

Politicisation of the Public Service Issues Paper and Request for Submissions

In February this year the Legislative Council passed a motion requiring the Ombudsman to investigate some matters, including issues relating to the alleged politicisation of the public service.

This paper summarises the public policy issues raised by the Referral and calls for individuals and organisations to provide information to assist the investigation.

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To make a submission:

You can call us to discuss confidentiality obligations and related issues.

We will accept submissions until 15 July 2022.

[Click here for more information on how to have your say.](#)

The Parliamentary Referral

The Legislative Council referred six matters to the Ombudsman on 9 February 2022 under section 16 of the *Ombudsman Act 1973* (Vic) (**Appendix 1**).

This Issues Paper relates to Item (d) of the Referral, requiring investigation of –

... the allegations in the 14 August 2021 article published in *The Age* titled '*The Chosen Few: How Much is Victoria really Governed*', that ALP activists are 'stacked' into the public service thus compromising objectivity and professionalism and increasing the risk of corruption ...

The article alleged recent Government appointments of senior officers had caused or accentuated a politicisation of the Victorian public service. It said there was a 'marked shift in the number of political operatives installed in senior bureaucratic jobs'. This has the potential to erode a key notion of the Westminster system of government, that the public service is independent of government and gives frank and impartial policy advice.

The Ombudsman's role

The Ombudsman Act provides that the Ombudsman shall 'forthwith investigate' a matter referred by a House of the Parliament and report back to that House.

It is important that the Ombudsman, as an independent officer of the Parliament using public resources, conduct investigations in a manner that is appropriate, practicable and proportionate. The Ombudsman has discretion both in framing and conducting an investigation.

The Ombudsman has started an investigation and has appointed Professor John McMillan AO to assist and lead the investigation team. Professor McMillan was the Commonwealth Ombudsman, NSW Ombudsman (Acting), Australian Information Commissioner, and the Integrity Commissioner (Acting) leading the Australian Commission for Law Enforcement Integrity. He is an Emeritus Professor in the College of Law at the Australian National University. He has not worked for or in any Victorian Government agency.

Scope of this investigation

The investigation will consider the implications of an allegation that there is an emerging trend of people with a political affiliation being appointed to executive positions in the Victorian public service (ie agency heads or other 'executive' roles within the meaning of the *Public Administration Act 2004* (Vic)).

The investigation will examine four key questions. They are cast broadly to show the dimension of this investigation and to underscore that the Ombudsman brings an open mind to the matters raised.

1. Concern has been expressed about the politicisation of public sector appointments. Are there recent examples of impropriety in the way executive officers have been appointed in Victoria?

This embraces other questions, such as –

- Are there recent examples of proper steps not being followed within government in creating executive vacancies and making appointments to those vacant positions?
- Are there recent examples of inappropriate processes being followed, or criteria applied, to identify the most suitable person for an executive vacancy?
- Are there recent examples of appointees to executive vacancies being engaged on inappropriate terms or conditions of employment?
- Are there recent examples of different terms and conditions being set for appointees, and if so, is there a sound reason for that difference?
- Are there recent examples to the contrary, where a candidate's affiliations have been declared and appropriately managed?

2. Are there recent examples where the Victorian public service has either suffered adversely or benefited from people with a political affiliation being appointed to executive positions?

This embraces other questions, such as –

- How important is it to preserve the conventional role of the public service in the Westminster model of government in providing independent decision-making and advice to government?
- Are there examples of the capacity of the public service to fulfil that conventional role being diminished by a new and different trend in executive appointments?
- If a change has occurred, is it an expected consequence of the evolving nature and style of executive government?
- Are there recent examples of the appointment of people with a political affiliation to executive positions having either a detrimental or beneficial effect on relations between the political and executive branches of government, including the interaction between senior officers and government ministers and advisers?

3. Are there recent examples where Victorian government administration has been either detrimentally or beneficially affected as a consequence of people with a political affiliation being appointed to executive positions?

