 3.3.8, p.17.

8 *Report of the Public Service Act Review Group*, December 1994, p.52-53.

11.29 The McLeod Report also recommended the replacement of the existing provisions with streamlined arrangements giving staff who leave the APS in these circumstances the right to apply for APS vacancies for certain periods, with the details of transitional arrangements for staff covered by the existing provisions to be negotiated with the unions.

11.30 The difficulties with the current mobility arrangements are highlighted in the evidence given by the Public Service Commissioner who commented that there is a considerable problem with managing in the Public Service with, in effect, a contingent liability of 50,000 people who have return rights of one form or another on a public service that is in total size between 125,000 and 130,000.[9]

11.31 These views are reinforced by Mr Peter Boxall, the Secretary of the Department of Finance who commented that Part IV mobility makes it very difficult for a secretary to run a department when people can just literally arrive back on the doorstep.[10]

11.32 Submissions varied on the issue of future mobility rights of public service staff. Mr Denis Ives commented that the current provisions are most complex, difficult to apply in practice and potentially very costly in terms of their open ended nature and that they are being replaced by what would appear to be a practical and flexible arrangement.[11]

11.33 The ACTU noted that as a result of these Bills there will be reduced mobility between Federal Government agencies and between those agencies and the Parliament[12] and that the removal of the existing arrangements fails to recognise a whole of Government approach. In particular it fails to recognise the significant benefit to the Parliament and the APS through the current mobility provisions.[13] The ACTU believe the new Act or Regulations should continue to provide mobility rights in defined circumstances.

9 Dr Peter Shergold, *Transcript*, p.26.

10 Dr Peter Boxall, *Transcript*, p249.

11 Mr Denis Ives, *Submission*, pp.S116, S124.

12 ACTU, *Submission*, p.S132.

13 ACTU, *Submission*, p.S165.

Committee Comment

11.34 The Committee accepts that the existing mobility arrangements between APS and non-APS Commonwealth employment are extremely detailed and complex and should not be replicated in the new Act.

11.35 The Committee agrees that a system which involves either the granting of leave or resignation is satisfactory in most instances, and that this approach will be advantageous to APS agencies by allowing them to consider such arrangements in the context of the overall management of their staffing. If agencies decide to grant leave in particular circumstances, they will also have the flexibility to determine whether that period of leave counts as service for the purpose of accruing APS entitlements.

11.36 The Committee notes that while these arrangements will place a greater onus on APS staff being ultimately responsible for the career choices they make by potentially removing the automatic safety net of a right of return to the former employer, they will still have access to certain protections - for example APS employees will still be able to apply for leave to take up such employment and, if this is granted, their APS status will not change.

Arrangements applying to employment under the Members of Parliament Staff Act, the Governor-General Act and appointments to other statutory offices.

11.37 Under the present arrangements, Commonwealth office holders, which includes most statutory appointments as well as persons who take up appointments under the *Governor-General Act 1974* or the *Members of Parliament (Staff) Act 1984,* are covered by first tier mobility arrangements for the duration of their appointments.

11.38 In effect, this means that these people are regarded as being on leave without pay from the APS.

11.39 The Explanatory Memorandum to the CTA Bill notes that as a matter of practice, it will be expected that agency heads will grant leave without pay to APS employees who wish to take up statutory appointments.[14] The Deputy Public Service Commissioner stated before the Committee that 'statutory appointments' captures the nature of appointments under the MOPS Act. Mr Kennedy noted that:

> *there is a fairly clear statement of government policy that they would expect agency heads to give effect to.*[15]

11.40 The Clerk of the Senate, in discussing mobility between the public service and the staff of members of Parliament commented:

> *It is essential to preserve that mobility ... There have been a lot of very valuable people who have worked on the personal staffs of senators and members and ministers and who have later returned to the parliamentary service or returned to the Public Service because they are professional public servants. That cross-fertilisation ... has been very valuable in a lot of cases.*[16]

Committee Comment

11.41 The Committee notes the statement in the Explanatory Memorandum to the CTA Bill that it is expected that APS employees who wish to take up statutory appointments will be granted leave without pay and the commitment given by the Public Service Commissioner in the public hearings that the intentions regarding the granting of leave in particular circumstances will be made more explicit in a subsequent version of the Explanatory Memorandum.

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14 *Public Employment (Consequential and Transitional) Amendment Bill 1997*, Explanatory Memorandum, paragraph 3.3.17, p.19.

15 Mr Peter Kennedy, *Transcript*, p.27.

16 Mr Harry Evans, *Transcript*, p.127.

11.42 The Committee believes it is important that the provisions for APS employees to take up statutory appointments, including employment under either the MOPS Act or the Governor-General Act without severing their status as APS employees should be retained. The Committee considers that the reference in the Explanatory Memorandum that agency heads will be expected to grant leave in these circumstances is inadequate to ensure that this will occur.

11.43 The Committee believes there should be a clearer statement of Government policy on this matter which will bind agency heads to grant leave in these circumstances.

11.44 **Recommendation 19**

The Prime Minister should exercise the power under clause 21 of the Public Service Bill 1997 to issue a general Direction to agency heads stating that agency heads must grant leave without pay to Australian Public Service employees to take up statutory appointments, employment under the Members of Parliament (Staff) Act 1984 or employment under the Governor-General Act 1974.

This Direction should cover existing Australian Public Service staff who may need to seek an extension to their current arrangements as well as staff seeking to move to such employment in the future.

Transitional arrangements

11.45 The CTA Bill proposes that the transitional arrangements for persons covered by Part IV mobility arrangements operate as follows:

First tier

- the consequential and transitional regulations made under the CTA Bill will determine a transitional period of 12 months for persons covered by first tier mobility provisions;

- during this period, a first tier person will continue to be regarded as absent from the APS on leave without pay and may return to his/her former APS agency at any time during this period;
- a first tier person will be taken to have resigned from the APS at the end of this period unless he/she resumes duty in the APS or is granted a further period of leave by the APS agency;
- sick leave, recreation leave and long service leave entitlements will continue to accrue at APS rates during the transitional period.

Second tier

- Second tier persons will continue to be entitled to be reappointed to the APS for a period of 12 months after the commencement of the new legislation, provided certain conditions (similar to those that currently set out in section 87N of the 1922 Act) are satisfied;
- reappointment is to the former APS agency.

11.46 The ACTU believes that it is inappropriate for the Parliament or the Government to retrospectively remove mobility rights which have been given to people.[17] It considers that a fairer approach would be to allow those persons who currently have mobility rights to retain them indefinitely.

11.47 The PSMPC, on the other hand, believes it is appropriate to negotiate a transitional period during which people can continue to access their current rights of return to the APS. The PSMPC considers that indefinite mobility rights would simply continue the present unsatisfactory arrangements and place a significant administrative burden on APS agencies, as well as the ongoing retention of certain formal reappointment committees established under the *Merit Protection (Australian Government Employees) Act 1984.*

17 Mr Peter Moylan, *Transcript*, p.328.

Committee Comment

11.48 The Committee supports the introduction of transitional arrangements for persons covered by Part IV mobility arrangements at the time the new Public Service Act comes into operation.

11.49 The Committee believes that in the interests of the efficient and effective management of the APS, it is reasonable to impose a time limit on the continuation of present mobility rights.

11.50 The Committee believes that the transitional period should be extended to three years to allow:

- a realistic transition period to enable persons to decide whether they want to return to the APS or continue in their current employment; and
- APS management a longer period to manage any influx of former employees to the APS.

11.51 **Recommendation 20**

The transitional period for people with current mobility rights should be extended to three years.

12

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Introduction

12.1 This chapter draws together the Committee's comments, conclusions and recommendations and presents them in a consolidated form as an aid to readers.

Overarching issues

General concerns

12.2 The Committee notes, but does not share, all of the general concerns that have been raised about the Bill.

12.3 Committee members differed in their view on how radical a change the Bill represents.

12.4 The Bill is dramatically different in form and content from the 1922 Act. However, many of the employment and management relationships proposed in the Bill do not differ substantially from the employment and management relationships currently operating in the APS. For example, nearly all Secretaries of Commonwealth Departments are appointed on contracts with 5 year terms - the notion of permanency or tenure no longer exists for departmental heads. On the other hand, the proposals to allow the Prime Minister to determine remuneration of agency heads, and the extended powers of agency heads in relation to employees, constitute significant departures from current practice.

12.5 In large part, the Bill seeks to give a contemporary legislative basis for employment and management practices which have evolved in the APS over the last ten years, and to incorporate into the public sector the current Government's industrial relations reforms.

12.6 The Committee agrees with those who argue that there are some fundamental differences in the responsibilities of public servants and responsibilities of employees of private companies. These differences are important and are worth preserving.

12.7 The Bill seeks to change, in some cases dramatically, some aspects of the public sector employment framework. The most contentious provisions in the Bill tend to be those where the changes proposed are most significant. For example, the provisions dealing with the review of employment decisions attracted much critical comment.

12.8 While the Committee supports the need for the 1922 Act to be replaced, and favours simplification, modernisation and the more accessible format of the Bill, its review has identified a number of areas where improvements can clearly be made. These areas are the subject of recommendations in this report.

12.9 The review has also revealed a number of issues on which Committee members have not been able to agree. These areas are highlighted in report for the information of Members and Senators.

Annual reporting provisions

12.10 The Committee considers that downgrading the status of the annual report requirements for Commonwealth Departments is a retrograde step.

12.11 Annual reports are key accountability documents. It is through annual reports to Parliament that agencies account for their past year financial results and program performance.

12.12 As Parliament is the main user of the information reported in annual reports, it is appropriate that Parliament have a assured and central role in determining the guidelines against which annual reports are prepared. It is not adequate that the annual report guidelines be prepared at the discretion of Executive agencies after consultation with the Parliament.

