

SENATE INQUIRY SUBMISSION

(a) Disclosure and public reporting of sensitive and classified information, including the appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation

The current processes for disclosure and public reporting of sensitive and classified information, including under the *Public Interest Disclosure Act 2013* (PID Act) are inadequate. