

BALANCING IMPARTIALITY AND FREE SPEECH: AN EMPIRICAL STUDY OF ‘ON THE GROUND’ EXPERIENCES OF AUSTRALIAN PUBLIC SERVANTS

ABSTRACT

In this article, we share findings of a study exploring whether and how public servants experience tensions between their duties of impartiality and restraint in public speech and their freedom to participate in political debate, whether and how they experience confusion or uncertainty with respect to the law governing their speech, as well as the impacts of such uncertainty, confusion and tension where it arises. We found that there was significant uncertainty about whether the Australian Public Service (‘APS’) guidelines do in fact allow public servants to make public comments, including on social media. This lack of clarity has profound professional and personal impacts identified by participants, but also was perceived to have broader and more troubling impacts for democracy and the APS itself.

I INTRODUCTION

There is a longstanding institutional tradition bolstered by legally binding requirements restraining public servants from participating in public debate in the interests of preserving the impartiality of the Australian Public Service (‘APS’). At the same time, there is recognition in APS guidelines that public servants are also citizens, who, to some extent, are entitled to express their personal political views.¹ Section 10 of the *Public Service Act 1999* (Cth) (‘*PS Act*’) sets out the APS Values, which require the APS to be ‘apolitical’, providing the government with ‘advice that is frank, honest, timely and based on the best available evidence’.² Section 13 sets out the APS Code of Conduct (‘Code of Conduct’), which includes the following requirement:

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¹ See, eg, ‘Social Media: Guidance for Australian Public Service Employees and Agencies’, *Australian Public Service Commission* (Web Page, 17 March 2021) <<https://www.apsc.gov.au/working-aps/integrity/integrity-resources/social-media-guidance-australian-public-service-employees-and-agencies>> (‘2020 Guidance’).

² *Public Service Act 1999* (Cth) s 10(5) (‘*PS Act*’).

13 The APS Code of Conduct

...

- (11) An APS employee must at all times behave in a way that upholds:
- (a) the APS Values and APS Employment Principles; and
 - (b) the integrity and good reputation of the employee's Agency and the APS.³

This appears to regulate public servants' speech and behaviour both within and outside working hours. However, the guidance published on the APS Commission's website in 2020 ('2020 Guidance') also acknowledges that 'employees have a right to participate in online society, just as they have rights as citizens of Australia to engage in community life. APS employees are entitled to private lives, personal views, and political opinions.'⁴ But if public servants have a right to participate in online society and democratic life, how is this right exercised in practice within APS guidelines? What are public servants allowed to say publicly, and how do they participate given expectations of impartiality and restraint? These questions have become more urgent since the 2019 High Court decision in *Comcare v Banerji* ('*Banerji*'),⁵ which has generated further ambiguity in relation to these issues.

In this article, we share findings of our study exploring whether and how public servants experience tensions between their duties of impartiality and restraint in public speech and their freedom to participate in political debate, whether and how they experience confusion or uncertainty with respect to the law governing their speech, as well as the impacts of such uncertainty, confusion, and tension where it arises. While there has been some scholarship addressing free speech and the public service,⁶ there has been minimal research examining how this tension is *experienced* by public servants in their employment and private lives. This is an important question, relevant to not only understanding the issues public servants

³ Ibid s 13(11).

⁴ 2020 Guidance (n 1).

⁵ (2019) 267 CLR 373 ('*Banerji*').

⁶ See, eg: Kieran Pender, "'Silent Members of Society'? Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327 ('Silent Members'); Kieran Pender, '*Comcare v Banerji*: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131 ('Public Servants and Political Communication'); Azadeh Dastyari, 'Vitalising International Human Rights Law as Legal Authority: Freedom of Expression Enjoyed by Australian Public Servants and Article 19 of the *International Covenant on Civil and Political Rights*' (2020) 43(3) *University of New South Wales Law Journal* 827; Katharine Gelber, 'The Precarious Protection of Free Speech in Australia: The *Banerji* Case' (2019) 25(3) *Australian Journal of Human Rights* 511; Don A Driscoll et al, 'Consequences of Information Suppression in Ecological and Conservation Sciences' (2020) 14(1) *Conservation Letters* e12757:1–13, 8–9.

face, but also ensuring that any reforms or recommendations are suitably tailored to address these ‘on the ground’ experiences and tensions. Our study seeks to address this gap. Among those we interviewed, we found there was significant uncertainty about whether and how the APS guidelines allow public servants to make public comments, including on social media. This lack of clarity had profound professional and personal impacts identified by participants, but also was perceived to have broader and more troubling impacts for democracy and the APS itself.

Through semi-structured interviews, the study explored public servants’ understanding of the APS guidelines,⁷ whether they know of their responsibilities when engaging with social media, and whether they experience tensions between their day-to-day roles and private lives. Specifically, the project addresses the following three research questions:

1. Is there widespread uncertainty within the public service about the speech rights of employees?
2. If so, what are the effects of this uncertainty? Does it create a ‘chilling effect’⁸ on speech?
3. Could the responsibilities of public servants be made clearer, especially in relation to the use of social media?

In Part II, we explain the project design and methodology. In Part III, we briefly examine the legal background and context which we suggest gives rise to legal uncertainty in relation to whether and how public servants can participate in public debate. In Part IV, we use systems theory to argue that public servants constitute an integral part of Australia’s deliberative system and that their public contributions, including on social media, can improve the quality of public debate. Given fair participation in debate is crucial for citizens in a democracy, the legal certainty, comprehensibility and reasonableness of any free speech restrictions must be ensured. It is therefore essential that any confusion about whether and how public servants can contribute to public debate is resolved. In Part V, we analyse our findings with respect to six identified themes emerging from the interviews, namely questions around: (1) clarity; (2) tone; (3) balance; (4) impact; (5) seniority; and (6) mitigation. We find that most of the public servants interviewed experienced significant confusion and uncertainty regarding their ability to contribute to public debate. This uncertainty entails important professional, personal and democratic impacts, but we recommend broader inquiry to ascertain a fuller and more accurate understanding of public servants’ experiences of free speech restrictions. We conclude

⁷ 2020 Guidance (n 1).

⁸ The ‘chilling effect’ has its roots in First Amendment jurisprudence and refers to cases where speech regulations have the indirect effect of deterring people from exercising their free speech rights because they fear sanctions. See Frederick Schauer, ‘Fear, Risk and the First Amendment: Unravelling the “Chilling Effect”’ (1978) 58(5) *Boston University Law Review* 685.

in Part VI with a summary of our findings and tentative recommendations for how issues identified can be addressed.

II PROJECT DESIGN AND METHODOLOGY

We adopted a qualitative methodology to answer the research questions because we were interested in gaining a deeper understanding of the experiences of the public servants affected by the APS guidelines. It was our contention that purely quantitative methods would not give us the data we would need to address the research questions; nor would they give a sense of the complexity of the issues and nuances involved. The purpose of qualitative research methods is to examine a social situation or interaction by enabling the researcher to enter the world of others, allowing for a more holistic rather than reductionist understanding.⁹ Data was collected through semi-structured interviews with 23 public servants at different levels and stages of their career, including recent retirees and employees from different departments in the APS. Prior ethics approval was obtained from Macquarie University's Human Research Ethics Committee.¹⁰ Each participant signed a consent form agreeing to be interviewed, and for the interview to be recorded and transcribed.