12.13 A desire to achieve a streamlined Act is not sufficient reason to change the current arrangements.

12.14 **Recommendation 1**

Clauses 56 and 63 of the Public Service Bill 1997 should be amended to require that annual reports from secretaries of departments and heads of executive agencies be prepared in accordance with guidelines approved by the Joint Committee of Public Accounts on behalf of the Parliament.

APS Values and Code of Conduct

General comments

12.15 The expectations imposed on employees by the APS Values (see clause 10) must be clear. In view of the potential seriousness of allegations of failing to uphold the Values, which could result in termination of employment, it is vital that they be easily interpreted.

12.16 The Committee notes that the Commissioner's power to issue directions in relation to APS Values is non-discretionary: clause 11 states that the Commissioner 'must issues directions in writing.' The Committee would expect the Commissioner's Directions on the APS Values to clarify the meaning and intent of the Values, to the extent that the Values are unclear.

Comments on specific clauses

12.17 Clause 10 (e) states that 'the APS is accountable for its actions.' The Committee is of the view that it is vital that the APS Values must clearly state to whom the APS is accountable.

12.18 **Recommendation 2**

Clause 10(e) of the Public Service Bill 1997 should be amended so as to add the words 'within the framework of Ministerial responsibility to government, parliament and the public' after the word 'actions' of line 17 of page 7.

12.19 The APS Values, in Clause 10 (f), require APS employees to provide 'timely advice' to the Government but do not prescribe any other characteristics, such as quality, to the advice. The Committee believes that the provision of honest, comprehensive and accurate advice, without fear or favour, is an important responsibility of the APS. A clear expression of the nature of advice required to be provided by the APS is vital for good, accountable government.

12.20 **Recommendation 3**

Clause 10(f) of the Public Service Bill 1997 should be amended to insert the words 'frank, honest, comprehensive, accurate and' before the word 'timely' in line 18 on page 7.

Code of Conduct

12.21 The Committee agrees with the view expressed in a number of submissions that it would be inappropriate to, on the one hand, establish common values and standards throughout the APS and then, on the other, to apply different procedures and degrees of sanction within each agency when dealing with employees who fail to uphold these standards. The Committee agrees that this a matter on which consistency would be desirable.

12.22 **Recommendation 4**

The Public Service Commissioner should monitor the procedures developed by agencies under clause 15(3) to ensure that they are reasonable and fair.

12.23 The Committee received many suggestions for changes to the wording of particular subclause in clauses 13 and 15. The Commissioner should review all of the suggestions and advise the Government on whether they should result in amendments to the Bill.

12.24 **Recommendation 5**

The Public Service Commissioner should review all suggested amendments to clauses 13 and 15 of the Public Service Bill 1997, as tabulated in Appendix IV of this report, and advise the Government on whether they should result in changes to the Bill.

Merit

General

12.25 The Committee strongly supports the principle that merit continue to be to be the primary basis for employment decisions in the APS.

12.26 The Committee also supports the inclusion in the legislation of specific prohibitions of patronage and favouritism and ministerial interference.

12.27 The Committee believes that the inclusion of a specific reference to the principle of merit in employment decisions in the APS values should be supported by the inclusion of a clear and unambiguous definition of merit in the Bill. The Committee considers that this approach would enhance community understanding of the importance of merit in APS employment decisions by providing a definition of merit that cannot be varied except with the direct authorisation and participation of the Parliament.

12.28 **Recommendation 6**

The Public Service Bill 1997 should include a definition of merit.

Definition of merit

12.29 The Committee notes the commitment given by the Public Service Commissioner in hearings conducted by the Committee that a more appropriate form of words will be developed which would remove any ambiguity in relation to the application of merit to identified employment decisions. The Commissioner also noted that he would consider the revised definition put forward by the Women's Electoral Lobby.

12.30 The Committee agrees that the inclusion of the phrases *while contributing to the effective and efficient operation of the Agency* and *the assessment is taken into account in making the decision* in the current draft definition of merit could be seen as a substantial diminution of the application of the merit principle in relation to relevant APS employment decisions and considers that they should be deleted.

12.31 The Committee believes that it is important that there be a transparent definition of merit included in the primary legislation based on the generally accepted *CCH Australian and New Zealand Equal Opportunity Law and Practice* definition.

12.32 The Committee also considers that it is appropriate that the Public Service Commissioner's Direction on Merit specify the range of employment decisions to which a merit assessment must apply, identify examples of work related qualities that may be relevant to such assessments, recognise that there may be certain cost related decisions that might be relevant considerations in employment decisions and set out a range of other matters in relation to the application of merit in the APS.

12.33 The Committee believes that this approach will assist in meeting the objectives of a more streamlined and flexible approach to the application of merit in the APS while at the same time ensuring that relevant employment decisions continue to be made on the basis of merit and without patronage and favouritism.

12.34 **Recommendation 7**

The definition of merit to be included in the Public Service Bill 1997 should be as follows:

An employment decision about a person is based on merit if:

- ***an assessment is made to establish the best applicant for the job(s);***
- ***the assessment is based on the relationship between the applicants' work related qualities and the work related qualities genuinely required for performance in the job(s); and***
- ***the assessment focuses on the capacity of applicants to achieve job outcomes.***

Advertising requirements

12.35 The Committee supports the requirement in the draft Direction on Merit in Employment in relation to advertising which provides that where it is proposed to either promote a person to a particular vacancy or to engage a person for a period of, or periods totalling, more than 12 months, an opportunity to apply for the relevant employment, or similar employment in the agency, is notified in the *Commonwealth Gazette*.

12.36 However, the Committee considers that it would be consistent with the general trend established by the Bill to allow agency heads some flexibility in deciding whether individual vacancies, particularly at lower levels, need to be advertised as being open to all Australians. Accordingly the Committee believes that the Direction on Merit in Employment should be amended to allow agency heads the discretion to determine that particular vacancies are to be advertised as only open to current APS employees.

12.37 **Recommendation 8**

The Public Service Commissioner's Direction on Merit in Employment should be amended to allow agency heads the discretion to decide whether individual vacancies are to be advertised as open to all Australians.

Workplace diversity

12.38 The Committee accepts that the policy underpinning the Bill is to be to be less prescriptive in the reporting required of agencies. However the Committee is of the view that it is a matter of public accountability that agencies properly evaluate their workplace diversity programs in a way which is meaningful. It therefore makes the following recommendation:

12.39 **Recommendation 9**

The Public Service Commissioner's Direction on Diversity in Employment should be amended to:

(a) expressly require agency heads to evaluate the 'outcomes' of their workplace diversity programs; and

(b) to specify the performance indicators and criteria which should be used by agencies in carrying out these evaluations.

12.40 **Recommendation 10**

The Public Service Commissioner should monitor the evaluations of Agency's workplace diversity plans, and should use his or her powers of evaluation and inquiry under clauses 41 and 43 of the Public Service Bill 1997 to ensure that these reports are adequate.

12.41 **Recommendation 11**

The Public Service Commissioner should make recommendations to an agency head whose workplace diversity plan is found to be deficient. If the agency head fails to implement the recommendations without sufficient reason, the Public Service Commissioner should bring this to the attention of the relevant Minister/s and, if necessary, the Parliament.

12.42 **Recommendation 12**

The Public Service Commissioner's Direction on Diversity in Employment should be amended to make it clear that the Public Service Commissioner will:

(a) collect from agency heads the information that is necessary to carry out comparisons on the outcomes of agencies' workplace diversity programs;

(b) develop an appropriate analytical framework to ensure that these comparisons are meaningful; and

(c) publish the results of these comparisons in the Commissioner's annual State of the APS report.

Whistleblowing

12.43 A number of serious weaknesses have been identified in the scheme established by clause 16. The Committee is concerned that APS employees may not be prepared to make reports if they believe that adequate protection is not available. The Committee therefore believes that the protection ought to be strengthened on a number of levels. However, the Committee feels that it is limited in the sorts of recommendations that it can make for the following reasons:

(a) there has not been sufficient consultation and debate on the issue. There are many complex philosophical and practical issues related to whistleblowing. Clause 16 is only one clause in the Bill, and this review was not the appropriate forum in which to thoroughly examine these issues; and

(b) in considering this issue, it has become evident to the Committee that there are considerable limitations to any whistleblowers protection scheme which is based within the Public Service Bill. It would take a significant number of amendments, many of which would involve changing basic characteristics about the Bill, to

provide a comprehensive whistleblowers scheme. The Committee does not feel that the sort of recommendations necessary to fully overcome the weaknesses in the scheme are consistent with the philosophy and the framework of the legislation.

12.44 For these reasons the Committee has decided not to make major recommendations for change in relation to clause 16.

12.45 The Committee is of the view that it would be preferable for the Government to introduce whistleblowers protection legislation along similar lines to that which already exists for the public sector in other Australian jurisdictions. In the event that such legislation is passed by the Parliament, the whistleblowers protection contained within the Public Service Act could be removed. Accordingly, the Committee makes the following recommendation.

12.46 **Recommendation 13**

The Government should consider introducing whistleblowers protection legislation along similar lines to that which already exists for the public sector in other Australian jurisdictions. Any such legislation should be the subject of scrutiny by a parliamentary committee prior to its passage through the Parliament.

Employment arrangements, categories of employment and tenure

Employment powers of agency heads

12.47 The Committee accepts that placing the necessary employment powers with agency heads is consistent with the Government's broader policy on workplace relations and the proposed changes in the area of financial management.

12.48 The Committee notes that the exercise of these powers will be regulated to a certain extent by relevant provisions of the Bill and the subordinate legislation, as well as by the Workplace Relations Act, other relevant legislation and by certified agreements negotiated between agency heads and employees. The role of the Public Service Commissioner in monitoring and evaluating employment practices will also be relevant in this regard.

Remuneration and terms and conditions of employment

12.49 The Committee notes that the changes proposed by the Bill in relation to employment for APS employees are consistent with the broader reform agenda in relation to workplace relations and agreement making which place responsibility for these matters at the agency level.

