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5 September 2018

# ***The Australian Public Service Integrity Regime***

*An ANZSOG Research Paper for the  
Australian Public Service Review Panel*

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## **Preface**

Our task was to provide a high level literature review (in 10-15 pages) for addressing an APS Review topic on public integrity. The literature review was to respond to a set of framing questions provided by the APS Review Secretariat (as copied below) that begin with the meaning of public integrity for public institutions and for public officers. We were also to provide a forward-looking prodding paper (in 2 pages) to suggest possible further research and analysis that may assist in informing the APS Review. In completing this task, we consulted a panel of specified experts\* in the first and third weeks of the three week process.

Within these project parameters, we have adopted an analytical approach applying a conceptual framework for the meaning of public integrity that serves to highlight key findings evident in the literature as relevant to public integrity and its relationship with public trust and confidence in the APS. That is, within the page limits and across the wide scope of the framing questions, we have not catalogued all reports, histories, statistics, performances or possibilities on each of the sub-topics but opted for highlights that are particularly illustrative of the issues raised in the literature review and that are within the scope and concern of the APS Review's terms of reference. We have made recommendations on issue positioning where the weight of the literature and analysis permitted those reasonable conclusions, and we identified recommended elements for further focus where it was neither possible nor appropriate in a few paragraphs to resolve tensions or challenges that have persisted for decades.

From a conceptual framework defining public integrity, the literature review examines how an integrity system can secure robustness of public integrity, the current strengths and weaknesses, and opportunities for improvements on the current state. Risks and challenges are explained by applying integrity theory in practice and next steps are identified. The literature review concludes with an understanding of the interconnectedness of the relationship between public integrity and trustworthiness and the exogenous factors that influence its translation to public trust. Appendix 1 further assists in also representing the self-perpetuating tendencies of low trust and high trust outcomes.

Due to the extensive nature of the literature review, the large number of footnotes (which include relevant commentary and further examples with in-text references) have been moved to endnotes to allow the 15 pages of text to flow more easily for the reader.

*Framing questions (the list below is not exhaustive of the issues to be considered):*

- *What is public integrity? What does it mean for public institutions on the one hand, and for public officers on the other?*
- *Why is public integrity important? What is the relationship between government legitimacy, public trustworthiness and public trust? What the APS can do to improve public trust, beyond simply improving trustworthiness, and why this might be important? What are the limits to reaching this objective?*
- *What is the current state of APS's public integrity, encompassing current norms, rules and culture? What are its key strengths and/or weaknesses?*
- *What are some possible challenges and risks on the horizon? For example: contracting out service delivery; expectations of government that the APS is to be more engaged in the delivery of infrastructure; effectiveness of key integrity institutions; use of technologies; whistle-blower arrangements.*
- *What are some examples of alternative practices that might improve the APS's current integrity regime, drawing from the literature and comparative practice in other jurisdictions? Specific focus on the staffing (APS values, Code of Conduct, employment principles), and consideration of whether post-employment standards would be desirable. Also consideration of possible broader institutional reforms, including to the legislative framework.*

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\* We gratefully acknowledge the comments provided by Helen Williams, Elizabeth David-Barrett, Michael Macaulay, AJ Brown, Howard Whitton and Marilyn Warren. The final opinions expressed herein belong to the authors.



## List of Acronyms:

ABC	Australian Broadcasting Commission
ACLEI	Australian Commission for Law Enforcement Integrity
AHRC	Australian Human Rights Commission
AFP	Australian Federal Police
APS	Australian Public Service
APSC	Australian Public Service Commission
ARC	Administrative Review Council
ICT	Information and communication technologies
NISA	National Integrity System Assessment
NPM	New Public Management
OECD	Organisation for Economic Co-operation and Development
PM&C	Department of the Prime Minister and Cabinet
PPP	Public-private partnership
SBS	Special Broadcasting Service
UK	United Kingdom
UNHCR	United Nations Human Rights Council
US	United States

## Prodding Paper

### ***Introduction: the new importance of public integrity in the 21st Century***

The late 20th Century saw a ‘modernisation’ of the APS with a number of important reforms that enshrined effectiveness and efficiency, responsiveness, and government control. The APS today is much better for it. The 21st Century, however, brings a new modernity: a disrupted, volatile and uncertain media landscape, implicated in growing popular distrust of institutions in general; a complementary, partisan and sometimes populist politics; immense technological opportunities and risk; threats of undue foreign influence; and the ever-blurring boundaries of public and private sectors. The APS must respond in ways that prioritise public integrity unlike ever before. It must invest proactively in public institutions and public officers of integrity, made robust by a system of integrity agencies. This will justify public trust. It will also facilitate overall performance. The APS cannot afford to be complacent and wait merely to react to crises. In this new 21st Century context, public trust, once lost, will be much harder to recover than ever before, and the consequences more dramatic.

The literature review advocates an institutional approach to integrity, understanding it as a higher-order structural value that requires a robust disposition to engage in legitimate praiseworthy behaviour more ambitious than merely meeting minimum standards. This ‘prodding paper’ suggests four avenues for further exploration and recommendation by the Review, on how to operationalise this idea of public integrity.

### **The APS: apolitical but responsive; robustly legitimate but also efficient and effective**

The growing importance of public integrity, and for ‘integrity management,’ gives rise to two key points of tension with the new public management reforms of the late 20th Century.

First, public integrity emphasises the need for the APS to be apolitical, both when implementing government policy and when offering ‘frank and fearless’ advice. However, there is also a legitimate demand that the APS be responsive to ministers and the government, being practical, pragmatic and trusted. This has led to an ongoing instability: ‘responsiveness’ was included in the APS values in 1999, and removed in favour of a reiteration of being ‘apolitical’ in 2008; merit as the primary basis for selecting APS leadership has become more precarious as new governments seemingly dismiss agency heads *tout court*. Further research would assess this tension, its causes and consequences and look to new ideas in order to balance these competing concerns.

Secondly, public integrity emphasises the need for the APS institutions to be robustly legitimate, both in purpose and their pursuit of that purpose. It implies that since legitimacy is the *sine qua non* of the APS and public trust, it cannot compromise on its maintenance. However, an obsession with legitimacy and its constraining rules, risks inefficiency and ineffectiveness, a ‘compliance culture,’ and ultimately a failure to pursue purpose at all. The APS cannot have a ‘whatever it takes attitude,’ but neither can it spend resources and then fail to achieve much at all. Further research would seek to draw a principled line between these two imperatives, with a particular focus on organisational culture, the risks of policy capture, and public-private governance.

### **Difficult ethical questions where not easily reducible to lawfulness**

Public integrity is unavoidably a *moral concept*. As explained in the literature review, It does *not* require public agents to act in accordance with their own conceptions of ‘morality,’ ‘justice,’ ‘equity,’ ‘the common good’ and so on. However, it does require them to have and act upon their own conceptions of *legitimacy*. Operationally, in general, legitimacy will be equivalent to lawfulness, and acting consistent with any superior’s direction. However, exceptionally, it will not.

Further research would explore these exceptions. First, it will assess and categorise areas where acting with legitimacy, and therefore public integrity, will be difficult, controversial, and potentially divisive. Secondly, it will explore how public officers might be trained to think about such issues, in a way that clearly separates the ethical question of legitimacy from merely applying one’s own private moral views. Finally, it will assess the APS’s current systems for dealing with such scenarios, including whistleblowing protections, with an eye to recommending best practice.

### **Integrity System reform**

Most work on integrity systems in Australia has focussed upon how they can be designed to make public institutions and officers robust against corruption. Less clear are requirements needed to expand such a system’s reach to promote integrity in the fuller sense advocated by the literature review. Further research will bring together two modes of inquiry.

First, it will look *outward* to alternative international integrity practice, looking at jurisdictions like the Netherlands which have most fully adopted a ‘pro-integrity’ approach. It will also bring together the basic research, especially from behavioural science, organisational management, political science and public management. Secondly, it will look *inward* to assess the prospects of implementing such an approach within Australia. It will investigate why the APSC has restricted itself to such a minimalist approach, despite its broader powers. It will explore the tension between the need to devolve agency management for performance, and to centralise for public integrity. It will evaluate in greater detail whether a new pro-integrity agenda is best housed within the APSC, a new Integrity Agency or elsewhere, as well as the capacity, data and powers needed to prosecute such an agenda.

### **Managing Policy Capture**

Possibly the greatest risk to APS public integrity is policy capture (whether overt, subtle, intentional or unintentional), and the *perceptions* of policy capture. It risks feeding the growing public sentiment that the system is ‘rigged,’ run by ‘faceless men,’ and serving the interests of the few. Further research will address the genuine risks of capture threatening the APS: homophily, revolving doors, PPPs (especially unsolicited ones) and inadequate political scrutiny due to commercial confidentiality (or judicial scrutiny because trading on use of executive not legislative power), policy and regulatory capture, growth of governance in a complex, cross-jurisdictional world and whether, as some literature suggests, public integrity would benefit from a broadening of the range of administrative discretion.

Equally important, further research will also address genuine (*mis*)*perception* issues facing the APS, often creating mistaken cynicism about public institutions. It will explore and categorise the causes of this phenomenon, and concrete measures the APS may be able to take in order to address them.

## 1. How should the APS define 'public integrity'?

### ***APS has no current definition of 'public integrity'***

The APS currently offers no explicit definition of 'public integrity,' despite its use in basic legislation, regulation, codes of conduct, agency titles, and other directive documents, as well as being commonly heralded by its leadership.<sup>1</sup> Without explicit definition, 'integrity' risks being an empty goal, dismissed as meaningless rhetoric by the public, and failing to effectively guide actual practice.

### ***Integrity, defined***

Integrity is a virtue. It is a robust disposition to act: (a) in a morally justifiable manner; (b) consistent with a clear set of coherent values; (c) that not merely meets minimum standards but is genuinely praiseworthy; (d) thus, grounding trustworthiness.<sup>2</sup> A definition of 'public integrity' makes explicit the specific implications of this virtue for *public* agents.

### ***Public integrity, defined***

We recommend that the APS conceive public integrity in the following manner:<sup>3</sup>

- '*Public institutional integrity*' is the robust disposition of a public institution to pursue its purpose, within the limits of legitimacy, consistent with its commitments.
- '*Public officer integrity*' is the robust disposition of a public officer, limited to the course of her public duties, to pursue the values supporting the integrity of her institution to the best of her abilities.
- '*Public integrity system*' is the set of agencies, laws, procedures, practices, incentives and attitudes that promote the integrity of any particular public agent(s).

The key components of these definitions are elaborated upon, and set against the strengths and weaknesses of the APS, below. However, there are four general points to note.

### ***The need for an institutional approach to public integrity***

Most APS materials implicitly assume that public integrity is merely a virtue of public officers.<sup>4</sup> However, as rightfully recognised in the *Public Service Act 1999*,<sup>5</sup> APS institutions as a whole need to have public integrity.<sup>6</sup> This is because public institutions are also properly treated as responsible agents in their own right, by government, the public and other institutional actors. They are granted powers and resources, held to account for their use, praised (or not) and (dis)trusted as collective entities. Further, institutional performance against any component of integrity is not merely a simple aggregate function of the same quality in its individual public officers.<sup>7</sup>

### ***Public integrity requires more than merely meeting minimum standards***

Within the current APS, the term 'integrity' may be generally associated with merely meeting minimum standards, in particular not being corrupt.<sup>8</sup> This not merely fails to accord with the general virtue of integrity, it also fails to accord with community expectations, and its terms of trust.<sup>9</sup> Minimum standards only define the limits of official discretion ('do we have to do it, given the rules?'). Public integrity goes further, informing the praiseworthy exercise of discretion ('is this the best I/we can do, within the rules, in pursuit of our overall purpose?')<sup>10</sup>

### ***Public Integrity is a higher-order value***

Section 10 of the *Public Service Act 1999* lists the APS Values, and includes 'integrity' merely as one amongst including leadership, trustworthiness, impartiality, service, and so on.<sup>11</sup> However, public integrity is better conceived as a higher-order value, achieved through the consistent and coherent pursuit of these other primary values.<sup>12</sup> This is reflected at other points in APS materials.<sup>13</sup> Thus, in this paper, we shall assess the APS Values collectively as an important part of the current attempt to operationalise 'public integrity' in this higher order sense, both for the APS institutions and officers.