A purposeful sampling procedure was used to ensure we had representatives from different departments, a representation of junior and senior public servants (including supervisors responsible for enforcing APS guidelines) and a balance in terms of gender. Fifteen participants were initially recruited through the Community and Public Sector Union which advertised the study to its members. Public servants who wished to participate contacted the researchers directly to arrange a time for interview. A snowball sampling strategy (also referred to as network or chain sampling)¹¹ was also employed to ensure representation by non-union members and to ensure that more senior public servants were included in the study. The initial participants distributed information about the study to their wider networks, and we were contacted by an additional 8 participants through snowballing.

We interviewed 11 female and 12 male public servants. Nine of the participants were junior or mid-career, 11 were senior or held supervisory/executive roles, 2 were recently retired and had held executive roles, and 1 had recently left the public

⁹ Robert C Bogdan and Sari Knopp Biklen, *Qualitative Research for Education: An Introduction to Theories and Methods* (Pearson, 5th ed, 2007) 9–10.

¹⁰ Macquarie University Human Research Ethics Committee approval: application number 10334.

¹¹ Mark S Handcock and Krista J Gile, 'Comment: On the Concept of Snowball Sampling' (2011) 41(1) *Sociological Methodology* 367, 367–70; Patrick Biernacki and Dan Waldorf, 'Snowball Sampling: Problems and Techniques of Chain Referral Sampling' (1981) 10(2) *Sociological Methods and Research* 141, 141–3; Chaim Noy, 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research' (2008) 11(4) *International Journal of Social Research Methodology* 327, 328.

service. The participants were from a range of different Commonwealth departments, some large and some smaller. We have not identified the specific departments because: (1) given the sensitive nature of the subject matter and the potential career consequences, the protection of participants' identities was of crucial importance and could not be guaranteed in the event of identification through disclosure of department, especially in the case of smaller departments; (2) the consent form signed by the participants and approved by the University Ethics Committee stated that departments and APS level of participants would not be identified; and (3) this was a necessary clause in order to mitigate the risk of revealing the participants' identity.

Interviews were selected as the primary method of data collection for this study because interviews can elicit 'thick' descriptions, and we were able to clarify statements and probe for additional information.¹² Although interviews have these benefits, there are also some limitations associated with interviewing, including the fact that interviews are not neutral tools of data gathering because they are coloured by the participants' experiences and perceptions.¹³ This is a limitation to any interview based qualitative research, which we attempted to mitigate through a large sample size. We stopped interviewing at the point we reached 'saturation': where no additional data was being found despite our attempts to 'stretch' the diversity as far as possible.¹⁴

Interviews were conducted by phone and went for approximately 30–45 minutes, during which the participants were asked the following questions:

1. Do you have a clear understanding of the APS guidelines¹⁵ in relation to participating in political debate?
2. The guidelines suggest that you can participate in public debate as long as the tone is appropriate. Do you know what that means?
3. Do you feel confident participating in public debate via other social media platforms if you want to? If not, do you feel this affects you in any way?
4. Do you think there is an appropriate balance between your responsibilities as a public servant to remain impartial, and your rights as a citizen?

¹² Catherine Marshall, Gretchen B Rossman and Gerardo L Blanco, *Designing Qualitative Research* (Sage Publications, 7th ed, 2022) 12.

¹³ For analysis of the advantages and limitations of interviewing, see Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Sage Publications, 2nd ed, 2005).

¹⁴ Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967) 61.

¹⁵ We were referring to the 2020 Guidance but did not specify this in our questioning: 2020 Guidance (n 1).

These questions allowed the participants to reflect at length, often prompting further questions. This meant that the experiences and reflections of the public servants largely informed what was discussed.

Interviews were then transcribed, and each researcher read all 23 transcripts. We met to discuss the broad themes that had emerged and then re-read the transcripts a second time with these themes in mind. At a second meeting, the researchers identified the following common terms and themes emerging from the data. These included: (1) clarity; (2) tone; (3) balance; (4) impact (5) seniority; and (6) mitigation. We then read the transcripts a third time and began a process of manual coding, where we cut and pasted relevant quotations from the transcripts under the main themes.

The coding process requires the researcher to fragment the interviews into separate categories. This data then needs to be synthesised by ‘piecing these fragments together to reconstruct a holistic and integrated explanation’.¹⁶ Our approach here was to examine and compare threads and patterns within each of the coded categories, then to compare the threads across the categories.¹⁷ We then situated these findings within the broader literature, with a view to thinking about the broader implications of this research and making some tentative recommendations.¹⁸

Clarity refers to whether the APS guidelines were well understood, and whether public servants perceived them to be clear. Tone refers to whether public servants understood, and were able to implement, the appropriate tone in their public contributions. Balance refers to whether public servants thought the appropriate balance had been struck between their responsibilities as public servants to remain impartial, and their freedoms as ordinary citizens to contribute to public debate. This includes whether they felt they ought to be able to contribute to public debate in areas outside their department and portfolio. Impact refers to the kinds of impact the APS guidelines had on their professional and personal lives. It also encompasses whether the restrictions entailed broader democratic impacts. Seniority refers to whether APS level made a difference: were the contributions of more senior public servants subjected to greater scrutiny, and should they be? Finally, mitigation refers to the steps public servants took to mitigate any effects of their contributions to public debate and avoid risk of sanction.

III BACKGROUND

A *The APS Guidelines*

The APS Values and Code of Conduct, when read together, seem to require APS employees to exhibit at all times (not just within work hours) a level of political

¹⁶ Linda Dale Bloomberg and Marie Volpe, *Completing Your Qualitative Dissertation: A Road Map from Beginning to End* (Sage Publications, 4th ed, 2019) 222.

¹⁷ Ibid.

¹⁸ Ibid.

impartiality, to protect the integrity and reputation of the APS. However, the degree of impartiality, and what it requires at all times, is unclear. Various guidelines have attempted to clarify expectations and balance concerns about free speech. For example, the 1979 *Guidelines on Official Conduct of Commonwealth Public Servants* recognised that public servants may participate in political life. The Guidelines explained that

public servants should not be precluded from participating, as citizens in a democratic society, in the political life of the community. Indeed it would be inappropriate to deprive the political process of the talent, expertise and experience of certain individuals simply because they are employed in the public sector.¹⁹

However, the impact of social media has perhaps encouraged a stricter approach in recent decades. Updated guidance issued by the APS Commission in 2017 ('2017 Guidance') advised that even 'liking', reposting or sharing social media content, or selecting particular reaction icons (such as an 'angry face' reaction icon to signal disapproval), could breach employment expectations.²⁰ Despite the fact that maintaining impartiality should preclude public criticism of government as well as public praise,²¹ the 2017 Guidance also confusingly stated that while '[c]riticising the work, or the administration, of your agency is almost always going to be seen as a breach' of the Code of Conduct, this 'doesn't stop you making a positive comment on social media about your agency'.²²

The most recent guidance published on the APS Commission's website in 2020 backtracks from this position,²³ perhaps prompted by legal scholarship²⁴ and judicial comments in *Banerji*.²⁵ The 2020 Guidance clarifies that 'extreme pro-Government posts raise the same concerns as those that are extremely anti-Government: both can call into question your capacity to be impartial, and damage public confidence'.²⁶

¹⁹ Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants* (Australian Government Publishing Service, 1979) 47 [5.3], quoted in *Banerji* (n 5) 430–1 [127].

²⁰ 'Making Public Comment on Social Media: A Guide for APS Employees', *Australian Public Service Commission* (Web Page, 2017) <<https://legacy.apsc.gov.au/social-media-guidance-australian-public-service-employees-and-agencies>>, archived at <<https://web.archive.org/web/20210315165809/https://www.apsc.gov.au/archived-making-public-comment-social-media-guide-employees>> ('2017 Guidance'), quoted in Gelber (n 6) 513.

