# BALANCING PUBLIC SERVANTS' RESPONSIBILITIES WITH THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION: WHAT CAN WE LEARN FROM *BANERJI*?

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*There is a longstanding institutional tradition that requires public servants to refrain from participating in public debate, in the interests of preserving Australian Public Service ('APS') impartiality. At the same time, there is recognition in APS guidelines that public servants are also citizens entitled, to some extent, to express their political views.* Comcare v Banerji *presented an opportunity to resolve these competing tensions, yet the case leaves us with various uncertainties about whether and how public servants can contribute to public debate. This uncertainty has several potential consequences. First, without principled criterion by which to assess public comments, managers might err on the side of caution and overreach in restricting employees' speech. Second, government employees might self-censor for similar reasons. Third, when gagging of public servants goes too far, this can itself appear politically biased, compromising APS impartiality and professionalism. In this paper, we argue that public servants are constitutional actors. Like other constitutional actors, they should be allowed to wear two hats, to enable a reasonable level of free speech in their private and expert capacities. We propose policy recommendations building on the Justices' proposals, that may help clarify a better balance between public servants' responsibilities and the freedom of political communication.*

## I INTRODUCTION

There is a longstanding institutional tradition that requires public servants to refrain 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 political views. These competing tensions have largely remained unresolved in litigation about the extent to which public servants

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can participate in public debate.[1] *Comcare v Banerji* ('*Banerji*') presented an opportunity to resolve or at least clarify this vexed issue.[2] However, the case leaves various uncertainties about whether and how public servants can contribute to public debate. This uncertainty has several potential consequences. First, without principled criterion by which to assess public comments, managers might err on the side of caution and overreach in their restrictions of public servants' speech. Second, government employees might self-censor for similar reasons. This 'chilling effect' not only burdens a significant portion of citizens, but also deprives the public of important information that could usefully inform voting choices. Third, when gagging of public servants goes too far, the restrictive approach can itself appear politically biased, compromising APS impartiality and professionalism.

After presenting an account of earlier litigation about whether public servants can engage in political communication, we provide analysis of the judicial reasoning in *Banerji*. We then argue that public servants are constitutional actors and, like other constitutional actors, they should be allowed to wear two hats to enable a reasonable level of free speech in their private and expert capacities. We propose tentative policy recommendations, building on the Justices' proposals and analogous legislative frameworks, that may help clarify a better balance between public servants' responsibilities and freedom of political communication. While we accept that the ultimate outcome reached by the High Court in *Banerji* may have been appropriate in the circumstances (and indeed, Banerji's speech would probably also fall foul of the criteria we propose), we raise concerns about the ambiguous judicial reasoning used to reach this conclusion, and the real-world policy consequences enlivened by this ambiguity. In particular, we argue that making law on the basis of these 'extreme' cases raises serious uncertainties about whether more tame speech by public servants is allowable. This ambiguity has the potential to chill political participation by public servants more generally.

The article proceeds in three parts. The first part presents an account of pre-*Banerji* litigation on whether public servants can make public comments, then analyses and explains the facts and legal reasoning in *Banerji.* The second part explores the competing policy tensions which the judges in *Banerji* acknowledge but do not resolve. The third part sets out some tentative reform ideas that may help provide clarity to APS employees and managers alike, by better articulating the boundaries of freedom of political communication for public servants, while safeguarding APS impartiality and professionalism. By taking a proactive and preventative approach which minimises uncertainty and encourages open communication between parties, these reforms may help avoid the bad press and litigation that can arise from speech-related transgressions of the APS Code of Conduct ('APS Code'), which are ultimately unconducive both to perceptions of APS impartiality and professionalism, and employee wellbeing and productivity.

1 *Bennett v Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 ('*Bennett*'); *R v Goreng-Goreng* (2008) 2 ACTLR 238 ('*Goreng-Goreng*'); *Starr v Department of Human Services* [2016] FWC 1460 ('*Starr*'); *Chief of Defence Force v Gaynor* (2017) 246 FCR 298 ('*Gaynor*').

2 (2019) 267 CLR 373 ('*Banerji*').

## II PUBLIC SERVANTS AND THE IMPLIED FREEDOM OF COMMUNICATION: THE BANERJI CASE

Several earlier cases examined whether public servants could make public comments, often reaching contradictory conclusions. In the 2003 *Bennett v Human Rights and Equal Opportunity Commission* ('*Bennett*') case,[3] the applicant was a public servant and union leader who was disciplined for breaching reg 7(13) of the *Public Service Regulations 1935* (Cth). The provision prohibited any disclosures of information about public business or about anything 'of which the employee has official knowledge'.[4] Justice Finn found that the regulation unreasonably burdened the implied freedom of political communication, and so was invalid. His Honour described the prohibition as 'a relic of an era of government in which the practice of politics and of public administration differed markedly from our own'.[5] In finding for the applicant, his Honour argued that these sorts of secrecy provisions have a detrimental 'effect on the quality of public debate and, ultimately, on the practice of democracy itself'.[6]

Post-*Bennett*, new secrecy provisions were enacted in reg 2.1 of the *Public Service Regulations 1999* (Cth),[7] prohibiting the disclosure of information communicated in confidence or received in confidence, unless that information was already in the public domain. This provision was unsuccessfully challenged in *R v Goreng-Goreng* ('*Goreng-Goreng*') in 2008,[8] on the grounds that it was not a 'catch-all' provision, but more targeted and limited than the provision considered in *Bennett*. Justice Refshauge found that:

> While the inevitable area of indeterminacy which has to accompany a description such as 'the effective operation of government', that inevitably relies to some extent upon a judgment, may lead to some information not being disclosed which could legitimately be disclosed, I do not consider this to convert the provision into what can properly be described as a 'catch-all' nor to render it invalid as breaching the constitutional guarantee.[9]

In 2016, the Fair Work Commission ('FWC') found that political comments and criticisms made by government employee Starr about Centrelink time frames and customers did not constitute a valid reason for his dismissal from the Department of Human Services. Starr had made a number of anonymous comments on social media over a period of three years. Some of these comments related to an online

3 *Bennett* (n 1) 337 [1]–[5] (Finn J).

4 Ibid 350 [60] (Finn J), quoting *Public Service Regulations 1935* (Cth) reg 7(13). Although Finn J cites the 1999 regulations, it is the now impliedly repealed 1935 regulations where reg 7(13) is found: *Public Service Regulations 1935* (Cth).

5 *Bennett* (n 1) 355 [82].

6 Ibid.

7 *Public Service Regulations 1999* (Cth) reg 2.1, as amended by *Public Service Amendment Regulations (No 2) 2004* (Cth) sch 1 item 1.

8 *Goreng-Goreng* (n 1) 247 [37] (Refshauge J).

9 Ibid.

dispute between Starr and another Centrelink employee over waiting times for youth allowance payments, some were critical of the federal budget and some were more vitriolic and disrespectful of Centrelink customers. The FWC nevertheless found that

> in the case of the vast majority of public servants who perform routine administrative tasks (such as Mr Starr), it is difficult to envisage any circumstance in which the robust expression of political views and criticism of government outside of work could have an impact on the performance of their duties.[10]

In 2017, the Federal Court rejected reservist Gaynor's argument that the termination of his service in the Army Reserve on account of social media comments critical of the LGBT+ community, trans people and Muslims was a violation of the implied freedom of political communication. The Full Court of the Federal Court found his dismissal to be constitutional and confirmed the validity of reg 85 of the *Defence (Personnel) Regulations 2002* (Cth), which conferred the power of termination. The Full Court reversed the decision of the primary judge, who incorrectly treated the respondent as having a constitutional right to express himself on political matters. The Full Court reiterated that the implied freedom is not a personal right, and therefore concluded that Buchanan J had applied the *Lange v Australian Broadcasting Corporation* ('*Lange*')[11] proportionality tests incorrectly.[12] While *Chief of Defence Force v Gaynor* differed from the other APS cases because it concerned speech in the context of military service and so had different disciplinary requirements,[13] the pre-*Banerji* litigation suggests significant confusion about whether and how public servants can engage in political debate or express their views.

The 2019 *Banerji* case was an opportunity to settle the contradictory jurisprudence on the vexed question of whether public servants can make political comments, and if so, under what circumstances. As Pender notes, the persistent uncertainty surrounding this issue has a significant effect on public discourse and is unfair to public service employees who are expected to follow confoundingly hazy rules and guidelines.[14] As Pender puts it: '[i]f public servants are required to accept employment-related limitations, those obligations — and their practical application — should be clearly defined'.[15]

10 *Starr* (n 1) [73] (Hatcher V-P).

11 (1997) 189 CLR 520 ('*Lange*').

12 *Gaynor* (n 1) 310 [47] (Perram, Mortimer and Gleeson JJ). See also Jemma Potezny, '"Extreme Circumstances" Leave Public Service Employees Silent and Uncertain: *Chief of Defence Force v Gaynor* (2017) 246 FCR 298' (2018) 39(1) *Adelaide Law Review* 217.

13 (2017) 246 FCR 298.

14 Kieran Pender, '"Silent Members of Society": Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327, 329 ('Silent Members?').

15 Ibid.

*Banerji* required the High Court to determine whether the relevant sections of the *Public Service Act 1999* (Cth) ('*PSA*') imposed an unjustified burden on the implied freedom of political communication under the *Australian Constitution* and therefore whether the termination of Michaela Banerji's employment for breaching the APS Code was an unreasonable administrative action warranting compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).[16]

Banerji was an APS employee at the Department of Immigration and Citizenship. Sometime before 2012, she began using an anonymous Twitter account to send tweets (sometimes during work hours)[17] criticising the government's asylum seeker policies, the Department, other employees and Members of Parliament.[18] Some tweets were considered 'intemperate' and 'vituperative' in tone.[19] Following complaints from employees, a lengthy department investigation confirmed Banerji as the anonymous tweeter. In November 2012, Banerji sought an injunction in the Federal Magistrates Court of Australia to prevent the Department from proceeding with the proposed termination of employment. In *Banerji v Acting Secretary, Department of Immigration and Citizenship*,[20] the Federal Circuit Court dismissed the injunction application. In 2013, the Department terminated Banerji's employment for breach of the APS Code.[21] Then in October 2013, Banerji submitted a claim for compensation under s 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) for a psychological condition arising from the termination of her employment. A delegate of Comcare rejected the application in February 2014, a decision that was affirmed by another Comcare delegate again in August 2014.[22] Banerji subsequently sought merits review at the Administrative Appeals Tribunal ('AAT') and was successful in her claim. The Tribunal held that ss 10(1), 13 and 15(1) of the *PSA* imposed an unjustified burden on the implied

16 *Banerji* (n 2) 388–9 [1] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5A(1).

17 The question of when the comments were made is significant. Much was made of when Banerji sent the tweets in the Administrative Appeals Tribunal ('AAT'), with Banerji vehemently claiming that with the exception of one tweet, all were published outside of work hours. See *Banerji and Comcare (Compensation)* [2018] AATA 892, [26]–[30] (Deputy President Humphries and Member Hughson) ('*Banerji AATA*'). The AAT noted that not much turns on this question, however, the APS guidelines state that APS employees are required to exhibit impartiality 'at all times', which suggests that comments made in their capacity as private citizens outside of work hours are also captured. Justice Edelman noted in his judgment that this provision would have a 'powerful chill' on APS employees and not only during their period of employment: *Banerji* (n 2) 441–2 [164]. We will return to the issue of whether it is relevant that APS employees make comments during work hours or in their own time in parts two and three of the paper.

18 *Banerji* (n 2) 389 [2] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Banerji AATA* (n 17) [8], [40] (Deputy President Humphries and Member Hughson)

19 Ibid 389 [2] (Kiefel CJ, Bell, Keane and Nettle JJ).

20 [2013] FCCA 1052.