This embraces other questions, such as –

- Which areas of government decision-making are endangered when political considerations inappropriately overshadow public interest considerations? Such areas may include, but are not limited to, information release, procurement, resource allocation and land development.
- Are there recent examples of this occurring?
- Are there recent examples of the appointment of people with a political affiliation to executive positions weakening the commitment in government to observing administrative law principles in decision-making?
- Are there recent examples of inferior outcomes in policy development, procurement or service delivery that can be linked to the appointment to executive positions of people with a political affiliation?
- Are there recent examples of the work of executive oversight agencies being hampered by improper executive appointments? If so, how was this evident?

4. Is any reform required to the way that executive officers are appointed by the Victorian government and undertake government service?

This embraces other questions, such as –

- Should changes be made to the process that is followed and the criteria that are applied in appointing people to executive positions?
- Are new arrangements required to ensure that any political affiliation of a person who is appointed to an executive position is properly managed to avoid this impacting their public service obligations?
- Do public service codes of conduct or guidance documents need revision to minimise or manage the risk of politicisation of the public service?

Some relevant context

This section is to assist those providing information to the investigation to understand three relevant aspects of the Victorian government system. They are:

- the traditional role of the public service in a Westminster system of government
- how that role is anchored in the *Public Administration Act 2004* (Vic)
- the evolving character of the public service in a refashioned Westminster model.

The Westminster model of government

'Westminster government', 'responsible government' and 'Cabinet government' are all terms for the system of government adopted in Australia. The essence of the model is that the government – or ministry – is chosen by and is accountable to the legislature, which is appointed by the people. The role of the public service is to carry out the will of the ministry, and if a new ministry is chosen, to carry out its will as faithfully.

The public service – also called the executive branch of government – has a large degree of functional independence from the legislative branch of government. The public service must be politically neutral so that it can serve any ministry or government with equal loyalty and efficiency and not become embroiled in partisan controversies.

Every government must trust that it can rely on the public service to implement legislation and government programs, however different they may be to those of a former government. Equally, the public service must make decisions without regard for political considerations and must provide independent advice to government in a 'frank and impartial' manner.

Westminster precepts are reinforced by many individual practices of government. One is that public officers are appointed on merit and can be removed only by due process and not without cause. The values and professionalism of the service are monitored by an independent public sector commission.

The Westminster model has many distinct benefits. It sustains democracy by reassuring the community that the elected government will be properly and ethically supported by the public service. It supports high-quality policy formulation and administration by ensuring that advice to government is impartial and plain-spoken, and that decision-making is principled and evidence-based. And it builds a superior public service that can attract and retain high-grade applicants who can be reassured of a secure, professional and rewarding public service career.

The importance of respecting and adhering to Westminster foundations is repeatedly stressed in publications on Australian governmental practice and in independent reviews of Australian government.

In September 2021, the Victorian Public Sector Commission issued an advisory circular *Informing and advising ministers: guidance to Secretaries about their responsibilities*. The circular explains that its purpose is to 'support our system in Victoria of responsible government and ministerial accountability'. The circular discusses the role of the public service in remaining professional and apolitical and the legal obligation of departmental secretaries to provide frank and impartial advice to ministers. Under the heading 'Providing apolitical advice', the circular notes:

[A] Secretary should be aware of, but not influenced by, political or electoral considerations that exist separate to policy advice. The purpose of policy advice should not be to advance a particular party's political interests. Secretaries should be aware of the political context; however, they should always ensure they are providing frank and impartial policy advice separate to the policy context.

There was a similar strong endorsement of Westminster principles in the 2019 report of the independent review of the Australian Public Service conducted by an expert panel chaired by David Thodey AO:

The modern Westminster principles of government remain essential: an apolitical, merit-based, and open public service, underpinned by integrity, serving the Government, Parliament and the people of Australia. These principles must be reinforced and supported. ...