²¹ Pender, 'Public Servants and Political Communication' (n 6) 146.

²² 2017 Guidance (n 20).

²³ 2020 Guidance (n 1).

²⁴ Pender, 'Public Servants and Political Communication' (n 6) 146.

²⁵ *Banerji* (n 5) 424–5 [105] (Gordon J).

²⁶ 2020 Guidance (n 1).

The 2020 Guidance further notes that anonymity provides no guaranteed shield from APS requirements, and that disclaimers and aliases on social media accounts, while potentially mitigating risks of sanction, cannot eliminate them.²⁷ Again, even ‘liking’ certain posts or signing a petition critical of government policy could — depending on the relevant circumstances — raise concerns about impartiality.²⁸ Further, it is not only *public* speech that is affected, because as the 2020 Guidance warns: ‘private correspondence does not always stay private’.²⁹

Given the evolving and ambiguous APS guidelines inform the operation of the legislative restrictions, the framework appears to impose significantly on public servants’ political communication. The ambiguity of the guidelines is also reflected in the litigation: the extent to which public servants can make public comments has been the subject of contradictory case law.³⁰ This arguably contributes to confusion about whether and how public servants can participate in public debate.

Legal certainty on this issue is important, because as Kieran Pender notes, ‘[i]f public servants are required to accept employment-related limitations’ on their free speech, ‘those obligations — and their practical application — should be clearly defined’.³¹ The following sections discuss our empirical investigation of whether uncertainty exists in relation to whether and how public servants can participate in public debate, and the consequences this may have for free speech and democracy.

B *The Banerji Case*

In 2019, the case of Michaela Banerji came before the High Court to determine whether relevant sections of the *PS Act* ‘imposed an unjustified burden on the implied freedom of political communication’ under the *Australian Constitution*, and whether Banerji was entitled to compensation for termination of employment under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).³² Banerji was an APS employee at the Department of Immigration and Citizenship.³³ Sometime before 2012, she began using an anonymous Twitter account, where she criticised the government’s immigration policies.³⁴ At times, the tweets were ‘vituperative’

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ A history of the vexed case law on public servants and free speech is provided in Shireen Morris and Sarah Sorial, ‘Balancing Public Servants’ Responsibilities with the Implied Freedom of Political Communication: What Can We Learn from *Banerji*?’ (2022) 48(1) *Monash University Law Review* (advance).

³¹ Pender, ‘Silent Members’ (n 6) 329.

³² *Banerji* (n 5) 388–9 [1]. See also *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5A(1), 14.

³³ *Banerji* (n 5) 389 [2].

³⁴ Ibid; *Banerji and Comcare (Compensation)* [2018] AATA 892, [8], [40] (*Banerji AAT*).

and ‘intemperate’.³⁵ Following a lengthy investigation, she was identified as the anonymous person behind the tweets, and her employment contract was terminated on the grounds that she had breached the Code of Conduct.³⁶ Before the High Court, Banerji argued that the *PS Act* provisions unduly burdened the implied freedom, an argument that was unanimously rejected by the High Court.³⁷

While the High Court was correct that Banerji’s specific tweets were in violation of the Code of Conduct, and while the judgments identify the relevant tensions between having an impartial and neutral public service and the burdens imposed on the speech of public servants in their capacity as ordinary citizens, the judgments do not resolve this tension.³⁸ As we have argued, the case gave rise to further uncertainties.³⁹ What emerges from all judgments is the ill-defined and situation-specific nature of the boundary between permissible and impermissible political communication for public servants.⁴⁰

IV THEORETICAL FRAMEWORK: DELIBERATIVE SYSTEMS THEORY

Theoretically, our approach draws from the concept of democracy as a ‘deliberative system’.⁴¹ Deliberative systems theory explains how deliberation occurs and is connected across different deliberative ‘sites’ in the complex modern deliberative landscape.⁴² Deliberative sites can include formal sites such as legislatures and courts, schools and universities, as well as more informal civil society networks, advocacy groups, ‘private and non-profit institutions’, and both mainstream and social media.⁴³ While the deliberation in some of these sites will be more informed than in others (for example, you would expect the deliberation in a university to be better informed than an unregulated, public online blog), the way these sites interact has potential to improve the quality of deliberation overall.⁴⁴

For example, while the deliberation in an unregulated online site might be of a poorer quality, it may nevertheless, raise relevant issues that have not been considered

³⁵ *Banerji AAT* (n 34) [109].

³⁶ *Banerji* (n 5) 389–90 [3]–[5].

³⁷ *Ibid* 404–5 [42] (Kiefel CJ, Bell, Keane and Nettle JJ), 408–9 [53]–[54], 423–4 [102] (Gageler J), 440 [161] (Gordon J), 442 [166], 457–8 [206] (Edelman J).

³⁸ *Morris and Sorial* (n 30) 23–4.

³⁹ *Ibid* 24.

⁴⁰ *Ibid*.

⁴¹ See generally Jane Mansbridge et al, ‘A Systemic Approach to Deliberative Democracy’ in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 1, 4–5.

⁴² See *ibid* 2.

⁴³ See *ibid*.

⁴⁴ See *ibid* 2–3.

by more formal and regulated spheres. Conversely, unregulated sites with poor deliberative quality can have a destructive effect, such as when they perpetuate misinformation. The systems approach to deliberation is based on the idea that because these individual sites together constitute a cohesive ‘system’, it is possible for some parts of the system to correct for deficiencies in other parts in a way that improves deliberation overall.⁴⁵

Variations on the systems approach are developed in the theoretical literature. For Robert E Goodin, the virtues associated with deliberation do not need to be located in any one particular site, but can be dispersed between and across different institutions:

In this model of ‘distributed deliberation’, the component deliberative virtues are on display sequentially, over the course of this staged deliberation involving various component parts, rather than continuously and simultaneously present as they would be in the case of a unitary deliberating actor.⁴⁶

John Parkinson argues that different actors, such as activist networks, experts, bureaucracy, media, and elected assembly, play different roles within the system: ‘[e]ach element in such a system may not be perfectly deliberative or democratic in its own right, but may still perform a useful function in the system as a whole’.⁴⁷ Jane Mansbridge et al define a ‘system’ as ‘requir[ing] some functional division of labour, so that some parts do work that others cannot do as well. And it requires some relational interdependence, so that a change in one component will bring about changes in some others.’⁴⁸

Our contention is that while impartiality is of utmost importance for the public service, public servants nevertheless constitute an integral part of Australia’s ‘deliberative system’, which includes all the institutional components established by the *Australian Constitution*, as well as other important organisations and participants. The public service, as part of the executive, is one of the three arms of constitutional government in Australia. Public servants are therefore important constitutional actors helping manoeuvre the executive as an institution, along with Ministers. Public servants can be understood as undertaking constitutional implementation both of government policy and constitutional values.⁴⁹ But they should be able to participate in the deliberative system not only in their institutional role, but also as private citizens. Like other constitutional actors, public servants should be

⁴⁵ See *ibid* 4–7.

⁴⁶ Robert E Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford University Press, 2008) 186.

⁴⁷ John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 7.

⁴⁸ Mansbridge et al (n 41) 4 (emphasis omitted).