Employment categories and tenure

12.50 The Committee supports the inclusion of relevant provisions in the Public Employment (Consequential and Transitional) Amendment Bill 1997 which preserve the employment status and tenure of existing APS staff.

12.51 The Committee concluded that, as employment categories are an allowable matter for inclusion in Awards under the Workplace Relations Act, it is appropriate that these matters be specified in an Award rather than in the Bill itself.

12.52 The Committee also supports the initiative inherent in the new arrangements which gives agency heads have greater flexibility in developing a suitable 'staffing mix' of continuing and fixed term employees for their agencies.

12.53 However, the Committee believes that it will be important for agency heads adopt a strategic approach to developing necessary employment policies which balances the need for flexibility against a recognition that there is likely to be a continuing requirement for the ongoing employment of persons in their agencies to maintain a degree of stability and continuity of corporate knowledge.

Termination of employment of APS employees

12.54 The Committee supports the removal of the maximum retiring age provisions from the legislation.

12.55 In relation to *non-SES employees*, the Committee accepts that the protections afforded by the Workplace Relations Act against termination of employment provide an adequate safeguard against unfair termination decisions which are commensurate with the protections afforded to workers in the private sector. However the Committee also notes that the situation in relation to fixed-term non-SES employees having access to these provisions may need to be clarified.

12.56 In relation to the *SES termination provisions*, the Committee also notes that many of the concerns about SES termination provisions which were expressed in submissions to its review, and at the public hearings on 6 and 7 August, were made before the Commissioner's draft Direction on Senior Executive Service employment was available for scrutiny.

12.57 The Committee notes the advice from the Public Service and Merit Protection Commission that the draft Direction puts in place the substantive restrictions which are presently set out in section 76L of the current Act and believes that this will at least partially address some of the concerns that have been identified in relation to SES terminations.

12.58 In addition, the Committee believes that the acceptance of its recommendation in relation to the inclusion of the words 'frank, honest, comprehensive and accurate' in clause 10(f) of the APS values will at least partially address concerns that have been raised about the impact of these termination provisions on the nature and quality of advice given to government.

12.59 The Committee also notes that there were a number of other concerns raised during the course of its review about various aspects of the termination of employment provisions. The Committee has identified a number of possible amendments to the Bill which were raised during its review by various parties as suggestions for addressing some or all of these concerns. These are:

- to include specific grounds for termination in the Bill which would apply to all APS employees. The grounds could be those specified in the Public Service Commissioner's draft Direction on SES Employment;
- to include a requirement in the Bill for reasons for the termination to be given to affected employees;
- to include a requirement in the Bill that an agency head must obtain a report about the proposed termination from the employees supervisor or another appropriate employee before the power is exercised; and
- in relation to SES employees, that the requirement that the Public Service Commissioner certify that the termination is in the best interests of the APS be included in the Bill itself rather than in the Direction, and that this be supplemented by a requirement for the Commissioner to certify that the termination meets the minimum requirements set out in the Direction.

12.60 The Committee has not reached a consensus on the inclusion of any of these suggestions. The Committee notes however that it is a matter of Government policy that SES employees should be excluded from coverage by the termination of employment provisions of the Workplace Relations Act.

Review of Actions

12.61 The Committee concluded that, on the basis of the evidence to its review, there is a clear need for a revision of the current grievance and appeal mechanisms which exist under the 1922 Act. The Committee also concluded that there are shortcomings in the *Public Service Draft Regulations* relating to Clause 33 of the Bill.

12.62 Some Committee members believe that the objective of streamlining the review processes has not been achieved. It would appear to those members that the PSMPC has set up far more complex layers of processes than those that they seek to replace.

12.63 The Committee's review of the regulations was frustrated by the fact that the regulations concerning review of APS actions had not been drafted when the Public Service Bill was referred to the Committee for review. As a result of the regulations not being available to the Committee until 21 August, the Committee was unable to obtain comments on the regulations until late in the review.

12.64 This situation was compounded by the PSMPC subsequently submitting revised draft regulations to the Committee. While the Committee commends the Commission for its responsiveness to suggestions made to the JCPA review, the Committee is critical that, given the importance of the review provision, it has been denied the ability to conduct a proper review of the subordinate legislation.[1]

12.65 The Committee is concerned about the level of dissatisfaction with the proposed regulations.

12.66 The draft regulations provide the Public Service Commissioner with an external and independent review role. There is a perception however that, by virtue of his role as the APS standard setter and as the Executive Officer to the Management Advisory Committee, the Commissioner is not well placed to exercise independence in reviewing APS employment decisions.

12.67 A review mechanism which builds on the current model of a separate statutory officer within the structure of the PSMPC may offer a more independent review process than is proposed in the current version of the Regulations.

12.68 The Committee notes that at the public hearing of the Senate Finance and Public Administration Committee's review of the Public Service Bill,[2] Dr Shergold stated:

1 The Committee received a further revised version of the draft regulations at the time the Committee was finalising its report. The Committee was therefore unable to take the revised version into account.

2 24 September 1997.

> *I am not convinced of the need to establish a separate statutory office. Indeed if that was being considered, I would have thought a refinement of the present model where, within the one administrative organisation, there is both a Public Service Commissioner and a Merit Protection Commissioner with separate independent statutory powers woukld probably be as effective. However, I am not convinced that there is a need for such a separation.*[3]

12.69 In the JCPA's view such a separation seems a sensible solution to a complex issue.

12.70 There was little evidence of consultation over the development of the subordinate legislation. The Committee noted that the draft regulations had been 'workshopped' with departmental secretaries but no real consultation had yet occurred with the body involved in current review processes, the MPRA. The Commissioner acknowledged:

> *There have certainly been discussions. I have certainly seen the submissions that they have made to this committee and at least some of the proposals that they have put to the minister. To some extent the version that you have in front of you now I think addresses some of the earlier concerns raised by the MPRA.*[4]

12.71 The Committee recognises the importance of reducing costs to a minimum and some members are concerned that higher costs will be generated as a result of litigation.

12.72 The Committee concluded that the draft regulations do not reflect the simplicity of the Bill. The Committee believes that it is desirable that the draft regulations are clear and concise and are not open to ambiguity.

12.73 The Committee recognises that the draft regulations are still in the process of development. It is important that whatever review mechanism they ultimately contain they be drafted in a simple, clear and concise fashion.

3 Draft transcript, 24 September 1997.

4 *Transcript*, p.312; 317.

12.74 **Recommendation 14**

The Public Service Regulations dealing with review of Australian Public Service employment actions must be redrafted, in a way which is, at least, simple, clear and concise.

Agency Heads - Appointment and Termination Provisions and Remuneration Arrangements

Procedures for appointment and termination

12.75 The Committee agrees with the comment expressed in evidence by Derek Volker that the proposed changes to the appointment and termination processes for secretaries warrant substantive consideration by the Parliament because they involve a change to the arrangements set down in section 67 of the Constitution.

12.76 However, the Committee accepts that in practice the current process of appointment and termination of secretaries being made by the Governor-General is heavily influenced by the power only being able to be exercised in accordance with advice that is consistent with a recommendation by the Prime Minister.

12.77 The Committee accepts that the approach proposed in the Bill reflects the reality that such matters rest with the Prime Minister of the day and therefore supports the proposed changes.

12.78 As regards the situation of the Public Service Commissioner, the Committee accepts that, in view of the particular role set out for the Commissioner in the Bill, it is appropriate that the Governor-General continue to have a role in the appointment of the Commissioner and the termination of that appointment.

Tenure and the effect on the quality of advice

12.79 The Committee notes that it is a matter of fact that the arrangements proposed in the Bill in relation to secretaries are a continuation of the limited term appointment arrangements introduced in 1993.

12.80 The Committee supports the continuation of the present arrangements that secretaries be offered fixed term appointments up to a maximum period of five years.

12.81 As to the question of the effect of these arrangements on the quality and nature of advice provided, the Committee notes the differing views put forward by participants in its review. The Committee does not believe, however, that there is any reason the alter the limited term arrangements and termination provisions in relation to appointments at the Secretary level.

The role and status of executive agencies and their heads

12.82 The Committee agrees with the comments made by the ANAO that the rationale for the establishment of executive agencies is unclear and supports the view that the Explanatory Memorandum to the Public Service Bill should include a more complete explanation.

12.83 The Committee also believes that the powers of an agency Minister to appoint and to terminate the appointment of the head of an executive agency should be subject to the same limitations that are imposed on the Prime Minister in relation to the appointment and termination of appointment of secretaries.

12.84 **Recommendation 15**

The Explanatory Memorandum to the Public Service Bill 1997 should provide a clearer explanation of the purpose of executive agencies.

12.85 **Recommendation 16**

The provisions relating to the appointment and termination of heads of executive agencies should be amended to include a requirement that the agency Minister only be able to exercise the relevant powers after having received a report from the Secretary of the Prime Minister's Department.

Remuneration of agency heads

12.86 The Committee notes the differing views put forward in evidence about the role of Remuneration Tribunal in relation to setting the remuneration and other terms and conditions of appointment of agency heads and the Public Service Commissioner.

12.87 The Committee considers that the options are:

- to retain the current system whereby the Remuneration Tribunal is responsible for setting the salary and other terms and conditions of these persons; or
- to adopt the approach suggested in the Bill which places the responsibility with the Prime Minister (in relation to secretaries) and agency Ministers (in relation to other agency heads and the Public Service Commissioner).

12.88 The Committee has not reached a consensus view on this matter. The Committee notes however that it is a matter of Government policy that the power to determine the remuneration and other terms and conditions of employment of agency heads should rest with the Prime Minister, in the case of secretaries, and with agency ministers, in respect of other agency heads and the Public Service Commissioner, with the Remuneration Tribunal playing an advisory role.

12.89 The Committee believes however that whatever method is introduced for determining remuneration, it is important that , consistent with the Guidelines on *Financial Statements of Commonwealth Departments* issued by the Minister for Finance in June 1997, there continue to be mechanisms for the aggregate remuneration and benefits of persons in agency head positions to be open to public scrutiny.

