

Who is driving audit, compliance and improvement in public sector decision making?

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introduction

Public Sector Ethics has been around for many years in a number of Australian jurisdictions. The Executive arm of government in most jurisdictions have explicitly or implicitly legislated the standard for the conduct and ethics of public servants. The complexity of issues, diversity of language and variations on unacceptable behaviour, reflects historic events in each jurisdiction.

The ethical standards are multiple and varied. The modes of approach to enforcement are diverse. The outcomes and benefits to the public remain patchy.

Queensland, West Australia and New South Wales have adopted independent processes to review the criminal conduct of public servants. The definition of public servants is also varied, sometimes covering government companies and tertiary institutions. In some cases Agencies have sought to extend the coverage to Agency contractors.

All jurisdictions have developed highly complicated and complex responses to the challenge to good government by public servants acting unethically or inappropriately.

doing things right, doing the right thing, my right to do **things**

Every Agency has its core professional area of responsibility. At a strategic level this will provide an organisational bias or organisational stacking, where certain philosophies and skill sets will be rewarded. Examples include, service delivery organisations failing to deliver projects and policy focussed organisations not coping with project management.

In many instances the management, staff or business practices of an Agency are not suitable for delivering a project and there is a high risk of significant project failure and waste of public resources. Conversely, Whole of Government and Agency specific opportunities may be overlooked.

Some Agencies are policy based. They interact with other Agencies, State / Commonwealth Agencies and work to deliver legislation that is consistent with the policy. The dilemma occurs when the final law does not support the intended policy or worse where the policy and the law are not realistic.

While the headlong pursuit of the policy and/or the law can be reviewed by a number of external agencies, there is a high risk of enforcement costs escalating, significant diversion of resources and waste of public resources, before those external reviews can be completed and any improvement opportunity identified and implemented. These agencies may over commit resources or misallocate resources, compared with the actual risk. This approach diverts resources from other services and from opportunities.

Inside and outside of the delegations framework there are numerous decisions by public servants made on a daily basis that are on the margins. The motive may be genuine, however the value of the decision and the advancement of the policy are questionable.

The cost to business of these decisions can be quite expensive. Many of these decisions reflect improvement opportunities for the Agency and the public service generally. Where concerns of the public are perceived as threats to the Agency's authority, the concerns are often ignored.

public sector ethics **ownership**

In most jurisdictions the lead agency for public sector ethics also sets the human resource standards across the public service. While setting the ethical standard for ethics might sit comfortably with the Agency, there is an assumption that the strategies for prevention and managing non-compliance also rests with human resources.

While it is appropriate for human resources to deal with inappropriate public servant behaviour, many of the issues discussed in this paper and examples in the public domain, require intervention before inappropriate actions by a public servant. On this view Internal Audit is better placed to prevent and respond to the challenge of Public Service Ethics.

This is critical in the key high risk areas of:

- financial benefits for decisions
- disclosure of public service information
- arbitrary decisions and outcomes that reflect unfavourably on the public service

The most obvious examples are bribery, whistleblowing, loss of objectivity in decision making and bullying.

No one jurisdiction (Commonwealth, State, Territory or local government) or political party is immune from discordance with the public service and instances where the public service is no longer serving the public.

While whistleblowing and the loss of public service objectivity have human aspects, they also represent systemic failures. The systemic failure occurs before the human failure. Just as systems, processes and policies underpin a financially accountable public service, they should be used to serve organisations in preventing opportunities for breaches of public service ethics.

It is clear that audit skills are the right skills to be at the forefront of responding to the challenge of public sector ethics. Auditors already understand the nexus between how good systems and reviewing work processes lead to better outcomes across performance, culture and accountability. Auditors have the skills to set, monitor and report on systems for risk management and for risk prevention. Presently, few audit functions have a mandate to participate in preventative measures for ethical problems.

A risk management approach which included documentation of opportunities would enable Audit to support management to improve service and project delivery.

I hope that after consideration of the issues raised in the presentation that presenting public sector ethics as a human resource issue, has been to the detriment of government, the public service and the public they serve. Auditors are well placed to ensure that Agency systems and processes to reduce systemic failures that lead to whistleblowing, loss of objectivity of the public service, as well as to prevent fraud and inappropriate personal gain.

public sector ethics reform drivers

All organisations, whether public, private or not for profit, expect their employees to be accountable for their actions. Many of the standards expected of public servants are the same for employees and society in general. Stealing, violent behaviour and the misuse of information are all examples of unacceptable behaviour.

Public Sector Ethics in **Queensland** was kick started by the Fitzgerald Inquiry which provided its final report in July 1989. The Inquiry led to the establishment of the Electoral and Administrative Review Commission (EARC). The work of EARC resulted in the *Public Service Ethics Act 1994*. After a number of issues in the Bligh Labor government the Act was reviewed and the *Public Service Ethics Act 1994* was substantially amended in 2009. The standards apply to Ministers, public servants and employees of tertiary institutions.