21 *Banerji* (n 2) 389–92 [3]–[8] (Kiefel CJ, Bell, Keane and Nettle JJ).

22 See also 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, 836.

freedom of political communication.[23] Comcare challenged the decision, and the case was remitted to the High Court in 2018, where Banerji argued that the *PSA* provisions breached the implied freedom of political communication.[24] The High Court disagreed and unanimously upheld the provisions as proportionate to the legitimate objective of maintaining an impartial and professional APS.

## A *Legislative Provisions Considered in Banerji*

The *PSA* is the latest legislative expression of a long institutional tradition that requires public servants to refrain from some kinds of public comment,[25] in the interests of maintaining APS political impartiality.[26] Section 10 set out APS Values, which stated (at the time of the appeal to the High Court in *Banerji*) that the APS should be 'apolitical, performing its functions in an impartial and professional manner', so as to deliver services 'fairly, effectively, impartially and courteously to the Australian public', in a way that is 'sensitive to the diversity of the Australian public'.[27] Section 13 sets out the APS Code and requires that:

> (a) An APS employee must behave honestly and with integrity in connection with APS employment.
>
> …
>
> (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
>
> (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
>
> (7) An APS employee must: (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment.
>
> …
>
> (11) An APS employee must at all times behave in a way that upholds (a) the APS Values … and (b) the integrity and good reputation of the employee's Agency and the APS.[28]

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

23 *Banerji AATA* (n 17).

24 Kieran Pender, '*Comcare v Banerji*: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131, 136–7 ('Public Servants and Political Communication').

25 Pender, 'Silent Members?' (n 14) 327–8.

26 *Banerji* (n 2) 393 [14]–[15] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Public Service Act 1999* (Cth) ss 10, 13 ('*PSA*').

27 *PSA* (n 26) ss 10(1)(a), (g), later amended by *Public Service Amendment Act 2013* (Cth) sch 1 item 28.

28 *PSA* (n 26) s 13.

impartiality, to protect the integrity and reputation of the APS — but the degree of impartiality and what it requires at all times is unclear.

Various guidelines have attempted to clarify expectations of APS employees in light of institutional traditions of impartiality and restraint, and to balance concerns about free speech. These have evolved with shifting social and political expectations. While a 1902 regulation required that public servants must not 'discuss or in any way promote political movements', there were efforts towards liberalisation in the 1970s.[29] 1979 guidelines recognised 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.[30]

At the same time, these guidelines also emphasised the importance of safeguarding 'the political neutrality of the Public Service'.[31] Guidelines issued in 1987 give further advice as to tone of allowable communication by public servants, suggesting that '[r]easoned public discussion on the factual technical background to policies and administration' which could 'lead to better public understanding of the processes and objectives of government' may be acceptable.[32] However, 1995 guidelines explained it is 'not appropriate for a Department employee to make unofficial public comment that is, or is perceived' to be

> compromising the employee's ability to fulfil his or her duties professionally in an unbiased manner (particularly where comment is made about Department policy and programmes); so harsh or extreme in its criticism … that it calls into question the employee's ability to work professionally, efficiently or impartially; so strongly critical of departmental administration that it could disrupt the workplace; or unreasonably or harshly critical of departmental stakeholders, their clients or staff.[33]

Relevant to the facts of *Banerji,* a 2012 APS Circular warned employees that 'anyone who posts material online' should assume their identity and employment

29 *Commonwealth Public Service Regulations 1902* (Cth) reg 41, quoted in Pender, 'Silent Members?' (n 14) 327.

30 Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants* (Australian Government Publishing Service, 1979) 47 [5.3] ('*Guidelines on Official Conduct*'), quoted in *Banerji* (n 2) 430–1 [127] (Gordon J).

31 Public Service Board, *Guidelines on Official Conduct* (n 30) 47 [5.4], quoted in *Banerji* (n 2) 431 [127] (Gordon J) (emphasis omitted).

32 Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants* (Australian Government Publishing Service, 2nd ed, 1987) 14 [6.2], quoted in *Banerji* (n 2) 431 [128] (Gordon J).

33 *Banerji* (n 2) 394 [17] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Banerji AATA* (n 17) [36] (Deputy President Humphries and Member Hughson), quoting Public Service Commission, *Guidelines on Official Conduct of Commonwealth Public Servants* (Australian Government Publishing Service, 3rd ed, 1995) 35.

are discoverable,[34] and that employees' rights to participate in social media were therefore limited.[35] But how limited and in what way?

Guidance issued in 2017 ('2017 Guidance') by the APS Commission advised that even 'liking', reposting and sharing social media content or selecting particular reaction icons could breach employment expectations, while not taking action about objectionable material posted by someone else could be seen as endorsement.[36] Labor criticised the 2017 Guidance as a 'totalitarian crackdown [which] does not belong in an Australian Public Service Commission guide',[37] and the Commonwealth Public Sector Union also argued the guidance was unbalanced.[38] Indeed, one would assume the requirement to maintain APS Values including impartiality at all times should preclude public criticism of government along with public praise — given praise is not impartial and could compromise the perception of the APS delivering 'frank and fearless' advice just as much as criticism. Section 13(11) of the *PSA* properly interpreted therefore 'cuts both ways'.[39] Confusingly, however, the 2017 Guidance also 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 APS Code, this 'doesn't stop you making a positive comment on social media about your agency'.[40] This seems clearly at odds with impartiality: rather than encouraging objectivity in communication, it encourages the expression of pro-government opinions.[41]

34 *Banerji* (n 2) 394 [17] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Banerji AATA* (n 17) [37] (Deputy President Humphries and Member Hughson), quoting 'Circular 2012/1: Revisions to the Commission's Guidance on Making Public Comment and Participating Online (Social Media)', *Australian Public Service Commission* (Web Page, 8 June 2018) <https://www.apsc.gov.au/circular-20121-revisions-commissions-guidance-making-public-comment-and-participating-online-social>, archived at <https://webarchive.nla.gov.au/awa/20191107183834/https://www.apsc.gov.au/circular-20121-revisions-commissions-guidance-making-public-comment-and-participating-online-social>.

35 Katharine Gelber, 'The Precarious Protection of Free Speech in Australia: The *Banerji* Case' (2019) 25(3) *Australian Journal of Human Rights* 511, 513, quoting 'Making Public Comment on Social Media: A Guide for Employees', *Australian Public Service Commission* (Web Page, 16 September 2019) <https://www.apsc.gov.au/making-public-comment-social-media-guide-employees>, archived at <https://webarchive.nla.gov.au/awa/20191107005637/https://www.apsc.gov.au/making-public-comment-social-media-guide-employees>.

36 Australian Public Service Commission, *Making Public Comment on Social Media: A Guide for APS Employees* (2017) ('*2017 Guidance*').

37 Thomas McIlroy, 'Australian Public Service Commission Social Media Guidance Angers Opposition and Activists', *The Canberra Times* (online, 7 August 2017) <https://www.canberratimes.com.au/story/6029672/australian-public-service-commission-social-media-guidance-angers-opposition-and-activists/>.

38 Tom McIlroy, 'New Public Service Social Media Policy is "Overreach": Union Boss Nadine Flood', *The Canberra Times* (online, 7 August 2017) <https://www.canberratimes.com.au/story/6029702/new-public-service-social-media-policy-is-overreach-union-boss-nadine-flood/>.

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

40 Australian Public Service Commission, *2017 Guidance* (n 36) 3, quoted in ibid.

41 See also Anthony Gray, 'Public Sector Employees and the Freedom of Political Communication' (2018) 43(1) *Alternative Law Journal* 10.

However, the most recent guidance on the APS website ('2020 Guidance') backtracks from this position, perhaps prompted by legal scholarship[42] and judicial comments in *Banerji.*[43] 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'.[44] These guidelines further articulate the balance being sought in light of new challenges of social media, explaining 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.
>
> At the same time, the unique nature of APS employment means expressing our views can reflect not only on us as individuals, but on our agencies and the APS as a whole. Our personal behaviour can ultimately affect the confidence of the Australian community and the Government in the integrity of the APS as an institution.
>
> This is why some of our obligations as public servants extend into our private lives, and must be balanced with our rights as citizens.[45]

Echoing the 2012 APS Circular, the 2020 Guidance emphasises that the potential anonymity of the internet is no guaranteed shield from requirements to exercise restraint in public speech, and that disclaimers and aliases on social media accounts, while potentially mitigating risks of sanction, cannot eliminate such risks.[46] It similarly reiterates that 'liking' certain posts or even signing a petition critical of government policy could — depending on all the relevant circumstances — raise concerns about impartiality. While expression of extreme views and hate speech is discouraged, the guidance attempts to clarify that

> [t]his does not mean that APS employees must always be positive, polite, or even neutral online — the range of acceptable expression is broad. The question is whether a reasonable member of the community would conclude on the basis of the post that the employee can't be trusted to work impartially, professionally, or with integrity in the APS.[47]

Given that what is reasonable for one person may be unreasonable for another, significant uncertainty as to what is acceptable public speech for public servants remains. Further, it is not only *public* speech that is potentially affected: the 2020 Guidance, echoing the 2017 Guidance, warns that 'private correspondence does

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

43 *Banerji* (n 2) 424–5 [105] (Gageler J).

44 'Social Media: Guidance for Australian Public Service Employees and Agencies', *Australian Public Service Commission* (Web Page, 17 March 2021) ('2020 Guidance') <https://www.apsc.gov.au/social-media-guidance-australian-public-service-employees-and-agencies>.

45 Ibid.

46 Ibid.

47 Ibid. As will be explained, this guidance seems to echo and may be informed by Edelman J's advice in *Banerji* (n 2) 448–9 [182].

not always stay private' and that social media behaviour *before* an employee begins APS employment could still affect trust and confidence in the APS.[48]

Given changing and uncertain guidelines informing the operation of the legislative restrictions, the framework appears to impose significantly on public servants' political communication.

## B *High Court's Reasoning*

According to the Commonwealth, Banerji's anonymous tweets violated the APS Code, as clarified by the various guidelines. In response, Banerji argued the legislative provisions unjustifiably burdened the implied freedom of political communication and sought compensation for unreasonable termination of employment. The AAT, placing weight on the anonymity of the tweets,[49] agreed the provisions imposed a 'heavy burden'[50] and found that using the APS Code 'as the basis for the termination of Ms Banerji's employment impermissibly trespassed upon her implied freedom of political communication'.[51] The High Court disagreed. Delivering a plurality judgment (Kiefel CJ, Bell, Keane and Nettle JJ) and three separate judgments (Gageler J, Gordon J and Edelman J), the Court unanimously overturned the AAT's decision, on the basis that the burden on the implied freedom imposed by the provisions was justified by the legitimate objective of maintaining an impartial and professional APS.

Banerji unsuccessfully put three arguments to the High Court. First, that the legislative provisions properly interpreted did not apply to anonymous communications; second, that if the provisions did apply to anonymous communications, then they impermissibly breached the implied freedom; third, that if the provisions did not unjustifiably burden the implied freedom, then the decision-maker failed to properly take into account the effect of the implied freedom before terminating Banerji's employment.[52]

The plurality dismissed the anonymity argument, noting this had not been argued before the AAT, but that the APS Code nonetheless applied to anonymous speech. Their Honours cited guidelines which explained that anonymous communicators should assume their identities are discoverable (as occurred in this case) and which warned employees that 'harsh or extreme' communication could compromise APS impartiality and integrity.[53] As Gageler J explained, trust and confidence were essential elements of a professional public service:

48 Australian Public Service Commission, '2020 Guidance' (n 44).

49 For a detailed summary of the AAT's reasoning, see Pender, 'Public Servants and Political Communication' (n 24) 134–6.

50 *Banerji AATA* (n 17) [119] (Deputy President Humphries and Member Hughson), quoting *Brown v Tasmania* (2017) 261 CLR 328, 369 [128] (Kiefel CJ, Bell and Keane JJ) ('*Brown*'). See also *Banerji AATA* (n 17) [89], [104], [120] (Deputy President Humphries and Member Hughson).