12.90 **Recommendation 17**

The aggregate remuneration of agency heads and the Public Service Commissioner should continue to be open to public scrutiny and published in the annual financial statements of Commonwealth agencies.

Mobility Arrangements

A separate Parliamentary Service

12.91 The Committee supports the establishment of the Parliamentary Service as a separate service.

12.92 However, the Committee considers that it is essential that reciprocal mobility arrangements between the two services be introduced. These mobility arrangements should allow for movement on merit between the two services and for portability of relevant entitlements.

12.93 The Committee notes the advice that inclusion of necessary provisions in the Parliamentary Service legislation will be sufficient to ensure that this reciprocal mobility is in place. However, the Committee is concerned that if the Parliamentary Services legislation is not introduced at the same time as the new Public Service Bill, there will be no provisions authorising mobility between the two services.

12.94 **Recommendation 18**

The Parliamentary Service Bill should provide for reciprocal mobility arrangements between the Parliamentary Service and the Australian Public Service which enable staff of either service to compete on merit for jobs in the other service and to carry over relevant entitlements.

If the Parliamentary Service Bill is not enacted at the same time as the Public Service Bill 1997, relevant provisions should be included in the Public Service Bill 1997 to ensure this mobility.

Future mobility arrangements between the APS and other non-APS bodies

12.95 The Committee accepts that the existing mobility arrangements between APS and non-APS Commonwealth employment are extremely detailed and complex and should not be replicated in the new Act.

12.96 The Committee agrees that a system which involves either the granting of leave or resignation is satisfactory in most instances, and that this approach will be advantageous to APS agencies by allowing them to consider such arrangements in the context of the overall management of their staffing. If agencies decide to grant leave in particular circumstances, they will also have the flexibility to determine whether that period of leave counts as service for the purpose of accruing APS entitlements.

12.97 The Committee notes that while these arrangements will place a greater onus on APS staff being ultimately responsible for the career choices they make by potentially removing the automatic safety net of a right of return to the former employer, they will still have access to certain protections - for example APS employees will still be able to apply for leave to take up such employment and, if this is granted, their APS status will not change.

Arrangements applying to employment under the Members of Parliament Staff Act, the Governor-General Act and other statutory appointments

12.98 The Committee notes the statement in the Explanatory Memorandum to the CTA Bill that it is expected that APS employees who wish to take up statutory appointments will be granted leave without pay and the commitment given by the Public Service Commissioner in the public hearings that the intentions regarding the granting of leave in particular circumstances will be made more explicit in a subsequent version of the Explanatory Memorandum.

12.99 The Committee believes it is important that the provisions for APS employees to take up statutory appointments, including employment under either the Members of Parliament (Staff) Act or the Governor-General Act without severing their status as APS employees should be retained. The Committee considers that the reference in the Explanatory Memorandum that agency heads will be expected to grant of leave without in these circumstances is inadequate to ensure that this will occur.

12.100 The Committee believes there should be a clearer statement of Government policy on this matter which will bind agency heads to grant of leave in these circumstances.

12.101 **Recommendation 19**

The Prime Minister should exercise the power under clause 21 of the Public Service Bill 1997 to issue a general direction to agency heads stating that Agency Heads must grant leave without pay to APS employees to take up such statutory appointments, employment under the Members of Parliament (Staff) Act 1984 or employment under the Governor-General Act 1974.

This Direction should cover existing Australian Public Service staff who may need to seek an extension to their current arrangements as well as staff seeking to move to such employment in the future.

Transitional arrangements

12.102 The Committee supports the introduction of transitional arrangements for persons covered by Part IV mobility arrangements at the time the new Public Service Act comes into operation.

12.103 The Committee believes that in the interests of the efficient and effective management of the APS, it is reasonable to impose a time limit on the continuation of present mobility rights.

12.104 The Committee believes that the transitional period should be extended to three years to allow:

- a realistic transition period to enable persons to decide whether they want to return to the APS or continue in their current employment; and
- APS management a longer period to manage any influx of former employees to the APS.

12.105 **Recommendation 20**

The transitional period for people with current mobility rights should be extended to three years.

Alex Somlyay MP

Chairman

APPENDIX I - SUBMISSIONS

1	Marian Sawer AO, Associate Professor in Politics, University of Canberra
2	Renato Alessio
3	Sir Lenox Hewitt OBE
4	Dr John Uhr
5	Dr Clare Burton, Women's Electoral Lobby
6	Australian National Audit Office
7	Ms Ann Forward Merit Protection and Review Agency
8	Harry Evans, Clerk of the Senate
9	Helen Coventry, School of Administrative Studies, University of Canberra
10	Greg Bunnett
11	Alan Rose, Australian Law Reform Commission
12	David Gates
13	Richard McPhee, Industrial Officer, Australian Services Union, Taxation Officers' Branch
14	R Hamilton
15	L F Mahony
16	Denis Ives

17 Assistant Secretary
Australian Council of Trade Unions

18 Roger Wettenhall, Professor of Public Administration Emeritus and Visiting Professor, Centre for Research in Public Sector Management, University of Canberra

19 D Volker

20 John Templeton, Department of the Parliamentary Reporting Staff, Department of the Parliamentary Library and Michael Bolton, Joint House Department

21 Mr G Pesce

22 Steve Russell

23 Howard Whitton

24 Professor Marcia Neave
President, Administrative Review Council

25 Dr Peter Shergold
Public Service Commissioner

1.1 Dr Marian Sawer AO, Associate Professor in Politics
University of Canberra

1.2 Dr Marian Sawer AO, Associate Professor in Politics
University of Canberra

3.1 Sir Lenox Hewitt OBE

5.1 Dr Clare Burton
Women's Electoral Lobby

5.2 Dr Clare Burton
Women's Electoral Lobby

11.1 Alan Rose
Australian Law Reform Commission

17.1 Assistant Secretary
Australian Council of Trade Unions

17.2 Assistant Secretary
Australian Council of Trade Unions

25.1 Dr Peter Shergold
Public Service Commissioner

26 Mr Lee Boldeman

24.1 Professor Marcia Neave
President
Administrative Review Council

27 Mr Robin Stewart-Crompton
Deputy Secretary
Department of Workplace Relations and Small Business

7.1 Ms Ann Forward
Merit Protection and Review Agency

3.1 Sir Lenox Hewitt OBE

28 Phillipa Weeks
Reader in Law, Australian National University

9.1 Helen Coventry
School of Administrative Studies, University of Canberra

7.2 Ms Ann Forward
Merit Protection and Review Agency

5.3 Dr Clare Burton
Women's Electoral Lobby

8.1 Harry Evans
Clerk of the Senate

17.3 Assistant Secretary, Australian Council of Trade Unions

16.1 Mr Denis Ives

25.2 Dr Peter Shergold
Public Service Commissioner

25.3 Dr Peter Shergold
Public Service Commissioner

19.1 Mr Derek Volker

7.3 Ms Ann Forward
Merit Protection and Review Agency

25.4 Dr Peter Shergold
Public Service Commissioner

Confidential Submissions

The Committee received one confidential submission as part of its review.

II

APPENDIX II - EXHIBITS

1 'current draft of the proposed Commissioner's Directions under cls.11 and 36 of the *Public Service Bill 1997*' received from the Public Service Commissioner

2 'current draft of proposed regulations relating to review of actions under cl.33 of the Bill' received from the Public Service Commissioner

3 'drafting instructions that have been sent to the Office of Legislative Drafting in relation to the other regulations proposed under the Bill' received from the Public Service Commissioner

4 'drafting instructions that have been sent to the Office of Legislative Drafting in relation to the consequential and transitional regulations that are proposed under the *Public Employment (Consequential and Transitional Amendment Bill 1997*' received from the Public Service Commissioner

5 'draft classification rules proposed under cl.23 of the *Public Service Bill 1997*' received from the Public Service Commissioner

6 'managing poor performance' the Public Service and Merit Protection Commission

7 'People Management and Administrative Law - State of the Service' the Public Service Commission

8 'recruitment and selection' the Public Service and Merit Potection Commission

9 'Achieving Cost Effective Personnel Services' Joint publication of the Management Advisory Board and its Management Improvement Advisory Committee

10 'Achieving Cost Effective Personnel Services - Attachment C - Survey Report' Joint publication of the Management Advisory Board and its Management Improvement Advisory Committee

11 'Re-engineering - People Management, from Good Intentions to Good Practice' Public Service and Merit Protection Commission

12 'Management Advisory Board - Third Report - *Achieving Cost Effective Personnel Services, December 1996*', Public Service and Merit Protection Commission

13 'Proposed Certified Agreement for PSMPC Employees', Public Service and Merit Protection Commission

14 'Departmental Secretaries in Canada and the United Kingdom', Report to the Institute of Public Administration Australia (ACT Division) by John Halligan, University of Canberra, provided by Dr Allan Hawke, Secretary, Department of Transport and Regional Development

15 'Departmental Secretaries: Appointment, Termination and their Impact', Report to the Institute of Public Administration Australia, (ACT Division) by Patrick Weller and John Wanna, CAPSM, Griffith University, provided by Dr Allan Hawke, Secretary, Department of Transport and Regional Development

APPENDIX III - WITNESSES AT PUBLIC HEARINGS

Canberra 6 August 1997

Australian Council of Trade Unions

Mr Peter Moylan
Industrial Officer

Canberra Times

Mr Jack Waterford

Community and Public Sector Union

Mr Douglas Lilly
Assistant National Secretary

Department of Finance

Dr Peter Boxall
Secretary

Department of Workplace Relations and Small Business

Mr Robin Stewart-Crompton
Deputy Secretary

Ms Catherine Bosser
Acting Principal Adviser
Australian Government Employment Group