⁴⁹ Vanessa MacDonnell, ‘The Civil Servant’s Role in the Implementation of Constitutional Rights’ (2015) 13(2) *International Journal of Constitutional Law* 383, 392–7, 405–6.

recognised as being capable of wearing two hats.⁵⁰ This does not mean they should be entitled to say whatever they like however they like.⁵¹ However, public servants should be entitled to engage in reasoned, restrained political communication.⁵² This is important, because their contributions to public debate can help improve deliberation across the system as a whole.

Several reasons support this position. First, public servants comprise approximately 16% of the workforce.⁵³ This is a sizeable proportion of the Australian population. Second, public service employees have specialised knowledge and expertise about the policy issues with which they engage at work. As John Wilson and Pender point out, '[t]he APS, as an employer, is placing increased emphasis on advanced higher education', in some cases funding PhD scholarships for 'high-achieving public servants'.⁵⁴ Additionally, '[a] number of recent agency heads have ... PhDs' and '[a]cross the federal public service, almost 2 per cent of employees hold doctorates (just under 3,000 staff)', which is 'double' the rate in Australia of 1%.⁵⁵

Because of this specialised knowledge and expertise, public servants can make informed contributions to public debate, thereby improving the quality of public debate overall. Given that a significant portion of public political debate now occurs online on social media platforms, participating in online debate — in a restrained and informed way, subject to confidentiality requirements — offers an opportunity for public servants to correct misinformation cascades occurring online and to promote more informed debate about policy issues. To exclude public servants from the 'deliberative system', whether overtly through speech restrictions or through the 'chilling effect' of unclear guidelines, is to potentially damage the whole system. With misinformation on the rise, trust at an all-time low, and the polarisation of debate of growing concern, the restrained and reasoned contributions of public servants should be encouraged, not unnecessarily curtailed.

V PROJECT FINDINGS

In this study, we aimed to test the levels and experiences of legal uncertainty, as relayed by public servants, in relation to their free speech. As noted, our interviews

⁵⁰ We argue this in Morris and Sorial (n 30): at 33.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia* (Catalogue No 6248.0.55.002, 11 November 2021); Australian Bureau of Statistics, *Labour Force, Australia* (Catalogue No 6202.0, 15 July 2021). See also Pender, 'Silent Members' (n 6) 327, citing Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia, 2016-17* (Catalogue No 6248.0.55.002, 9 November 2017).

⁵⁴ John Wilson and Kieran Pender, 'Uncertainty Silences Public Service Free Speech', *Lexology* (Blog Post, 2 June 2020) <<https://www.lexology.com/library/detail.aspx?g=f9d6345c-7edd-4a11-98f3-f17b16165fbc>>.

⁵⁵ Ibid.

uncovered six key themes: (1) clarity of guidelines; (2) understanding of what constitutes ‘tone’; (3) whether the balance between impartiality and free speech is well struck; (4) the impact of speech restrictions on professional and private lives as well as democracy more broadly; (5) the relevance of seniority; and (6) strategies for managing and mitigating these tensions. Our findings are discussed below.

A Clarity

Justice Gordon in *Banerji* referred to the ‘transparency’ and fairness of disciplinary processes in finding that the restrictions on public servants’ free speech were appropriately balanced.⁵⁶ However, in previous work, we have suggested that the guidelines are unclear and that the uncertainty of the High Court’s reasoning compounded this lack of clarity.⁵⁷ To test this, we sought to understand whether the APS guidelines⁵⁸ in relation to participating in public debate are clear and understood by public servants. Responses fell into two main categories: 7 of the participants thought the guidelines were clear and understood what was required of them but nevertheless expressed some uncertainty about how they would be interpreted in practice, or how they would affect them should they choose to contribute to public debate; and 16 participants thought they were unclear. A significant related concern was that the guidelines were often changing and restrictions were evolving to become tighter.

1 Guidelines Are Clear

These interviewees expressed a clear understanding of the guidelines, but also understood what they were signing up for when they entered the public service. As Interviewee A describes:

I am aware of the APS guidelines and, for me, it’s a way of life. I entered this career knowing what the expectations are of how you’re supposed to act as an APS employee ... I took it similar to, for example, police officers, how when they’re on duty, they’re expected to act a particular way, and when they’re off duty, they’re also expected to be portrayed to being a model citizen, for example.

Interviewee J thought that the High Court judgment in *Banerji* improved clarity:

Yeah, I think I do have a pretty good understanding, because I remember that one of the things that came out of that case was that the court did find that public servants were still allowed to engage in public debates, and could be members of political parties.

⁵⁶ *Banerji* (n 5) 435 [141], 440 [158].

⁵⁷ Morris and Sorial (n 30) 28–9.

⁵⁸ 2020 Guidance (n 1). As noted, we did not provide these guidelines to interviewees, as we wanted to understand their awareness and understanding of the guidelines independently: see above n 15.

Others expressed an understanding that they could participate in public debate, subject to two qualifications. As Interviewee E described:

So as I understand it, you've pretty much the same right of political communication in a public setting with two exceptions. One being that the criticism shouldn't be harsh or extreme about a specific person. And two, that it shouldn't be something directed to your own agency or portfolio. That's the two main caveats that I'm aware of.

However, these participants identified dissonance between what the guidelines said on paper and how they would be interpreted by supervisors. Some noted that the 'unofficial' advice was to refrain from participating as the safest option. Interviewee G explained, 'you don't know how far you can push things really. Cause there's just no visibility of where the actual boundaries are being enforced.' Interviewee G further identified 'a sort of wordplay that goes on' in the guidelines, making it 'hard to trust if you haven't seen actual implementation of the policy, you don't know what it actually means'. As a consequence of this uncertainty in practice, the majority expressed unease when participating in social media platforms, or exercised extreme caution.

2 *Guidelines Are Unclear*

These participants thought the guidelines were unclear, and that they were deliberately left vague to give supervisors wide discretion in enforcement. As Interviewee C described 'I have read them, but I don't trust them basically ... I don't really trust that they will be fairly implemented and I'm not reassured to participate ...'. Others interpreted the guidelines as imposing a blanket prohibition on public comment. As Interviewee D explained:

I don't comment on the government or the department's activities while I'm online. I'm not allowed to say anything about the government or 'like' anything that's criticism of the government, or post anything that's criticism of the government, that they perceive.

Interviewee D further described the policies as being 'deliberately quite elastic' which meant they could be 'overbearing'. According to this participant, this elasticity was intended to give the APS bureaucracy 'more flexibility as what they interpret as being inappropriate'. Interviewee F also felt the ambiguity of the guidelines gave enforcers more power: 'I don't think anybody policing that is clear about it, and I think that the subjectivity of that makes it easy to sort of shove somebody out'.

There was also, predictably, some variation depending on the department the person worked in, with some departments requiring higher levels of caution because of the nature of the work and the obligations of confidentiality. The public servants who worked for these departments accepted the level of restriction to their speech in relation to their work and their portfolios, but still expressed some uncertainty about whether they could participate in public debates on topics that did not concern their employment. Interviewee U noted that the guidelines are deliberately broad

because they must cover the whole of the APS, but the risk is that they also restrict other departments, such as cultural departments, that do not have the same kind of power or decision-making authority as departments where security might be more of a concern.

Interviewee T described the uncertainty from the perspective of being a supervisor, noting that supervisors were not provided with any training on how to interpret the guidelines. They described being alerted to some posts by the integrity team made by staff under their supervision. They note that ‘it wasn’t necessarily clear what I was meant to do with that [information]’ and chose not to pursue an investigation because the posts were not deemed to be biased. The fact that there was this divergence of views about what constituted bias further highlights the uncertainty of the guidelines.