The current **New South Wales** government reviewed public sector ethics when it took office in 2011. New laws were enacted under the *Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Act 2011* which amended the *Public Sector Employment and Management Act 2002*.

The **Commonwealth** *Public Service Act 1999* gave effect to the then Government's public service employment framework based on devolution and flexibility. This Act provided the way for introducing the Commonwealth APS Values and accountability framework. The standards do not apply to Ministers or members of Parliament.

Victoria has had long standing arrangements in place, although there continues to be calls for reform in the oversight of public servants in Victoria.

ACT has recently updated the Code of Conduct and the ACT Integrity Framework for Public Servants.

South Australia, Northern Territory and **Tasmania** have frameworks in place under the relevant public sector employment arrangements, although they have not developed the same level of co-ordinated and highly structured response as other jurisdictions.

Western Australia has had a number of incidents of questionable behaviour, involving past politicians and current public servants over the past decade. This has led to a consolidation of existing laws into a framework for Accountable and Ethical Decision Making.

In some jurisdictions there have been parallel reforms for whistleblowing by public servants.

In some jurisdictions the reform of ethical standards has been extended to include members of Parliament and their staff.

public sector ethics approaches across australia

While there are differing views on the overarching framework and for articulating public sector ethics, the general thrust of the laws is quite explicit. The standards of behaviour expected of public servants are higher than what might be tolerated in other entities.

The focus and emphasis varies across, principles, values and expected behaviour. Interestingly there is significant variation across jurisdictions. The flavour of all jurisdictions is that a breach of the public service ethics is a breach of employment. In that sense the standards are more than “guidance” and a breach should be seen as a breach of an employment contract.

In some cases the Agency has received a notice of resignation before the conduct has been fully investigated or before action can be taken. In that sense the breach is used to terminate employment in the same fashion as private sector entities where there has been a breach of policy. Once the public servant has resigned few of the investigations continue.

In many cases the framework calls up existing laws regulating activities in the jurisdiction. Therefore the code of conduct or code of ethics adds little to the existing enforcement powers. In these jurisdictions the code draws the information together and presents a coherent narrative on what is expected of public servants.

While public service ethics are part of the employment arrangements, the consequences for non-compliance directly relate to increased costs, loss of funds and realisation of risks. All are key areas for Audit oversight.

The approaches across jurisdictions can be categorised as:

- Principle based, with or without detailed statements
- Values based with or without detailed statements
- Process based

The different approaches across jurisdictions can be explained as:

- No new laws. A coherent statement of expectations drawn from existing provisions
- No new laws. Adoption of a Code to augment current employment conditions, either as a directive from the Executive or by the Premier
- New laws with explicit standards set by Parliament

In all cases the Agency is responsible for implementation and accountable for enforcement. The jurisdictions have adopted different levels of autonomy, including:

- Whole of Government for all public service ethics material
- Whole of Government Code of Conduct, with agencies responsible for their own policy and procedures and modification for professional standards (eg: doctors and lawyers)
- Agency responsible for all material, including Code of Conduct, policy and procedures

Delivery of information and training programs for staff are also highly varied, including:

- discussions on the philosophy of ethics
- detail on what is a breach
- identifying inappropriate behaviour

In summary, after almost two decades there is no consistent view of ethics, accountability and reporting across Australian jurisdictions.

In none of the jurisdictions is the standard of public servants widely publicised so that the public can assess the conduct of public servants against the local public service ethics.

human resources' role

Irrespective of the disparity of views, many of the ethical issues encountered by public servants do not just appear. Every public service ethical issue has some pre-existing history linked to system, governance, compliance, risk and audit failures.

The presentation tracks some high profile public service ethic failures to provide perspective on the nature and extent of the issues.

While criminal conduct is a breach of Public Sector Ethics, lesser breaches do not reach the criminal investigation threshold. However in many cases the underlying issue is high risk, with potential for significant expense or saving. In risk parlance they are "near misses" that should trigger a review and potentially a system change.

In many cases public servants who identify inappropriate behaviour are advised to talk with the person concerned or with their supervisor. Given the asymmetric nature of the information involved when people are acting unethically, this advice is not really helpful. In fact it can be a "career limiting move".

In many cases the person who has identified the issue, has no idea of the full nature and extent of the problem. Generally they will also lack the forensic skill to determine what is happening and what is an appropriate response for the Agency.

Where an Agency pays lip service to the standards, there is limited ability for staff to raise the issue within existing human resources and management structures. Where Agency culture is not transparent, the opportunity to detect, identify and take preventative action is limited.