Institute of Public Administration

Mr Patrick Gourley
Member

Merit Protection and Review Agency

Ms Ann Forward
Merit Protection Commissioner

Mr Christopher Hunt
Agency Member

Private Citizen

Sir Lenox Hewitt OBE

Dr John Uhr

Public Service and Merit Protection Commission

Dr Peter Shergold
Public Service Commissioner

Mr Peter Kennedy
Deputy Public Service Commissioner

Mr Geoffrey Cameron
Senior Policy Adviser
Public Service Employment Framework Team

Mr Jeffrey Lamond
Team Leader
Public Service Employment Framework Team

Women's Electoral Lobby

Dr Clare Burton
Member

Ms Janice Macintyre
Member

Canberra 7 August 1997

Administrative Review Council

Professor Marcia Neave
President

Australian Law Reform Commission

Mr Alan Rose
President

Joint House Department

Mr Michael Bolton
Secretary

Private Citizen

Sir Lenox Hewitt OBE

Dr Marian Sawer

Mr Derek Volker

The Senate

Mr Harry Evans
Clerk of the Senate

University of Canberra

Ms Helen Coventry
Lecturer
School of Administrative Studies

Monday 25 August 1997

Public Service and Merit Protection Commission

Dr Peter Shergold
Public Service Commissioner

Mr Peter Kennedy
Deputy Public Service Commissioner

Mr Dominic Downie
Team Leader

Mr Jeffrey Lamond
Team Leader

Thursday 28 August 1997

Department of Prime Minister and Cabinet

Mr Max Moore-Wilton
Secretary

Tuesday 9 September 1997

Australian Council of Trade Unions

Mr Peter Moylan
Industrial Officer

Australian Customs Service

Mr Lionel Woodward
Chief Executive Officer

Australian Taxation Office

Mr Michael Carmody
Commissioner of Taxation

Canberra Times

Mr Jack Waterford

Community and Public Sector Union

Ms Wendy Caird
National Secretary

Department of Employment, Education, Training and Youth Affairs

Mr Stephen Sedgwick
Secretary

Department of Finance

Dr Peter Boxall
Secretary

Department of Primary Industries and Energy

Mr Paul Barratt
Secretary

Department of Transport and Regional Development

Dr Allan Hawke
Secretary

Department of Workplace Relations and Small Business

Mr Robin Stewart-Crompton
Deputy Secretary

Ms Catherine Bosser
Acting Principal Adviser
Australian Government Employment Group

Institute of Public Administration

Mr Patrick Gourley
Member

KPMG

Mr Kenneth Baxter

Merit Protection and Review Agency

Ms Ann Forward
Merit Protection Commissioner

Mr Christopher Hunt
Agency Member

Private Citizen

Sir Lenox Hewitt OBE

Mr Denis Ives

Mr Derek Volker

Ms Phillipa Weeks

Mr Howard Whitton

Public Service and Merit Protection Commission

Dr Peter Shergold
Public Service Commissioner

Mr Peter Kennedy
Deputy Public Service Commissioner

Mr Dominic Downie
Team Leader
Strategic People Management Team

Mr Jeffrey Lamond
Team Leader
Public Service Employment Framework Team

Women's Electoral Lobby

Ms Janice Macintyre
Member

IV

APPENDIX IV - CLAUSE BY CLAUSE COMMENTS

The following table sets out comments made in relation to specific clauses in the Bill made in written submissions to the review. The first column lists the clause and the second the name of the person or organisation responsible for the comment. The third column refers to the page number in the volume of submissions where the comment can be found, and the last column summarises the issue raised in the submission.

CLAUSE	SUBMISSION BY	PAGE	COMMENTS/ISSUES/SUGGESTED AMENDMENT
3	ACTU	S139	Suggests additional objects: (as recommended by McLeod) ***'to define the powers and responsibilities of Agency Heads in the Australian Public Service; and*** ***to recognise the role of Australian Public Service employees in providing an efficient, effective and responsive public service; and*** ***to set out the functions and powers of the Public Service Commissioner'.***
4	ACTU	S139	Suggests that a definition of merit be included in this clause which encapsulates the following: ***'Applicants for vacancies shall be selected on the basis of merit. The relative suitability of applicants shall be assessed against selection criteria, which shall have regard to the following requirements, to the extent that they are relevant:***

CLAUSE	SUBMISSION BY	PAGE	COMMENTS/ISSUES/SUGGESTED AMENDMENT
			• ***skills and abilities*** • ***qualifications*** • ***achievement of recognised competencies*** • ***training*** • ***experience*** • ***standard of work performance'.***
	WEL	S26	Suggests that Merit must be properly defined, drawing on well established case law on anti - discrimination and having regard to consequences of indirect discrimination. (Possible example, CCH Equal Opportunity Law and Practice Guide definition could be adopted.)
	MPRA	S64	Suggests that the Bill should be amended to include a definition of merit so that there is a requirement that the successful applicant must possess skills and attributes that are relevant to the role to be performed.
10	H Whitton	S224	Notes that the plain English drafting has resulted in the clause reflecting a high level of generality using terms which are not defined and open to broad interpretation. This lack of conceptual clarity could lead to problems in enforcement. Notes the Queensland Parliamentary Committee for Electoral and Administrative Review has commented adversely on the desirability of enforcing high level abstractions of ethical principle, as being open to abuse and difficult to defend against accusations. Suggests that the Commissioner's Directions will need to clarify the

CLAUSE	SUBMISSION BY	PAGE	COMMENTS/ISSUES/SUGGESTED AMENDMENT
			broadly stated principles. Notes that the Minister and his/her staff are not required to uphold or promote the Values. Also notes that there are a number of key Values which are generally recognised as being relevant, including: expertise, continuous improvement, the rule of law, the supremacy of Parliament, the public interest, responsibility, representativeness, opposition to corruption, organisational integrity, transparency and civic-mindedness.
10(c)	ACTU	S140	Suggests that this sub-clause should be amended to read: ***'the APS provides a workplace that is free from discrimination and its workforce reflects the diverse nature of the community it serves'.***
	ANAO	S58	Suggests that this sub-clause should be amended to read: ***'the APS provides a workplace that is free from discrimination and capitalises on the diverse backgrounds of APS employees'.***
10(e)	ACTU	S141	Suggests that this sub-clause should be amended to read: ***'the APS is accountable for its actions within the framework of Ministerial responsibility'.***
10(f)	ACTU	S141	Suggests that this sub-clause should be amended to read: ***'the APS is responsive to the Government in providing timely, frank and fearless advice and implementing the Government's policies and***

CLAUSE	SUBMISSION BY	PAGE	COMMENTS/ISSUES/SUGGESTED AMENDMENT
			programs'.
	D Volker	S183	Comments that Values refer to the APS being responsive in providing advice but not to its providing good quality advice or performance
10(g)	ACTU	S141	Suggests that this sub-clause should be amended to read: ***'the APS delivers services fairly, effectively, impartially and courteously to the Australian public using procedures which are transparent'.***
	ANAO	S58	Suggests that this sub-clause should be expanded to include ***'efficiently'.***
10(h)	D Ives	S112	Believes this subclause simply expresses a view or a statement rather than being a Value.
10(i)	ACTU	S141	Suggests that this sub-clause be amended to read: ***'the APS establishes cooperative and participative workplace relations based on consultation, communication and negotiation'.***
	Australian Services Union Taxation Officers' Branch (ASUTOB)	S99	Suggests that this sub-clause should be amended to read: ***'the APS establishes cooperative workplace relations based on consultation, communication, and employee participation in decisions which affect their employment'.***
10(j)	D Ives	S112	Notes that the Values provide for a 'fair, flexible, safe and rewarding workplace' and comments that it would seem self evident that this may not always be the case. Asks, where does this

CLAUSE	SUBMISSION BY	PAGE	COMMENTS/ISSUES/SUGGESTED AMENDMENT
			lead?
10(k)	L Mahony	S103	Suggests that this clause be amended to read: ***'the APS focuses on achieving results through sound processes and managing performance'.***
10 (new)	ASUTOB	S99	Suggests that a new sub-clause be added to the effect that APS agencies be model employers
10 (new)	ACTU	S142	Suggests that a new sub-clause be added to read: ***'the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment'.***
10 (new)	ACTU	S142	Suggests that a new sub-clause be added to read: ***'the APS is a career based service to enhance the effectiveness and cohesion of Australia's democratic system of Government'.***
10 (new)	ACTU	S142	Suggests that a new sub-clause be added to read: ***'the APS provides a fair system of review of decisions taken in respect of members of the Australian public and APS employees'.***
10(new)	L Mahony	S103	Suggests that a new sub-clause be added to read: ***'the APS will apply resources effectively and efficiently'.*** or that if this is not acceptable include ***'efficiency'*** in Value (g)
10 (new)	D Ives	S112	Suggests that a strong commitment to the community should be reflected in the Values as should the concepts of honesty

CLAUSE	SUBMISSION BY	PAGE	COMMENTS/ISSUES/SUGGESTED AMENDMENT
			and integrity.
10 (new)	H Whitton	S213	Suggests that the Values should explicitly recognise public interest disclosure.
11	D Ives	S111	Suggests that this clause could enable the Commissioner to issue directions which can affect or restrict the application of the Values, leading to uncertainty.
12	G Pesce	S193	Suggests that Agency Heads should have to uphold the Code of Conduct as well as the APS Values.
13	ACTU	S143-4	Suggests that the following paragraph (as recommended by McLeod) be inserted: ***'avoid patronage, favouritism and discrimination on the grounds of political affiliation, union membership or activity, race, colour, ethnic origin, social origin, religion, sex, sexual preference, marital status, pregnancy, age or physical or mental disability (other than justifiable discrimination expressly provided for in the regulations)'.***
	G Bunnett	S75-7	Makes a number of suggestions to strengthen the Code including: • a requirement for employees to report breaches • prohibition of unjustified discrimination • inclusion of a provision along lines of current regulation 29 relating to the role of the manager/supervisor • a requirement for APS employees to behave professionally

CLAUSE	SUBMISSION BY	PAGE	COMMENTS/ISSUES/SUGGESTED AMENDMENT
			• a requirement for APS employees to seek approval to engage in outside employment
	S Russell	S200	Expresses concern about a number of issues which do not appear to be covered, including: • improper conduct (although some elements may be covered under 13(11)) • provision of false information prior to or when seeking employment • compliance with terms and conditions of employment - questions whether the reference to "instrument" in 13(4)(a) include Regulations, Agency Head Determinations, Commissioner Directions, Departmental guidelines/instructions • reasonable assistance to the public (current regulation 8A(f) • attendance (current reg 13) • forfeiture of office/employment
	H Whitton	S226	Notes that the Code is stated in narrow, negative, compliance-driven terms which reflect its essentially disciplinary purposes. Suggests that managers will be reluctant to take action based on a 'breach' when the language of the code is so unspecific. Suggests that ***'failure to comply'*** is a better term. Notes that the code does not apply to former APS employees. Suggests that there is no reason why former employees cannot be brought within the scope of the Act, as they are in the Queensland *Criminal Justice Act*

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			and other similar examples.
13(1)	H Whitton	S226	Suggests that it is desirable that this requirement extend to a serious lack of personal integrity in a private capacity on the part of a high profile public official.
13(2)	D Volker	S183	Questions why 'skill' has been omitted from this sub-clause.
	H Whitton	S227	Suggests that it would be better if 'care and diligence' were qualified by ***'reasonable'*** because of the open ended nature of the words.
13(3)	D Volker	S183	Questions whether there may be a problem with the use of the words 'without coercion' in respect of APS employees applying Social Security, Tax or similar legislation which may require certain action to be taken which could be construed as 'coercive'.
	H Whitton	S227	Suggests that the use of the words 'of any kind' could render the sub-clause ineffective.
	G Bunnett	S75-7	Suggests add ***'sensitivity'*** after 'respect and courtesy'.
13(4)	G Bunnett	S75	Suggests adding the words ***'applicable to, or connected with, employment'*** after 'all applicable Australian laws'.
	H Whitton	S227	Notes that the requirement is one of minimal compliance, and that the community is generally critical of professions which are satisfied with mere technical compliance, rather than a broader concern for its spirit.
13(4)(b)	S Russell	S200	Asks whether or not it is it intended to provide any guidance in Regulations or Directions on the handling of criminal convictions?
13(5)	D Volker	S183	Suggests that issues could arise in respect of the meaning of the

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			words 'and reasonable direction'.
	G Pesce	S193	Suggests that the word 'lawful' is too narrow and should be replaced with ***'proper'***.
	G Bunnett	S76	Suggests add words ***'connected with employment'***.
13(6)	D Volker	S183	Questions whether or not it is necessary to maintain 'appropriate confidentiality' in respect of dealings an APS employee has with a Minister's member of staff.
	H Whitton	S227	Questions whether this is necessary, in light of the Information Privacy Principles and clause 13(10) of the Bill. Questions why it is limited to dealings with the Minister and his/her staff.
13(7)	H Whitton	S228	Notes that the clause provides no mechanism for registering a conflict of interest. Routine registration has been the mandated practice for a decade in most jurisdictions. Also suggests that it is for the employer, rather than the employee to be satisfied as to whether a given conflict is significant or not, and what is an appropriate way of dealing with it.
	G Bunnett	S75	Suggests that the reference to conflict of interest needs to be broadened to incorporate reference to the interests of those connected with the employee.
13(8)	D Volker	S183	Suggests that issues could arise in respect of the meaning of the words the words 'in a proper manner'.
	H Whitton	S228	Suggests that the sub-clause should refer to ***'proper purpose'***

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			as well as 'proper manner'.
13(9)	H Whitton	S228	Suggests that this sub-clause is ambiguous. Any request made by a citizen of an official for a proper purpose, which may include a private purpose, should elicit a truthful and comprehensive response.
	G Bunnett	S75-7	Suggests that the reference to false and misleading information should not be limited to official purposes - should refer to any attempt to mislead.
13(10)(a)	D Volker	S184	Suggests that a preferable test to the undefined phrase 'inside information' would be ***'any official information acquired as a consequence of his or her employment'***.
13(10)	H Whitton	S213	Notes that this could be a significant impediment to making a disclosure of a breach of the Code of Conduct, despite the apparent protection provided in clause 16. This is particularly the case because there is nothing in the APS Values or in the Code of Conduct which endorses public interest disclosure or mandates whistleblowing.
	H Whitton	S228	Notes that the term 'inside information' is not defined and that there is a lack of a general duty of confidentiality.
13(11)	H Whitton	S229	Suggests that this clause should require the official to have regard to the Code of Conduct.
13(12)	H Whitton	S229	Questions the necessity of this sub-clause considering the preceding sub-clause.
13(13)	H Whitton	S229	Notes that this seems to have the effect of enabling the Code of Conduct to be extended indefinitely by further codification in regulations. This is in addition

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			to the 'further or more detailed requirements' which may be developed by Agency Heads 'because of the particular operational circumstances' of the Agency. This means that conduct requirements will come from multiple sources (the Values and Code of Conduct in the Bill, Commissioner's Directions, the Regulations, additional conduct requirements of an agency), making it difficult to ascertain with certainty which provisions apply at any particular time to a particular employee.
15	G Pesce	S194	The provision should be expanded to cover Agency Heads, who are not 'employees' and are therefore not subject to the sanctions set out in this clause.
	S Russell	S201	Expresses concern that the Bill wishes to establish common Values, conduct and penalties across the APS but is not establishing a common framework for handling non-compliance with these standards. Comments that the standards become meaningless if it is not a total package.
15(2)	ACTU	S144	Suggests that the sub-clause be amended so that the list of sanctions cannot be added to via the Regulations. There must also be a legislatively based appeal against sanctions or suspensions imposed as a result of breach of Code
	D Volker	S184	Queries whether sanctions encompass admonitions and the placing on file of a suitable reference in the case of minor breaches. Concerned that without express authority for such action, Privacy Act might have the effect of preventing it.

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15(3)	ACTU	S145	Suggests that this sub-clause be amended so as to include a reference to 'natural justice' as well as 'procedural fairness'.
	S Russell	S201	'Procedural fairness' should be spelt out in the Act.
16	ACTU	S146	Drew the Committee's attention to the legislative provisions recommended by the Report of the Senate Select Committee on Public Interest Whistleblowing.
	MPRA	S63	Suggests that the Bill should be amended so that the protection of whistleblowers should not be carried out by the investigatory body but rather by somebody not able to be influenced by an investigation or any participants in an investigation.
	ASUTOB	S99	Suggests that this clause should be amended so that it provides active assistance to come forward with allegations and that the protection is vague.
	G Pesce	S194	Suggests that the clause should provide protection when a report is made to the police or the DPP.
	H Whitton	S213-215	Notes that there is no endorsement or encouragement for APS employees to report breaches of the code of conduct. (this is to be contrasted with the Queensland scheme where there is a positive obligation to come forward.) Notes that clause 13(10) could, in fact, be a disincentive to making a report. Notes that because Ministers and their staff and contractors are not APS employees, they are not bound by the code, and therefore reports about their unlawful or unethical conduct will not trigger

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			the protection of clause 16. Notes that the clause does nothing to prevent or protect from victimisation of a whistleblower by someone who is not an APS employee (eg a friend or relative of the person who has allegedly breached the code). Notes that sanctions against a person who breaches clause 16 would only be available via clause 15, which only covers APS employees. This means that no sanctions are available against third parties who may 'victimise' or 'discriminate against' a whistleblower. Suggests that the phrase 'a person performing functions in or for an Agency' is ambiguous. It could read as 'a person, in the course of performing functions', or as 'a person who performs functions'. The former is much too narrow. The clause should be amended to clarify this. Suggests that the absence of any definition of 'victimise' or discrimination' could lead to uncertainty and abuse of the protection. Notes that an APS employee can't legally disclose to the Ombudsman or the Attorney-General - can only make reports to the Commissioner or Agency Head.
	ARC	S223-6	Suggests that the body investigating whistleblowers' allegations should also have a role in protecting them from retaliation. Notes that there is no explicit sanction against APS personnel who victimise or discriminate

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			against whistleblowers. Assumes that Commissioner's Directions outlining minimum procedures to be followed where a report is received from a whistleblower will include steps to safeguard the position of whistleblowers. Notes that regulations will exclude from external review matters which are covered by procedures under certified agreements or review is available under the WRA. Suggests that this exclusion should be drafted so as to preserve the protections available to whistleblowers.
17	G Pesce	S194	Notes that the section is very weak. Suggests that it should include list of presumptions which give effect in a visible way to rules of natural justice and which if shown to exist would establish a breach of the section.
18	ACTU	S148	Believe this clause is insufficient commitment to EEO. Suggests that the Bill could be amended so that the *Equal Employment Opportunities (Commonwealth Authorities Act)1987* and the *Affirmative Action (Equal Employment Opportunity for Women) Act 1996* could apply to Public Service Agencies.
19	ACTU	S148-9	Suggests that the clause be amended to add the words ***'or particular cases'*** after the words 'particular individuals. Same suggestion in relation clause 67(3).
	G Pesce	S195	Suggests that the clause should include a requirement to report any such Ministerial interference.
20(2)	ACTU	S149	Questions the need for this sub-clause.