3 *Changeability*

A significant related concern was the feeling that the guidelines were tightening and becoming more ambiguous. While Interviewee B felt they previously understood the guidelines, enabling them to participate confidently in public debate, including by blogging on topics outside their own department, they felt ambiguity was increasing and limitations were tightening. Part of the reason was what Interviewee B described as the ‘absurd and doomed’ *Banerji* case, which ‘muddied the water so badly for everybody’. The resulting ‘huge uncertainty’ gave the government ‘leverage’ to ‘clamp down’ on social media comment, creating ‘a toxic influence on our ability to engage publicly’. Interviewee M also noticed that the guidelines ‘chopped and changed’, while Interviewee C emphasised the increased uncertainty meant that ‘the advice you get from people who are active in this space’ is ‘in effect saying, “Just don’t do it” ... Don’t participate in media, social media ... because you just don’t know how it’ll come back to haunt you. And whatever the rules are, they can change them anyway ...’.

Interviewee D similarly observed that the guidelines had become ‘more strict’ and were increasingly open to interpretation, which works in favour of government power: ‘It’s kind of moved all the way along to almost got no right to say anything about the government because I work for the government. That’s the policy.’ Interviewee D further explained: ‘this is how I’ve seen it evolving over time. I think it benefits the employer more to not have something absolutely set in stone’.

B *Tone*

What constitutes appropriate tone in public speech for public servants can be a vexed question, as acknowledged in *Banerji*.⁵⁹ We were interested to understand how requirements regarding appropriate tone have been interpreted by public servants. There was widespread consensus that what constitutes appropriate tone is open to interpretation and potentially abuse. Interviewee C stated that proper tone

⁵⁹ See, eg, *Banerji* (n 5) 435 [140] (Gordon J), 448–9 [182]–[183] (Edelman J).

is ‘very subjective ... it’s a completely contestable area’. Interviewee H explained that in extreme examples, it was possible to identify the appropriate tone:

I can make a guess as to what would be clearly inappropriate, if anything really personal or anything unprofessional, if I said a certain politician is a lying dog who should be taken out and shot, that’s probably a tone that would get me into trouble.

However, there were borderline cases where it was unclear, which meant ‘it’s kind of hard to know where the boundary is between what is acceptable and unacceptable. I think there’s a lot of grey.’

Some public servants had received media training, which involved identifying whether the tone was appropriate. Some training used ‘scenarios where you had to read ... about somebody posting something online and then go through and work out whether they had breached anything or not’. However, Interviewee I still felt that it ‘leaves it up to the person who’s potentially punishing you ... to interpret whether something was right or wrong’. Interviewee I similarly considered that an assessment of tone is subject to the vagaries of a person’s age, background, culture and other factors. They further noted that the correct tone can be particularly difficult to convey in writing: ‘tone on social media is very hard to convey and I can say, “In no way did I mean what I said to be rude,” and you can say, “Yeah, but it was rude. I think it was rude”’. Interviewee F agreed that managers and supervisors have difficulty assessing tone because

[p]eople write in certain ways, people express themselves in certain ways, correcting argument matter of factly, could be interpreted as hostile. It could be interpreted as just correcting the record online. So that’s a sort of a difficulty we have.

Similarly, Interviewee K noted that background was relevant, including education:

what’s an acceptable tone to one person may not be to another person. I come from a medical background speaking openly and plainly about abortion to me is completely acceptable ... [but] to a person from a more conservative, perhaps less scientific, less educational background that could be totally unacceptable ...

The overwhelming view was that while tone can be determined in cases where speech is clearly vitriolic, it is too open to subjective assessments, potentially chilling speech as a consequence.

C Balance

Participants were asked whether they think there is an appropriate balance between the responsibilities of public servants to remain impartial, and their freedoms as ordinary citizens to contribute to public debate. The majority of responses suggested that the balance is not appropriately struck. While there was consensus that it was inappropriate for public servants to comment on the work of their department or

within their portfolio, many thought they should be able to make public comments in areas outside their portfolio. The one exception to this was public servants who were also academics. Their responses were more complicated and will be discussed in Parts V(D)(1) and V(F).

A minority felt the restrictions were balanced, with some qualifications. Emphasising that it is inappropriate to comment on issues even outside of their department, Interviewee A noted that as ‘a public servant, you’re representing the Australian government as a whole. Not just your department.’ Others felt the balance was appropriate, so long as it just required public servants to exercise restraint and caution when making public comments. As Interviewee E argued:

To expect them never to speak about it [political views] or share it in any way seems a bit unreasonable. But I think that it is reasonable to have them temper that. Hold them to a bit of a higher standard of impartiality than the average person who’s not a public servant.

Others thought that while they should be able to comment on areas outside their portfolios, they did not feel able. As Interviewee H explained, ‘I think your own agency might may well [sic] reasonably be off limits, so I accept that’, however given public servants are also ordinary citizens who interact with government agencies like the Australian Taxation Office and the public health system, restricting public servants’ speech on those topics was ‘kind of giving us less rights than somebody who doesn’t work for a government agency’.

Most participants felt the guidelines were inappropriately balanced. Interviewee K said that while the guidelines were clear, they were nevertheless ‘an overstep’, because ‘it pretty much directs you that you can’t post anything. You must remain completely impartial.’ They explained that even ‘liking’ something or being tagged by family in something political could have disciplinary consequences, ‘if you don’t respond to it saying, “That’s not my point of view that doesn’t represent the broader perspective of the public service” ... you can actually be pulled up for that kind of stuff, which was pretty shocking’.

Public servants who occupied two positions — such as public servants who were also scientists — also thought the balance was imperfect. Often, they felt a duty to contribute to debates within their portfolios, especially given their special expertise. This tension was compounded by the COVID-19 pandemic, where some wanted to correct the public record regarding vaccines or mask-wearing, but felt constrained. These participants thought it was important contribute their expertise to public debates, particularly to dispel conspiracy theories on social media. The restraint entailed professional, personal and broader democratic impacts, discussed in Part V(D).

D *Impact*

There were three kinds of impact arising from APS free speech restrictions noted by participants: personal, professional and democratic impacts. However, a minority of

participants felt largely unaffected by the restrictions on free speech. For example, Interviewee E said the guidelines did not ‘restrict me in any meaningful way’ and they did not feel ‘[h]ammed in by it’. This attitude was generally connected to personal circumstances. As Interviewee J explained, they felt unrestricted by the guidelines because ‘I’m not a wide user of social media anyway’, and being ‘pretty junior’, they did not think ‘anybody would even notice’ their online behaviour. This participant was also ‘not that fussed’ about career security or progression as they were ‘hoping to retire soon’, which meant that ‘[i]f they want to kick me out, I really don’t care’. Nonetheless, Interviewee J was concerned about how colleagues were experiencing the restrictions:

It does bother me to see other people ... Intimidated sounds like a strong word, but perhaps intimidated a little bit by feeling there’s a conflict between wanting to be involved politically and keeping their jobs ...

More interviewees felt the guidelines’ restrictions on free speech entailed professional, personal and broader democratic impacts.

1 *Professional Impacts*

Professional impacts of the restrictions included worries about job security, concerns about lack of trust, and unfair restraint of professional and moral obligations to speak out.