[T]he review strongly reaffirms the Westminster tradition as the system to base the APS's foundations today and into the foreseeable future. The review rejects any move towards a partisan 'Washminster' model, whereby agency heads change when governments change and senior public servants have clear political allegiances.¹

Public Administration Act

The *Public Administration Act 2004* (Vic) embeds the Westminster principles and traditions in Victorian government.

Objects: The Act pronounces eleven objects. Those directly relevant to this investigation are:

- to ensure the maintenance of an apolitical public sector
- to foster a public sector that ... responds to government priorities in a manner that is consistent with public sector values
- to ensure that employment decisions in the public sector are based on merit.

Public sector values: The Act pronounces seven public sector values and describes how public officials should demonstrate them. They are: responsiveness; integrity; impartiality; accountability; respect; leadership; and human rights.

All are potentially relevant to this investigation, but four are in particular:

- **Responsiveness** – public officials should demonstrate responsiveness by ... providing frank, impartial and timely advice to the Government.
- **Integrity** – public officials should demonstrate integrity by –
 - o avoiding any real or apparent conflicts of interest ...
 - o striving to earn and sustain public trust of a high level.
- **Impartiality** – public officials should demonstrate impartiality by –
 - o making decisions and providing advice on merit without bias, caprice, favouritism or self-interest
 - o acting fairly by objectively considering all relevant facts and criteria
 - o implementing Government policies and programs equitably.
- **Leadership** – public officials should demonstrate leadership by actively implementing, promoting and supporting these values.

Public sector employment principles: The Act requires the heads of public sector agencies to establish employment processes that ensure six principles are met. Two of those principles are that:

- employment decisions are based on merit
- in the case of public service bodies, the development of a career public service is fostered.

¹ Department of the Prime Minister and Cabinet, *Our Public Service Our Future. Independent Review of the Australian Public Service* (Final Report, December 2019) pages 8, 89.

Agency heads: There are two categories of agency head – a Department Head (i.e. Secretary) and an Administrative Office Head. Both are ‘executive’ positions within the meaning of the Act.

All agency heads are appointed by the Premier, on behalf of the Crown. The agency head is to enter into a written contract of employment with the Premier, for a duration of no more than five years. The person’s employment may be terminated earlier by the Premier for a reason consistent with the terms and conditions of employment. The Governor in Council may also remove an agency head from office at any time.

The remuneration bands for agency heads are set by the Victorian Independent Remuneration Tribunal but can be exceeded if the Tribunal’s advice is first sought and considered. The Premier must approve the remuneration payable to an agency head. The Premier’s approval is also required for an agency head to engage in other work.

Department heads are responsible to a minister for the general conduct and effective, efficient and economical management of the functions and activities of their department and any related administrative offices. An administrative office head is responsible in the same way to the department head. An agency head is also to discharge his or her functions in accordance with the public sector values and employment principles.

Other executives: In most cases, other executives are employed by agency heads, who are required to observe the public sector values and employment principles when acting as employer, including the principle that employment decisions are based on merit.

Executive appointments are governed by a written contract and subject to similar conditions as agency heads. As at June 2021, there were 1,759 executives employed in the public service.

Victorian Public Sector Commission: The Act establishes the Victorian Public Sector Commission, headed by the Commissioner. The Commission originated in the 1800s with a goal of establishing a merit-based career public service and ending patronage appointments.²

The twin objectives of the Commission are:

- to strengthen the efficiency, effectiveness and capability of the public sector in order to meet existing and emerging needs and deliver high quality services
- to maintain, and advocate for, public sector professionalism and integrity.

The Commission’s functions include:

- advocating for an apolitical and professional public sector
- adopting codes of conduct and standards, and reporting to agency heads on compliance with them.

The Commission is not subject to ministerial direction or control in performing these functions.