### ***Legitimacy is the primary ethical norm of public integrity***

APS materials rightfully imply that acting with public integrity requires being 'ethical' in some sense. However, they fail to distinguish the specific sense of being ethical for *public* as opposed to *private* agents.<sup>14</sup> Private agents have their own views on what is 'ethical,' including what is 'right,' 'best for the country,' 'just,' 'equitable,' in the 'public interest' and so on. They may even be correct. However, the public sphere is a system that determines *whose* view of what is 'ethical' should prevail when exercising public power. The primary ethical question of public agents is not 'what is the best/most just/equitable thing to do here?' But instead, 'who has the right to decide this question, what are the limits on that right, and therefore do I have the duty to obey?' This is a question of 'legitimacy' (rather than public good, justice, equity).<sup>15</sup> Operationally, at least within the current Australian context, this will *generally* be equivalent to lawfulness, however, as explored below, *exceptionally* not.<sup>16</sup>

Sometimes the answer to the legitimacy question will assign to APS agents themselves the right and duty to act on their own independent view of what is ethical: to act autonomously, entrepreneurially and innovatively.<sup>17</sup> Other times, the answer requires that public agents act on what a superior agent decides to be ethical. In the latter case, being 'ethical' is primarily a task of personal restraint, interpretation and earnest pursuit. One must *restrain* oneself, not merely from acting on one's own personal self-interest but also what one privately believes to be best; instead, one must *interpret* the will of the superior, or its delegates; and, one must *earnestly pursue* that will, despite difficulties - personal or otherwise. However, regardless, for APS agents being 'ethical' always requires background monitoring, cohering with and protecting the standards of legitimacy themselves that justify this distribution of decision-making powers, and its limits. This is the first and most important duty of public integrity, and they cannot abdicate from it. Indeed, fulfilling it may sometimes require difficult actions, including questioning and/or challenging the actions of others, including superiors. There is no excuse for 'just following orders,' if those orders themselves are illegitimate.

## **2. APS Public Institutional Integrity**

### **2.1. Purpose**

#### ***The importance of institutional purposes***

Modern public administration is mission driven.<sup>18</sup> This is vital not merely for the efficiency and efficacy of public institutions, but also their integrity. Without clear overarching purposes, understood by all and robustly invigilated by leadership, individually competent public officers are liable to exercise their discretion in ways that are inconsistent with one another. This risks overall institutional incoherence and untrustworthiness, compromising institutional integrity. The purposes of the APS may be divided into those that are 'fundamental' (ranging across all APS institutions, taking priority, and seen as core to APS identity) and those that are 'operational' (specific to particular institutions, and/or for specific times). This paper only assesses its fundamental purposes.

#### ***Clarity of fundamental purposes***

A strength of the APS is its relatively clear overarching purpose: to serve, apolitically, the Government, the Parliament and the Australian public.<sup>19</sup> This involves two key functions: (a) to implement policy in the public interest;<sup>20</sup> and, (b) to provide the Government with advice that is frank, honest, timely and based on the best available evidence.<sup>21</sup> The power of the APS Commissioner to make directions, also allows for further clarity in real time.<sup>22</sup>

Bipartisan consensus and reforms of the 1970s-80s,<sup>23</sup> have made very clear *in practice* that, within the constraints of legitimacy, 'it is the Ministers who decide what is in the public interest and how it should be brought about.'<sup>24</sup> However, this could be made more explicit within the APS Values themselves. Currently, 'achieving the best results for the Australian community and the Government' remains ambiguous.<sup>25</sup>



The aim of delivering ‘frank and fearless’ advice has been less clear in recent times. In particular, the previous requirement in legislation that such advice be ‘responsive to the government,’<sup>26</sup> was linked to a perceived politicisation of the public service, arguably evidenced in a number of incidents where public servants withheld information and advice from ministers and the public, seemingly to the government’s political advantage.<sup>27</sup> The replacement of responsiveness with the reiterated need to be ‘apolitical’ is an advance on this position,<sup>28</sup> complemented by the ministerial advisor code of conduct introduced in 2008.<sup>29</sup> However, as demonstrated in the Victorian context, one grey area remains in cases where the government’s priorities are clearly inconsistent with what the department would otherwise recommend.<sup>30</sup> The APS needs to make clear how to resolve such scenarios.<sup>31</sup>

### ***Legitimacy of fundamental purposes***

The current fundamental purposes of the APS are clearly legitimate both as a matter of law, and theory.<sup>32</sup> However, any change in such purposes would have to be so assessed. In particular, putting aside theoretical arguments, constitutionally they would have to accord the principle of ministerial responsibility,<sup>33</sup> and tentatively that public officers are always public trustees, who must be appropriately accountable to the public.<sup>34</sup>

## ***2.2. Pursuit***

### ***A robust, motivated, disposition to legitimately pursue***

In order to be genuinely praiseworthy, a public institution must be robustly motivated (manifest in the decision-making of its leadership) and structured (manifest in the capacities, co-ordination and actions of its constitutive parts) to legitimately pursue its purposes to the best of its abilities, given its resources. Precisely *how* a public institution should best achieve this disposition will be a matter of management theory, and such theories will come and go. By contrast, public integrity should be identified with the higher-order disposition to innovate and improve such management practices, and the yardstick against which they are assessed. This is rightly reflected in the APS values of leadership, efficiency, effectiveness and innovation in particular.<sup>35</sup>

Given its scope, with two exceptions below, this paper will not address the current management approach of the APS in general, besides noting that many management pathologies should be explicitly understood and discussed within the APS *as failures of public integrity*: institutional mission-drift; budget maximisation practices and diverting resources to empire-build; ‘go-slow’ policies; failing to take appropriate risks and innovations necessary for earnest pursuit of purpose; litigation and other acts designed merely to save face of the institution or its leadership; and so on.

### ***Legitimacy: a ‘whatever it takes attitude’***

Whilst individual misconduct for private benefit compromises public *officer* integrity, an institution whose culture and/or leadership tolerates or even encourages individual misconduct for the institution’s own apparent benefit compromises public *institutional* integrity. In particular, the APS must be vigilant against importing *via* management practices a ‘whatever it takes attitude.’<sup>36</sup> In its latest Integrity Survey of the US Business community, KPMG found that such an attitude was the most commonly cited driver of misconduct, in a context where 73% of employees reported that they had observed misconduct in the prior 12-months, and 56% reported that what they observed could cause ‘a significant loss of public trust if discovered.’<sup>37</sup> The private sector may get away with a more instrumental approach to following the constraints of legitimacy. The public sector can and should not. It is difficult given current publicly available evidence to assess APS vulnerability to this risk, but it should consider acquiring similar data, as in other jurisdictions.<sup>38</sup> Public integrity does abhor a ‘compliance culture’ obsessed with following rules as an end in itself. But it does not license disrespect for rules either. Instead, it demands robust processes of feedback, review and response to ensure rules are always fit for purpose.<sup>39</sup>

### ***Legitimacy: policy capture***

A further legitimacy constraint on pursuit of purpose is the need to avoid 'policy capture.' According to the OECD, policy capture is 'consistently or repeatedly directing public policy decisions away from the public interest towards the interests of a specific interest group or person.'<sup>40</sup> It is a form of 'institutional corruption.'<sup>41</sup> And, 'while capture is not necessarily illegal, it is always illegitimate.'<sup>42</sup> Capture that is hard to prevent merely by law, includes undue influence through formal participation mechanisms, lobbying, revolving doors and advisory groups. Such influence can be strategic (e.g. deliberate attempts to monopolise policy process), but it can also arise by unintended selection effects (e.g. allowing nominally open participatory fora to be effectively closed to marginalised groups lacking resources to participate). Advice can be 'frank, honest, timely and based on the best available evidence,' but if availability is constrained, manipulated and skewed, an institution still risks capture.

Recent evidence suggests that no country is immune to policy capture, including countries like Australia that otherwise perform well on governance indices.<sup>43</sup> In fact, growing public perception of how easily policy can be captured *legally*, may well be driving increased public perceptions of corruption, and the freefall in public distrust.<sup>44</sup> Following OECD advice, the APS must develop a comprehensive strategy against policy capture and *perceptions* thereof, that balances the need for external accountability, collaboration, expertise, advice and consultation, in a 21st century governance system where traditional boundaries are only going to become more blurred.<sup>45</sup> It must recognise that new laws will not be sufficient, and must be supported by proactive processes, norms and culture.<sup>46</sup>

### **2.3. Commitments**

#### ***Trustworthiness requires fulfilling commitments***

If an institution fails to fulfil its commitments with justification, then it is untrustworthy and compromises its integrity.<sup>47</sup> *Ex ante*, APS institutions are committed to those elements discussed above: pursuing their purpose and complying with the constraints of legitimacy. However, they also acquire *ex post* commitments to various stakeholders: citizens, contractors, clients, employees, other public institutions. These commitments may be explicit or implicit, legally enforceable or not. Public integrity and trust, however, depend upon an institution meeting these commitments, and not merely commitments to those stakeholders with the most powerful legal and lobbying teams. This imperative is not recognised clearly in APS materials as a matter of public integrity at an institutional level.<sup>48</sup> The current focus upon the trustworthiness of individual public officers is insufficient. Perfectly trustworthy public officers can together make their institution untrustworthy, when due to poor institutional coordination, they make inconsistent commitments on behalf of their institution.

#### ***Funding Commitments***

The literature indicates that the biggest weakness of the APS in meeting commitments is financial. On the one hand, Secretaries are responsible for financial management of their department.<sup>49</sup> On the other hand, Ministers have the right to continually ask departments to perform more tasks. The APS may wish to consider activity costing,<sup>50</sup> or the UK practice of Ministerial Directions.<sup>51</sup>

#### ***Dealing with Conflicting Commitments***

Public institutional integrity requires that consistency between commitments must be a constant management goal. However, where this fails, an institution must still decide which commitments to prioritise. With respect to a conflict between its *ex post* commitments (e.g. a promise to citizens to deliver a certain service by a certain date) and the constraints of legitimacy, it must adhere to the latter. This is because the former commitment is *ultra vires*. By contrast, with respect to a conflict between such an *ex post* commitment and legitimate purposes, the institution must adhere to the former. This is because citizens, employees and other actors can reasonably expect the institution to be responsible for ensuring its own *ex post* commitments are consistent with its own purpose. Such information, power and accountability will most often be outside the reach of the other actors. And, the institution

cannot reasonably expect these other actors to bear the cost of its own failure to make *ex post* commitments consistent with purpose. Further, such costs can generally be far more easily, and legitimately, borne by the institution rather than by other actors.