51 *Banerji AATA* (n 17) [120] (Deputy President Humphries and Member Hughson).

52 *Banerji* (n 2) 396 [22] (Kiefel CJ, Bell, Keane and Nettle JJ).

53 Ibid 397 [24].

> Confidence cannot exist without trust, and trust cannot exist without assurance that partisan political positions incapable of being communicated with attribution will not be communicated anyhow under the cloak of anonymity. … The confidence of the Government, the Parliament and the Australian public in the APS as an apolitical and professional organisation would be undermined without more were an APS employee free to engage with impunity in clandestine publication of praise for or criticism of a political policy …[54]

The Court therefore considered it 'facile' to impute a parliamentary intention to exclude anonymous communications,[55] with the plurality noting it would be 'a question of fact and degree whether or not a given "anonymous" communication infringes s 13(11) by failing to uphold the APS Values and the integrity of the APS'.[56]

The plurality similarly rejected the argument that the implied freedom was an 'essential mandatory consideration' in the exercise of the administrative discretion in relation to the termination of Banerji's employment,[57] and that failure to consider it should vitiate the decision.[58] On this issue, the Court sided with Commonwealth and State submissions which urged a focus on the impact of the legislative provisions on the implied freedom, rather than the exercise of the administrative discretion.[59] By contrast, the Australian Human Rights Commission ('AHRC'), intervening as amicus curiae, argued that the implied freedom as construed in *Lange*[60] and other cases has usually been understood as limiting legislative and executive power.[61] Justice Gageler, however, dismissed this argument as 'conceptual confusion'.[62] Notably, the precise interplay between constitutional limitations and administrative discretion did not arise as directly as it might have in this case, because Banerji pursued a Comcare claim which enabled the High Court to largely sidestep the issue. The issue may arise again if a public

54 Ibid 424–5 [105]. Justice Gageler's comments perhaps help explain the updated APS 2020 Guidance in relation to public praise of government.

55 Ibid 397 [24] (Kiefel CJ, Bell, Keane and Nettle JJ), 424–5 [105] (Gageler J).

56 Ibid 398 [26].

57 Ibid 405 [43].

58 Ibid 405–6 [44].

59 Attorney-General (NSW), 'Submissions of the Attorney General for New South Wales (Intervening)', Submission in *Comcare v Banerji*, C12/2018, 14 November 2018, 5 [18].

60 *Lange* (n 11) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

61 Australian Human Rights Commission, 'Submissions of the Australian Human Rights Commission Seeking Leave to Appear as Amicus Curiae', Submission in *Comcare v Banerji*, C12/2018, 12 December 2018, 4–5 [12]–[20]. See Pender, 'Public Servants and Political Communication' (n 24) 141; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 412 ('Rights, Personal Rights and Freedoms').

62 *Banerji* (n 2) 408 [52], quoting *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240, 256–7 [56] (Basten JA). Again adopting the Commonwealth's framing: see Pender, 'Public Servants and Political Communication' (n 24) 143.

servant seeks judicial review via the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, the AHRC's correct observation that the implied freedom must limit both legislative and executive power does not necessarily entail that an administrative decision-maker should take into account the implied freedom when making decisions under an Act, if the freedom is not specified as a relevant factor for consideration. A better interpretation is that the implied freedom constrains executive power because any executive action must comply with the relevant empowering legislation, and that legislation must comply with the implied freedom. However, as we suggest below, subordinate legislation in the form of various guidelines is executive action that should be judicially scrutinised in light of the implied freedom.

Having dispensed with these arguments, the Court turned to the implied freedom of political communication and its impact on the validity of the legislative provisions.

### C *Were the Legislative Provisions Invalid Due to the Implied Freedom?*

The plurality found the AAT erred by interpreting the implied freedom of political communication as if it were a 'personal right' like that conferred under the *United States Constitution* amend I, rather than a structural limitation on legislative power.[63] As Edelman J explained:

> [U]nlike the United States, in Australia the boundaries of freedom of speech are generally the province of parliament; the judiciary can constrain the choices of a parliament only at the outer margins for reasons of systemic protection. The freedom of political communication that is implied in the Commonwealth *Constitution* is highly constrained.[64]

The Court held that the proper focus should be not on the legislation's impact on Banerji's *personal* ability to communicate politically, but on 'the law's effect on political communication as a whole'.[65] A narrow approach to the implied freedom was therefore taken, in line with cases since *Lange* which have arguably sought to constrain the implied freedom, probably due to faltering judicial support[66] — perhaps in reaction to the freedom's 'implied' nature. However, Stone has shown how the Court's categorisation of the implied freedom as a structural limitation based on institutional justifications rather than a personal right may be

63 *Banerji* (n 2) 394–6 [19]–[21] (Kiefel CJ, Bell, Keane and Nettle JJ), 422–3 [99] (Gageler J).

64 Ibid 442 [164].

65 Ibid 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis omitted), citing *Wotton v Queensland* (2012) 246 CLR 1, 31 [80] (Kiefel J) ('*Wotton*'), *Unions NSW v New South Wales* (2013) 252 CLR 530, 553–4 [35]–[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J) ('*Unions NSW*') and *Brown* (n 50) 360 [90], 374 [150] (Kiefel CJ, Bell and Keane JJ). See also *Banerji* (n 2) 407–8 [50] (Gageler J).

66 Stone, 'Rights, Personal Rights and Freedoms' (n 61) 417, citing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, *Stephens v West Australian Newspapers* (1994) 182 CLR 211 and *McGinty v Western Australia* (1996) 186 CLR 140 ('*McGinty*').

conceptually overstated, because the basic reasoning underlying the freedom is consistent with some level of concern for individual autonomy. As Stone explains, 'arguments for autonomy and arguments for democratic government are rather closely linked'.[67] Personal autonomy is relevant to the idea of a 'free choice' in voting, arising from the text and structure of the *Constitution*, and 'democratic government presupposes or logically implies the autonomy of citizens'.[68] Further, the conceptual distinction is minimal in practice: whether the freedom is construed as a personal right or a narrower structural limitation, 'the Court is inevitably drawn into the evaluation and balancing of competing values',[69] as evidenced by the use of proportionality analysis that is usually associated with rights guarantees. Despite the questionable distinction, however, it would seem the more limited, structural understanding of the freedom has taken hold in Australian judicial reasoning.

Applying the *Lange* method, the parties agreed that the law effectively burdened political communication,[70] but disagreed as to whether the burden was justifiable. To resolve this, the Court applied the well-established two-step test. The two further questions to be answered were:

a) whether the provisions have 'a legitimate purpose consistent with the system of representative and responsible government mandated by the *Constitution*'; and
b) whether the provisions are reasonably appropriate and adapted — that is suitable, necessary and adequately balanced — for the achievement of that purpose.[71]

### 1 *Step One*

The Court found the purpose of the provisions was legitimate: their object was 'to ensure that employees of the APS at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS'.[72] The provisions were therefore 'attuned to the maintenance and protection of an apolitical public service that is skilled and efficient in serving the national interest'.[73] The Court found this purpose to be consistent with, and according to Gordon J a 'defining

67 Stone, 'Rights, Personal Rights and Freedoms' (n 61) 391.

68 Ibid 391–3, 396.

69 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668, 671 ('Standards of Review'); Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 842, 850.

70 *Banerji* (n 2) 398–9 [29] (Kiefel CJ, Bell, Keane and Nettle JJ).

71 Ibid 398–9 [29] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Lange* (n 11) 561–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), *McCloy v New South Wales* (2015) 257 CLR 178, 194 [2(B)] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*') and *Brown* (n 50) 363–4 [102]–[104] (Kiefel CJ, Bell and Keane JJ), 413 [271], 416 [277] (Nettle J). See also *Banerji* (n 2) 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ), 408 [53] (Gageler J).

72 *Banerji* (n 2) 399 [30] (Kiefel CJ, Bell, Keane and Nettle JJ).

73 Ibid. See also at 416–17 [75]–[77] (Gageler J).

characteristic' of,[74] the system of representative and responsible government mandated by the *Constitution*, for example by reference to ss 64 and 67 which establish the constitutional role of executive departments, as well as the historical importance of an apolitical and professional public service in the functioning of government.[75] The Court saw the *PSA* as the influential 'contemporary expression'[76] of a long tradition of 'professionalism and political neutrality' in the APS.[77] This historical tradition entailed a 'continuing ethos' of impartiality, characterised as much by its 'genuineness' as its 'amorphousness'.[78]

As Gageler J explained, the amorphousness inherent in determining a breach of the appropriate standard of neutrality and impartiality in APS employee behaviour was not usually for judicial adjudication, but a matter to be resolved by the administrative decision-maker under the legislative rules.[79] But because the law conferred a discretion 'capable of being exercised to impose a direct and substantial burden on political communication', the legislative provisions required a 'compelling justification' and 'close scrutiny' by the judiciary.[80] In adopting this 'close scrutiny' approach, Gageler J signalled a slightly different (or perhaps just less explicitly articulated) approach to application of the two-step test, in line with his approach in earlier cases.[81] Justice Gordon also appeared to take a somewhat different approach to the proportionality analysis. The variations in their reasoning are discussed further below. Despite the variation in articulation of the test, however, the substance of the analysis in practice is much the same,[82] and all Justices were led to the same conclusion.

### 2 *Step Two*

At the 'close scrutiny' stage of the test, the Court found the provisions were proportionate to the legitimate objective of protecting the impartiality and professionalism of the APS, notwithstanding that they imposed (as described by

74 Ibid 426 [111]. See also at 436–9 [146]–[155] (Gordon J).

75 Ibid 399–400 [31] (Kiefel CJ, Bell, Keane and Nettle JJ), 409 [54], 409–12 [56]–[65], 413–15 [70]–[72], 423 [100]–[101] (Gageler J).

76 Ibid 416 [75] (Gageler J).

77 Ibid 413 [70]. See also at 443–8 [171]–[180] (Edelman J).

78 Ibid 416 [74] (Gageler J).

79 Ibid 421 [94].

80 Ibid 422 [97], citing *Brown* (n 50) 389–91 [200]–[204] (Gageler J) and *Clubb v Edwards* (2019) 267 CLR 171, 229–32 [175]–[185] (Gageler J) ('*Clubb*').

81 For more on the two approaches to the two-step test being applied by the High Court, see Anne Carter, 'Bridging the Divide: Proportionality and Calibrated Scrutiny' (2020) 48(2) *Federal Law Review* 282; Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92; Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123; Sir Anthony Mason, 'Proportionality and Calibrated Scrutiny: A Commentary' (2020) 48(2) *Federal Law Review* 286.

82 *Lange* (n 11) 567 n 272 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), citing *Cunliffe v Commonwealth* (1994) 182 CLR 272, 377 (Toohey J), 396 (McHugh J); Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards*; *Preston v Avery*' (2018) 40(3) *Sydney Law Review* 395, 405.

Edelman J) a 'deep and broad' impingement on political communication.[83] First, the laws were suitable, because they carried a rational connection with the purpose they intended to fulfil.[84] Second, the laws were necessary, as there was no 'obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom'.[85] The plurality rejected the idea that excluding anonymous communication would be a compelling alternative way of achieving the object of the legislation, because all anonymous communications 'are at risk of ceasing to be anonymous'.[86] Further, anonymous communications could nonetheless compromise APS integrity, impartiality and reputation. If the restrictions excluded anonymous communication, then the provisions would cease to deter behaviour damaging to the institution.[87]

The Court therefore found the laws to be appropriately balanced. This third sub-step involved consideration of the 'quantitative extent of the burden' as against the 'importance of the impugned provisions to the preservation and protection of the system of representative and responsible government mandated by the *Constitution*',[88] and evaluation of the appropriateness of legislative penalties. In general, this final step requires a judicial '*value judgement* as to the relative importance of the freedom of political communication as measured against the importance of the ends pursued by the challenged laws' be made.[89] The Court found the penalties were flexible and adaptable according to the severity of the breach, and that the scheme enabled procedural fairness including mechanisms for appeal.[90] The protective benefit of the provisions for the APS was therefore not 'manifestly outweighed by their effect on the implied freedom'.[91] An appropriate balance had been struck.