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21	ACTU	S150	Suggests that it should be made clear that Directions be published in the *Gazette*.
22	ACTU	S150	Suggests that it should be stipulated that merit protection applies to the filling of any vacancy of 3 months duration or longer. Unless agreement is confirmed on appropriate award provisions which would come into effect at the same time as the new Act, the ACTU would require the retention of employment categories in the Act.
	S Russell	S202	Raises a number of questions concerning the application of this clause including: • will formal qualifications be able to be established for generalist (ASO) jobs?; • will probation requirements only be applied on entry to the APS or will it be possible to apply them when APS employees move within or between agencies to new/higher level jobs? • who will be able to provide health clearances and will there be a general or job specific standard?
	WEL	S27	• Citizenship waivers should take into account differential costs of taking out citizenship. The Commission (on basis of advice from DIMA) should issue general citizenship waiver in these cases. • Setting of health and physical fitness standards need to be consistent with requirements of Disability Discrimination Act

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			• Setting of minimum qualifications may be indirectly discriminatory unless demonstrated to be essential for performance of duties • assessment of character must be clearly and unambiguously related in behavioural terms to performance in the position.
22A (new clause)	ACTU	S152	Suggests the following new clause be added: ***Entitlements of APS employees*** - see attached.
23	WEL	S28	Notes that classification and reclassification are employment practices which are subject to anti-discrimination law provisions. Commissioner should have a role in ensuring laws are not breached.
	ACTU	S153	Suggests that Classification Rules should be subject to negotiation and agreement under the Workplace Relations Act.
24	ACTU	S153	Suggests that a new sub-clause (5) should be added to the effect that determinations made under this clause should not be able to diminish any provision contained in an Award or Certified Agreement. Should also be a capacity for Service-wide determinations where appropriate. Clarification of power in clause 24(3) is required.
	G Pesce	S196	Suggests that there is a need to avoid unilateral changes to the contract of employment.
25	ACTU	S154	Argues that the power to assign duties cannot be unfettered. Unless agreement is confirmed on appropriate award provisions that would come into effect at the same time as the new Act, the ACTU

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			would require the retention of a right to apply to decline transfer in the Act.
	G Pesce	S196	Suggests that there is potential here for arbitrary decisions.
27	G Bunnett	S75	Suggests that this clause is inconsistent with the declared policy of devolution of full responsibility for employment to agency heads.
	S Russell	S203	Suggests that safeguards are necessary to ensure that his power is not abused.
27(1)	D Volker	S184	Suggests that it is unwise to enable the Commissioner to move an excess APS employee to another Agency without anyone's consent including that of the receiving agency's Secretary.
28	ACTU	S155	Suggests that provisions relating to suspension should be detailed in the Act and not be able to be varied through regulation.
29	ACTU	S155	Suggests that Bill should include all grounds for employment separation and further prescription should be included in regulations or awards/certified agreements. The grounds should be: resignation, redundancy, invalidity, inefficiently, disciplinary dismissal, loss of essential qualifications, abandonment of employment. SES should have access to WRA protections against unfair dismissal.
	Sir Lennox Hewitt	S14	Suggests that the clause should be removed from the Bill.
	D Volker	S184	Suggests that it would seem reasonable to include a requirement that an Agency Head terminating the employment of an APS employee give reasons for the

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			termination.
	D Ives	S114	Suggests that it is not reasonable that the only protection for SES against termination of their employment is the common law.
	G Bunnett	S78	Suggests that is should be incumbent on the employer to state clearly grounds on which termination is to occur.
	S Russell	S204	APS wide minimum provisions should be prescribed in regulations which would apply to issuing notices under s.29 and in relation to statements of reasons in support of such notices.
	P Weeks	426	Recommends that there be clear guidance from the government on: • parameters for the adoption of fixed term contracts and notice provisions in employment contracts; • parameters for the exercise of the power of termination, especially in relation to those employees who will not have access to the procedures and remedies under the Workplace Relations Act.
30	ACTU	S156	Suggests that the Bill should be amended so that retirement age cannot be varied through the regulations.
31	D Ives	S116	Unclear whether provision applies to Agency Heads.
31	ACTU	S156	Suggests that Bill should be amended to as to make clear that his provision covers Agency Heads.
31	G Pesce	S196	Suggests that the clause should allow for the employee to agree on the amount or formula to be used to calculate the recoverable amount, and that it should

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			stipulate that the amount or portion to be recovered is to be determined prior to the work being undertaken.
33	WEL	S28	External review mechanisms should have power to overturn decisions
	ACTU	S156	Suggests that the Merit Protection Act should be retained to ensure independent external review is available. Suggests that the Public Service Commissioner cannot provide independent review because s/he is responsible for issuing the directions and guidelines which would be under scrutiny. Believe that stronger emphasis should be placed on resolving issues at the agency level.
	Dr Uhr	S16	Suggests that the Bill should be amended to include a 'robust mechanism of independent external review of employment decisions made by public service managers'.
	MPRA	S62	Suggests that the Public Service Commissioner cannot conduct external review under this clause because the review is not independent and there is no separation of powers. Suggests that external review function should be statutorily independent of the executive, and that an alternative could be for an independent Commonwealth Employment Ombudsman to carry out reviews. Also concerned at possible limitation in scope of reviews - matters covered by WRA and dispute settling procedures of Certified Agreements will be excluded from review under clause 33 which may limit number of grievances that are able to be

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			heard.
	ASUTOB	S99	Suggests that the review process set out in this clause is inconclusive. Should be independent investigation with power to review decisions and substitute new ones
	G Pesce	S196	Suggests that the whole review mechanism is too important to be left to the regulations. Particularly, the provision should specify that review should be on the merits and that the rules of natural justice apply.
	ARC	S232	Notes that the regulations will provide exceptions to the right to appeal under this clause, and suggests that it would be preferable if these exceptions were spelt out in the Bill. Suggests that employment decisions should be reviewable where there has been a breach of the APS Values, or there has been a failure to follow the procedures established under clause 15. Suggests that the establishment of a prima facie case should not be a prerequisite for external review. Note that the Explanatory Memorandum states that as a matter of practice, it is intended that the Public Service Commissioner will report with recommendations to the Minister or Parliament on any review matter that has not been satisfactorily resolved. Suggests that this should be an express statutory power of the Commissioner as foreshadowed in the second discussion paper.
	P Weeks	S428	Suggests that with the Commissioner carrying out the review role, review is neither

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			'external', nor 'independent'.
35	ACTU	S158	Suggests that the Bill should be amended so as to ensure that the Public Service Commission maintains a role in the selection and deployment of SES across the APS.
35(2)(a)	D Volker	S184	Suggests that there should be a reference to 'leadership'.
36	ACTU	S159	Suggests that the clause should be amended to say that the Commissioner's directions must detail employment matters relating to the SES including engagement, promotion, mobility and separation.
38	ACTU	S159	Suggests that this clause should not be included because unfettered right of termination of SES employees will contribute to further the politicisation of the APS.
41 (1)(a)	ACTU	S159	Suggests that the clause should be amended to read: ***'to evaluate the extent to which Agencies incorporate and uphold the APS Values'.***
42	ANAO	S58	Suggests that, for the purposes of clarity, the Bill should outline the matters on which Directions may be made by the Public Service Commissioner.
43	ALRC	S81	Suggests that this clause is inconsistent with the declared policy of devolution of full responsibility for employment to agency heads and believes that the Commissioner's inquiry powers should be given to the Auditor-General.
44	WEL	S26	Suggests that clause should be amended to require the Public Service Commissioner to report on the effectiveness with which each

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			Agency Head has moved to achieve best practice people management, full compliance with the direct and indirect provisions of the anti-discrimination laws and with the Workforce Diversity aspects of the proposed Act.
44	ARC	S234	Bill should include express statutory power for Commissioner to report to Parliament on satisfactory resolution of grievances, and on inquiry functions.
45	D Volker	S184	Suggests that it may be prudent to provide for the re-appointment of the Commissioner as is the case under the current Act.
46	ACTU	S160	Suggests that Bill should stipulate that the Remuneration Tribunal will set the salaries and allowances of the Public Service Commissioner.
49	G Pesce	S197	Suggests that creating an 'office' of Secretary is inconsistent with the rest of the Bill which abolishes the concept of office.
50	ACTU	S161	Suggests that, in light of the additional powers given by the Bill to Agency Heads, the Bill should more comprehensively set out their responsibilities. Suggests that clauses proposed in the McLeod Report could be used.
51	H Evans	S197	Suggests that the clause should be amended so that Secretaries are appointed by the Governor-General in Council following a report by the Public Service Commission, that appointment be for a fixed term and that termination occur only by the Governor-General on grounds of misbehaviour, incapacity or bankruptcy.

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	G Pesce	S197	Suggests that Secretaries should not be able to hold more than one office.
	WEL	S27	Suggests that the legislation should specify selection process for Secretaries, including the skills they need to possess.
	D Volker	S181-2	Raises concerns about move from Governor- General to Secretary exercising this power and queries whether proposed change will result in appointments being subject to AD(JR) Act.
52(1)	Sir Lenox Hewitt	S14	Suggests that his sub-clause should be removed from the Bill.
	G Pesce	S197	Argues that the rules of natural justice should be observed when terminating the Secretary.
54	ACTU	S161 S160	Suggests that Bill should stipulate that the Remuneration Tribunal will set the salaries and allowances of Secretaries.
	ANAO	S58	Notes that the remuneration of Secretaries is subject to public scrutiny through the Remuneration Tribunal processes and through current Minister for Finance Guidelines for financial statements of departments an agencies. Suggests that mechanisms be included to ensure public scrutiny along these lines continues.
	D Volker	S184-5	Notes that the Bill does not require the Prime Minister to even take account of advice from the Remuneration Tribunal. Suggests that there are arguments that support remuneration and conditions of employment of Secretaries being determined by an independent tribunal, or at least requiring the Prime Minister to take into account the views of an independent tribunal. Notes