### 3. APS Public Officer Integrity

#### 3.1. Values

##### ***Public officer integrity is pursuing public institutional integrity***

Public officer integrity requires both morally justifiable and praiseworthy behaviour of public officials. What does this require? It might be 'morally justifiable' for any public officer to 'stay in her lane' and merely fulfil the minimum requirements of her office without taking responsibility for the integrity of the institution as a whole, but this would not be 'praiseworthy.' And it might, arguably, be 'praiseworthy' for a public officer to use her discretionary powers to promote other values apart from the integrity of her institution (e.g. her own controversial idea of justice) but that would not be justifiable, because it would not be legitimate for a public officer. For these reasons, the uniquely justifiable *and* praiseworthy activity for any public officer is to pursue, to the best of her abilities, whatever values promote the integrity of her institution - whether that happens to be simply doing the best she can with respect to core responsibilities at the current moment, or stepping outside of those responsibilities to draw attention and response to some weakness or threat to institutional integrity overall.<sup>52</sup>

##### ***APS Values: The Need for Stewardship***

The APS Values are typical of national public service codes around the world. Whilst different words are obviously used, recent research shows a striking convergence around six core values: impartiality, legality, reliability, equal treatment, integrity (in the narrower sense of merely being 'ethical') and professionalism.<sup>53</sup> Each one is reflected in the APS Values. Further, Australia shares with other New Public Management (NPM)-influenced countries the incorporation of values around efficiency and effectiveness. However, in line with the conception of integrity put forward in this paper, we recommend incorporating a value of 'stewardship'.<sup>54</sup> The ANAO long heralded stewardship as an important value of public sector governance. However, it was generally cast only as a responsibility of senior leaders.<sup>55</sup> We recommend it be reinstated to prominence but understood as a more distributed and institutional value, (although as with all such values leaders must play an outsized role). 'Stewardship' draws attention to the responsibility that all public officials have for the integrity of their institution that is entrusted to them.<sup>56</sup> No bright line can be drawn between any individual public officer's integrity and the rest of her institution, as 'the standard you walk past, is the standard you accept.'<sup>57</sup> However, it also recognises that far from being the greatest risk to promoting institutional integrity, public officers are also its greatest asset, and should be deployed as such.<sup>58</sup> This value also needs to be supported institutionally by systems for employee feedback, reporting misconduct by others and whistleblowing.<sup>59</sup>

#### 3.2. Robust Disposition

##### ***Capacity and motivation***

A 'robust disposition' means that, given a wide range of circumstances, difficulties, threats and opportunities, a public officer will still pursue institutional integrity. This requires both capacity (skills, resources and knowledge) and motivation (identification with values, groups norms, and alignment of incentives). It is naïve to expect purely morally motivated officers. *Ceteris paribus*, institutions should 'economise on virtue,' implementing processes that minimise reliance on any particular officer's public integrity,<sup>60</sup> and utilise invigilation, transparency and accountability measures.<sup>61</sup> However, principal-agent models are limited,<sup>62</sup> incentives cannot always be aligned, and under-invigilated discretion is ineliminable.<sup>63</sup> Often the origins of unethical motivations arise within toxic work cultures, rather than vice versa. Furthermore, whilst most public officers are motivated by a commitment to 'make a difference' and 'contribute to society,' such motivations risk conflict with the constraints of legitimacy.<sup>64</sup> The APS must strategically invest in inculcating values, building group norms,

assess the relative integrity risks of particular roles, and select officers accordingly.

### ***Incorporating Behavioural Science***

Modern behavioural science offers a wealth of discrete insights about how to address bias, moral balancing, reference points, temptation and self-control, commitments, moral reminders, and so on.<sup>65</sup> The APS needs to not only incorporate such current insights, but develop processes to constantly innovate in response to cutting-edge research. Such research and ongoing reform should be task of one of the central integrity agencies (below).

### ***Training the group not the individual***

Current integrity training offered by APSC is minimal, optional, general and for individuals not teams. There is little evidence that such training has any effect on integrity performance.<sup>66</sup> Training needs to be extended and mandatory, and a condition for leadership progression.<sup>67</sup> It needs to be context sensitive, and most importantly it needs to work with teams. Immediate group norms are often the most powerful determinant of individual behaviour. Further, such trainings need to move away from casting public integrity as an individual task, but rather a team effort focussed upon building a clear, shared, and concrete conception of that institution's integrity, and then developing the different ways that different members can best support that institutional integrity. It demands positive, motivated, co-option in the collective task of institutional integrity, rather than merely top-down delegation and enforcement of each individual's minimum, 'integrity responsibilities.'

### ***3.3. Limits***

#### ***Public officer integrity must have principled limits***

In theory, public officer integrity should have no implications for a public officer's own personal morality, and personal integrity. She should be able to keep those worlds separate, and this needs to be respected by the APS. However, in practice there are some points of justified intrusion. First, insofar as one's private circumstances might undermine one's robust disposition to pursue public institutional integrity in one's public life, action must be taken to safeguard the institution. Conflict of interest mechanisms are a paradigmatic example. Secondly, whilst there is no general justification for moralism on behalf of the institution about one's private life, there should be a clear commitment between public officers and their institution that one's private life should not damage the institution's legitimate reputational interests. Finally, where public officer integrity and personal integrity conflict, in general the only option is to resign.

#### ***Post-employment conditions***

Public institutional integrity entails that, in order to best pursue its purposes, the APS hire flexibly at all levels, experience, and from a range of sectors. Strict post-employment principles may deter otherwise attractive candidates. Further, public officer integrity has limits, and the APS must respect the private, post-employment life of its officers - as well as the limits of competition legislation, and restraint clauses in employment contracts which need to be 'reasonable' to be enforceable. However, cumulative evidence demonstrates that 'revolving doors' lead to policy and regulatory capture and the perception thereof, decreasing public trust, and legitimacy.<sup>68</sup> The APS cannot sacrifice legitimacy for possible efficiency gains. Legitimacy is not simply one value to be traded-off against others, but is the very source of government's authority.

The OECD has noted that with the increase in contracting out arrangements and changing patterns with public sector careers, there have been increased opportunities for public officers to be involved in 'conflict of interest situations' of 'influence peddling', same-field/same-players future employment, lobbying, switching sides, use of insider information and re-employment. The OECD has considered remedies and good practice benchmarks, including acknowledgement of the US Revolving Door Working Group conclusion to beware 'a highly complex but ultimately ineffective framework of ethics and conflict of interest regulations' where enforcement becomes a 'virtual industry', costing significantly and rare

sanctions offer no deterrence.<sup>69</sup> There is limited available evidence on the effectiveness of legislation over the Code of Conduct or other specific post-public employment instruments.<sup>70</sup> International comparisons evidence a range of approaches and the OECD overall supports links to individual country context, the broader conflicts of interest regime, and proportionality with risk. The APS post-employment rules steer a mid-course with the code of conduct requiring disclosure and appropriate management of the conflict of interest at the agency head's discretion.<sup>71</sup> Agency heads may also include contractual provisions for employment, and with successful tenderers to restrict employment of APS employees.<sup>72</sup> The agency head may also decide through agency policy whether a cooling off period is appropriate.<sup>73</sup>

This individual agency head's discretionary approach enables, at least in theory, that the degree of restraint be proportionate to the risk. France obliges officials to consult with a dedicated ethics commission prior to moving to the private sector. Canada, Italy and Spain also have dedicated integrity bodies for post-public employment consideration. We recommend that agency heads be required to consult with a dedicated integrity actor in exercising their discretion for an independent, expert check and balance, either the APS Commissioner or included in the responsibilities for a dedicated new integrity agency, as recommended below.

#### **4. APS Integrity System<sup>74</sup>**

##### ***Creating robustness: public integrity is only possible within an integrity system***

Both public institutional integrity and public officer integrity require *robust dispositions*. As discussed at various points above, both institutions and their own officers must play roles in securing such robustness *in each other*. Their integrity is mutually supporting. However, this is not sufficient. Robustness is best secured within a broader integrity *system*: where laws, agencies, procedures, practices, incentives and attitudes together help secure the integrity of public institutions and their officers. Such a system should promote integrity not only through accountability and reactive measures; but also proactive capacity building. The system required to secure the public integrity of APS institutions is necessarily diffuse, incorporating everything from the media to judicial institutions to 'society' values,<sup>75</sup> effectively a 'whole-of-society' approach as coined by the OECD.<sup>76</sup> It is beyond the scope of this review to name all such elements, let alone assess them. However, we recommend that the government not merely respond to just such assessments conducted by Transparency International,<sup>77</sup> but that it also help institutionalise their regular production. In this paper, we shall focus only upon key official integrity agencies.

##### ***Key APS integrity agencies: the strengths***

The APS integrity system has a 'multi-agency' approach (considered itself a strength by some)<sup>78</sup> with responsibilities for: standards and oversight;<sup>79</sup> judicial and administrative review;<sup>80</sup> detection and investigation;<sup>81</sup> prosecution;<sup>82</sup> and international cooperation.<sup>83</sup> The APS integrity system sits within the broader system promoting the integrity of all commonwealth public sector agencies, and the National Integrity System Assessment (NISA) found this system to have the following strengths: financial management arrangements, in particular fraud control;<sup>84</sup> independent investigation, prosecution and judicial processes; monitoring by the Ombudsman and Auditor-General; and the active role of Senate Committees backing up statutory accountability arrangements.<sup>85</sup> It also highlighted the value of the Administrative Review Council (ARC), which has now been abolished.<sup>86</sup>

##### ***The APS integrity system needs to not merely fight corruption but promote integrity***

In general, the current key agencies promoting the integrity of the APS are reactive, focused upon holding individuals accountable for breaches of minimum standards (in particular, corruption). In line with the definitions of 'public integrity' put forward in this paper, at least some agencies within this system need to broaden their focus: they need to undertake *proactive* measures, aiming to build the capacity of institutions as well as individuals to have the highest levels of integrity.<sup>87</sup> The current, limited 'pro-integrity work' of the ACLEI,<sup>88</sup>

APSC, Auditor-General,<sup>89</sup> and, now defunct, ARC has been largely limited to the education programs discussed above,<sup>90</sup> evaluation against the APS values and conduct of conduct,<sup>91</sup> standards and best practice development, and the encouragement of whistleblowing.<sup>92</sup> Within the context of a comprehensive system-wide integrity promotion framework, agencies additionally need to gather, assess and mobilise academic research on public integrity across time, assess APS institutions' strengths and vulnerabilities on the basis of such research with sufficient scope to see patterns and tendencies,<sup>93</sup> engage leadership in designing and promoting change, provide specialist inhouse training (discussed above) and facilitate tertiary level integrity programs, and evaluate APS integrity performance and integrity interventions over time, including against public trust.<sup>94</sup>

### ***Australian Public Service Commission***

The APSC is responsible for promoting APS public integrity, although its effectiveness and relevance has not convinced a previous review.<sup>95</sup> It largely restricts itself to evaluating public integrity both generally and through inquiries of particular incidents. It undertakes few proactive measures, although its statutory powers appear to anticipate them.<sup>96</sup> The APS Commissioner, leads the APSC, and is also positioned by current policy and statute as the primary vouchsafe of independence, transparency and merit in the selection of agency heads and other statutory officers,<sup>97</sup> and also when evaluating their alleged misconduct.<sup>98</sup> Appropriate to such a keystone role in protecting APS public integrity, unlike most agency heads, the Commissioner may only be removed from their five year tenure upon address by both Houses of the Parliament addressed to the Governor-General.<sup>99</sup>

Whilst the arguments for broadening the current proactive role of the APSC, or assigning them to a new body are addressed below,<sup>100</sup> its primary weaknesses are *fourfold*. First, the *appointment* process of the Commissioner is a weakness. Given his/her pivotal position within the entire APS integrity system, it should be designed for maximal independence, merit, and individual public officer integrity. However, currently the Commissioner is merely appointed at the recommendation of the Prime Minister to the Governor-General.<sup>101</sup> Appointments in this manner have already led to allegations of misconduct, controversy and partisanship, at the apex of a system designed to address these issues.<sup>102</sup> We recommend a statutory requirement for a competitive merit appointment process or even a bipartisan appointment process similar to that for the Auditor-General;<sup>103</sup> and an ineligibility period (e.g. 6-12 months) following service in a Minister's office whether in an employed or volunteer capacity. Secondly and relatedly, the Commissioner's *powers to investigate misconduct* by agency heads is a weakness. In other jurisdictions, this power would be exercised by a clearly independent, anti-corruption commission. However, even if the Commissioner's independence were somehow assured, they can only make a report to the agency head's minister, with no prescribed further procedure. Furthermore, if the Commissioner her or himself is the subject of allegations, then they are investigated by their junior, the Merit Commissioner, with similar opacities in further procedure.<sup>104</sup> Thirdly, the APSC is only partially funded directly, and must acquire other funding by providing paid courses to other agencies, at their request. This shifts power away from the APSC to set any agenda opposed by such agencies. Finally, and perhaps partially as a consequence of the foregoing, the Commissioner appears to lack the standing and gravitas in practice to exploit the scope of his/her powers. Subject to what is discussed below, this could be ameliorated by new structures such as a Secretaries Board (a specific committee), specifically tasked with improving APS public integrity and capability, chaired by the Commissioner.