Justice Gageler, in his separate judgment, further emphasised the provisions' limited and flexible operation,[92] echoing Commonwealth arguments that framed

83 *Banerji* (n 2) 442 [166] (Edelman J).

84 Ibid 400–1 [33]–[34] (Kiefel CJ, Bell, Keane and Nettle JJ), 424 [104] (Gageler J).

85 Ibid 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Monis v The Queen* (2013) 249 CLR 92, 214 [347] (Crennan, Kiefel and Bell JJ), *Tajjour v New South Wales* (2014) 254 CLR 508, 550 [36] (French CJ), *McCloy* (n 71) 210–11 [57]–[58] (French CJ, Kiefel, Bell and Keane JJ), *Brown* (n 50) 371–2 [139] (Kiefel CJ, Bell and Keane JJ), 418–19 [282] (Nettle J) and *Clubb* (n 80) 186 [6] (Kiefel CJ, Bell and Keane JJ), 262 [263], 264–5 [266(3)], 265–6 [267]–[268], 269–70 [277] (Nettle J), 337–8 [478]–[480] (Edelman J). We dispute this, however. As we will argue, reforms could implement a more practical flexible and communicative approach to managing public servants' speech, by encouraging early negotiation about intended speech between public servants and their managers.

86 *Banerji* (n 2) 402 [36] (Kiefel CJ, Bell, Keane and Nettle JJ).

87 Ibid 402 [36].

88 Ibid 402–3 [38].

89 Morris and Stone (n 82) 406 (emphasis in original).

90 *Banerji* (n 2) 403–4 [40]–[41] (Kiefel CJ, Bell, Keane and Nettle JJ), 425 [106] (Gageler J), 435 [141] (Gordon J).

91 Ibid 405 [42] (Kiefel CJ, Bell, Keane and Nettle JJ).

92 Ibid 418–19 [83]–[84].

the restrictions as more context-specific and less constrictive than the absolutist tenor of the words 'at all times' in s 13(11) of the *PSA* would seem to imply.[93] In its efforts to avoid invalidation, the Commonwealth submitted that 'at all times' in s 13(11) does not mean 'always and under any circumstances' — an interpretation Pender correctly observes as involving 'linguistic gymnastics', particularly given s 13(11) stands distinct to other more limited subsections that prohibit only conduct that is 'in connection with APS employment'.[94] Agreeing with the Commonwealth's interpretation, however, Gageler J emphasised that the restrictions only apply to APS employees while they remain APS employees — though this contradicts the previously discussed APS warning in the 2020 Guidance on social media behaviour, which advises that even behaviour *before* employment could compromise an employee's impartiality and professionalism. His Honour further noted that the provisions do not provide 'a "blanket restraint on all civil servants from communicating … on any matter of political controversy"'.[95]

Both Gageler J and Gordon J appeared to deviate somewhat from the plurality in their reasoning, though both were led to the same conclusions after undertaking their respective versions of the proportionality analysis — demonstrating the flexibility and scope for individual judgement calls inherent in the test. The other three salient features to emerge from Gageler J's judgment is that 's 3(a) of the *PSA* not only is consistent with the constitutionally prescribed system of representative government but serves positively to promote' it; ss 10(1)(a), 13(11) and 15(1)(a) and (3) are 'narrowly tailored to achieve' these objectives in a way that only 'minimally impairs freedom of political communication';[96] and that the procedural mechanisms provided by these sections require that administrative decision-makers act reasonably and fairly, thereby providing for a measure of protection for APS employees against sanction. Conceding that the burden on political communication is 'substantial' for APS employees,[97] Gageler J nonetheless found it to be 'reasonably appropriate and adapted to achieve the identified object of establishing an apolitical public service in a manner that involves minimal impairment of freedom of political communication'.[98] This was because the law is not targeted at political communication in general; rather, it only operates in relation to the political communication of APS employees and it 'does not discriminate on the basis of any particular viewpoint'.[99]

93 Pender, 'Public Servants and Political Communication' (n 24) 138.

94 Ibid 138–9, quoting Attorney-General (Cth), 'Reply Submissions of the Attorney-General of the Commonwealth', Submission in *Comcare v Banerji*, C12/2018, 19 December 2018, 1 [3] n 3 and *PSA* (n 26) ss 13(1)–(4).

95 *Banerji* (n 2) 420 [89] (Gageler J), quoting *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 77 (Lord Clyde for the Court) ('*de Freitas*'). See also *Banerji* (n 2) 424 [103] (Gageler J).

96 *Banerji* (n 2) 409 [54].

97 Ibid 420 [90].

98 Ibid 423 [102].

99 Ibid 420 [90].

Justice Gordon's interpretation was that, while the *PSA* burdens the implied freedom of political communication by restricting the capacity of public servants to engage in political communication, this needs to be understood in context. In particular, her Honour found that 'ss 13(11) and 10(1)(a) are not 'self-executing. They are only given legal "teeth" through determination of breach'.[100] We take this to mean that the freedom is only burdened in the event of a breach (but notably, these sections nevertheless lie dormant and may still have a chilling effect on the speech of public servants more generally). Second, Gordon J reiterated that the provisions are suitably targeted; they do not 'apply to the public at large' but only to a 'specific group of people' those being APS employees.[101] Third, the provisions do not 'directly target political communication' but are 'directed at the *conduct* of APS employees "at all times"'.[102] For Gordon J, whether conduct is caught would be an 'evaluative judgment' dependent on a range of factors, including 'the seniority of the APS employee, when, where and how any public comment is made, and the language and tone of the comment'.[103] Not all public comment will be captured; 'only those comments that fail to uphold APS Values or the integrity and good reputation of the APS'.[104] Finally, the 'content of the burden is transparent', in the sense that there are clear procedures for the determination of a breach, which also includes merits review.[105]

Justice Edelman came closest to fully acknowledging the problematic nature of the extreme uncertainty created by the legislative framework, yet his Honour also found the scheme to be properly balanced. For Edelman J, the scheme did not impose obligations precluding public servants 'from making political comments on social media', but rather created 'a boundary, albeit ill-defined, between acceptable expression of political opinions and unacceptable expression of political opinions'.[106] His Honour admitted, however, that the provisions cast 'a powerful chill over political communication' for APS employees:[107]

> The burden imposed by ss 13(11) and 15 is also wide. The provisions burden political communication in the workplace as well as outside the workplace. They apply 'at all times' and not merely in the course of APS employment. They affect thousands of people; in oral submissions reference was made to evidence that there are nearly a quarter of a million public servants in the APS.[108]

100 Ibid 434 [138] (Gordon J).

101 Ibid 434 [139].

102 Ibid 434 [140] (emphasis in original).

103 Ibid 435 [140].

104 Ibid 435 [140].

105 Ibid 435 [141].

106 Ibid 448 [182] (Edelman J).

107 Ibid 441 [164].

108 Ibid 453 [196].

Indeed, such restrictions could apply to around 16% of the Australian workforce who are government employees — or around 8% of the population.[109] For the High Court, however, this 'powerful chill' was justified for the legitimate purpose of protecting an impartial and professional APS.[110]

## D *An Appropriate Balance?*

Despite what the judges assert, it is not clear that a well-defined and appropriate balance has been struck under the legislative framework. Pender argues that '[p]rohibiting anonymous political expression by non-senior public servants on a topic of immense national interest (as the ongoing debate about border protection ahead of the 2019 Federal Election demonstrates) is not adequate in the balance it strikes between the competing policy objectives'.[111]

There is an argument that Banerji's relatively low-level seniority at the APS may not have been given enough weight by the Court. The question of anonymity as a vitiating factor may also have been prematurely dismissed, a point we will return to in Part III. On the other hand, the tenor and tone of Banerji's tweets may properly be considered harsh and extreme enough in their criticism of the Department to warrant termination of employment from an apolitical APS, and it may be that Banerji's comments would also have been found inappropriate on the basis of the recommendations we propose in Part III. As noted, we do not necessarily take issue with the ultimate outcome in *Banerji*. Our contention is that the High Court failed to adequately resolve the vexed question of whether public servants can make political comments. In the process, this decision has created even more uncertainty as to whether public servants' speech that is not as 'extreme' would be permitted. In this respect, the judgments failed to adequately contend with the real-world and policy consequences of their findings beyond the individual respondent.

Even more troublingly, Pender identifies 'a concerning trend' arising in the few litigated cases analogous to *Banerji*: 'all involved criticism of Commonwealth policy'.[112] In light of this trend, surprisingly little attention was paid in the judgments to the fact that the provisions *in practice* may operate in a way that targets or discriminates against certain kinds of political communication, also known as 'viewpoint discrimination'.[113] In the United States, there is a general prohibition in First Amendment law on 'content-based' laws regulating speech. The rule against viewpoint discrimination arises because of the anti-democratic

109 Pender, 'Silent Members?' (n 14) 327, citing Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia, 2016–17* (Catalogue No 6248.0.55.002, 9 November 2017).

110 *Banerji* (n 2) 441–2 [164] (Edelman J). See also Pender, 'Public Servants and Political Communication' (n 24) 146.

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

112 Ibid.

113 Leslie Kendrick, 'Content Discrimination Revisited' (2012) 98(2) *Virginia Law Review* 231, 242–3; Adrienne Stone, 'Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech' (2017) 32(3) *Constitutional Commentary* 687, 690 ('Viewpoint Discrimination').

nature of prohibiting certain opinions or ideas. It has been justified on the grounds that discriminating on the basis of content distorts public debate and interferes with citizens' capacity to properly inform themselves. More troubling, however, is the risk that in prohibiting or regulating speech on the basis of its content, the state will seek to reinforce its own interests.[114]

Australian jurisprudence is similarly alive to such concerns. The High Court held in *Brown v Tasmania* ('*Brown*') that discriminatory provisions warrant closer scrutiny under the implied freedom of political communication because, as Gageler J explained, there is a risk that 'political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded'.[115] In *Banerji*, the 2017 Guidance seems to be a clear example of the prohibition of politically inconvenient communication for political purposes, contrary to the legislatively required goals of APS impartiality. However, Gageler J found that the legislative framework 'does not discriminate on the basis of any particular viewpoint'.[116] This may be true on the face of the legislation, and his Honour correctly observed that APS impartiality and confidence could be undermined by 'clandestine' criticism *or* praise,[117] yet the Court did not engage with the fact that the legislation (and broad administrative decision-making powers under the provisions) may not operate impartially in practice. There is an argument that any guidelines encouraging politically biased communication by APS employees (like the 2017 Guidance) should be invalidated as an unjustified breach of the implied freedom.[118] Though the 2017 Guidance emphasised that it lacks force of law,[119] such departmental standards, rules and procedures nonetheless govern the exercise of discretion under the *PSA* (and various guidelines are referred to throughout the judgments as demonstrating the flexibility of the legislation). APS guidelines therefore potentially provide a covert way of circumventing the implied freedom and engaging in viewpoint discrimination.

At the same time, however, such guidelines appear to be loosely informed by judicial findings. For example, the 2017 Guidance 'Frequently Asked Questions' confidently advised employees as to their rights to freedom of speech:

> **What about my right to freedom of speech?**
> The common law recognises an individual right to freedom of expression. This right is subject to limitations such as those imposed by the *Public Service Act*. In effect, the Code of Conduct operates to limit this right.
>
> **What about the Constitutional freedom of political communication?**

114 Stone, 'Viewpoint Discrimination' (n 113) 688.

115 *Brown* (n 50) 390 [202].