The Commission has published an extensive range of codes, standards and guidance circulars, including the *Code of Conduct for Victorian Public Sector Employees*, *Standards for Application of the Victorian Public Sector Employment Principles*, and *Informing and advising ministers: guidance to Secretaries about their responsibilities*.

² *Public Service Act 1883* (Vic).

Westminster refashioned

The central role of the public service is to support the elected government to implement its agenda and policies. It is inherent in that role that the public service will change over time, both in structure and method.

This evolution is intensified by the greater pressure that elected governments now face to respond to a multitude of economic, social, environmental and international challenges. Equally, governments expect the public service to be flexible and responsive to their demands and direction.

This has refashioned the classic model and principles of Westminster government. One change has been that department heads and other executives no longer have ongoing or permanent tenure. They are contracted for a fixed term, and it is now common that some at least will be replaced when there is a change of government or even a change of minister.

Ministers have used this opportunity to appoint agency heads who are thought to understand the government's policy direction and who can develop a constructive and harmonious working relationship with the minister. Not infrequently, the chosen person will have worked in a minister's office or have other political experience.

A related change is that governments may not rely solely – or on occasions primarily – on the public service to provide policy advice and options. Ministers frequently nurture and use an advisory network of professional colleagues, consultants, researchers, representative bodies and interest groups.

Another source of alternative advice and support is ministerial advisers, who are employed directly by the Premier and work directly to the minister in their office. Ministerial advisers are not public service employees. There has been steady growth in the number and influence of ministerial advisers providing political support, analysis and advice to ministers. These advisers are relied upon heavily to liaise with senior agency executives. This is reported anecdotally to be a source of occasional tension and even conflict, with advisers reportedly imposing pressure to revise or tailor departmental advice to a minister. It may equally be testing in a highly interactive or fast-paced setting to draw a sharp line between the political lens of the adviser and the apolitical lens of the public servant.

Another recalibration of the Westminster system regards the personal anonymity of senior public servants. Many maintain a high public profile in parliamentary hearings and other forums in explaining agency programs, responding to criticisms and appearing jointly with ministers in media briefings and other platforms. Freedom of information laws, transparency practices and administrative law processes have also contributed to a lessening of the perceived neutrality of the public service.

Have your say – making a submission

We will be taking submissions until 15 July 2022. Every submission will be treated with appropriate sensitivity and dealt with on a case by case basis.

You can contact us by telephone to discuss confidentiality and related issues or to comment on the questions outlined above, or discuss how to provide documents or other information.

Call us on 0429 607 914

The line is open:

8am to 6pm Monday to Friday

10am to 4pm Saturday.

If we are not available to answer your call please leave a detailed message with your contact details and we will respond as soon as possible.

You can send in your written submission.

Email us at

submissions@ombudsman.vic.gov.au

Write to us at

Victorian Ombudsman
Level 2, 570 Bourke Street,
Melbourne, Vic 3000.

Your written submission may:

- identify examples of politicisation of the public service that you have witnessed
- provide copies of relevant documents
- include details to assist the investigation make further enquiries
- comment on any or all of the key questions outlined above.

Need assistance?

If you need particular help in communicating with us, please let us know. We will make all reasonable attempts to assist you.

Confidentiality and privacy

- Ombudsman investigations are conducted in private and, as a general rule, we will not disclose the identity of people who make submissions to an investigation.
- If we want to publish any details of your submission that may identify you, we will discuss this with you beforehand.
- If you have concerns about confidentiality, please raise these with us.

Receiving evidence

- The Ombudsman is able to conduct investigations as she sees fit.
- Depending on the details of your submission, we may contact you to request an interview or to take a statutory declaration. We will discuss any confidentiality concerns you have.
- The Ombudsman may interview a witness in an investigation under oath or affirmation.
- We will consider issuing a witness summons if you prefer to give evidence to the investigation this way. The same can apply to any documents you wish to provide.