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			AD(JR) Act (including s.13) may apply to decisions of the Prime Minister in relation to determining terms and conditions of offices of Secretary. Also points to possible contradiction between Explanatory Memorandum (6.12) and clause 389 of CTA Bill in relation to role of Remuneration Tribunal.
55	G Pesce	S197	Suggests that the clause should specify that the acting should be for a fixed period only.
56	ANAO	S58	Commonwealth Authorities and Companies Bill 1996 provides a good model for specifying annual report obligations of Secretaries.
57	D Volker	S185	Questions whether Management Advisory Committee (MAC) with so many participants will be a workable body. Also comments that it is not clear how MAC will advice the Government and whether its deliberations will be made public or be subject to scrutiny under FOI, ADJR or Ombudsman's Act.
	ACTU	S161	Note that the clause does not contain a similar provision to the current Management Advisory Board which ensures the inclusion of a member nominated in consultation with the ACTU. Suggests that the Bill should be amended to provide for an APS Industry Consultative Council to replace the Joint Council (section 23 current Act).
	D Ives	S112	Suggests that making the Public Service Commissioner the executive officer to the Management Advisory Committee may prejudice the Commissioner's independence.
58	ANAO	S59	Suggests that the Explanatory Memorandum should explain

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			rationale for establishment of Executive Agencies
	ACTU	S162	Explanatory Memorandum doesn't provide enough information on these provisions. Bill should include clear criteria for establishment of these agencies and Parliamentary scrutiny of the process.
60	ACTU	S162 S159	See comments made in relation to clause 38.
60(2)	Sir Lenox Hewitt	S14	Suggests that this clause be removed from the Bill.
61	ACTU	S163	See comments made in relation to clause 46.
	ANAO	S58	See comments made in relation to clause 54.
65	ACTU	S163	Suggests that the Bill should be amended to protect the terms and conditions of employees from being unilaterally changed through Machinery of Government changes.
	G Pesce	S198	Suggests that the rules of natural justice should be observed when making decisions under this clause
67(3)	ACTU	S163	Insert words ***'or particular cases'*** after 'particular individuals'. (same as clause 19)
69	G Pesce	S198	Suggests that clause should provide that the employee be notified of the intention to release the information and the reasons for the release of the information.
70	ACTU	S164	Suggests that the clause should make clear that the merit principle applies to appointing employees to a position.
	S Russell	S204	Queries whether it is necessary to include a power to abolish as well

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			as create positions
70(2)	G Pesce	S198	Suggests that clause should provide that positions should be filled on the basis of merit.
71	ACTU	S164	Suggests that the clause should make clear that a 'senior official' would not include inappropriate people eg a Ministerial staff member.
new	M Sawer	S1	Suggests that the Bill would make provision for a major independent review of the gender outcomes of performance pay and agency negotiated remuneration arrangements after three years of operation.
new	WEL	S28	Suggests that both Parliament and the Public Service Commissioner should scrutinise gender equity aspects of performance based pay.
new	R Alessio	S5	Suggests that a specific provision should be incorporated in Part 5 of the Bill empowering the Commissioner to investigate cases of unfair dismissal/termination where the APS employee involved has undertaken actions specified in clause 16 (protection for whistleblowers).
new	WEL	S27	Suggests that the Public Service Commissioner should provide guidance on best practice models of human resource management and that it be compulsory for Agency Heads to follow one of thee models for the first three years of operation of the new legislation, unless they can demonstrate that their proposed Human Resources Strategy is itself best practice.
new	H Evans	S66	Suggests that the Bill should ensure that the Public Service Commission is genuinely independent with power to

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			enforce employment only on merit of all public servants.
new	ASUTOB	S99	Suggests that the Bill should state that APS ethics are to be part of the Code of Conduct.
new	ARC	S235-6	APS personnel should be able to release information where that information is not exempt under the FOI Act. (ie employees should not be subject to any disciplinary or criminal offence for disclosing information which would normally be given to any member of the public seeking that information.) see 1996 report of the ARC and the ALRC *Open Government: a review of the federal Freedom of Information Act 1982.*
new	ACTU	S151-168	Depending on result of negotiations on Service-wide Award, may want categories of employment specified in the Act confirming the concept of permanent employment as the usual basis for staffing and including tests in relation to engagement of temporary staff Should be continuing capacity in legislation for making Service-wide determinations in relation to certain employment conditions Act should continue to provide for mobility in defined circumstances eg for statutory office holders and for staff of members of Parliament. Also oppose any weakening of mobility between the APS and the Parliamentary Service.
new	Parliamentary Depts	S188-9	The Bill and the Parliamentary Service Act should contain legislative provision to ensure a continuing unfettered ability for staff of either Service to accept employment in the other. The

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			proposed clause is attached.

Clause proposed by the Parliamentary Departments

'25 Mobility between Parliamentary Service and Public Service

(1) A Parliamentary Service employee is eligible for engagement in any position, or at any classification or level, as an employee of a Department of State or of an Executive Agency under the *Public Service Act 1997* on the same terms and conditions, but subject to the same restrictions (for example, a restriction limiting an engagement to a person who has particular qualifications) if any, as would apply to an APS employee seeking to be employed in the position or at the classification or level.

(2) An APS employee is eligible for engagement in any position or at any classification or level as an employee of a Department on the same terms and conditions, but subject to the same restrictions (for example, the restriction limiting an engagement to a person who has particular qualifications) if any, as would apply to a Parliamentary Service employee seeking to be employed in the position or at the classification or level.

(3) A person who moves from:

(a) employment in the Parliamentary Service to employment in the Australian Public Service; or

(b) employment in the Australian Public Service to employment in the Parliamentary Service;

retains his or her existing or accruing rights in respect of matters relating to his or her employment to the same extent as if he or she were moving from employment in one Department of State to employment in another Department of State.'

Proposed clause 22A:

'APS employees are entitled to:

remuneration rates and conditions of employment commensurate with their responsibilities;

compete for promotion and advancement in their employment on the basis of merit;

terms and conditions of employment which do not discriminate on the grounds of political affiliation, union membership or activity, race, colour, ethnic origin, social origin, religion, sex, sexual preference, marital status, pregnancy, age or physical or mental disability. Where it is justifiable, exceptions to these principles may be specified in the regulations;

opportunities for appropriate training and development;

a safe and healthy working environment free of harassment;

opportunities for appropriate participation in the decision-making processes of the department in which they are employed;

the right to be represented by unions;

fair and consistent treatment, free of arbitrary or capricious administrative acts or decisions;

employment that may only be terminated on prescribed grounds for cause and through due process; and

access to fair avenues for redress of grievances.'

V

APPENDIX V - COMPARISON OF DIFFERENT MODELS FOR CONDUCT OF EXTERNAL REVIEW OF PUBLIC SERVICE MANAGEMENT

See attached table

COMPARISON OF DIFFERENT MODELS FOR CONDUCT OF EXTERNAL REVIEW OF PUBLIC SERVICE MANAGEMENT[1]

	Merit Protection and Review Agency (MPRA)	Proposed replacement of Repeal of Merit Protection Act	Commonwealth Employment Ombudsman Proposal
Purpose	• fairness, equity, sound personnel management for staff • accountability for human resource management: . improves quality of primary decision making . powerful anti-corruption mechanism • jurisdiction: Commonwealth employment	• review of employment actions • jurisdiction: Public Service Act staff except for Senior Executive Service and Agency heads	• similar to MPRA but streamlined to be appropriate to new Public Service Act • Jurisdiction: Commonwealth employment
Major functions	• establishment of independent tripartite appeal committees re: . promotions (administrative Service officer staff and equivalent levels only) . discipline (all public Service Act staff) • grievance resolution (second tier) • provision of joint selection committees (fee for service) • provision of advice to individual staff on request • inquiries on request	• review of employment actions • whistleblower investigation • advice to agencies on request	• grievance resolution very broadly defined and to include promotion and discipline matters as necessary to replace appeals • provision of advice to employees • conduct of inquiries (on request/own motion) • whistleblower counselling and protection

	Merit Protection and Review Agency (MPRA)	Proposed replacement of Repeal of Merit Protection Act	Commonwealth Employment Ombudsman Proposal
Powers	• entry, evidence collection etc • evidence on oath or affirmation • mediation, conciliation, investigation, reporting • independent tripartite appeal committees have power to make new decision (i.e. merits review) • in grievance review by MPRA, recommendatory powers only (as with existing Commonwealth Ombudsman) • report to Prime Minister and parliament if necessary in particular cases	• special inquiry powers including of whisltleblower allegations • powers to be identified in new Public Service Regulations • powers to be available to the Public Service Commissioner or anyone else conduction a review • approval of reviewers external to agency • no specific powers to report on cases investigated	• as for MPRA except for no power to make new decisions (ie no merits review as currently preformed by independent appeal committees) • any additional powers as may be required to protect whistleblowers • reporting to Parliament on particular cases when necessary
Reviewers	• Public Service Act staff employed for the purposes of the Merit Protection Act • Panel Review officers selected and trained by MPRA and employed on temporary transfer or temporary contract so that they are subject to the same provisions as substantive staff (currently about 200 PROs) • delegations for case work only given by MPRA at senior officer or SES level (or equivalent). All delegations subject to in-house training indulging in administrative law, interviewing techniques, grievance resolution etc. • MPRA guidelines required to be taken into account by review officers • delegation to sign off grievances only given to SES officers	• Public Service Commissioner-approved reviewers from inside or outside the APS • no indication of any proposal for selection, authorisation, training, accountability	• current MPRA arrangements re review officers work very will in meeting variable demand and could be carried over to Commonwealth Employment Ombudsman, i.e. work performed by employees acting on delegations and accountable to commonwealth Employment Ombudsman who reports to Parliament.

	Merit Protection and Review Agency (MPRA)	Proposed replacement of Repeal of Merit Protection Act	Commonwealth Employment Ombudsman Proposal
Independence	• not part of management of APS • no relationships to protect • not subject to direction from anybody other than a court performance of statutory functions • not accountable to Minister for day to day casework (allows Minister to be arms length from individual cases) • work allocated to staff by SES officers • statement of independence for appeals by committee members • MPRA not the rule maker	• part of Management Advisory Committee • reviewer selected by department • rulemaker	• same as MPRA and existing Commonwealth and Defence Force Ombudsman • work allocated by Ombudsman or delegate