Accordingly while the aspirations and frameworks for a high standard of public sector ethics exist, the reality is that under the present configuration, there is little chance for overall improvement. Acknowledging that ethics occurs within the Agency culture means placing oversight with an independent reviewer. Internal audit is best placed for this role, particularly where organisational behaviour is at odds with the public sector values themselves.

While clear examples of illegal activity can be dealt with once detected, other activities can be much harder to deal with if they go undetected. In some jurisdictions the combined effect of the agency culture, the rules covering public service ethics and corporate governance can either promote non-disclosure or increase the likelihood of a whistle blowing event.

agency culture

Agency history, a policy making culture and the blurring of policy and service delivery, can contribute to weak oversight and review mechanisms. In society generally and for organisations with the budget levels of Australian governments, the governance and oversight for service delivery require review.

The presentation contains published examples of governance failures in the public service and the results of the reviews.

The failure of an organisation to respond to warnings of current or future high risk issues in the context of public service ethics has at least two paradigms. The position at the Commonwealth level is that disclosure is never countenanced. In contrast some States do offer limited protection for some disclosures. The Commonwealth position of prosecution for disclosure coupled with the Public Sector Values give little scope for improvement within the Commonwealth Public Service.

The policy position of “outlawing” disclosure so that it cannot happen is a peculiarly government approach. The outlawing of disclosure at the Commonwealth level can be contrasted by numerous laws passed by the Commonwealth Parliament to encourage disclosure by private sector employees against their private sector employers and co-workers, including:

- business laws for cartel conduct, including fixing prices; manipulating shares markets; rigging bids and restricting supply/outputs
- corporations law, which protects disclosure to auditors and the release of the information to ASIC, APRA and the AFP

These initiatives are directed to discouraging inappropriate behaviour in the private sector, protection of funds of the public and to promote the efficient supply of goods and services.

The leadership shown by the Executive arm of the Commonwealth government does not promote accountability. The resistance to calls for accountability does not set a high standard for Commonwealth public servants.

Some States acknowledge situations arise where disclosure is appropriate and that this disclosure should be protected. In this context the general acceptance is that disclosure of this type may be beneficial to the public service.

Many will point to the various oversight regimes (such as Anti Corruption, Ombudsman, Right to Information, internal review, Human Resources, Courts and Administrative Review Tribunals) to indicate that there are enough avenues for review of the behaviour of Public Servants. The time, cost, resources and retribution concerns limit how often and in what circumstances information becomes available for these reviews to be initiated.

The cost and risk to government, communities and people from non-disclosure and inappropriate disclosure of information can be high.

agency systems

Some time ago NSW ICAC espoused a view that the ethical tone of an organisation impacted on efficiency and effectiveness, decision making processes, staff commitment and job satisfaction, staff stress and staff turnover.

This paper is directed towards system and business improvement. Reliance on feedback from oversight can be cumbersome, delayed and legalistic. Improvement opportunities can be obscured and delayed, where external review is commenced. Obfuscation is likely for policy or legal issues, where they rest with an individual's discretion or political requirement.

What is missing within some areas of the Public Service is governance and oversight approaches, in the form of risk management (operational and strategic) for service delivery and non-conformance reporting.

The risks mentioned should explicitly cover "decision making" within the context audit frameworks and how they can be improved. The risk process should be inclusive of opportunities. Political risk is generally a factor in the policy formulation stage and may become relevant where the Agency has a number of options for service delivery.

In many cases political risk is neutral to a public service delivery of projects or providing a service, as the political decision has already been made. Political risk in the context of this paper arises from project or service delivery failure, not from the original government decision.

setting, communicating and monitoring **expectations**

The Commonwealth Parliament has still not passed whistleblower protection laws. The Commonwealth has been quite clear in prosecuting whistleblowers. While in some cases the whistleblowing might be characterised as a public servant releasing sensitive information, in other cases it is quite clear that all other avenues had been exhausted.

Where agencies are expected to work on activities that are outside of their current dominant skill set, serious issues can arise. Similarly where an organisation has a dominant skill set there is a high risk that alternative views and risk factors will not be explored.

The examples in the presentation concern disclosures that are confirmed as being factually correct. In many cases the disclosure follows a standard path where the public servant:

1. observes an event or sequence of events
2. raises issues with peers, supervisors or accountable line management
3. cross checks with others in the organisation
4. exhausts internal dialogue with no change (agency acquiescence) or conforms with expectations of silence (peer pressure)
5. discloses outside the public service

The critical part of this process is the transition from step 4 to step 5. This decision is generally taken by the public servant knowing that they will:

- not be thanked for making the disclosure
- be liable for prosecution for breach of employment conditions
- be named in a public way
- defending their actions and reputation in the media, in Parliament and in legal processes

From a systems and audit perspective, the transition from step 4 to step 5 demonstrates a systemic failure in the public service generally and the line Agency specifically. The current remedy is either:

- stronger laws to prevent disclosure; or
- better pathways for disclosure

Either way, this “policy” and human resource solution fails the Agency, the public servants and the public. Where systems, processes and structure allow aberrant or inappropriate behaviour, normal practice is for audit reviews to be undertaken to fix the systems, processes and structure. This is routine in financial and IT processes, but can be absent in the oversight of project delivery and decision making of public service agencies.