Many felt concern about job security arising from the uncertainty of guidelines. As Interviewee I explained, the ‘nuanced view’ of what is acceptable public speech was ‘quite confusing’ and ‘worrying because I’ve seen people lose jobs ... it makes me quite nervous to try and interpret the public service’s view of what is appropriate ... It stresses me out’. An unfair connection between job security and rights to free speech was noted by some participants. As Interviewee I strongly put it: ‘I shouldn’t have to sacrifice my freedom to have an opinion publicly because of my job.’ Contradicting observations made by Justices of the High Court in *Banerji*,⁶⁰ threats to job security were amplified by the fact that, where disciplinary processes occur, they can lack transparency, especially where security clearances are involved. As Interviewee L explained: ‘It’s not like a transparent, open court case.’ Appealing a decision can be ‘very difficult because the decision on a clearance sits solely with an agency head ... You can have the right to representation and appeal, if you know about it, is very hard to navigate.’ Interviewee J further explained that as a casual employee, they were ‘pretty terrified to lose my job over posting the wrong thing on social media’. But this restriction was not limited to social media. They recalled a former Minister who warned against making ‘a political comment to your family in a dinner party because that’s outside of your code of conduct’.

⁶⁰ See comments in *Banerji* about the administrative processes and their alleged transparency: *Banerji* (n 5) 421 [93] (Gageler J), 434–5 [139]–[140], 439–40 [157]–[158] (Gordon J).

This speaks to concerns about the guidelines fostering lack of trust within the public service. Interviewee C identified ‘a lack of trust of employees’, despite acknowledging that ‘in public sector life ... your reputation and whether you’re trustworthy is pretty important’. Interviewee K similarly explained:

I think that the lack of respect is a bit sad because ... I haven’t really met a lot of people who couldn’t be trusted to have an intelligent conversation with people or intelligently vent their perspective on things and you come to work and totally just put that aside ... They pick their candidates carefully enough ... there should be more trust there.

Interviewee G agreed that ‘it’s a bit hard to trust if you haven’t seen actual implementation of the policy’.

Such mistrust was compounded by the fact that, as Interviewee I explained, policing of the rules in practice relies on ‘dobbers’, which can cultivate mistrust of colleagues and encourage conflict. In their observation,

[p]eople just absolutely love to dob ... I’m Aboriginal and sometimes when Aboriginal people put their head online, up above the parapet, people instead of taking shots at them online and like taking the argument there online, they’ll go and dob them into their workplace and say they’re inappropriate ... It’s pretty nasty ...

This added an important insight into the way intersectionality can compound the chilling effect of APS speech restrictions, and the ways that they affect some groups more than others, either because of race or sexuality.

Some participants, especially those with special expertise, expressed frustration that the guidelines prevent them from properly fulfilling their professional obligations. Interviewee G noted that public servants with specific and special knowledge or skills should be trusted to comment on their work, because ‘we’re important repositories of national expertise. It’s very disturbing that people like right wing think tanks are always talking about things, but we never hear anything from the actual national expertise in the matters.’ While scientists could publish in academic journals in their areas, and were even expected to do so (subject to approval processes), they generally expressed reluctance to engage, for fear of falling foul of the guidelines.⁶¹

2 *Personal Impacts*

We also heard from participants about how the guidelines may impact personal financial security, mental health, romantic relationships, personal online enjoyment and even minor political interactions. Interviewee B explained that they had previously been sanctioned for making public comments about matters outside their own department, which meant they were ‘always a little scared because it destroyed

⁶¹ See also Driscoll et al (n 6) 8–9.

my career for some years'. This participant went through a conduct investigation which was ultimately withdrawn, however it had 'far reaching' personal ramifications. The disciplinary process cost thousands of dollars in legal representation which was 'never recoverable' and resulted in a 'couple of months health leave because it was doing my heading in'. It affected their personal relationship, led to depression and unemployment.

Interviewee I expressed concern about whether romantic relationships might be monitored due to their APS role:

I'm even worried about the fact that I'm a single person, and I don't live the most conservative lifestyle and I have dating apps, which are technically, I don't know if they would fall under social media, but I think if they wanted to police anything I did or said on dating apps, it would absolutely fall under social media ...

And I worry about the fact that I'm non-monogamous and it says that on my dating profile, and if somebody screenshot that and sent it to my work, for me I don't know whether they would actually have a right to discipline me over something like that.

The creeping restriction curtailed personal enjoyment of online activity for some participants. According to Interviewee D:

you can't even like something funny that someone's put up. Like a cartoon or whatever, of Peter Dutton, because he might take offence. Or someone else you know might take offence. I think that's pretty sad. That is a breach of my rights as a citizen ...

Interviewee I said they 'even worry about signing petitions' and whether that will 'come back to haunt me at work somehow', even though the petition signed was about matters outside their department. Interviewee N further explained: 'I don't go around 'liking' politicians' pages. I have in the past, but I just don't want to get myself in a situation where I'm compromising myself ...'. Interviewee P described the mental health impacts of not being able to comment during the marriage equality debate, which affected them personally, again highlighting the ways in which intersectionality compounded APS speech restrictions. These reflections convey a sense of worry, paranoia and anxiety colouring these participants' online engagement.

3 *Democratic Impacts*

The restriction of public servants' free speech may also entail broader democratic consequences, according to many participants. As Interviewee C described:

I would expect that in a free democratic society, that this [participating in debate] would be possible. But unfortunately in this free democratic society, it's dangerous. It's dangerous. There are consequences for you doing it. If you're asking me the question, ideally, would I want this to be different? Yes. But I live with the reality that it's not.

Again, this feeling was particularly potent for public servants with special expertise. While Interviewee L felt that being restricted from publicly sharing their scientific expertise was for ‘the greater good’, this was a minority view. Other interviewees felt the guidelines’ restrictions on free speech conflicted with their responsibilities as public servants (and sometimes as scientific experts) to ‘correct the public record’ and contribute to a healthy democracy.

Interviewee K felt the restriction was ‘really frustrating’ because the expertise of public servants could help ‘people to be knowledgeable about politics and the way that government works’. Interviewee K noted that, as a public servant, it can be ‘hard to even help people’, for example ‘friends who are not super literate about voting’. Public servants can feel inhibited from helping them understand political systems for fear of being perceived as trying to influence politics.

Some participants expressed a desire to share expertise by helping fact-check false information. Interviewee F explained that, in the context of ‘Craig Kelly’s claims about unproven drugs, for instance ... I personally feel it’s a responsibility of public servants to correct the record. Obviously tactfully and carefully, but in a very contested space and a very unpleasant space.’ Interviewee M similarly felt that ‘sometimes when you see obvious information that’s incorrect and where the correct information is publicly available, even then, I often hesitate to point things out’. This can have broader ramifications, because as Interviewee F explained, if public debate becomes too chilled, this can drive secrecy un conducive to rational democratic discussion:

if you don’t have these debates in public, people move to things like Telegram, where it’s all secret. So I think it’s the balance between trying to address things in the open space, and be that balanced voice, versus just having ... I mean, for instance, a lot of the people that were posting on Facebook with these conspiracy theories that I was following, have just disappeared. Now they’ve been banned and gone somewhere else.

According to Interviewee K: ‘The concern is there are debates going off somewhere else, without any sort of factual corrections.’ Interviewee T noted that they do not feel they are participating in their democracy.

Public servants thus clearly perceive themselves to be part of a wider ‘deliberative system’ in which they should play an important role, namely, in using their expertise to correct the public record and improve deliberation about important policy matters. According to some participants, over-restriction of public servants’ free speech may also compromise the APS. Interviewee F said it could lead to a perception of politicisation: ‘The boundaries, I feel have become quite blurred during the pandemic, between the political and the impartial advice that public servants are supposed to give.’ A culture of overt control, through ‘militarisation of the public service’, may hamper the giving of frank and fearless advice. Interviewee P similarly stated: ‘frank and fearless advice in my portfolio died about eight years ago’. As Interviewee H suggested, tight controls may also prevent public servants defending the public service in online debate.