### ***The need for a new integrity agency***

The Commonwealth is the only jurisdiction without a dedicated broad-based anti-corruption agency, and it has been recommended many times over the last two decades.<sup>105</sup> The arguments in favour are clear. The current integrity system lacks coordinated oversight of high-risk conduct with capacity to assess risks, monitor patterns, and ensure quality and consistency.<sup>106</sup> It lacks a clear, centralised, mandated reporting mechanism for suspecting misconduct trusted by employees at all levels,<sup>107</sup> let alone a one-stop shop for

whistleblowing.<sup>108</sup> It lacks an agency with the scope to monitor procurement processes,<sup>109</sup> contractors, and other engagements with private actors upon whom the reputation of the APS rests. And, the powers and capacities of current agencies are limited, in the context of the lowest resource allocation for anti-corruption across all jurisdictions in Australia and New Zealand by far.<sup>110</sup> The Fraud and Anti-Corruption Centre focuses only upon serious crime (such as complex fraud, foreign bribery and money laundering), generally in the private sector, with doubted capacity to address corruption at the highest public sector levels.<sup>111</sup> The AFP does not assess high-risk conduct cases with no prospect of criminal conviction.<sup>112</sup> The ACLEI, which arguably could be built upon,<sup>113</sup> subject to recommended governance improvements is currently almost entirely limited to monitoring law enforcement agencies.<sup>114</sup>

However, the APS integrity system needs more than just a dedicated *anti-corruption agency*. It needs a genuine *integrity* agency that also promoting 'public integrity' in the wider sense understood in this review.<sup>115</sup> The current system, including the tepid use of the APS Commissioner's own powers to promote public integrity, may partially reflect the devolutionary NPM ethos. However, assuming the merits of such an approach in general, public integrity must be an exception.<sup>116</sup> Public trust and legitimacy, flowing from public integrity, are of critical, constitutional importance to the APS. Further, they are a *common resource* and *shared risk* of APS agencies, as the public does not commonly compartmentalise its judgement. Finally, unlike other performance measures, public integrity is harder to assess from the 'outside,' at least until it is too late. Hence, the biggest risks to public integrity are generally when agency leadership is unmotivated, lacks capacity or is even implicated, yet the devolutionary approach leaves these very actors under-supported, and under-invigilated.

Arguably, such a 'pro-integrity' role could be kept with an emboldened APSC, complementing its broader performance focus, with a new anti-corruption commission focussed upon reactive measures. However, this risks maintaining a false separation between fighting corruption and promoting integrity, and reinforcing an unhelpful division of professional labour between lawyers and criminal experts on the one hand, and behavioural scientists, political scientists ethicists, and public administration and organisational management experts, on the other hand. Neither the tasks of promoting public integrity, nor fighting corruption respect such boundaries. Only an integrated integrity agency could take responsibility and leadership for addressing public integrity as a whole, championing the cause,<sup>117</sup> as an important symbol of intent,<sup>118</sup> providing needed stability and support for associated agencies,<sup>119</sup> and addressing issues of public trust.<sup>120</sup>

## 5. Risks and Challenges

### 5.1. Contracting out service delivery

Although contracting out service delivery is now common practice for the APS, it remains a contested element in the literature for its risks to government accountability, coordination and public integrity. The Australian experience in competitive tendering and outsourcing for complex and specialist services is premised on the economic rationale of efficiency and cost benefits and follows international trends in OECD countries as well as Australia's microeconomic reform and policy preference for smaller government from the 1990s.

There is a state-private spectrum offering a range of institutional arrangements for provision of public services by non-state actors that includes public-private partnerships and the participation of not-for-profit and non-government organisations.<sup>121</sup> Contracting out for the provision of public services can vary in terms of the degree of risk and involvement that is contracted out, whether the contracted services are inputs to the APS or provided directly to the public, or indeed whether the state is a competitor provider. 'Wicked' policy problems and preferences for collaborative governance extend contracting out scenarios beyond simple purchaser-provider relationships for discrete services like ICT or employment placement services, which have already transformed the APS landscape and size.

### ***'Revolving door' risks***

The integrity risks involved in the 'revolving door' exchange of staff between the private and public sector include capture, bias, abuse of office, misuse of information, conflicts of interest or corruption, particularly if there is influence, or responsibilities, for procurement or business regulation involved.<sup>122</sup> Therefore, the merits of recruiting these 'institutional nomads' with direct experience in the field, relevant networks and trust-based relationships must be weighed against expectations for public officer integrity to avoid conflicts of interest, or perceived conflicts, including assessment and management of the risks and transparency of the potential conflicts. The literature also supports post-employment standards.<sup>123</sup>

### ***Integrity failures undermining legitimacy***

The public sector agency contracting out the service can suffer challenge to its legitimacy when the service provider is alleged, or proven, to have breached fundamental human rights, or constitutional, democratic or administrative law norms such as in the administration of an immigration or youth detention centre.<sup>124</sup> This risk to legitimacy is distinct from political, moral or ethical concern or challenge for moral justifiability for the immigration or youth detention policy and legislation *per se* which determines the *fact* of detention. The undermining of legitimacy in this example attaches to the breaches of human and other rights in executing the contract for administration of the detention centre by the private sector provider in a way that included physical, mental and/or sexual abuse of the detainees.

Public institutional integrity such as in this example may be further compromised by the nature of the government's response: the nature and extent of criticism directed to the integrity agent for the report revealing breaches, or gag orders imposed on those within the system;<sup>125</sup> the whistleblower protection arrangements that are in place, or not;<sup>126</sup> the manner of application of freedom of information or other accountability fora (such as estimates committee appearances) intended to provide transparency to the public in their design.

### ***Ongoing accountability gaps***

The Australian history of outsourcing has experienced 'gaps'<sup>127</sup> in transparency and accountability mechanisms that applied to delivery of services by non-public providers notwithstanding public funding, including practical problems of coordination and confused lines of delivery. For example, not following the public dollar in external audit or commercial-in-confidence application over contracts avoid transparency that might otherwise have been afforded.<sup>128</sup> The 2005 National Integrity Systems Assessment recommended that all governments should review traditional legislative methods for defining the jurisdiction of integrity institutions away from a characterisation of the service-provider (as public, corporatised, private) towards a discretion to review services that are *publicly* funded.

The literature notes the risk of a minimalist, terms-only contract approach by providers which is inconsistent with the higher integrity standard for the public sector: 'Accountability is far more than simply doing what their contracts specify'.<sup>129</sup> Having outsourced officers working alongside APS staff confuses the public integrity culture, as the legislated APS values do not apply to the outsourced officers. This practical tension for public integrity may be improved if APS contracts could provide for (publicly-funded) services to at least endeavour to apply the APS values and code of conduct, but sufficient contract expertise and contract management would be required (in each of the APS agencies under the devolved managerialism public sector model).<sup>130</sup> Decentralised contract expertise in drafting reasonable terms and in the ability to hold the contracted agent to account after the contract has been awarded is generally a public sector area of weakness.<sup>131</sup>

### ***No shield from accountability***

The literature, international and Australian experience<sup>132</sup> confirm that, notwithstanding the organisational form or the 'arm's length' nature of the contracted out arrangement, the public *expects* the government to be accountable for the expenditure of public funds and in the



delivery of public services. Outsourcing public services offers no shield from government accountability nor excuses public integrity. Public trust and confidence in the public integrity of all contracting out forms therefore needs the ongoing accountability gaps to be addressed as part of a principled system-wide review focussed on anchoring accountability and integrity arrangements and capabilities on the spend of public monies over the form of the provider for those public services.<sup>133</sup>

## ***5.2. Expectations that the APS is to be more engaged in the delivery of infrastructure***

Infrastructure investment holds several integrity and accountability risks for government due to the long term commitment of significant expenditure some years before public benefits are delivered, multiple stakeholders including other levels of government, and inherent risks involved in delivering infrastructure, on time, on budget and to quality standards. The shorter term electoral cycle adds contestability to decision-making for public assurance that the (contractual) commitments are adequately funded and the scope prudently represented given each election brings with it the possibility of a change of government.

### ***Accountability concerns regarding public-private partnerships (PPPs)***

There are constitutional concerns as to the certainty of the law that determines the limits and governs the exercise of the powers of the executive to make major or substantial contracts that bind future administrations without legislative authority, if indeed the legislature can even authorise such contracts. Also, challenging the sufficiency of parliamentary appropriations is complicated by contemporary outcomes-based, accrual accounting. Other concerns include whether large contracts fall outside the notion of 'administering a department' and whether decisions are subject only to political accountability, if judicial review is more difficult to raise as the process is not regulated by statute, especially in relation to the more recent practices of receiving unsolicited proposals for major infrastructure (marketed as 'innovative infrastructure or service delivery solutions' or 'market-led proposals') directly from project proponents.<sup>134</sup>

Other analysis questions the propriety of PPPs as an accounting 'trick' appearing as partnership and risk sharing for budget and political purposes when the practice of giving government guarantees of high returns on investments and low interest rate loans can mean perverse results where the private sector owns major infrastructure heavily subsidised from public funds, with questionable incentive for maintenance before handover of the older asset back to government. An economic modelling analysis of 38 major road and rail infrastructure projects in Australia since 1991 (of which 17 of the 38 were called PPPs), found significant public economic losses associated with PPPs.<sup>135</sup>

These are all important questions that bear further inquiry, and may open up a due diligence integrity role for the APS on the legal, economic and practical considerations.

### ***Additional integrity and accountability challenges posed by 'major' infrastructure***

The literature also highlights the range of integrity and accountability challenges for the public sector in delivery of major infrastructure:

- Difficulty in accurately forecasting future demand and costs which makes them prone to accountability problems, irrespective of public-private institutional arrangements and despite experience and improved forecasting techniques.<sup>136</sup>
- Use of public-private partnerships to circumvent budgetary constraints which poses risks to government budgets with large contingent liabilities. Opportunistic behaviour of the contract winner seeking to re-open negotiations when the government is in a weaker position is an additional risk found in OECD study.<sup>137</sup>
- An asymmetric information problem due to the extent of specialist expertise required, which complicates project supervision such as determining whether a contractor's demands for more resources or more time are legitimate. A lack of effective scrutiny increases corruption risks.<sup>138</sup>

- Infrastructural capacity created by politicians or bureaucrats for a “merit good” without adequate consideration of economic rentability, have a negative influence on productive and allocative efficiency.<sup>139</sup>
- Inadequate due diligence investigation into the record, capacity (including beneficial ownership), character and integrity of project proponents, and verification of impact statements; lack of transparency in negotiations and agreements; state and policy capture and industry influence.<sup>140</sup>
- Inadequate integrity framework such as protection of whistleblowers in the private sector (victimisation is not prohibited, no compensation provisions and limited privacy protection), underregulation of political donations, and a national anti-corruption body.<sup>141</sup>
- Integrity management of influence in the exercise of considerable government discretion in decision-making for large infrastructure projects, concessional loans and other project approval concessions, particularly in a context of homophily.<sup>142</sup>

Consideration and action in respect of these leading risks, together with leading practices in public procurement and public-private partnerships will support the APS role in public infrastructure decision-making and delivery whether through its approvals role, a public-private partnership, traditional procurement approach, or where the government itself provides the infrastructure.<sup>143</sup>

### **5.3. Use of technologies**

The use of technologies in public administration presents several public integrity threats and opportunities for the APS. The public integrity compass in avoiding threats in technology use depends on legitimacy of purpose and process to ensure that there is not mission drift and that the rule of law and the essential elements of administrative law (such as procedural fairness, relevant not irrelevant considerations) are not compromised in the name of efficiency and cost-saving (also worthy integrity behaviours).<sup>144</sup>

