APSC Review – Making Public Comment

As the principal union representing Australian Public Service employees, the Community and Public Sector Union (CPSU) is committed to providing a strong voice for our members in key public policy and political debates and on issues relating to their employment.

The CPSU welcomes the opportunity to provide comment on the APSC's review of its guidance for employees on 'Making Public Comment'. In recent times, particularly around the use of social media, this has been an area of significant concern and uncertainty for many APS employees and agencies. Employees often feel that their rights to participate in public and political debates are being unnecessarily curtailed and are worried about potential Code of Conduct implications in respect of nearly any social media or online engagement.

At a time when the Federal Government is pursuing a digital transformation agenda, including how it engages with and delivers public services to the Australian community, it is entirely out of step for the APSC and APS agencies to seek to shut down online engagement by its staff.

In our view, the APSC advice regarding social media usage:

- places far too significant constraints on employees and limits their capacity to engage in a whole range of debates in a private capacity;
- is ambiguous for both employees and managers;
- raises real questions about its enforceability in certain circumstances;
- risks overstepping the legal parameters on the extent to which an employer can regulate the outside of work conduct of employees; and
- is out of step with the Government's stated commitment to digital transformation and digital delivery of public services.

The CPSU hopes as a result of this review the APSC will modernise its advice to APS agencies and its approach to online and social media engagement by APS employees.

If you would like further information in relation to the CPSU submission please contact Melissa Donnelly, Deputy Secretary on 02 8204 5709 or melissa.donnelly@cpsu.org.au.

Introduction

The rapid growth of social media in Australia has had a significant impact on workplaces across the nation, and the Australian Public Service (APS) is no exception. Emerging social media platforms have allowed Commonwealth agencies and their employees new and unforeseen opportunities to engage not only with their stakeholders, but also with one another and the community at large.

There are, however, vexed questions about how an employee's private use of social media impacts on their obligations to their employer. This has emerged as a particularly difficult issue in the APS.

As the Discussion Paper acknowledges there has been longstanding advice on the capacity of APS employees to make public comment. In our experience this was generally well understood and on the whole uncontroversial.

However, more recently the APSC has sought to extend that advice to cover comments made by APS employees online and on social media. The Code of Conduct does provide a statutory basis for regulating conduct of employees outside of work in certain limited circumstances. In the area of social media and public commentary, the APSC and agencies have sought to rely on these statutory provisions to support a very restrictive interpretation of when, how and under what circumstances APS employees can engage in commentary online forums and on social media.

It is our contention that the focus of APSC and agency advice needs to reconsidered and the guidance itself should be substantially rewritten. The circumstances in which APS agencies should be regulating the social media commentary of an APS employee should be limited to circumstances where:

- that commentary would reasonably call into question the capacity of that particular employee to do their job impartially; and
- the commentary is significantly damaging to the reputation or integrity of the agency or the APS – mere criticism of a policy or the Government of the day should not be sufficient.

1. (a) Should APS employees be prevented from making public comment on all political issues?

No, it would be inappropriate and potentially unenforceable to prevent APS employees from commenting on all political issues.

All Australians have political opinions and preferences, and APS employees should have freedom to express their views. Many APS employees have strong interest in matters of public policy, and it is those interests that draw them to work in the APS. Not only would it be undesirable but inexplicable for Federal Government employees to be indifferent to or uninterested in topics of concern to the Commonwealth.

The principle duty of Australian public servants is to serve the people of Australia, and the Government they have elected, faithfully and to the best of their ability. Necessarily, this means that Commonwealth employees will serve elected representatives of different political persuasions, and

be called upon to implement their policies in the most effective way possible, irrespective of any individual employee's personal political beliefs.

This duty does not require APS employees to remain silent on issues of the day in their private lives. Regulation of APS employees' engagement in political discussions on social media should be limited to circumstances that would legitimately call into question their capacity to undertake their duties impartially or is significantly damaging to the integrity or reputation of the agency or the APS.

A requirement that APS employees be prevented from making public comment on all political issues is unwieldy, ambiguous and may be unenforceable in practice, given the expansive and contested definitions of what topics are, and are not, 'political'. A restriction as to any and all public comment on political issues would, for that reason, have a serious and undesirable chilling effect on the speech and political participation of all APS employees.

Furthermore, the legality of such a broad restriction is questionable. The recent case of *Daniel Starr v Department of Human Services* [2016] FWC 1460 shows the limits of agencies taking action against employees for comment on social media. In that matter, the Fair Work Commission concluded that comments, even if they are offensive, made in a private capacity but which relate to work, are not sufficient grounds for the termination of employment in the absence of some actual (rather than perceived or potential) reputational damage to the employer.

The judgment in that case actually calls into question the legality of the APSC's social media policy and corresponding policies in place in APS agencies. In contrasting this view against the current standards, it is clear that the APSC guidelines are out of step. In our view this case makes it abundantly clear that the current advice needs substantial alteration, which better respects the rights of public servants to express opinions including on social media and online. A proposal to prevent any public comment on political matters on social media, as foreshadowed by this question in the Discussion Paper, would have the opposite result.

The current restrictions, and any future broad brush restriction, would make the APS a less desirable place to work. The Federal Government and APS agencies should treat their staff as adults and reasonably understand that in a workforce as large and diverse there will be a whole range of views on any political matter. The APSC and APS agencies reasonably stand to be criticised in the public domain of trying to shut down debate if they continue on the current course or pursue an even broader restriction on the use of social media.