E *Seniority*

Many interviewees felt that APS seniority entailed greater scrutiny in public speech. Interviewee A, as a more senior member of the APS, felt that seniority meant ‘more expectations that as a senior member ... you are expected to know how to act’. By contrast, as ‘a junior member ... it might be slightly more relaxed if you do get in trouble the first time’. Interviewee I agreed that junior staff had more freedom: ‘My understanding is now the lower you are, the more freedom you have. Like if you’re a six, you have a little less freedom than say a four to talk publicly on social media about political issues.’ Further, for senior members, as Interviewee B indicated, ‘if you are anything above level six’ in the APS ‘you’re almost fair game on what you say publicly’ (though notably, Banerji was level six⁶²). Interviewee C similarly explained that seniority entailed experience that would probably lead to further restraint: ‘I think the more senior they get, the more careful they get.’ Interviewee F observed that ‘senior public servants are probably more trusted’ to speak publicly, and stated: ‘I think by virtue of seniority, you’re not going to make stupid comments in public, too often in your career.’

Interviewee H said ‘only the most senior people’ were ‘allowed to use social media in their official role. We’re talking secretary level, basically.’ But they are ‘pretty heavily scrutinised’. Interviewee J thought tighter rules for senior APS staff was logical:

if you’re really high up and in maybe a place of advising government and stuff like that, I think that’s one part of the guidelines I do kind of agree with, because there could be a perception that maybe you couldn’t do that job or give that advice impartially ... I think pretty much everybody else should be given a fair bit of freedom. ... I reckon the rest of us should be pretty much left to our own devices and our own discretion.

But Interviewee K identified that sometimes ‘the highest figures ... wouldn’t even know their code of conduct’. As Interviewee L noted:

You might have managers or supervisors that say, ‘You can’t join a political party. You can’t post about that.’ They don’t know the rules and that’s where the risk comes in ... Managers and certifiers don’t know the rules on a whole heap of things. We’ve got policies coming out ... and they’re too busy to read them, and making calls that aren’t accurate on a whole heap of things, not just social media use.

F *Mitigation*

Most APS participants implemented strategies to mitigate the risk of sanction when engaging in online and other debate. These included being careful in public discourse, seeking advice or permission from managers or colleagues, wearing

⁶² Banerji *AAT* (n 34) [3].

two hats (that is, distinguishing between their professional and personal roles), and remaining anonymous or using pseudonyms to conceal identity.

1 *Taking Care*

Taking extra care in public communication was common. Interviewee A, a more senior member of the APS, felt relatively confident about constructing a personal tweet within APS guidelines, but also felt it might take ‘a few tries’, requiring them to ‘write out the tweet first, and then review it to make sure’. Interviewee B would also cautiously engage on social media, but acknowledged that even careful engagement in public discourse could come with risks of career damage:

I am careful, but still make comments ... I don't call the prime minister a moron and stuff like that ...

If I'm making a factual analysis of bad decision making and it's nothing to do with my portfolio, then I think I'm on relatively safe grounds. But if somebody really hated me ... maybe they could make a case. And it's happened to me before when I was in my other department ...

Interviewee E explained that the guidelines required them to ‘moderate’ what they say publicly. This would include refraining from ‘the type of debate that I have with friends and in smaller groups’ and being ‘aware of the fact that it is in a public setting and the fact that I'm a public servant would factor in to how I'm presenting’. Many were careful not to talk publicly about matters related to their department. Interviewee D explained that they participate in political debate online, but ‘I don't talk about the department at all or comment on any other posts or tweets about the department I'm in’ and ‘my profile doesn't have anything on it that would identify me as coming from department’.

2 *Seeking Advice*

Some interviewees mitigated risks by getting clearance from managers or advice from colleagues. Interviewee A felt they could talk to their supervisor if they were unsure about constructing a social media post, explaining that ‘[i]n my workplace, I have a very casual team, so we talk openly. So I would just openly talk to my supervisor.’ Interviewee L said they would probably ask a ‘someone I trust, a colleague’ to proofread a potential blog. By contrast, Interviewee H said:

I can't see much myself talking to my boss about my social media use. I ... wouldn't feel comfortable feel like it was appropriate that I had to clear my social media posts with them ... before I put them up and I think he [would] probably also feel that that wasn't his job.

3 *Publishing Academic Work*

Interviewee G experienced more formal processes for managerial sign-off of academic publications:

essentially we'll write what we want to write and then we'll put it to our immediate supervisor who will do this normal sort of editing sort of thing you might expect. And then it will go through a couple more levels above that, to what we call a division chief ...

we're expected to publish, so it is facilitated, but it is a very slow and cumbersome process because it goes up to people who have to see these things from couple 200 to 300 people. So it tends to take a month or so to get a publication.

Interviewee F similarly described how staff might author papers 'that are cleared for publication' using 'a very light touch' by management. In scientific areas, for example, this ability to publish was considered important:

I think the threshold for refusing should be very low, because I think if you're employed to do something and you know what you're doing, in a sense, it's your own personal reputation that is important as well ...

I think if there was a process that did prohibit advice for publication, I think there should be an appeals mechanism ...

But slow approval timeframes can cause 'considerable problems' in some fields. As Interviewee G explained, tight publication and conference deadlines may not 'fit terribly well having to wait five to six weeks to get approval for the publication'.

4 *Wearing Two Hats*

Some interviewees spoke about distinguishing between public speech as an APS employee, and speech as a private citizen — what has been described as 'wearing two hats'.⁶³ Interviewee D explained:

It has never mattered to me who the government is, I do my job the same no matter what, because it's a job. But that part of me that does that work is not the same person I am out of work and they don't know me.

As Interviewee N put it: we 'can be private citizens outside the workplace'. Interviewee C explained that trying 'to keep the two separate' meant conceptualising the wearing of 'two hats' to mitigate risk and manage restriction: in 'things I feel very passionately about, I basically say, "Well, this is not in my work role ... I'm putting on my private citizen hat."' Explaining further, Interviewee C said:

I'm absolutely clear about what it is I can't do in the work space and you think departmental resources, shall we say, that includes any computer system, email or whatever it is, that's all subject to scrutiny ...

... but I have to be very clear it's on my personal resources, on my personal time, on my personal stuff.

⁶³ See our discussion in Morris and Sorial (n 30): at 29–33.

This might include participating ‘in activism using my personal email account’. But even trying to utilise two hats, participation in debate was not always possible, because of the feeling that, with ‘social media stuff ... there is no private interaction with it’. Accordingly, though Interviewee C has a Facebook account to observe debate, they emphasised that they ‘never post anything ... I just don’t engage on any of these platforms that can come back to haunt me’.

Interviewee I further explained that APS staff ‘have the ability to be multiple people’. But it was noted that the government did not understand that public servants can wear two hats, which indicated a lack of trust: ‘There’s not this understanding that as a public servant, I can be impartial in my job and also in my private life be really critical of the government.’ Interview K remarked that ‘there’s this attitude where you get treated a bit like the kid’ in the APS, whereas ‘they need to think of us as adults’ who are

capable of coming to work and putting aside [political views] ... I don’t care who is in government ... whether I like them or I don’t ... It’s totally irrelevant, my political persuasion from my customer service and service delivery roles ... the lack of respect is a bit sad.