116 *Banerji* (n 2) 420 [90].

117 Ibid 424–5 [105].

118 Gray (n 41) 15–16.

119 *2017 Guidance* (n 36) 2. See also *Banerji* (n 2) 429–30 [126] n 169 (Gordon J).

> The implied Constitutional freedom of political communication is not a protection of free speech for individuals. It operates as a limit on the power of the Parliament to make laws unduly restricting speech.
>
> None of the litigation brought before various courts has successfully argued that the *Public Service Act*, or the Code of Conduct, amounts to an undue limitation of the freedom of political communication.[120]

Notably, the claim that none of the previous litigation regarding the validity of the scheme has been successful is inaccurate: *Bennett* invalidated an earlier iteration of the prohibition examined in *Banerji*.[121] Such guidelines purport to convey to employees their legal rights, whilst at the same time discouraging them from exercising those rights, exacerbating the highly imbalanced power relationship between employees and employers. Thus, in choosing to focus only on the validity of legislation with respect to the implied freedom, rather than the validity of various guidelines, the High Court created potential loopholes that prevent proper judicial scrutiny of APS restrictions. This stymies the potentially productive conversation between the courts and executive departments and further diminishes prospects of APS employees being able to defend their freedom to participate in public debate.

## E *Judicial Advice on Relevant Factors for Consideration in Determining a Breach of the APS Code*

While the judgments declined to apply the implied freedom to the exercise of the administrative decision-making, several judgments nonetheless suggested clarifying factors that should guide administrative decision-making under the *PSA* — which seems to verge into judicial offerings of policy advice rather than clear findings as to legality. Apparently cognisant of remaining confusion in the application of the APS Code, some Justices outlined relevant factors in determining a breach of s 13(11), which do not appear in the legislative text.[122] For Gageler J, these included the nuanced relevance of tone in evaluating potential breaches, such that APS employees must observe some 'circumspection', 'restraint or moderation in the expression of a political opinion'.[123] Factors like the employee's role and seniority might also be relevant in weighing up the level of restraint required.[124] Echoing the emphasis on flexibility, Gordon J similarly found that

120 *2017 Guidance* (n 36) 7.

121 *Bennett* (n 1) 361 [108] (Finn J).

122 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>.

123 *Banerji* (n 2) 421 [93].

124 Ibid. Notably these factors are echoed in the Australian Public Service Commission, '2020 Guidance' (n 44).

> [w]hether the specific conduct is caught will necessarily require an evaluative judgment that will depend on the seniority of the APS employee, when, where and how any public comment is made, and the language and tone of the comment. Specifically, not all public comment by a public servant will be found to be in breach of the statutory scheme — only those comments that fail to uphold the APS Values or the integrity and good reputation of the APS …[125]

Though the 'precise measure' of restraint would be 'situation-specific' and not readily 'reduced to a set of prescriptive rules',[126] for Gageler J this vagueness was an unavoidable incident of achieving the legislation's legitimate purpose and was ameliorated by the ability of the Commissioner to issue clarifying guidelines.[127] Yet, as noted above, the multiplicity of guidelines issued do not eliminate uncertainty in the operation of the provisions.

Echoing ideas put forward by Gordon and Gageler JJ, Edelman J proposed six factors relevant to any assessment of whether APS 'trust is sufficiently imperilled' to warrant a restriction or sanction on a public servant's speech. They included:

> i) the seniority of the public servant within the APS;
>
> ii) whether the comment concerns matters for which the person has direct duties or responsibilities, and how the comment might impact upon those duties or responsibilities;
>
> iii) the location of the content of the communication upon a spectrum that ranges from vitriolic criticism to objective and informative policy discussion;
>
> iv) whether the public servant intended, or could reasonably have foreseen, that the communication would be disseminated broadly;
>
> v) whether the public servant intended, or could reasonably have foreseen, that the communication would be associated with the APS; and
>
> vi) if so, what the public servant expected, or could reasonably have expected, an ordinary member of the public to conclude about the effect of the comment upon the public servant's duties or responsibilities.[128]

Justice Edelman proposed that these factors may help determine whether a breach of s 13(11) has occurred, 'despite the communication being anonymous'.[129] The problem is, these factors themselves perpetuate ambiguity, as evidenced by the repeated use of the word 'reasonable', which is always a matter of opinion. More problematically, Edelman J's framework lacks grounding in anything previously found in APS guidelines or in the *PSA*. Thus, while the principles might be sound, it is not clear that they would be used to assess whether a comment is acceptable. Indeed, using such criteria to judge public servants' speech would arguably lack a

125 *Banerji* (n 2) 435 [140]. See also at 434 [139], 439–40 [157]–[158] (Gordon J).

126 Ibid 421 [93]. See also at 440 [161] (Gordon J).

127 Ibid 424 [104].

128 Ibid 449 [183].

129 Ibid 449 [184].

principled basis: why should APS employee conduct be measured against standards wholly created by a judge, rather than anchored in democratically-enacted legislation, or at least subordinate legislation?

The remaining uncertainty entails burdensome real-world consequences, especially when one considers the lengthy and complex processes required to resolve breaches of the APS Code. Justice Gordon argued that the scheme's procedures for determination of breach are sufficiently transparent, however, this does not fully appreciate their practical dimensions.[130] In reality, if an APS employee makes questionable political comments and their supervisor imposes penalties, they would need to go through a complicated APS Code process, including a suspected breach notification, an investigation, a proposed determination on the breach, an opportunity for submission, and a determination on sanction. The whole process can take up to a year (as it did for Banerji) and if the public servant seeks legal representation to help manage the complexity, it can also involve significant costs.[131] This again points to the highly imbalanced power relationship at play between employees and employers, where supervisors enjoy wide discretion under the scheme, and employees must navigate a complex and long process if their comments attract attention. The onerous process itself can thus entail a strong chilling effect on public servants' speech; given the situation-specific level of discretion, it would be difficult for public servants to exercise *any* speech rights at all.

There is also ambiguity in relation to the relevance of the seniority of the person. If this is a factor, then what is its impact on an employee's expression? Does it imply that more senior public servants should not participate in public debate, or that they may just have different constraints (and if so, what is the nature of these constraints), or that they may be in a better position to speak out publicly given their high level of expertise? Can public servants comment on areas in which they have direct responsibilities, or are comments in their areas of work completely prohibited? The judgments thus raise more questions than they answer.

## III COMPETING POLICY TENSIONS

*Banerji* thus identifies, but does not resolve, a number of competing policy interests. The public interest in maintaining an impartial and neutral public service was uncontested, which requires that public servants refrain from some kinds of public comment. There are good reasons for imposing such demanding obligations on the speech of public servants. An apolitical public service ensures that it can carry out its duties 'irrespective of which political party is in power',[132] preventing

130 Ibid 435 [141].

131 We are grateful to an anonymous reviewer for raising and explaining this issue.

132 Pender, 'Public Servants and Political Communication' (n 24) 132, quoting Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Comcare v Banerji*, C12/2018, 7 November 2018, 9 [26], quoting Australian Public Service Commission, *Values and Code of Conduct in Practice* (August 2017) 8 [1.2.20].

the 'insecurity and ineptitude of a reversion to political patronage'.[133] 'The Commonwealth, as an employer, is also entitled to expect that its employees obey certain contractual obligations', in the same way a 'private sector employer would not tolerate overt criticism from an employee'.[134]

However, there are equally compelling reasons why government employees should not be totally excluded from public debate. The first is that, given the size of the public service, the restrictions burden a significant portion of the population. Second, the restrictions may have an adverse effect on the quality of public debate more generally. As noted, government employees often have specialised knowledge on policy matters and are able to make informed and considered contributions, not dissimilar to the contributions of other experts (and in some cases they are experts). In fact, as Wilson and Pender point out, '[t]he APS, as an employer, is placing an increased emphasis on advanced higher education', in some cases funding PhD scholarships for high-achieving public servants.[135] Many agency heads hold PhDs and '[a]cross the federal public service almost 2 per cent of employees hold doctorates (equating to just under 3000 staff), double the Australia-wide rate of 1 per cent'.[136] Public servants who are also academics may want to remain involved in their academic discipline, by publishing in their area of expertise or presenting and participating at conferences. Their expertise would considerably improve the quality of public debate. Third, because public servants are not 'second class citizens', they should have a reasonable expectation of political enfranchisement.[137] Burdening their communications in these ways has considerable personal consequences for government employees, including feelings of frustration and moral compromise, and other mental health consequences.[138]

*Banerji* not only perpetuated these tensions but gave rise to further uncertainties. What comes through in all judgments is the ill-defined and situation-specific nature of the boundary between permissible and impermissible political communication for public servants. For instance, the Court maintained that the APS Code does not prevent government employees from participating in public debate, but constrains *how* they do so,[139] emphasising that this was *not* a 'blanket restraint',[140] but a requirement to behave at all times in a way that upholds the APS Values and thus demands that employees exercise 'restraint or moderation' in their expressions of

133 Pender, 'Public Servants and Political Communication' (n 24) 132, quoting R S Parker, 'Official Neutrality and the Right of Public Comment: II. The Vow of Silence' (Pt 2) (1964) 23(3) *Australian Journal of Public Administration* 193, 196.

134 Pender, 'Public Servants and Political Communication' (n 24) 132.

135 Wilson and Pender (n 122).

136 Ibid.

137 Paul Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters* (Report, 1993) 60–1.

138 Don A Driscoll et al, 'Consequences of Information Suppression in Ecological and Conservation Sciences' (2021) 14(1) *Conservation Letters* e12757:1–13, 9.

139 *Banerji* (n 2) 420 [89] (Gageler J).

140 Ibid, quoting *de Freitas* (n 95) 77 (Lord Clyde for the Court).

political opinion.[141] The Court therefore perpetuated uncertainties regarding what constitutes enough 'restraint' or 'moderation', and how a manager might determine whether the language or tone or circumstances constitutes a breach. The seniority of the employee appears relevant, as is the exclusion of vitriolic or extremist expressions of political opinion, or personal attacks about specific Ministers. Some of Banerji's comments would fall into this category, and so arguably are not protected.

However, the subjective assessments required by managers and employees, seemingly on a case by case basis, might have concerning consequences. The first is without clearer, principled criterion by which to assess the public comments, managers might err on the side of caution and in practice prohibit all political speech by government employees or might overreach in their justifications as to why a particular expression is not permissible. Second, government employees might self-censor for similar reasons. Uncertainty about whether the expression will be in breach might deter them from making valuable contributions to public debate for fear of loss of employment. These outcomes deprive the public from important information that could affect decision-making and votes, thereby undermining free speech justifications based on democracy. But they also compromise the autonomy of government employees, who may want to express their views as a matter of conscience, or out of a sense of duty to the public at large.

## IV ARGUMENTS FOR A MORE ROBUST APPLICATION OF THE IMPLIED FREEDOM

In developing the arguments for an implied freedom of political communication as necessary for representative government, the High Court has eschewed any reference to 'political principles or theories' and confined its justifications to the text and structure of the *Constitution*.[142] Despite this reluctance to engage with the philosophical justifications for free speech principles, the implied freedom of political communication is based on the traditional arguments from democracy and, to a lesser extent, on arguments from autonomy. The implied freedom of political communication has been described as the freedom of citizens to 'communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision' and the freedom to 'criticize government decisions and actions, seek to bring about change'.[143] In *Australian Capital Television Pty Ltd v Commonwealth* ('*ACT*'),[144] the majority judges found that the *Constitution* establishes and entrenches the Australian system of government as a system of 'representative government', meaning that those who exercise legislative and executive power are directly chosen by the people and are accountable to them. It follows that freedom of communication on political matters is essential; '[a]bsent such a freedom of communication', representative

141 *Banerji* (n 2) 421 [93] (Gageler J).