1. **(b) Should there be different rules for different groups of APS employees?**

The standard principle regarding social media engagement should be whether it calls into question their ability to do of the APS employee to do their job impartially or is significantly damaging to the reputation or integrity of the agency or the APS. The application of this principle to some specific groups of APS employees may have different implications.

The Commonwealth employs a huge number of employees whose responsibilities that are both expansive and varied. Naturally, different groups of employees may have differing obligations in relation to making public comments.

For most APS employees, the guidelines as to public comment can be standardised and applied consistently without alteration.

The application of these standards will however result in different outcomes for particular groups of employees who have certain specific duties. For example particular groups of employees have responsibilities which include the administration of sensitive political processes, the adjudication of controversial public or political disputes, or who may be responsible for making public comment on behalf of their employer in relation to matters of public interest or concern.

For these employees, the appearance of impartiality is basic to the inherent requirements of their job. For this reason, the application of the general principles about social media commentary might require more specific and particular directions which are more restrictive.

Employees of the Australian Electoral Commission are an obvious example of employees for whom general political activity may create a conflict of interest in the eyes of a reasonable observer. The AEC requires all potential staff to complete a Declaration of Political Neutrality form, affirming that they are "not currently publicly active in political affairs and do not intend to publicly engage in such activities during…engagement with the AEC." Trade union membership is rightly excluded from political activity that might preclude employment with the AEC. These requirements are reasonable, straightforward, and oft-repeated to affected staff. They work well, and should remain in place.

Other staff to which special requirements might apply includes any staff who act as public spokespersons for APS employers, as per *Banerji v Bowles [2013] FCCA 1052*, given the requirements of those roles and the conflict to which personal public comment may give rise.

2. **Should APS employees be prevented from explicitly making critical public comment about services or programs administered by their agencies?**

No, not unless it goes to commentary that would reasonably call into question their capacity to do their job impartially or is significantly damaging to the reputation or integrity of the agency or the APS.

Imposing restrictions on public comment to programmes administered by an APS employee's Department is an unwieldy and undesirable blanket ban on thousands of APS employees discussing key matters of public importance.

An agency-wide prohibition on, for example, employees in the Department of Human Services discussing issues associated with Medicare or the aged pension would impose a significant and real burden on those employees' freedom of political communication, without obvious justification. Similarly, there is no clear operational need to prevent, for instance, an employee of the Australian Taxation Office expressing an opinion on tax reform.

In both examples, employees work may be associated with the program in question but they are not decision-makers or spokespersons for that. In these examples it would be easy to think of many circumstances in which an employee may make a comment on such a matter, that does not call into question their capacity to do their job impartially or is significantly damaging to the integrity or reputation of the agency they work for or the APS.

In spite of this, a blanket approach to making public comment would absolutely restrict their ability to express an opinion on the matter. Issues like health funding, immigration policy or taxation levels occupy a major portion of Australian election coverage and campaigns. An across-the-board prohibition on discussing these topics for employees working in agencies that cover those policies could impose an undue and undesirable burden on the freedom of political communication of tens of thousands of people.

3. **Should senior public servants have specific limitations about making public comments?**

The standard principle regarding social media engagement should be whether it calls into question their ability to do of the APS employee to do their job impartially or is significantly damaging to the reputation or integrity of the agency or the APS. The application of this to the Senior Executive Service may have different implications for that group as compared with other groups of APS employees.

The principle about impartiality in undertaking their job may mean that Senior Executive Service have to be far more limited in their engagement on social media and public commentary. There would be circumstances, for example, where a member of the SES providing commentary on a contentious policy issue in an area where they had responsibility may be seen as a reflection of the views of the Minister or the Government.

While this is an important issue to manage, it should be remembered that the vast majority of APS staff are employed at the APS and EL classification levels, and it is these staff that are most likely to face disciplinary action under the APS Code of Conduct in relation to material published online.

4. **Should public servants posting in a private capacity be able to say anything as long as it includes a clear disclaimer stating that the opinion they have expressed is purely a statement of their own opinion and not that of their employment and is otherwise lawful?**

Yes, within the reasonable bounds set in recent case law and with due respect to the privacy and confidentiality obligations inherent to their job.

There is emerging case law in respect of these matters, particularly in relation to comments made on social media. Cases such as *Rose v Telstra* and *McManus v Scott Charlton (1996) 140 ALR 625* establish the circumstances by which conduct outside of work may be actionable by an employer. It is these standards that should apply to APS employees.

It is common on social media to explicitly make clear that all content published by an account holder is being posted in a private, not a professional, capacity.

However the APS Code of Conduct, as it is currently explained by APSC social media advice, would not cease to apply to content which was published, subject to a disclaimer, by reason of the disclaimer.

In adopting the position that such content would, within reasonable limitations, be effectively exempt from restrictions around public commentary, the APS would be formalising a system which is already commonplace and understood on social media. In our view this approach would also more closely align with the general community expectations as to the divide between an employee's professional and private responsibilities.

5. **Are the requirements of the APSC guidelines expressed clearly? Can they be made simpler and easier to understand?**

No, the APSC guidelines are not expressed clearly. On key issues like the circumstances in which social media commentary can be regulated, the guidelines are ambiguous. The guidelines should be simpler and easier to understand and apply.

In practice the APSC guidelines have created uncertainty and confusion. For employees the APSC advice, and corresponding agency policies that rely on it, raise more questions than they answer. Agency managers also find it hard to understand the APSC policy, particularly regarding the circumstances in which actions against employees should be taken and should not be taken. In terms of ensuring future guidelines are clear and easy to understand there would be substantial benefit in producing draft guidelines and consulting with employees and union about their terms.