#### ***Integrity theory in practice***

Administrative error occasioned by technologies must be within the scope of risk, in a legitimate pursuit of purpose, as are non-technology errors. For example, the occurrences of website outage, data-overload, even cyber-attack are all technology risks for which APS information and communication technology (ICT) providers plan, and decisions are made on cost-benefit analysis and risk tolerance levels as some risk must be taken, otherwise there would be no technology use. The robust pursuit of that endeavour is open to legitimacy critique (e.g. 2016 Census failings in ICT implementation). But, the next potentially more vulnerable assessment of legitimacy in a robust disposition to pursue purpose (public integrity), is how the APS plans for, and *responds* to, the fact of an administrative error in its subsequent processes and procedures. For example, if there is a web outage that prevents a jobseeker from entering requisite details,<sup>145</sup> how is the probability of adverse consequences from a failure to provide the details (e.g. non-payment of benefits) managed in a way that is *justifiable* (i.e. without disproportionate impost on the citizen). Or, in the absence of a due process to manage that risk (public institutional integrity) does the public officer (contrary to APS values and a robust disposition required for public officer integrity) say to the distressed citizen in receipt of advice of a debt that is denied, ‘I’m sorry, computer says no’?<sup>146</sup> A public integrity analysis of the Centrelink ‘Robo-debt’<sup>147</sup> controversy would first scrutinise the incidence and scale of the error in the original technological and process design (e.g. averaging) as to its reasonableness or recklessness (legitimate pursuit).<sup>148</sup> But, fundamental to the crisis of illegitimacy claimed was the subsequent, and ongoing,<sup>149</sup> perception of failures to adhere to administrative law norms and existing government policy. The rule of law challenges were directed not just to the practical onus on the citizen to ‘disprove’ the debt, and failures of natural justice, but the contestable legal foundation for the existence of the debt at all.<sup>150</sup>

The integrity system acted to identify individual debts as false (zero) or incorrect and pointed to wider systemic concerns (through the Commonwealth Ombudsman and the

Administrative Appeals Tribunal) and recommended that Centrelink resume responsibility for obtaining all information necessary for calculating debts (Senate Community Affairs References Committee 2017). However, claims of illegitimacy continued for the debts failing to have a legal foundation and for 'arguably breaches' of the Commonwealth's model litigant policy which requires fair play and for litigation not to oppress citizens.<sup>151</sup> Affected citizens reacted by using technology in creating an online community of information to inform and support others who were affected.<sup>152</sup>

### **On the horizon**

Expanding use of new technologies by the APS should evaluate such public integrity learnings from recent ventures, the opportunities suggested by international e-government leadership (e.g. Britain recognised as world leader in digital government by the United Nations in 2016),<sup>153</sup> and look forward to a horizon that offers enhanced value for public integrity through new technologies combined with open government data:<sup>154</sup>

- To enable and drive citizen self-empowerment, participation and engagement of citizens (e.g. in planning and land use, service design and delivery, and public policy engagement in the broader democratic process).
- To improve government accountability, transparency, responsiveness and democratic control. (e.g. in Brazil, a citizen's group applied data analysis skills to develop (with crowdfunding) artificial intelligence to use open government data to review reimbursements for politicians' travel and other entitlements' expenditures and then inform voters; officially report suspicious expenditures; and now the robot, 'Rosie', has a twitter account to post findings and tag the congressperson to contact for clarifications.<sup>155</sup>)
- To value data: use public sector data and analytics by government (e.g. in Saudi Arabia, there is an automatic alert when a public contract is awarded if anyone on the procurement panel is related to anyone at the winning supplier), deliver personalised public services, combine public sector data with external data sources for policy making, enable data-driven private sector innovations for new ways of delivery and new goods and services.

A precondition to many of these opportunities is open access government data. *Australia's First Open Government National Action Plan 2016-18* commits to the international initiative for reforms that 'promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance'. There are cultural, technological and legal challenges to manage and international literature suggests that the way forward is a culture of risk management (which is outward and forward looking) rather than closed cultural norm preferences for security.

### **5.4. Whistleblower arrangements**

Whistleblower protection is an effective means of exposing fraud, misconduct and corruption and is an integral element of an integrity framework. The weight of history and the literature explain that in some cases whistleblowing may be the *only* effective means of detection where behaviours are well-concealed, part of a culture of cover-up, and especially where levels of complexity and sophistication lower the risk of being discovered.

Introduction of the *Public Interest Disclosure Act 2013* 'to promote the integrity and accountability of the Commonwealth public sector'<sup>156</sup> followed no less than six committee inquiries since 1991, Private Member Bills and the experiences of most states and territories that had legislation since the 1990s. In a 2015 comparative assessment of G20 countries against international best practice criteria for public sector whistleblowing legislation, Australia ranked as a top two country with the United States.<sup>157</sup> The key risk for the APS now is complacency in its whistleblowing arrangements. As for any essential element of institutional governance, and public institutional integrity, a *de minima* approach that checklists off legislation as 'achieved' will not sustain public integrity. In translating the theoretical intentions into practical norms for the APS, the next steps should include ongoing

evaluation of implementation;<sup>158</sup> assessment against international leading practices and principles;<sup>159</sup> and then further development of the legislative and policy framework<sup>160</sup> (including due examination of proposals and changes that limit scope and effect).<sup>161</sup>

Priority challenges in whistleblower arrangements include that the Commonwealth whistleblower protections do not cover wrongdoing by members of parliament, ministerial staff or the judiciary, unlike most State jurisdictions. Nor is whistleblower protection readily available to access for a public servant given the key steps would involve contacting the Australian Federal Police if there was a criminal reprisal or take court action.<sup>162</sup> Secondly, a one-stop shop, or gateway central agency to support whistleblowers has long been recommended.<sup>163</sup> Thirdly, various reports confirm that protections for private sector whistleblowers are 'weak' and 'limited'<sup>164</sup> which incompleteness also undermines the broader public sector integrity system given the nature and extent of contracting out arrangements, and public officers working alongside private sector contractors. Private sector whistleblower protections should therefore be improved and integrated with public sector whistleblowing.<sup>165</sup>

Fourthly, the literature debates the 'large carve-out' in coverage where no whistleblower protection is afforded for external disclosures that involve essentially an intelligence agency or related information, and certain sensitive law enforcement information.<sup>166</sup> Legislative amendment in 2014 also makes it illegal and punishable by imprisonment for anyone (MP and journalist included) to report on a 'special intelligence operation' as may be determined by the Attorney-General.<sup>167</sup> Analysis in the literature suggests that the *Public Interest Disclosure Act 2013* would offer limited protection to cases like Manning, Assange, and Snowden, and that without tailoring laws more specifically, serious criminal offence for example, could follow a disclosure of improper and immoral conduct in good conscience. The literature suggests that these outcomes may not accord with public expectations.

Similarly, although 'not a whistleblower',<sup>168</sup> the prosecution of Witness K and his lawyer for raising concerns about a covert Australian spying operation (that bugged East Timor's Cabinet in 2004 during negotiations about an oil and gas treaty), and the well-known Ponting case in the UK in the 1980s where the senior official provided a parliamentary committee with evidence that contradicted the government account of a decision taken during the Falklands war, open up broader integrity debates on the balance to be struck between employee fidelity and the public interest, and between national security information concerns and exposing perceived abuses of power by government. Such concerns have been described not as paradoxes but parallaxes: they are not either/or propositions which is why they are difficult, and sustain a persistent contest of perspectives.<sup>169</sup>

## 6. Why is public integrity important?

According to 2018 OECD research, the perception of government integrity is the *strongest* determinant of trust in government. Perceived institutional performance (reliability and responsiveness) also strongly correlates with both trust in government and trust in others.<sup>170</sup> The most recently released Australian survey results show a continued decline in Australians' trust in government (46% for federal level), attributed in part to growing concerns about corruption at the federal level with 85% responding that at least some federal parliamentarians are corrupt.<sup>171</sup> The latest research builds on the trend shown in earlier results across a range of surveys and reflects global trends.<sup>172</sup> Whilst surveys measuring public trust and confidence in government are useful in and of themselves to show comparative trends from previous surveys and serve to validate or test public perceptions, they are inherently challenged by the amorphous character of their subjects, trust and integrity, and the difficulties inherent in distinguishing institutional trust from political trust. Further elaboration for example as to 'trust to do what' may also assist in understanding the extent to which public service delivery is caught within the frame of public interest over partisan or private interests in surveys generally. Moreover, a read of other

indicators in survey results (such as for institutional governance and democracy) may elucidate a broader picture.<sup>173</sup> The public “accountability” narrative for compliance and needing to “hold government to account” may also be providing a schema-relevant context that influences the recall memory of trust.

### ***Public trustworthiness and public trust - how they relate and how to improve***

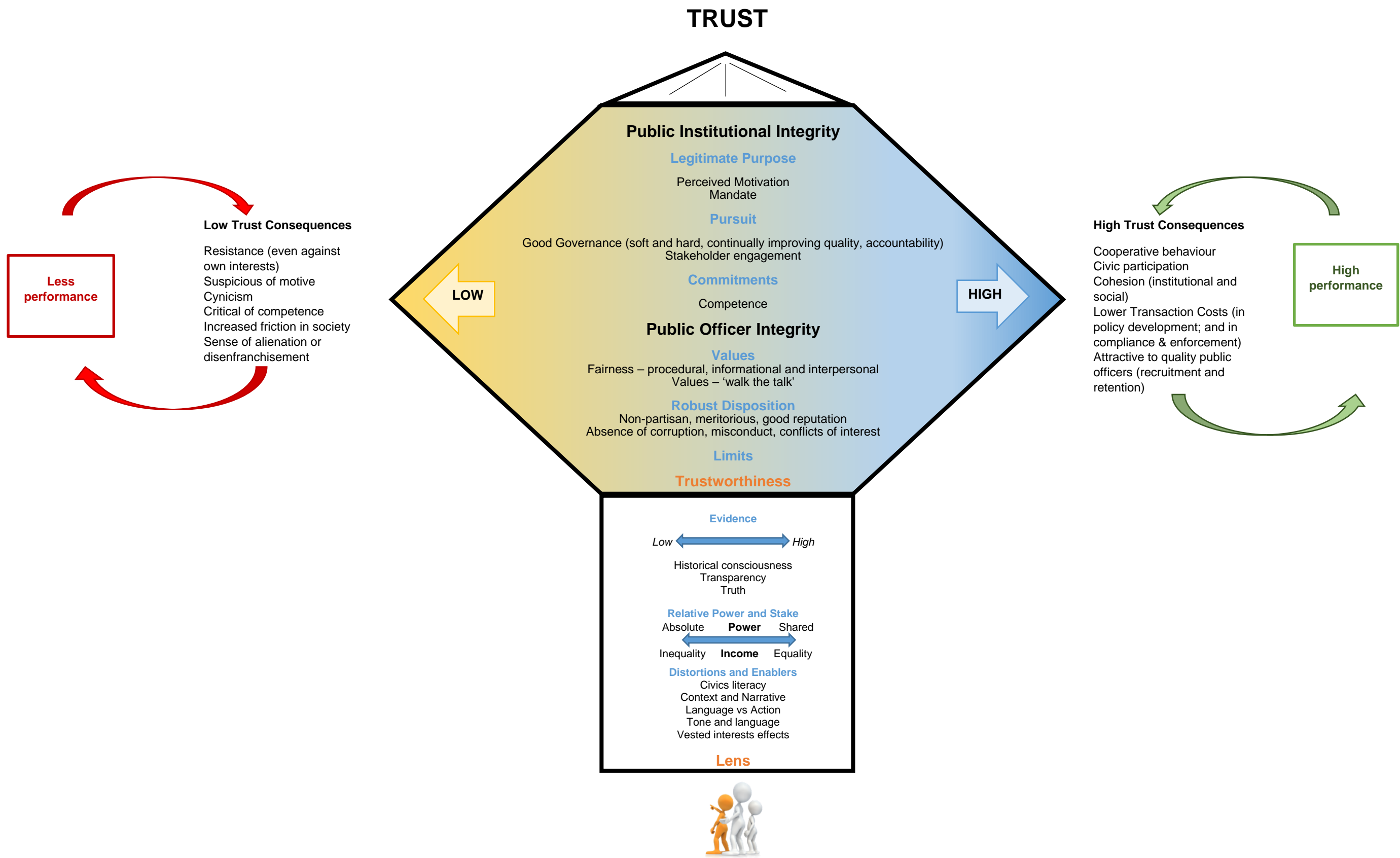
Reasonable scepticism of government is generally regarded as an element of a healthy democracy but when ‘mistrust is high and generalised, it is harmful’.<sup>174</sup> The literature recognises ‘social good’ consequences for high functioning trust, including the higher level performance that the public service can achieve.<sup>175</sup> A ‘vicious cycle of distrust’ can separate bureaucrats from citizens, increase friction in society, produce suspicion of government motives, and resistance to government even when it is against the citizen’s own interests.<sup>176</sup>