Public interest disclosures

- Information you provide may be subject to the *Public Interest Disclosures Act 2012* (Vic).
- The Ombudsman can receive a 'public interest disclosure' about most public bodies and public officers. We prefer that people seeking to make a 'disclosure' contact us during business hours via **03 9613 6220**. We will assess your information and decide whether we must notify the Independent Broad-based Anti-corruption Commission. IBAC determines whether information constitutes a 'public interest complaint'. Details of how it does so are at '<https://www.ibac.vic.gov.au/reporting-corruption/public-interest-disclosures>.'
- We may ask you to confirm in writing whether you are seeking to make a 'public interest disclosure', or not.
- Please refer to our Public Interest Disclosure Policy for further information '<https://www.ombudsman.vic.gov.au/reporting-improper-conduct/pid-policy/>'.
- People wishing to make a 'public interest disclosure' about Ministers or Members of Parliament must direct them to the relevant House of Parliament. See Procedures for Making a Disclosure about a Member of Parliament for further information 'https://www.parliament.vic.gov.au/images/stories/Public_Interest_Disclosure_Procedures_October_2020.pdf'.

Your welfare

- The Ombudsman is committed to supporting the welfare of witnesses in all our investigations. We will ask you about any support you might need.

Appendix 1



Legislative Council

Parliament House East Melbourne Victoria 3002 Australia
Telephone 61 3 9651 8911 Facsimile 61 3 9650 5253 Email council@parliament.vic.gov.au

9 February 2022

Ms Deborah Glass
Victorian Ombudsman
Level 2, 570 Bourke Street
Melbourne VIC 3000

Dear Ms Glass,

Referral pursuant to Section 16 of the *Ombudsman Act 1973*

I am writing to you to inform you that on Wednesday, 9 February 2022, the Legislative Council agreed to the following resolution referring a matter to you for investigation and report:

That this House —

- (1) notes the Resolution of the Council on Wednesday, 17 June 2020 referring a matter to the Ombudsman has led to Operation Watts, a coordinated investigation that the Ombudsman is undertaking with the Independent Broad-based Anti-corruption Commission (IBAC) into a range of matters including allegations of 'branch stacking' aired in media reports in 2020;
- (2) further to that Resolution, refers the following matters, pursuant to section 16 of the *Ombudsman Act 1973*, as part of an expanded investigation —
 - (a) the red shirts scheme, including the role of the then Opposition Leader, the Hon Daniel Andrews MP, in designing, propagating, and facilitating the scheme;
 - (b) all electorate officers and ministerial advisers performing factional tasks during work hours from all factions of the Australian Labor Party (ALP);
 - (c) the extent of branch stacking activities and funding of branch stacking activities, in particular whether government funds have been misdirected to pay for memberships from electorate office budgets, including, but not limited to, through arrangements for the provision of printing, office supplies or other services;
 - (d) the allegations in the 14 August 2021 article published in *The Age* titled '*The Chosen Few: How Much is Victoria really Governed*', that ALP activists are 'stacked' into the public service thus compromising objectivity and professionalism and increasing the risk of corruption;
 - (e) the Premier's taxpayer funded social media unit staff;
 - (f) the monetising of factional politics through the new trend of occupying the dual role of lobbyists/faction powerbroker to ensure that factional power over Members is not misused for personal financial gain;

- (3) requires the Ombudsman to consider her powers and obligations under the *Ombudsman Act 1973* to refer matters to, and share information with IBAC and other integrity bodies, with a view to expanding the scope of Operation Watts to include the matters referred to in paragraph (2);
and requires the Clerk to write to the Victorian Ombudsman and the IBAC Commissioner to convey the terms of this Resolution.

Pursuant to section 25AB of the *Ombudsman Act 1973*, where a matter is referred to the Ombudsman by the Legislative Council under section 16, the Ombudsman shall send the report to the President of the Legislative Council.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Anne Sargent', with a stylized flourish at the end.

Anne Sargent
Acting Clerk of the Legislative Council