142 Stone, 'Standards of Review' (n 69) 669, quoting *McGinty* (n 66) 232 (McHugh J).

143 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) ('*ACT*').

144 (1992) 177 CLR 106.

government would not be possible and 'would cease to be truly representative' of the people.[145]

In the theoretical justifications for free speech, the protection of public communication is considered necessary to democracy on at least four interrelated grounds: first, public discussion and consensus over particular issues is necessary to ensure the legitimacy of the lawmaking process and by implication, the legitimacy of government.[146] Second, protection of communication provides the electorate with the necessary information for it to make informed choices about how to use its power.[147] Third, protection of communication enables citizens to criticise government decisions and policy, thereby ensuring that government and public officials are held accountable for their actions. This has been referred to as the 'checking value' of speech.[148] Finally, communication is essential for the cultivation of and respect for an individual's autonomy insofar as it facilitates choice with respect to political issues. Related to this, free speech is also necessary for an individual's expressive interests with respect to the political/social community in which they live and contribute.[149]

While the High Court has shied away from developing a free speech jurisprudence in relation to arguments from autonomy, Stone has convincingly argued that arguments for personal autonomy (which are often used in the philosophical literature to justify free speech) and arguments for democracy (which is the approach adopted by the High Court in Australia) are more closely related than the High Court contends.[150] Speaker autonomy refers to the freedom of the individual to participate in public debate as a speaker. It is relevant to democracy in the most basic sense that people need to have free access to the relevant information in order to make informed decisions at election time. A system of representative and responsible government thus logically requires or is premised upon, respect for the autonomy of the individual. Individual autonomy in this context refers both to the autonomy of *speakers* to participate in debate and the autonomy of the audience or *hearers,* who need to hear differing perspectives in order to make informed decisions.

The argument from democracy is also connected to the argument from autonomy because, as Joshua Cohen has argued, free speech is important from an individual's perspective because sometimes a person can have a very strong or compelling

145 Ibid 139 (Mason CJ).

146 Jürgen Habermas, *Between Facts and Norms*: *Contributions to a Discourse Theory of Law and Democracy*, tr William Rehg (Massachusetts Institute of Technology, 1996) 107–8.

147 Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 35–9.

148 Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2(3) *American Bar Foundation Research Journal* 521.

149 Joshua Cohen, 'Freedom of Expression' (1993) 22(3) *Philosophy and Public Affairs* 207, 225.

150 Stone, 'Rights, Personal Rights and Freedoms' (n 61) 417.

reason for expression that concerns questions of justice or conscience.[151] For example, in some cases an individual may feel that they have an obligation to speak out against something they consider to be unjust. Placing limits on 'expression in such cases would prevent the agent from fulfilling what she takes to be an obligation … [and] would impose conditions that the agent reasonably takes to be unacceptable'.[152] In these cases, there may be a political duty to speak about a particular issue of policy.

An example of the ways in which the arguments from democracy and autonomy are compromised by the uncertainty generated by the High Court in *Banerji* is evidenced by a number of cases involving public servants post-*Banerji*. Consider, for example, the case of public servant Josh Krook, a policy officer with the industry department.[153] Krook was asked by his supervisor to take down a blog post he authored on how COVID-19 benefitted big tech, or face termination of employment. In the post, Krook argued that social isolation was advantageous for big tech companies because it made people increasingly dependent on online platforms for interaction. He did not make any references to individual tech companies and did not mention or criticise the Australian government, governmental policy, or any individual. Nor did he identify himself as a government employee or policy officer or write in his capacity as a public servant. The views are uncontroversial, based on factual observations about people's reliance on technology during the pandemic. The justification given by Krook's supervisor for the sanction was that discussing big tech companies might damage the government's relationship with the companies, and that the article would have been assessed differently had it been 'positive' about the tech companies[154] — a comment reminiscent of the 2017 Guidance discussed above, which encouraged public praise of departments but discouraged criticism. This highlights a potential viewpoint discrimination in the manager's decision-making. In Krook's case, such an assessment also seems unduly cautious, given there was also no overt criticism of any particular company. In the absence of objective criteria, this demonstrates how supervisors and managers may overreach in their assessment of the expression of particular viewpoints or base their decisions on speculative assumptions without any foundation. Given government has relations with almost every industry, broadly conceived, this justification casts the net too wide. It even prohibits speech that is moderate and restrained, using appropriate tone and language. This approach undermines free speech justifications based on democracy because the public is deprived of expert knowledge; it undermines free speech justifications based on autonomy because public servants are prevented from speaking about

151 Cohen (n 149) 225.

152 Ibid.

153 Shannon Jenkins, 'New Social Media Guide for Public Servants Highlights Risks of Posting, Sharing, and Even "Liking" Online Content', *The Mandarin* (online, 8 September 2020) <https://www.themandarin.com.au/139184-new-social-media-guide-for-public-servants-highlights-risks-of-posting-sharing-and-even-liking-online-content/>.

154 Christopher Knaus, 'Australian Public Servant Condemns Censorship after Blogpost Cost Him His Job', *The Guardian* (online, 24 August 2020) <https://www.theguardian.com/australia-news/2020/aug/24/australian-public-servant-condemns-censorship-after-blogpost-cost-him-his-job>.

matters important to them and audiences are deprived of reliable sources of knowledge, on which to make voting decisions.

The consequences for autonomy are again apparent in a recent study of the effects of information suppression on the part of government scientists. Driscoll et al found that supressing expert knowledge not only hides environmentally damaging practices and policies from public scrutiny, but also has serious consequences for the wellbeing of scientists. Approximately half of government (52%) and 38% of industry respondents reported they had been prohibited from making public communications about their research, and 56% of respondents believed that these constraints 'had become more severe in recent years'.[155] Most government respondents (61%) felt these constraints were excessive.[156] The suppression of this scientific research has a profound impact on the quality of public debate about important issues. Some of the topics distorted or supressed include complex and demanding environmental issues, such as Australia's record of mammal extinctions by feral animals, changed fire regimes and land clearing and the risks of widespread biodiversity loss from climate change and habitat loss in the coming decades.[157] The suppression of this knowledge again undermines the argument from democracy.[158] But it also has a profound impact on government employees, many of whom reported feeling a *duty* to engage in public debate, rather than a freedom. The constraints on their ability to carry out this duty resulted in feelings of frustration and moral compromise. One fifth of scientists reported that 'science suppression affected their employment and a similar proportion indicated mental health consequences', and some had experienced bullying in their workplaces as a consequence of speaking out.[159] Aside from this empirical evidence, it is difficult to assess the full extent of the chilling effect, as there is lack of empirical data on APS employee perceptions. However, given the levels of uncertainty about whether and how public servants can make political comments, APS employees speak publicly at their peril.

Similar issues are evidenced by the case of a Victorian Treasury economist, Sanjeev Sabhlok, who quit his public service job after he was asked by his supervisor to remove all online criticism — both direct and indirect — of the State government's handling of the COVID-19 pandemic.[160] Some of Sabhlok's

155 Driscoll et al (n 138) 4–5.

156 Ibid 5.

157 Ibid 8.

158 The argument from democracy is one of the most compelling justifications for free speech. It maintains that free speech is important in a democracy for at least four interrelated reasons: to ensure the legitimacy of the lawmaking process and of government; to provide the electorate with the necessary information for it to make informed voting decisions; to ensure the government is held accountable for its actions; to protect individual autonomy in relation to political issues. See, eg, Blasi (n 148); Cohen (n 149); Schauer (n 147) 35–46.

159 Driscoll et al (n 138) 9.

160 Frank Chung, 'Coronavirus Victoria: Treasury Economist Resigns in Protest at "Police State"', *news.com.au* (online, 18 September 2020) <https://www.news.com.au/finance/economy/australian-economy/coronavirus-victoria-treasury-economist-resigns-in-protest-at-police-state/news-story/a2e9026a234600f22ea0c676d17de24c>.

criticism was extreme. Certain posts called for politicians to be jailed for imposing a 'police state', which does not meet required standards as to tone. Criticising United Kingdom Labour politicians, Sabhlok further called for '[t]hese monsters … to be tried for crimes against humanity and shot',[161] which appears a clear breach of expectations regarding extremist commentary. Nonetheless, the economist in this case felt a moral obligation, not unlike the scientists, to share his views. Sabhlok claimed he had tried to raise his policy concerns within his public sector role, but that his attempts were 'rebuffed'.[162] According to Sabhlok '[t]he bureaucracy has clamped down on frank and fearless, impartial advice, in a misplaced determination to support whatever the government decides, (instead of performing its taxpayer-funded duty of providing forthright analysis of alternatives)'.[163] Sabhlok therefore decided to resign from the Victorian public service which, according to him, was 'the only honourable course for a free citizen of Australia'.[164] While in Sabhlok's case, resignation seems the appropriate course of action because of the extreme nature of some of his speech, the case of Krook and the scientists discussed above demonstrate how such free speech restrictions on public servants can at times go too far. Under such uncertain guidelines, public servants may be unduly forced to decide between staying in the APS and having their speech over-restricted or leaving the public service because the tensions between impartiality and free speech remain unresolved.

*Banerji* thus leaves us with pressing questions: if it is the case that government employees can contribute to public debate, as current guidelines indicate, what form can this contribution take? Justice Gageler suggests that '[t]he precise measure is highly situation-specific and cannot readily be reduced to a set of prescriptive rules of behaviour',[165] but this leaves too much room for subjective assessments by supervisors who may either have vested interests in supressing speech or may themselves be uncertain and err on the side of caution. Either way, it creates a 'chilling effect' on speech more broadly. The plurality reiterated that the implied freedom of political communication is not a personal right. In assessing whether the implied freedom is unjustifiably burdened, therefore, the relevant question is the 'law's effect on political communication *as a whole*'.[166] While this question was given cursory treatment in relation to Banerji's speech, the judgments do not resolve the more fundamental problem that restricting a sizable and expert proportion of the population from participating in public debate — either overtly

161 Ibid.

162 Ibid.

163 Sanjeev Sabhlok, 'Why I Quit Rather than be Silenced: Vic Treasury Insider', *Australian Financial Review* (online, 16 September 2020) <https://www.afr.com/policy/economy/victoria-has-locked-itself-into-a-lockdown-blunder-20200916-p55w1z>.

164 Ibid.

165 *Banerji* (n 2) 421 [93].

166 Ibid 395 [20] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis in original), citing *Wotton* 31 [80] (n 65) (Kiefel J), *Unions NSW* (n 65) 553–4 [35]–[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J) and *Brown* (n 50) 360 [90], 374 [150] (Kiefel CJ, Bell and Keane JJ).

by silencing them (as in Krook's situation) or inadvertently, by making them fear for their jobs (as the case of scientists) — does seem to unjustifiably burden the implied freedom of political communication as a whole.

More problematically, the *PSA* legislative scheme creates uncertainty that is ripe for viewpoint discrimination. As Pender points out, 'the Commonwealth has made no publicised attempts to discipline public servants for publicly promoting government policy'.[167] The trend shows that even high-level APS decision-makers (for example, those writing the guidelines) may be unclear of what APS impartiality requires in relation to public servants' speech. In practice, government decision-makers are likely to prohibit speech that criticises government policy, rather than speech that praises it — in contradiction to Gageler J's direction. Though the updated 2020 Guidance indicates some change on this front,[168] the pattern is nonetheless concerning. Viewpoint discrimination in APS decision-making about matters of free speech can create public perceptions of lack of impartiality, which is just as damaging to APS professionalism as overt public criticism of government by APS employees. It could create a perception that public servants cannot give frank and fearless advice, or that an environment of 'groupthink' or coercion prevails in the APS, lending weight to concerns raised by Sabhlok. This kind of outcome goes against the very values the *PSA* seeks to protect and points to the need for reform.

## V POSSIBLE SOLUTIONS

### A *Constitutional Actors Should Be Able to Wear Two Hats*

As a general principle, we argue that public servants, as constitutional actors, should be allowed to wear two hats, enabling a reasonable level of free speech in their private and expert capacities.