Perceptions of trust are highly contextualised. The literature highlights the concerns that are weighed in determining whether there is trustworthiness (such as impartiality, whether there is apology and learning from mistakes, recycling of ‘bad’ bureaucrats in the system) and these invariably relate to the definitional elements of public institutional integrity and public officer integrity. While trustworthiness is both intrinsically and instrumentally important, trust requires *more than being trustworthy*. Each citizen, and groups of citizens, first bring to their consideration of trustworthiness a range of exogenous influences. This lens can colour their perception of trustworthiness. History matters. Grievous historical breaches of trust by government or gross failures of institutional historical consciousness or repeated failures to include minorities in making public policy<sup>177</sup> filter perceptions of trustworthiness, as do a reputation for untruths and half-truths (‘fake news’ and ‘spin’),<sup>178</sup> or gaming of transparency reforms through freedom of information or estimates committee responses which lead to public cynicism more broadly. Integrity failures of non-APS Commonwealth institutions such as key regulatory institutions can be just as damaging to public trust notwithstanding the technical jurisdictional boundaries of the *Public Service Act 1999*.<sup>179</sup>

The lens also sees the relative power and stakes involved. The greater the power differential, the more reason one has to distrust it. Research suggests that there is more than an intuitive correlation between levels of trust and income with trust depending on the system’s capacity to improve their wealth.<sup>180</sup> There are also distorting or enabling influences in determining trustworthiness such as analytical capabilities and experience, tone and language (e.g. the economic rationalist accents of ‘economy’ vs ‘society’, ‘efficiency’ over ‘fair’ and ‘just’). **Appendix 1** shows public integrity at the centre of the trust ecosystem in earning trustworthiness, possible influences of external variables, and the range of practical consequences for the spectrum of trust perceived.

Beyond improving trustworthiness through building public integrity, the APS can consider which external variables are properly within its sphere of influence to improve the pre-context for the assessment of trustworthiness (e.g. managing expectations, civics literacy initiatives, engaging in genuine policy conversations to build partnerships and ‘share’ public policy making power and influence), and even a risk management approach may assist in preparing for those matters that are reasonably beyond their control.

The influences affecting perceptions of trustworthiness and the consequences of high and low trust



## ***Points of recommendation or further inquiry arising from the literature review:***

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### **1. *How should the APS define public integrity***

- The need for an institutional approach to public integrity.
- Public integrity requires more than merely meeting minimum standards.
- Public integrity is a higher-order structural value.
- Legitimacy is the primary ethical norm of public integrity.

### **2. *APS public institutional integrity***

- It is the Ministers who decide what is in the public interest and how it should be brought about and this could be made more explicit within the APS Values themselves. Currently, 'achieving the best results for the Australian community and the Government' remains ambiguous.
- APS needs to make clear how to resolve scenarios where responsiveness and apolitical frank and fearless advice come into tension.
- APS must be vigilant against importing into the public sector *via* management practices a 'whatever it takes attitude'. The APS should consider acquiring attitudinal data to inform on drivers of misconduct, as in other jurisdictions.
- The APS must develop a comprehensive strategy against policy capture and *perceptions* thereof, that balances the need for external accountability, collaboration, expertise, advice and consultation, in a 21st century governance system where traditional boundaries are only going to become more blurred. It must recognise that new laws will not be sufficient, and must be supported by proactive processes, norms and culture.
- The APS may wish to consider activity costing, or the UK practice of Ministerial Directions.

### **3. *APS public officer integrity***

- A value of 'stewardship' (or 'trusteeship') should be incorporated in the APS Values and supported institutionally by adequate systems for employee feedback, reporting misconduct by others, and whistleblowing.
- The APS needs to not only incorporate current insights on modern behavioural science, but develop processes to constantly innovate in response to cutting-edge research. Such research and ongoing reform should be task of one of the central integrity agencies.
- Training needs to be extended and mandatory, and a condition for leadership progression. It needs to be context sensitive, and most importantly it needs to work with teams.
- Agency heads should be required to consult with a dedicated integrity agency in exercising their discretion for an independent, expert check and balance, either the APS Commissioner or included in the responsibilities for a dedicated new integrity agency, as recommended below.

### **4. *APS integrity system***

- Regular production of integrity assessments should be institutionalised.
- The current integrity system needs to broaden its focus: include proactive measures, aiming to build the capacity of institutions as well as individuals to have the highest levels of integrity.

- The APSC should be designed for maximal independence, merit, and individual public officer integrity. We recommend a statutory requirement for a competitive merit appointment process or even a bipartisan appointment process similar to that for the Auditor-General; and an ineligibility period (e.g. 6-12 months) following service in a Minister's office whether in an employed or volunteer capacity.
- Only an integrated integrity agency could take responsibility and leadership for addressing public integrity as a whole, championing the cause, as an important symbol of intent, providing needed stability and support for associated agencies, and addressing issues of public trust.

## **5. *New risks and challenges***

- Public trust and confidence in the public integrity of all forms of contracting out needs the ongoing accountability gaps to be addressed as part of a principled system-wide review focussed on anchoring accountability and integrity arrangements and capabilities on the spend of public monies over the form of the provider for those public services.
- The constitutional and accountability questions arising in relation to major contracts that purport to bind incoming administrations bear further inquiry, and may open up a due diligence integrity role for the APS on the legal, economic and practical considerations. Consideration and action in respect of these and other leading risks in relation to major infrastructure, together with leading practices in public procurement and public-private partnerships will support the APS role in public infrastructure decision-making and delivery whether through its approvals role, a public-private partnership, traditional procurement approach, or where the government itself provides the infrastructure.
- Expanding use of new technologies by the APS should evaluate public integrity learnings from recent ventures (e.g. Centrelink 'Robo-debt'), the opportunities suggested by international e-government leadership (e.g. Britain recognised as world leader in digital government by UN in 2016), and look forward to a horizon that offers enhanced value for public integrity through new technologies combined with open government data.
- In translating the theoretical intentions of whistleblowing arrangements into practical norms for the APS, the next steps should include ongoing evaluation of implementation; assessment against international leading practices and principles; and then further development of the legislative and policy framework (including the identified priority challenges and due examination of proposals and changes that limit scope and effect).

## **6. *Why is public integrity important, and how to improve public trust***

- Beyond improving public trustworthiness through building public integrity (as examined in the paper), the APS can consider which external variables are properly within its sphere of influence to improve the lens through which trustworthiness is viewed, and prepare for those matters reasonably beyond its control. See **Appendix 1** for a diagrammatic representation of some of the influences affecting perceptions of trustworthiness and the consequences of high and low trust.



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## Legislation and Cases

*Public Interest Disclosure Act 2013 (Cth)*

*Public Governance, Performance and Accountability Act 2013 (Cth)*

*Public Service Act 1999 (Cth)*.

*Report of the Royal Commission into Commercial Activities of Government and Other Matters*, (1992), (W.A.)

*Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433.

*Trent Latham Smith v Department of Foreign Affairs and Trade* [2007] AIRC 765; (28 September 2007)

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<sup>1</sup> Examples: Legislation and Code of Conduct: *Public Service Act 1999* (Cth) ss. 10, 13. Agency titles: Australian Commission for Law Enforcement Integrity. Other official documents: APSC, (2017b), (2017c), (2017d); PM&C, (2017). Speeches: Keating, (1995); Podger, (2012); McMillan, (2017); As a limited exception: APSC, (2017a), dir. 13.

<sup>2</sup> See, Williams, (1973); McFall, (1987); Monaghan (2017); Montefiori, and Vines (1999); Taylor, (1981), Calhoun, (1995); Davion (1991); Cox et al., (1999); Philp, (2007); Heywood and Rose, (2015); Audi and Murphy, (2006).

<sup>3</sup> These definitions are based upon the work of the Building Integrity Programme, Blavatnik School of Government, Oxford University. See, Kirby, (2018).

<sup>4</sup> See, n1.

<sup>5</sup> *Public Service Act 1999* (Cth) ss. 10, 13(11), see also *Trent Latham Smith v Department of Foreign Affairs and Trade* [2007] AIRC 765; (28 September 2007).

<sup>6</sup> See, Kirby, (2018); Brock, (2014); Breaky et al., (2015); Preston and Sampford, (2002); Grebe and Woermann, (2011); Lessig, (2013); Amit et al., (2017); Huberts, (2014).

<sup>7</sup> For example, an institution can be untrustworthy and thus lack public integrity, *not* because it has untrustworthy public officers, but because poor internal coordination results in individually trustworthy public officers making inconsistent commitments that the institution as a collective cannot fulfil.

<sup>8</sup> For example, see discussion of the meaning of the term in APSC, (2017b), (2017c), (2017d); PM&C, (2017). However, this is not the case if we understand the APS Values as a whole to be operationalising 'public integrity' as a higher order value (see next paragraph).

<sup>9</sup> See, §6 below.

<sup>10</sup> See, OECD, (2017g); Rein and Hamburger, (2017). See also, the discussion of compliance culture §§2.2.

<sup>11</sup> See, *Public Service Act 1999* (Cth) ss. 10; APSC, (2017d); APSC, (2017c), 4; APSC, (2016), 2.

<sup>12</sup> See, n2, 6. It also consistent with the view of the International Civil Services Commission, (2002): 'The concept of integrity... embraces all aspects of behaviour of an international civil servant,

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including... honesty, truthfulness, impartiality and incorruptibility. These qualities are as basic as those of competence and efficiency.'

<sup>13</sup> See, *Public Service Act 1999* (Cth) ss. 13(11); APSC, (2017c), 3.

<sup>14</sup> See, Briggs, (2009); the APSC's 'REFLECT' decision-making framework, APSC (2017e). However, it is also a common fallacy in the public administration literature: Breakey et al, (2015); Huberts, (2014), Heywood and Rose, (2017), Heywood et al., (2017), Brock, (2018). It is, however, consistent with Applbaum's approach: Applbaum, (1999), and Philp, (2007).

<sup>15</sup> Legitimacy is a moral concept. At heart, it is concerned with whether one agent has the *moral* 'right to rule' with respect to another agent, that is, whether the former has the ability to change the moral rights and duties of another latter agent *because it says so*. Invariably, the ruling agent can only have this moral right because it satisfies certain preconditions. Various theories of legitimacy, therefore, dispute what these preconditions are at a deep explanatory level: whether it requires democracy, a social contract, an instrumental justification, and so on. However, at an operational level, these theories generally converge to explain and justify without great controversy the general importance of rule of law, constitutionalism, due process, human rights, and so on, as the core content of legitimacy. As such, almost all will agree that within the democratic, constitutional Australian system, legitimacy will be *generally* secured by lawfulness (including obeying those who have the lawful authority to direct others). Of course, it is the point at which such generalisations break down that is most disputed, and where legitimacy may no longer be consistent with lawfulness: for example, where a lawful instruction by a superior requires a breach of fundamental human rights. At such a point one must engage with deeper and more contested theories of legitimacy, and first-order philosophical debate. For a general introduction to 'legitimacy', see Peter (2018), and in relation to public integrity more specifically, Kirby, (2018), 17-22.

<sup>16</sup> Also, see the second suggested topic in the Prodding Paper.

<sup>17</sup> This is consistent with Mark Moore's 'public value management': Moore, (1995). However, Moore gives the impression this should be a universal approach. However, public officers need to be sure that they have been authorised to take this approach, and sometimes, they will clearly not.

<sup>18</sup> Dobel, (2007); Senge, (1990); Block, (1993); Moore, (1995); Barnard, (1938); Collins, (2001).

<sup>19</sup> *Public Service Act* (1999), s 3.

<sup>20</sup> *Public Service Act* (1999), ss 3,10(1).

<sup>21</sup> *Public Service Act* (1999), s 10(5).

<sup>22</sup> *Public Service Act* (1999), s 11.

<sup>23</sup> MacDermott, (2008) 3; Keating, (1995); Podger, (2012), 10.