The approach ‘forgets that we’re also private citizens, we all go home. And we also need to be able to have private interests and hobbies’.

However, Interviewee P described the ‘emotional labour’ that can go into maintaining the distinction between private and public selves:

People working in these policy areas and in these regulatory areas are on the ground to see exactly how these things are working or not working, and are often experts in how the government is failing. Going to sleep at night with that knowledge, and then waking up the next day and administering whatever bogus scheme ... it really takes its toll.

5 *Using Anonymity and Pseudonyms*

Some interviewees used anonymity as a shield, even though under the 2020 Guidance anonymity is no guarantee against sanction.⁶⁴ For example, Interviewee I used anonymity and explained: ‘I wouldn’t be confident in putting my face and name to something if I thought people could track down where I worked’. But they acknowledged this was still risky. Another mitigation strategy was therefore to ‘regularly delete’ tweets. This did not eliminate anxiety however:

⁶⁴ 2020 Guidance (n 1). A 2012 APS Circular also warned employees that ‘anyone who posts material online should make an assumption that ... their identity and the nature of their employment will be revealed’: ‘Circular 2012/1: Revisions to the Commissioner’s Guidance on Making Public Comment and Participating Online’, *Australian Public Service Commission* (Web Page, 13 January 2012) <<http://www.apsc.gov.au/circulars/circular121.htm>>, archived at <<https://webarchive.nla.gov.au/awa/20120321015912/http://www.apsc.gov.au/circulars/circular121.htm>>.

I delete my tweets regularly. I have a locked account. It does cause me stress. It actually causes me a bit of anxiety occasionally, especially when I see people getting fired or getting called in. Even just getting called in to go through and defend myself would be quite stressful.

Interviewee G said they ‘interact under a pseudonym’ and strive to ‘adopt appropriate tone’. Interviewee K further explained they ‘don’t comment anywhere my name is obvious’. Interviewee M also used privacy settings, as well as overall restraint, to mitigate risks:

On Facebook I was very conscious about restricting the privacy of my account. So I don’t let [sic] any information publicly viewable. That’s only visible to friends. ... [but] even then I generally avoid commenting or making public statements about policy issues related to the portfolio that I work in.

Yet even so, Interviewee M remained ‘hesitant. I don’t really express my full view ... I’m self moderating and limiting what I would say compared to what I might say if I wasn’t in a public service courtroom.’ This was partly because factors like anonymity and seniority were not taken into account enough in APS sanctions: ‘I think the guidelines are probably too restrictive’, because there are ‘public servants like myself who do hesitate and who don’t engage openly in public debate, even in a respectful way and effective way because of concern about getting called by your HR department and questioned’.

VI CONCLUSIONS AND RECOMMENDATIONS

Our study’s findings indicate that the APS guidelines in relation to making public comments, including on social media, are perceived to be unclear and unbalanced by public servants. This lack of clarity has profound professional and personal impacts. However, it also has broader and more troubling impacts for democracy and the APS itself. Adopting a systems approach to democracy, we suggest that public servants constitute an integral part of the Australian democratic deliberative system. Their reasoned and rational contributions can potentially improve the quality of deliberation overall. Public servants in Australia not only comprise a significant proportion of the workforce, but also have specialised expertise and knowledge, that when incorporated into debate appropriately, can improve deliberative outcomes. Our findings also suggest that public servants see themselves as part of this system and are keen to contribute to it in productive ways. However, over-restriction of public servants’ speech also may entail broader implications for the APS itself, and its objective to maintain impartiality. An overzealous approach to restraining speech — either through overt restrictions or through ‘chilling’ due to ambiguity — can itself appear politically biased, compromising APS impartiality and professionalism.

To address these concerns, APS guidelines should be revised to improve clarity. While the guidelines contain explicit recognition that public servants are also

private citizens who are entitled to express their views,⁶⁵ we suggest that confusing and subjective requirements as to appropriate tone, expression, language and content⁶⁶ need to be further clarified. Given there also may be uncertainty on the part of supervisors implementing the guidelines, some objective criteria or concrete examples could be included to help distinguish acceptable and unacceptable contributions. While there is consensus about extreme cases that are clearly unacceptable — overtly critical or vitriolic statements made about a person or government department, for example — there are also significant grey areas that the participants found worrying. The following relevant factors could be included in the guidelines to provide greater clarity, objectivity when making assessments, and in turn, better balance between the public and private freedoms and responsibilities of public servants. Drawing on factors of relevance raised by the Justices in *Banerji*, existing legislation that balances free speech with other duties with respect to defamation and racial vilification,⁶⁷ and our own examination of these matters, such considerations could include whether the contribution:

1. was a fair and accurate report or discussion about a matter of public interest, including in an area in which the person works, made in a manner that upholds APS professionalism and impartiality;
2. involved disclosure of any confidential information the person may be privy to in the capacity as a public servant;
3. named or criticised any particular person, such as a Minister or supervisor;
4. was made by a public servant who is an expert in a particular area, able to offer expert evidence in relation to an issue of public importance;
5. was about a matter or issue outside the employees' department;

⁶⁵ See above n 4 and accompanying text.

⁶⁶ 2020 Guidance (n 1).

⁶⁷ For example, s 18D of the *Racial Discrimination Act 1975* (Cth) (*RD Act*) provides exemptions to the prohibition in s 18C of the *RD Act* on offensive behaviour based on racial hatred. These exemptions apply to making or publishing 'a fair and accurate report of any event or matter of public interest' or 'a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person': *RD Act* (n 67) ss 18D(c)(i)–(ii). The recent changes to defamation laws, contained in Australasian Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (27 July 2020), also use defences to protect free speech. These include the defence of contextual truth (which echoes the fairness and accuracy requirement in s 18D(c)(i) of the *RD Act*): at sch 1 cl 26; the defence of 'publication of matter concerning [an] issue of public interest' (similar to the 'public interest' element in ss 18D(b) and 18D(c)(ii) of the *RD Act*): at sch 1 cl 27; and the defence of honest opinion (similar to the 'genuine belief' element of s 18D(c)(ii) of the *RD Act*): at sch 1 cl 31.

6. was made by a very senior public servant, which suggests they should be held to a higher standard in upholding APS professionalism and impartiality;
7. was made in a private capacity, anonymously or with caveats or disclaimers making clear that the speech was not reflective of APS views; and
8. was discussed, negotiated and approved by the person's supervisor prior to publication.⁶⁸

These recommendations are only tentative, and would need to be developed collaboratively with the APS and tested with both employees and supervisors.

In most areas of speech, there are so-called 'boundary cases' between what is acceptable and unacceptable speech. Given the high standards to which public servants are held relative to ordinary speakers, it will not be as difficult to develop clearer and more robust criteria that strike a better balance between their free speech and professional responsibilities, minimise the impact the current restrictions have on their personal and professional lives, and the broader impact on the deliberative system and the APS itself. The indications of a culture of mistrustfulness and of creeping tightening of the guidelines, uncovered by this study, present particular concern for the maintenance of a robust and functional public service. Trust and confidence are essential to a professional public service, and, as Gageler J explained in *Banerji*, '[c]onfidence cannot exist without trust'.⁶⁹ It is therefore in the interests of maintaining a professional, impartial and trustworthy APS that the guidelines in relation to public servants' free speech are made clearer and more certain. A broader, randomised study should be undertaken to test the workability and appetite within the APS for changes along the lines suggested here.

⁶⁸ We put forward these factors in *Morris and Sorial* (n 30): at 35–7.

⁶⁹ *Banerji* (n 5) 424 [105].