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. In this sense, they are similar to judges who represent the judiciary, and parliamentarians who represent the institution of Parliament. Public servants can be understood as undertaking constitutional implementation both of government policy and constitutional values.[169] Indeed, preceding discussion of evolving APS guidelines demonstrates some measure of the public service trying to accommodate the implied freedom of political communication, indicating a subtle ongoing dialogue between the public service and the judiciary, mirroring that which occurs between courts and Parliament. After the High Court offered its clarifications of how the implied freedom impacts the APS, is it possible the APS responded by adjusting its guidelines, accounting for the differences between the 2017 and 2020 Guidance.

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

168 Australian Public Service Commission, '2020 Guidance' (n 44).

169 Vanessa MacDonnell, 'The Civil Servant's Role in the Implementation of Constitutional Rights' (2015) 13(2) *International Journal of Constitutional Law* 383.

In each of the arms of Australian government, constitutional actors have been recognised as being capable of wearing two hats. Ministers operate in both the executive branch as well as holding seats in Parliament, under principles of ministerial responsibility to Parliament.[170] Australia does not have a strict separation of powers between Parliament and the executive,[171] which means wearing two hats is part of the constitutional territory. Further, judges regularly perform various 'non-judicial, administrative functions, such as issuing search warrants or preventative detention orders'.[172] Every constitutional actor (like any employee) is also a human being, entitled to some measure of private life and freedom of expression in their personal, as distinct to their professional and constitutional, capacities. Of course, in switching hats — whether it is shifting between branches of government or distinguishing between one's professional and private capacity — employees and representatives must be careful to avoid conflicts of interest and refrain from behaviours that might unduly compromise their constitutional role. This is always a balancing act.

Given expectations of impartiality, the role of judges offers the most analogous constitutional parallel to the role public servants are expected to play. Like judges, public servants must be neutral, objective and apolitical. Just as judges must be wary that their behaviour does not undermine public confidence in the judiciary, public servants must be cognisant that their behaviour should not compromise public confidence in an impartial and professional APS. As Gleeson explained in 2002, speaking — notably — extra-judicially:

> Judges, individually and collectively, attach great importance to maintaining the confidence of the public. … Public confidence is invoked as a guiding principle in relation to the conduct of judges, on and off the bench, and in relation to the institutional conduct of courts. … It is necessary for the effective performance of the judicial function.[173]

Just as judges must, as impartially as possible, adjudicate the law based on facts and precedent, so too must public servants devise and implement policy and advise the government of the day without bias or favour. Yet like judges, public servants may often be highly educated and carry specialised expertise and experience in their field, which means there may be unique value to them speaking publicly on some matters. For example, Gleeson has noted that '[j]udges are often especially

170 *Australian Constitution* s 64. See also *Banerji* (n 2) 437 [149] (Gordon J).

171 Katharine Gelber, 'High Court Review 2005: The Manifestation of Separation of Powers in Australia' (2006) 41(3) *Australian Journal of Political Science* 437, 439.

172 Chief Justice RS French, 'Executive Toys: Judges and Non-Judicial Functions' (2009) 19(1) *Journal of Judicial Administration* 5, 5.

173 Murray Gleeson, 'Public Confidence in the Judiciary' (Speech, Judicial Conference of Australia, 27 April 2002) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_jca.htm>.

well placed to understand, and comment upon the implications of, legislative measures'.[174] But his Honour also warned that:

> Impartiality is a condition upon which judges are invested with authority. Judges are accorded a measure of respect, and weight is given to what they have to say, upon the faith of an understanding by the community that to be judicial is to be impartial. Judges, as citizens, have a right of free speech, and there may be circumstances in which they have a duty to speak out against what they regard as injustice. But to deploy judicial authority in support of a cause risks undermining the foundation upon which such authority rests.[175]

Nonetheless, in practice, judges hold and express personal and expert views away from the bench — which Gleeson was doing in the two quoted extracts above. The extent to which they do so is usually a matter of personal and professional discretion. While most agree judges should withhold public comment on some matters, like cases over which they are presiding (a limitation analogous to the argument that public servants should refrain from criticising matters with which they are intimately involved in a professional capacity), judges in reality speak out in a variety of ways. Sometimes, like Banerji, they may participate in debate anonymously. In 1958, Devlin J, a member of the Court of Criminal Appeal, was widely believed to have authored an anonymous article in the *Criminal Law Review,* hitting back at a barrister's criticisms of a case in which he was judicially involved.[176] Usually, however, anonymity is not required: the judge's public profile attracts audiences to public speaking events.

Even the most conservative judges have defended the ability of justices to speak out in a non-judicial capacity, and to criticise government in various ways. As the Hon Dyson Heydon explained, judges regularly 'criticise politicians … in their judgments, in submissions they make to government, in public speeches, in statements issued by the Judicial Conference of Australia'.[177] In 2011, while a High Court judge himself, Justice Heydon spoke at the funeral of the Hon Roderick Meagher, a former Justice of Appeal of the Supreme Court of New South Wales, and praised Meagher's political commentary. 'Moderation in criticism was never one of his failings', Justice Heydon said, and 'when deeply provoked by the fake, the foolish or the hypocritical … [h]e attacked many persons and institutions on these grounds'.[178] While a sitting judge, Justice Meagher gave highly politicised speeches to the Samuel Griffith Society. In 1993, Justice Meagher criticised the

174 Murray Gleeson, 'Judicial Legitimacy' (Speech, Australian Bar Association Conference, 2 July 2000) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_aba_conf.htm>.

175 Ibid.

176 See J W Cecil Turner, 'Malice Implied and Constructive' [1958] *Criminal Law Review* 15; Note, 'With Malice Aforethought: R v Vickers Reconsidered' [1958] *Criminal Law Review* 714, cited in J D Heydon, 'Does Political Criticism of Judges Damage Judicial Independence: Judicial Power Project Policy Exchange' (2018) 37(2) *University of Queensland Law Journal* 179, 180 ('Political Criticism').

177 Heydon, 'Political Criticism' (n 176) 186–7.

178 Justice JD Heydon, 'The Hon Roderick Pitt Meagher AO QC (1932–2011)' [2011] (Winter) *Bar News: Journal of the NSW Bar Association* 136, 140.

progressive 'chattering classes', especially republicans.[179] In 1999, his Honour colourfully disparaged abortion rights activists, describing them as 'a herd of bearded lesbians, for whom presumably the problem of an abortion will never arise'[180] — language markedly divergent from Edmund Burke's ideal of the 'cold neutrality of an impartial judge'.[181] Given the later *Clubb v Edwards* ('*Clubb*') cases concerning abortion 'safe zones' and the validity of state laws in light of the implied freedom,[182] the topic of Meagher's speech was a matter that could easily have arisen before his Honour at a NSW court, but to our knowledge, no formal allegations of bias were made.[183] In 2002, however, the Hon Meagher was chastised for comments about the mediocrity of female barristers by Mary Gaudron, who in a speech to the Women Lawyers Association, warned that: 'the natural and probable consequence of … [Meagher's remarks], when made by one of the most senior judges of this State's Court of Appeal, is that few, if any, women barristers will be briefed to appear in that Court.[184] While Meagher was known for his eccentricity, more sedate judges speak out too. Most recently, Keane twice rejected scholarly criticisms of the High Court's *Banerji* judgment, also in extra-curial speeches.[185]

Judges are supposed to be the epitome of neutrality and impartiality in our constitutional system. Presumably, the expectation of neutrality facing a judge should therefore be higher than that facing a public servant. Public servants, unlike judges, do not generally carry the same high-level coercive power to imprison or fine — though there are notable exceptions, including Centrelink's power to issue robodebts, the Australian Tax Office's power to fine, and Home Affairs' power to detain asylum seekers. However, these considerations would be unlikely to apply to a low or mid-level public servant like Banerji (though different considerations might apply for the most senior APS positions). So why are judges regularly

179 Justice Roderick Meagher, 'Addresses Launching Upholding the Australian Constitution' (1993) 3 (November) *Samuel Griffith Society Papers* 75, 75.

180 Justice Roderick Meagher, 'Civil Rights and Other Impediments to Democracy' (1999) 11 (July) *Samuel Griffiths Society Papers* 72, 74.

181 Edmund Burke, *The Works of the Right Honourable Edmund Burke* (Henry G Bohn, 1855) vol 3, 511.

182 *Clubb* (n 80).

183 See also Richard Ackland, 'The Judge Reveals a Keen Dislike of Hairy Legs', *Australian Financial Review* (online, 3 December 1992) <https://www.afr.com/politics/the-judge-reveals-a-keen-dislike-of-hairy-legs-19921203-k59c2>.

184 Justice Mary Gaudron, 'Speech for Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner' (Speech, NSW Parliament House, 13 June 2002) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gaudronj/gaudronj_wlansw.html>, quoted in Damien Freeman, *Roddy's Folly: R P Meagher QC* (Connor Court Publishing, 2012) 432.

185 P A Keane, 'Too Much Information: Civilisation and the Problems of Privacy' (Griffith Law School Michael Whincop Memorial Lecture, 27 August 2020) <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/keanej/keanej27Aug2020.pdf>; Justice P A Keane, 'Silencing the Sovereign People' (Speech, Spigelman Public Law Oration, 30 October 2019) <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/keanej/JKeane30Oct2019.pdf>.

invited to give public speeches sharing their expertise and insights (and sometimes politicised commentary), while public servants at all levels may be heavily sanctioned for doing the same? Why are judges presumed competent and capable of switching hats and managing their professional impartiality, whereas public servants are expected to wear one hat 'at all times' — notwithstanding that most ordinary public servants would earn far less than judges to compensate for the serious incursion into their private lives and free speech, and do not wield the same power? Of course, most judges when speaking beyond their judicial capacity engage in self-censoring and take great care not to compromise obligations of impartiality and objectivity. In proposing that public servants should be able to wear 'two hats', we are not proposing that they should be entitled to say whatever they like, however they like. However, public servants should be entitled to engage in reasoned, restrained political communication.

The fact that judges take advantage of their two hats, while ruling against the free political communication of a mid-level public servant, also warrants reflection. Such considerations point to the need for a fairer balance in managing public servants' responsibilities with the implied freedom of political communication. Public servants, like other constitutional actors, should be allowed to wear two hats. Like judges, they should be careful to maintain impartiality and confidence in their constitutional institution. The rules and guidelines need to be clearer in this respect. To this end, we propose tentative policy recommendations that could help improve clarity, enabling government employees to wear 'two hats'.

## B *Tentative Policy Proposals*

In this section, we propose two interrelated policy considerations that would operate in tandem to improve clarity. The first is to increase the clarity of the legislative framework governing public servants' political communication and provide more detailed guidance for public service employees and managers about how to interpret and apply the APS Code. Amended legislation could provide explicit exemptions and criteria for administrative decision-making that recognise the importance of political communication for public servants, while balancing the centrality of neutrality and professionalism for the APS. The second is to increase clarity and certainty by way of proactive negotiation and open communication between employees and managers.

### 1 *Legislative Amendments*

In keeping with Australia's pragmatic approach to balancing free speech with other legislative objectives, a clearer balance can be achieved legislatively within the *PSA*. Unlike most other democracies where free speech protections form part of an overarching national charter of rights, speech protections in Australia have usually developed haphazardly and incrementally, as part of the common law,[186] and as

186 Chief Justice RS French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, 4 September 2009) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>.

carves outs or exceptions to various anti-discrimination and defamation law provisions.[187]

In keeping with this tradition of uniquely Australian free speech protections, we propose that similar defences or clarifying carve-outs could be incorporated into the *PSA*, to more accurately convey the expected tone and standard that an APS employee should use when engaging in public commentary. There are, of course, differences between the various existing speech defences, their aims, and the legislative contexts in which they emerge, but they all share a focus on matters that are in the 'public interest', genuine or honest belief, and truth and factual accuracy, which seem relevant expectations for public servants' speech. This same language, for which there is a long and established tradition, could therefore be used to make the *PSA* more fit for purpose. However, given overarching duties of impartiality and restraint, we suggest it may be more appropriate for the *PSA* to refer to 'mitigating factors' rather than defences. We also concede that there will always be borderline cases that may not be captured by these mitigating factors. Nonetheless, we suggest that an appropriately drafted legislative amendment could provide a clearer and more pre-emptive approach that is more directly cognisant of the implied freedom.