<sup>24</sup> APSC, (2017d), 1.3.5; See Lawson, (2011), V.A. for a clear account of the law supporting this position. Less clear is what APS agents should do if ministerial directions about the public interest are conflicting or under-determine what to do in a particular scenario. Sometimes it is obvious that a matter should be raised with the Minister herself. However, other times this will be impractical, and the issue is treated as being within the scope of existing delegation. In such scenarios, decisions should reflect such reasoning, making the basis for the decision clear.

<sup>25</sup> *Public Service Act* (1999), s10(1).

<sup>26</sup> *Public Service Act* (1999), s10(1)(f) old version.

<sup>27</sup> MacDermott, (2008), 1.

<sup>28</sup> Especially as elaborated by APSC, (2017a), dirs. 17(d), (e).

<sup>29</sup> Edwards et al., (2012), 87.

<sup>30</sup> Victorian Auditor-General, (2015).

<sup>31</sup> See prodding paper, research option 2.

<sup>32</sup> For a basic survey of theories of legitimacy, see Peter, (2018).

<sup>33</sup> See, Lawson (2011), II.

<sup>34</sup> *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, Part II, 3.1.5., 1992, (W.A.); Finn, (1993), (2010).

<sup>35</sup> *Public Service Act* (1999), ss 3, 10.

<sup>36</sup> See, Downey, (2001), 31, citing Mulgan, (1997), 110: 'In terms of public servants performing their tasks, there is a shift from a process focus to an outcome focus. Whereas previously "public servants place[d] more emphasis on avoiding mistakes than on improving productivity," managerialism engenders a culture of "risk management" whereby eliminating the potential for mistakes is a goal only insofar as mistakes cost money. "Risk management" dictates that if it is not cost effective to reduce mistakes then no action is taken. At its core, managerialism refocuses administration on meeting the tasks set by government and away from wider public considerations.'

<sup>37</sup> KPMG, (2013), 2.



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- <sup>38</sup> The APS currently surveys APS employees only about serious corruption, although its methodology has been questioned: Brown et al., (2018), 21.
- <sup>39</sup> See, Kirby, (2018), 28.
- <sup>40</sup> OECD, (2017d), 9. Like much of the literature, the OECD does not give a clear definition of 'directing away from the public interest.' However, it effectively reduces it to meaning 'illegitimate influence.' This is surely correct, although it invites a much more detailed account of what makes influence legitimate or illegitimate. A comprehensive APS policy would need to elaborate, drawing upon the institutional corruption literature, see n 41 below.
- <sup>41</sup> Lessig, (2013); Thompson, (2018); Johnston, (2005).
- <sup>42</sup> OECD, (2017d), 19.
- <sup>43</sup> Johnston, (2005).
- <sup>44</sup> See, OECD, (2017d); ANAO, (2013), 50: 'Conflicts of interest can pose significant business and reputational risk. Even the perception that a conflict has influenced an outcome may undermine public confidence in the integrity of an entity or an individual.'
- <sup>45</sup> Edwards et al., (2012), 225.
- <sup>46</sup> For example, there should be reassessment of whether current processes for appointing senior leaders, such as statutory officers, are sufficiently independent and transparent, given alternative international practice, see Edwards et al., (2012), Ch 9; and §4 below. Also see prodding paper, research option 4.
- <sup>47</sup> See, Nickel, (2007); Hawley, (2014).
- <sup>48</sup> See, APSC, (2017d), 2.2.10. Although note, APSC, (2017a) dir. 14(b).
- <sup>49</sup> See, *Public Governance, Performance and Accountability Act 2013*, s 41.
- <sup>50</sup> Borthwick, (2012), 104-5.
- <sup>51</sup> Institute for Government, (2018).
- <sup>52</sup> This might be 'blowing the whistle.' But it may also be as simple as suggesting new ways in which already good institutional practices can be made better.
- <sup>53</sup> Rothstein and Sorak, (2017).
- <sup>54</sup> For the importance of stewardship as a value see, Dobel, (2007), 166-7; ANAO, (2003), 8; Asia-Pacific Economic Committee, (2011); Barrett, (2003). Arguably it is a constitutional principle, see *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, (1992), (W.A.), 3.1.5 cited in Finn, (1994), 234. 'Trusteeship,' resonates the old common law principles of public offices as public trusts. See, Finn, (2010). In this context, the integrity of the public institution can be seen as the resource being managed for the public as beneficiaries.
- <sup>55</sup> Edwards et al., (2012), 128; Advisory Group on Reform of Australian Government Administration, (2010), 5, 21-2, 47-9; ANAO, (2013), 10.
- <sup>56</sup> Thompson, (2003).
- <sup>57</sup> See, Morrison, (2013).
- <sup>58</sup> To be clear the object of stewardship, and implied duty of loyalty, is the *integrity* of the public institution, not the institution itself. There will be cases, therefore, where stewardship of the integrity of the institution run against the self-interest or even existence of the institution. Stewardship may require ending an institution (e.g. when it becomes redundant, without legitimate purpose); or, it may require damage to its reputation (e.g. when whistleblowing is the only effective way to address serious failures of institutional integrity).
- <sup>59</sup> See below, §4.
- <sup>60</sup> See Brennan and Hanlin, (1995); ACLEI's 'values alignment model', ACLEI, (2018a).
- <sup>61</sup> However, they are not ends in themselves, and can sometimes be counter-productive: O'Neill, (2002), 3-59; Owens, (2015), 162ff; Philp, (2007), 220ff; Mayer, (2013), 60; Bovens (2007), 194; Linaweaver (2003). See also, Podger, (2012).
- <sup>62</sup> Klitgaard, (2015); Heywood et al., (2017). An salient example is the introduction of performance pay for senior APS officials, which is generally seen as a failure, and repealed by the Rudd Government. See Edwards et al., (2012), 103, Podger, (2012), 10; Hawke, (2012).
- <sup>63</sup> Philp, (2007), 151: 'Any political system needs some on-going locus of integrity. Even the best balanced and best designed system needs interpretation and judgement, and those who interpret and judge must do so authoritatively and impartially, not just in the interests of some section of the community; for that we need integrity.'
- <sup>64</sup> Denhardt and Denhardt, (2003), 29.
- <sup>65</sup> OECD, (2018).
- <sup>66</sup> Menzel, (2015), 356.
- <sup>67</sup> Brown et al., (2005), 70.
- <sup>68</sup> OECD, (2007); OECD, (2010a).

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<sup>69</sup> OECD, (2007); OECD, (2010a).

<sup>70</sup> OECD, (2010a) 52.

<sup>71</sup> APSC, (2017f).

<sup>72</sup> Many APS agencies reported including references to their post-public employment rules in contracts with private sector organisations: OECD, (2010), 46.

<sup>73</sup> Cooling off periods of 1 year (5 years for lobbying) apply in Canada and 5 years for cooling off in Germany. In the UK most senior officers must seek permission before they take up business appointments: OECD, (2010), 69, 88.

<sup>74</sup> It is most common to speak of a 'national integrity system,' that is the total set of laws, agencies, procedures, practices, incentives and attitudes that together promote the integrity of all different agents (including even business, and civil society). However, sometimes we want to speak of the set of laws, agencies, procedures, practices, incentives and attitudes that together promote the integrity of a *particular* sub-set of agents, for example, just the public institutions and officers of the *Commonwealth*, or the *State of NSW*, or in this case a further sub-set of commonwealth institutions: the *APS*, (or even more precisely, as understood in this paper given its mandated scope, those institutions and officers falling under the *Public Service Act 1999* and as directly responsive to the Framing Question quoted in the Preface regarding improvements to the 'APS's current integrity regime'). Thus, just as the NISA review speaks of the 'Commonwealth Public Sector Integrity System' when doing this, we shall speak of the 'APS Integrity System,' (we could alternatively have spoke of the 'APS integrity *Sub*-system'). However, to avoid misinterpretation, two further things should be made clear. First not all, in fact not most, of the component parts of the 'APS Integrity system' will, themselves, be APS institutions. For example, the judiciary, police and the media are external to the APS, but are important parts of the system that promote its integrity by holding it accountable. Secondly, many more particularised 'sub-systems' within the broader national integrity system will share component parts. Thus, the national media will be part of the national integrity system, *and* Commonwealth integrity system, *and* APS integrity system, and so on.

<sup>75</sup> See, Pope, (2000).

<sup>76</sup> OECD, (2017g).

<sup>77</sup> Brown et al., (2005); Transparency International, (2018).

<sup>78</sup> Brown et al., (2018), 9.

<sup>79</sup> Those bearing on the APS: Attorney-General's Department; APSC, including both the APS Commissioner and the Merit Commissioner; Auditor-General; Officer of the Australian Information Commissioner, Department of Finance and Deregulation, Senate Committees. Others include: the Australian Electoral Commission, and Parliamentary Standards.

<sup>80</sup> Federal Judicial System; Administrative Appeals Tribunal.

<sup>81</sup> Australian Federal Police (including the Fraud and Anti-Corruption Centre); ACLEI, Australian Criminal Intelligence Commission, Office of the Commonwealth Ombudsman; Australian Transaction Reports and Analysis Centre Inspector-General of Intelligence and Security.

<sup>82</sup> Office of the Commonwealth Director of Public Prosecutions.

<sup>83</sup> International Crime Cooperation Central Authority; Attorney-General's Department Portfolio Agencies; AusAID.

Whilst not of obvious relevance to the APS, dealing with corruption can involve cross-jurisdictional challenges (e.g. foreign bribery). See Brown et al, (2018), 41ff.

<sup>84</sup> Further improved by the establishment of the Fraud and Anti-Corruption Centre in 2013.

<sup>85</sup> Brown et al., (2005), 34.

<sup>86</sup> Brown et al., (2005), 88-9. See, Boughey, J. and Weeks, G., (2015).

<sup>87</sup> See, Brown et al., (2018), 11-12; Heywood et al., (2017).

<sup>88</sup> ACLEI, (2018b); Brown et al., (2018), 13.

<sup>89</sup> ANAO, (2014), currently suspended.

<sup>90</sup> See §§3.2.

<sup>91</sup> APSC, (2017g).

<sup>92</sup> Graycar and Prenzler, (2013), 7;

<sup>93</sup> Thompson, (2003), 257.

<sup>94</sup> See, Brown et al., (2018), 32.

<sup>95</sup> The 2014 National Commission of Audit recommended that the APSC be merged into the departments of Employment and Finance (as the alternative to decentralising arrangements with a stronger role for secretaries through the Secretaries Board): Shepherd et al (2014), 37-42.

<sup>96</sup> APSC, (2017g).

<sup>97</sup> APSC, (2017h).

<sup>98</sup> *Public Service Act 1999* (Cth) ss 41A-B.