Directly linking audit, public sector ethics and improvement opportunities will provide significant benefits.

public as a source of **feedback**

Is the member of the public complaining because they don't like the decision or because they have a genuine problem? In many cases the complaint at first instance is dealt with within the existing policy framework and the decision made. At first instance the public servant is not empowered to consider the issue outside of the policy matrix.

As the matter escalates, the Agency position can become more entrenched and the view on the policy more strident. Compliance with the policy or law, as it has been interpreted, becomes sacrosanct. Accordingly useful feedback on policy or process improvement is lost.

Right to information laws can go some way to empower the public, however increasingly they have been used to hide information, rather than be used as an aid to performance improvement. In the context of project and service delivery these are cumbersome tools with long lag times before improvement can be made.

public servants as a source of **feedback**

The Commonwealth Public Service Values impose high expectations on public servants with the issues are presented as human resource issues.

For project management there are deeper group dynamic issues that coupled with organisational bias can lead to significant project issues. These project and service issues fit comfortably with internal audit, which has the skills to identify system, process and policy issues and implement proper checks and balances.

audit functions and public sector **ethics**

Much material has been written on the internal and external audit functions within the public service. In many cases there is clear guidance on issues of financial systems and controls. In some cases this has been extended to governance and frameworks in the public service.

The auditing of business practices of government agencies is quite mature and given modern computing systems is quite reliable. However areas outside the standard channels are not well covered. In many cases this lack of maturity provides the scope for exploitation by staff and leads towards adverse outcomes.

There are many sources of information that point to problems within an Agency. At an operational level examples include:

- disproportionately large communications unit (spin over performance)
- high number of complaints to ombudsman and Minister on single issues or on diverse issue, but with consistent theme
- high level of non-conformance with policy by the public/customers
- commentary in social media and online forums
- by-passing of systems by staff and management
- high number of exemptions granted to “not-comply” with systems
- absence of appropriate registers
- poor quality data or meaningless data in centre data complaint logs
- high staff turnover or stress claims
- budgetary approaches, including underfunding, reallocation and siphoning of budgets

Some of the potential cues for problems with public service ethics include:

Project Issues

- poor project management
- system constraints of time, resources or skills
- inappropriate metrics / reporting or project objectives
- non-alignment of professional and administrative cultures

Service Issues

- disconnect between “call centre data” and complaints to Ministers and external agencies
- poor policy or inappropriate implementation of policy
- pervasive dogmatic culture

potential solutions and **benefits**

The presentation provides a number of actions for a more structured approach to risk within government. The adoption of this structure approach for project management and service delivery would significantly reduce costs and lead to improved policy development and effective legislation.

The change in governance and oversight by the Executive, coupled with protected disclosure to Audit at first instance and adoption of proper reporting would:

- provide better project outcomes and enhance risk management in government
- assist in identifying opportunities
- facilitate the reduction in the burden placed on the community and business by Agencies
- reduce the potential for public service ethics breaches
- reduce times in the improvement opportunity cycle

This approach would also benefit Audit, by providing better clarity on Agency operations and a more holistic review, based on culture assessment indicators. Audit would be able to focus on strategies in the high risk areas to reduce Agency and whole of government risk.

Specific culture assessments would also enable systems to be fine tuned, for example:

- service delivery Agencies would be supplemented with project delivery skills
- project delivery Agencies could be augmented with skills in appropriate decision making

conclusion

In other agency areas or in a private company where there are “non conforming” behaviours, systems or processes, audit has a clear function. The governance (systems, processes and review model) for public sector agencies operates inconsistently with the financial and operational governance risk model.

It is appropriate for Audit to be primarily responsible for concerns about public service ethics as they are lead indicators of future problems. Audit having a key role in public sector ethics compliance would assist development of internal controls.

Just as Audit is responsible for systems ensuring compliance with Accounting Standards, Audit can ensure systems exist for ethical compliance across all areas of an Agency to compliment financial performance covered by Accounting Standards.

In this way Audit can fulfil its charter and use the audit skills to improve Agency performance and the management of Agency risks, incorporating public service ethics into the audit, risk and compliance framework.

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The conference presentation provides specific examples of the issues and solutions discussed in this paper.