Currently, parties must grapple with an amorphous implied freedom of political communication as a constitutional value informing the legislation, guidelines and procedures. The content of the freedom must be discerned from long and often complicated judicial statements, which can be 'spun' or oversimplified by those writing the guidelines in a way that conveys to employees that the implied freedom provides no protection, exacerbating power imbalances between employer and employee. A fairer approach would be for political communication considerations to be incorporated more directly and explicitly into relevant factors, set out in legislation, guidelines and procedures (or all three). For example, s 15(3) of the *PSA* provides that:

> An Agency Head must establish written procedures in accordance with this section for determining:
>
> (a) whether an APS employee, or a former APS employee, in the Agency has breached the Code of Conduct (including by engaging in conduct referred to in subsection (2A)); and

187 See, eg, s 18D of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') provides defences for making or publishing a fair report in the public interest, or which is a genuine belief of the person making the comment. The recent changes to defamation laws, contained in Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (27 June 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 of the *RDA*): s 26, the defence of 'publication of matter concerning an issue of public interest' (similar to the 'public interest' in s 18D): s 29A, and the defence of honest opinion (similar to the 'genuine belief' element of s 18D): s 31.

(b) the sanction (if any) that is to be imposed under subsection (1) on an APS employee in the Agency who is found to have breached the Code of Conduct (including by engaging in conduct referred to in subsection (2A)).[188]

The *PSA* could be amended to require that an Agency Head must also include in such procedures relevant factors for consideration in determining a potential breach under s 15,[189] including factors which protect reasonable political communication.[190] Drawing on the judgments in *Banerji,* and echoing the *Racial Discrimination Act 1975* (Cth) ('*RDA*') and defamation defences that already operate, such relevant factors could include whether the expression in question:

(a) 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;

(b) involved disclosure of any confidential information the person may be privy to in the capacity as a public servant;

(c) named or criticised any particular person, such as a Minister or supervisor;

(d) 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;

(e) was about a matter or issue outside the employees' department;

(f) was made by a very senior public servant, which suggests they should be held to a higher standard in upholding APS professionalism and impartiality;

(g) was made in a private capacity, anonymously or with caveats or disclaimers making clear that the speech was not reflective of APS views; and

(h) was discussed, negotiated and approved by the person's supervisor prior to publication.

The first consideration asks the decision-maker to reflect on whether the contribution is a fair and accurate report or discussion by a public servant, including in areas in which he or she works. As we have pointed out, public servants have specialised knowledge in their areas, and so are able to make valuable contributions to public debate, increasing the overall quality of debate about an issue and ensuring that all relevant information is available to voters. Their contributions may lead to greater clarity about complex policy issues and help overcome partisan commitments. Of course, public servants commenting in areas of their expertise will need to take extra care, in the same way judges must exercise caution in commenting on issues which may come before them. However, if there is no confidential information disclosed or overt bias that would

188 *PSA* (n 26) s 15(3).

189 The procedures are publicly available via Australian Public Service Commission, 'Procedures for Determining Breaches of the Code of Conduct and for Determining Sanction', (Web Page, 10 March 2021) <https://www.apsc.gov.au/about-us/what-we-do/procedures-determining-breaches-code-conduct-and-determining-sanction>.

190 Alternatively, these criteria could be incorporated in the procedures themselves via administrative action rather than legislative change.

compromise impartiality, and the language is restrained and appropriate, then the speech should be permissible. On the basis of these considerations, contributions such as that of Krook would likely be permissible, as these were fair and arguably accurate contributions made in their capacities as citizens rather than as government employees. The comments were not vitriolic, and Krook did not name any government department or tech company. We propose that, as long as the tone is factual and restrained, the communication should not be restricted. Expression which is vitriolic, overtly critical of government or pro-government, or which singles out individuals or relevant stakeholders, or which discloses confidential information, is justifiably restricted. Comments like those of Sabhlok would not be permissible, given its extremist and highly critical tone and content.

The fourth consideration differentiates between permissible speech made by different kinds of government employees based on their level of expertise and its relation to the public interest. For instance, the current guidelines identify a so-called 'risk factor' as a connection between the public interest topic and the area in which the employee works:

> On social media, our comments on some topics might be given greater weight — and cause greater concern — than similar comments made by members of the public, because APS employees may be perceived to have privileged access to knowledge and influence within government. This becomes more likely the closer the topic is to our area of work.[191]

However, given it is in the public interest for government experts to make contributions to public debate about their research, even if it is closely aligned to their area of work, we suggest that such contributions should be allowed, provided the information is made in a factual and accurate way, and does not breach confidentiality. The fourth exemption thus enables some differentiation between the different 'hats' that government experts wear, to allow them to meet their 'duties' to the public in the provision of such information. If the expression concerns a matter in which the person is working, additional care should be taken. However, employees should not be prevented from expressing an informed view for reasons previously outlined.

The fifth consideration acknowledges that government employees may want to contribute to political debate about areas outside their own departments. While it may be difficult for government employees to maintain impartiality in relation to their own areas of work, there seems no compelling reason why they cannot make contributions to political debates in areas outside their own work, provided that the expression is 'fair and accurate', and appropriate in tone. If the employee is commenting on an area outside their own, they should be able to express their views in an informed way, without the use of vitriol. Employees may, of course, move to the area in which they have made the contribution, however, this situation is no different to them making political statements about various issues prior to their government employment. In the event this occurs, the best course of action may be simply deleting the contribution in question.

191 Australian Public Service Commission, '2020 Guidance' (n 44).

The sixth consideration acknowledges that seniority is relevant. Senior members of the public service may be advising and making decisions on matters of public significance, and so their position vis-a-vis the public is not unlike a judge. Moreover, senior officials are more likely to be perceived by the public to be developing and implementing government policy, and so their actions can have a greater impact on public perceptions of APS impartiality. However, because of their seniority, they are also likely to have a high level of expertise and knowledge in the areas they work, so to restrict their speech is to also deprive the public of important information. In these cases, we suggest that details of the expression should be communicated to relevant managers and the precise wording pre-negotiated in an open and transparent way (this is discussed further below).

Seniority is also relevant to more junior APS employees, who should arguably have greater freedom to express private political views. Remuneration is arguably also a factor here, albeit more of a practical, market-based consideration. A top-level public servant earning $300,000 per annum, like a CEO, Minister or judge, should arguably carry a more onerous responsibility to uphold APS Values at all times than a lower-level public servant earning $60,000 per annum. The higher the salary, the stronger the practical argument that the organisation in question 'owns' more of your time and can restrict more of your freedom. More leeway should therefore be given to lower-level employees to express their own views in their private time, with the same cognisance as to expectations regarding tone, confidentiality and other relevant considerations outlined above. Of course, whether a person's constitutionally guaranteed freedom of political communication can ever be 'bought' via an employment contract is another question. While remuneration may be tangentially relevant, seniority is the more important factor.

The seventh consideration acknowledges that anonymity, or the use of disclaimers and caveats to clarify that the speaker is not wearing their APS hat, should also be taken into account by APS decision-makers. This should be particularly relevant to lower-level APS employees, who should be entitled to some measure of free speech in their private capacities, however, other considerations as to tone, factual accuracy and seniority may still remain relevant.

### 2 *Proactive Negotiations and Open Communication*

As factor eight above indicates, we propose that parties could undertake proactive 'free speech' negotiations, in light of the criteria discussed above. This could help minimise uncertainty for all parties, helping avoid dismissals arising because of uncertainty about expectations relating to free speech, minimise bad press harmful to the APS, and potentially avoiding costly litigation. For example, it would make sense for employees to be encouraged to let their supervisors know if they are planning to publish something, seek their feedback and to gain their permission (though this may be less workable for everyday tweets and Facebooks posts). In giving permission, the supervisor should bear in mind the implied freedom and the suggested criteria above. Such one-on-one negotiation would mean expression could be appropriately 'screened' for bias or inappropriate language, while the employee would still be able to express their views, albeit, in a modified way — hopefully achieving a better balance between public servant responsibilities and

the freedom of political communication. This process is not dissimilar to peer-review processes that are used for journal articles and the publication of books. We expect higher standards for academic work, and given the position of public servants, we would also expect high standards for their expression. An open process of negotiation also means that relevant stakeholders are not surprised or 'blindsided' by a particular view being expressed. It would similarly help APS employees (especially junior employees) learn what is expected of their political communication, through transparent discussion.

Similar recommendations have been adopted by the Canadian Government as a way of balancing the competing tensions between the responsibilities of government scientists and their duties to communicate their findings to the public. The recently adopted Model Policy on Scientific Integrity ('Model Policy') is intended to be read together with the Values and Ethics Code for the Public Sector.[192] Paragraph 7.4 of the Model Policy explicitly recognises the 'right to freedom of expression by researchers and scientists on matters of research or science. It also recognises the important role of researchers and scientists in communicating research and scientific information to the public'.[193] However, it also recognises the tensions between freedom of expression and the need for 'caution and prudence in the public communication of classified or sensitive scientific or research information, as well as existing legal constraints on information disclosure'.[194] Paragraphs 7.4 and 7.5 of the Model Policy provide explicit advice and recommendations on how decision-makers might balance these tensions. For example, it recommends that drafts of publications that contain explicit discussion about federal regulatory or policy matters authored by government scientists should be forwarded to managers and discussed. Managers can request amendments, and these are subject to negotiation and revision. If an employee does not agree with the recommendations, they can elect to remove their name as an author of the publication. In the event that the publication is not approved, reasons must be provided in writing. Publications that do not contain explicit comments or recommendations or any explicit discussion about federal statutory, regulatory or policy matters do not require any approval. The Model Policy also encourages researchers and scientists to participate in media training provided by the department or agency, but this is not a requirement for participating in public debate.

We propose that similar processes of negotiation could be adopted for the APS, on the basis that public servants should be able to wear two hats. Similarly, social media training should be provided to all employees, so they can confidently engage in public debate in a manner that does not jeopardise their employment.

192 'Model Policy on Scientific Integrity', *Government of Canada* (Web Page, 3 March 2021) <https://www.ic.gc.ca/eic/site/063.nsf/eng/h_97643.html> ('Model Policy'); 'Values and Ethics Code for the Public Sector', *Government of Canada* (Web Page, 15 December 2011) <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049>.

193 Model Policy (n 192) [7.4].

194 Ibid.

## VI CONCLUSION

We have argued that *Banerji* identifies, but does not resolve, a number of competing policy interests: an interest in an impartial and neutral APS, and an interest in public servants' freedom to communicate. Both are recognised as important, but there is uncertain and ambiguous guidance about how these tensions might be balanced. We suggested that this uncertainty has serious consequences for the reputation and perceived integrity of the APS, for employees who risk loss of employment, and for the voting public, who may be deprived of information that could helpfully inform voting choices. We suggested that public servants are constitutional actors, and like other constitutional actors, they should be allowed to wear two hats, to enable a reasonable level of free speech in their private and expert capacities. We have made some tentative policy recommendations, building on the Justices' proposals and existing free speech exemptions in legislation, that may help clarify a better balance between public servants' responsibilities and the freedom of political communication. These recommendations need to be tested in further empirical research to more accurately determine whether reforms along the lines proposed might assist the public service in undertaking its constitutional role and balancing the implied freedom of political communication more effectively.