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- <sup>99</sup> *Public Service Act 1999* (Cth) s 47.
- <sup>100</sup> See, 'The need for a new integrity agency.'
- <sup>101</sup> *Public Service Act 1999* (Cth) s 45.
- <sup>102</sup> Burgess, (2018); Merit Commissioner found breach of Code of Conduct by Public Service Commissioner: Donaldson (2018).
- <sup>103</sup> *Auditor-General Act 1997* (Cth), s.9 and Sch.1 (2). State jurisdictions offer similar bi-partisan appointment processes such as the Qld Auditor-General and Ombudsman (s.92(b) *Auditor-General Act 2009* (Qld) and s.59 *Ombudsman Act 2001* (Qld) ).
- <sup>104</sup> McMillan, (2018).
- <sup>105</sup> Brown et al., (2018); Hobbs and Williams, (2017); National Integrity Committee, (2018); Aulby, (2017a) and (2017b); Watson, (2017); Whealy, (2017). See discussion of arguments for and against considered by Senate Select Committee on the Establishment of a National Integrity Commission, (2016), 11-39 and by the Senate Select Committee on a National Integrity Commission, (2017), 181-217.
- <sup>106</sup> Brown et al., (2018); Hobbs and Williams, (2017).
- <sup>107</sup> MacMillan, (2018) has noted that, whilst Ombudsman: 'From time to time people would contact the office to inquire about steps that could be adopted to deal with a corruption allegation, for example, in a contracting arrangement, personnel recruitment or financial management. The person would often explain that they had come to the Ombudsman as they didn't know where else to go. Some callers were reluctant to give details of an allegation until they knew what would happen. Some were not interested in giving further details when advised that the AFP may be contacted – they did not want police involvement at that early stage, which is why they'd called the Ombudsman. Advising the caller that the Ombudsman did not have the forensic skills to investigate a complex matter, and that investigation options would have to be discussed with the agency to which the allegations related, was also discouraging to callers. Nor was it possible to advise the caller how the matter would be finalised or reported.' Brown et al., (2018) 22 also note, 'While the Australian Public Service Commissioner's Directions (2016) require all APS employees 'to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way', there is no requirement on APS agency heads to report these to anyone else, other than in an annual statistical return to the APSC, after the event.'
- <sup>108</sup> Brown et al., (2018), 44ff; and, see Recommendation 12.1, Parliamentary Joint Committee on Corporations and Financial Services, (2017), 158.
- <sup>109</sup> Brown et al., (2018), 29: 'Finally, it is remarkable that specialist, independent anti-corruption capacity and oversight is weak in respect of the single largest source of corruption risk – procurement of goods, equipment, facilities and services.' See also, ANAO, (2018a).
- <sup>110</sup> Brown et al., (2018), 37-8.
- <sup>111</sup> Whealy, (2017), Brown, (2017), Waterford, (2017).
- <sup>112</sup> Brown et al., (2018), 24; Whealy, (2017), 3.
- <sup>113</sup> Brown et al., (2018) recommending building upon the ACLEI, or at least subsuming it within a new organisation. MacMillan, (2018), 5, suggests it is better to simply start from the ground up.
- <sup>114</sup> The ACLEI has also tripled in size in under ten years (Brown et al, (2018), 1) without measurement, benchmarking or reporting on its efficiency as concluded by the Auditor-General in his first performance audit report, also recommending the ACLEI improve prioritisation and alignment of resources to its legislation (ANAO, (2018b)).
- <sup>115</sup> Brown et al., (2018),13: While stronger anti-corruption approaches are needed, limitation to this focus poses two risks: a potential failure to maximize existing pro-integrity strengths and traditions (including in corruption prevention), and the potential retrograde step of an 'integrity paradox', in which new laws and institutions obscure the behavioural challenges of organisational absorption of norms and values. See also discussion in Senate Select Committee on the Establishment of a National Integrity Commission, (2016), 27.
- <sup>116</sup> This does *not* appear to have been considered by the National Commission of Audit, which effectively viewed the APSC merely through the prism of a management and performance agency neglecting to consider its public integrity powers at length, let alone its unique significant for public sector distinct from private sector organisations: Shepherd et al., (2014), Phase Two, part B, 3.1.
- <sup>117</sup> Further, Brown et al., (2015) concluded "emphasis upon encouraging agencies to manage their own governance arrangements means that the whole of government integrity system does not have any clear leader or champion".
- <sup>118</sup> McMillan, (2018).
- <sup>119</sup> McMillan, (2017).

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<sup>120</sup> Currently, the APSC provides leadership and oversight to only approximately two-thirds of the Commonwealth public sector thus a broadened role would be better served as part of a more comprehensive framework covering both APS and non-APS agencies.

<sup>121</sup> David-Barrett, (2015), 7; OECD, (2008).

<sup>122</sup> David-Barrett, (2015); Transparency International UK, (2013); Murray and Frijters, (2017). Also see above, §2.2.

<sup>123</sup> See above, §3.3; also OECD, (2007) and OECD, (2010a).

<sup>124</sup> AHRC, (2014); The Nauru Files.

<sup>125</sup> UNHRC, (2018), 5, 7, 20-22.

<sup>126</sup> Wolfe et al., (2015).

<sup>127</sup> Brown et al., (2005), 69; Administrative Review Council, (1998).

<sup>128</sup> Whereas the extension of the Commonwealth Ombudsman's jurisdiction over APS contracted service providers (subject to specific exclusions such as intelligence agencies) have improved accountability for compliance.

<sup>129</sup> David-Barrett, (2015), 22 referring to Cohen and Eimicke's work 2008.

<sup>130</sup> See also *Whistleblower Arrangements* section below for recommendations to improve and integrate private with public whistleblower protections to ensure the full view of misconduct and protection for both private and public whistleblowers party to a contracted out arrangement.

<sup>131</sup> David-Barrett, (2015), 22; Transparency International UK (2013).

<sup>132</sup> For example, the Ministry of Justice forced to take control of HMP Birmingham from G4S following damning inspection (2018); NSW Railcorp de-corporatised (2008); and more in OECD (2002).

<sup>133</sup> See prodding paper, research option 4.

<sup>134</sup> Hayne, (2017).

<sup>135</sup> Murray and Frijters, (2017), 45-63 and Appendix 1: Compared to the advertised total costs of all the 38 infrastructure projects to \$60.5B, the \$42.8B loss is an additional cost of around 60%.

<sup>136</sup> David-Barrett, (2015), 11.

<sup>137</sup> Araújo, (2010).

<sup>138</sup> The United Kingdom has invested significantly in training civil servants in major program management; David-Barrett, (2015), 11.

<sup>139</sup> Denkhaus and Schneider in Lane, (2010), 84.

<sup>140</sup> Transparency International Australia, (2017) (citing Adani's Carmichael Coal Mine).

<sup>141</sup> Transparency International Australia, (2017).

<sup>142</sup> Murray, (2016); Transparency International Australia, (2017).

<sup>143</sup> Araújo (2010); OECD (2008); OECD (2009b). Also see prodding paper, research option 4.

<sup>144</sup> See Administrative Review Council (2004) for potential advantages and disadvantages of using expert systems in administrative decision making.

<sup>145</sup> Karp (2018).

<sup>146</sup> Alleged in relation to the Centrelink "Robo-debt": Revanche (2018).

<sup>147</sup> Online Compliance Intervention debt recovery system, a part of the Better Management of the Welfare System initiative to recover social security overpayments. (The public integrity analysis concerns the implementation of the policy, not the policy itself.)

<sup>148</sup> OECD (2005c), 124: discusses technology trends to *ex post* controls and stronger processes of internal controls required to implement processes to achieve effectiveness, reliability and compliance, and the corresponding growth in importance for accountability.

<sup>149</sup> Knaus (2018): Robo-debt bypasses previous safeguard for mentally ill.

<sup>150</sup> Carney, (2018); Ombudsman, (2017).

<sup>151</sup> Carney, (2018).

<sup>152</sup> Revanche, (2018).

<sup>153</sup> GOV.UK ; UN DESA, (2016) for innovative practices; OECD, (2010b) for Denmark example.

<sup>154</sup> OECD, (2015a) for data-driven innovation.

<sup>155</sup> Pedro, (2017).

<sup>156</sup> *Public Interest Disclosure Act 2013*, s.6.

<sup>157</sup> Wolfe et al., (2015).

<sup>158</sup> Such as the 2016 Moss Review (e.g. investigation mechanisms were overly complex); and the 2017 Parliamentary Joint Committee on Corporations and Financial Services (e.g. need for the establishment of a 'one stop shop' Whistleblower Protection Authority, inconsistencies and fragmentation in the framework, consideration of a reward and bounty system like US and Canada).

<sup>159</sup> Such as the G20 Compendium of Best Practices and Guiding Principles for Legislation and G20 Anti-Corruption Implementation Plan commitments (self-assessment) made at Brisbane G20 Summit in 2014. Also, Wolfe et al., (2015); OECD, (2016).

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<sup>160</sup> e.g. *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* is before the Senate extending protections for tax whistleblowers, and for corporate and financial sectors.

Whistleblower legislative protection in the private sector is weaker, incomplete and fragmented; as well as key reforms highlighted in reviews of implementation such as those concerning limitations in coverage and a 'one stop shop' support.

<sup>161</sup> e.g. Moss Review findings on breadth of disclosable conduct and whether the focus should be on the most serious integrity issues. Data retention scheme under telecommunications legislation (which downgraded Australia's rating for anonymity in the 2015 international comparative assessment).

*Australian Secret Intelligence Organisation Act 1979*, new s.35P.

<sup>162</sup> Brown et al., (2018).

<sup>163</sup> Senate Select Committee on Public Interest Whistleblowing, (1994); Senate Select Committee on a National Integrity Commission, (2017); Parliamentary Joint Committee on Corporations and Financial Services, (2017); Brown et al., (2018). In a recent international study comparing Australia's federal sector with the US, Belgium, Netherlands, Israel, Republic of Korea, only Australia had no independent or specialist whistleblowing agency that either investigates or assists whistleblowers to access remedies: Brown et al., (2018), 45.

<sup>164</sup> Parliamentary Joint Committee on Corporations and Financial Services, (2017); Wolfe et al., (2015).

<sup>165</sup> See recommendations to improve private sector whistleblowing in Parliamentary Joint Committee on Corporations and Financial Services, (2017); Brown et al., (2018).

<sup>166</sup> Wolfe et al., (2015), 27; Hardy and Williams, (2014), 813 as to whether a court might adopt a narrower view of scope.

<sup>167</sup> *Australian Secret Intelligence Organisation Act 1979*, new s.35P.

<sup>168</sup> Whistleblower protections are not available to secret service personnel. Witness K took his complaint to the Inspector-General of Intelligence Security. Greene (2018).

<sup>169</sup> Macaulay in Cox, (2009), 33-36.

<sup>170</sup> Key findings in OECD, (2018).

<sup>171</sup> Global Corruption Barometer Survey Data Release by Griffith University and Transparency International on 20 August 2018.

<sup>172</sup> e.g. Australia's 2017 Corruption Perceptions Index score as 13th least corrupt of 180 countries continued to slide; 2017 Survey by the Scanlon Foundation found Australians' faith in government declined significantly over past decade and the 2016 Australian Election Study found 45% were not satisfied with democracy in Australia (lowest level of satisfaction since 1970s): Denniss (2018), 42, 44. In 2014-16, only 38% of people in OECD countries said that they trust their government, a 4% decline since 2006: OECD, (2017a), 185.

<sup>173</sup> Brown et al., (2005), 60.

<sup>174</sup> Miller (2014); Brown et al, (2005).

<sup>175</sup> Consequences of a well functioning integrity system should include quality of decisions and services: Dobel (1999), p.xii. Trust is critical to the job we have as public servants, if we are to do them well: Eccles (2017). Also, Below (2018); Miller (2014); OECD (2017a).

<sup>176</sup> Garofalo and Geuras in Cox (2009); Miller (2014); Eccles (2017).

<sup>177</sup> See for e.g. Cox (2009), 44, 61.

<sup>178</sup> Not new, but a politician's tools of the trade. The more rhetorical than dialectical will aggravate trust perceptions. See Arendt's *Truth and Politics* (1967).

<sup>179</sup> Arising from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Previous criticism of ASIC for being 'too weak and trusting of the big end of town' has been joined by the failings of APRA being described as a 'hear no evil, see no evil' regulator: 'APRA has allowed the super system to operate with little transparency and accountability, to the detriment of millions of Australians and their retirement savings.' (Ferguson, 2018) In 2017, the ATO was in 'unprecedented crisis' with a deputy commissioner and others facing charges amid an alleged '\$165M tax-fraud syndicate scandal'; (Norington, 2017) public allegations of information security breaches with detail on bypassing of passwords; (news.com.au, 2017) and allegations of a culture of fear to keep employees quiet, retribution against whistleblowers and an 'obsession with reputation' which was a 'recipe for corruption'. (Power, 2017) In 2018, ABC-Fairfax investigative reports claimed 'draconian' abuse of power against small businesses and whistleblowing. (Ferguson et al, 2018) Public integrity is seriously undermined by these alleged behaviours for want of legitimacy and portray the institution as untrustworthy - an extraordinary predicament for notions of the social contract where citizens pay their taxes in exchange for mutual benefits, such as the rule of law. 'Taxes are what we pay for civilised society.' (US Supreme Court Justice Oliver Wendell Holmes, Jr 1904.)

<sup>180</sup> Below, (2018); OECD, (2017a), 67.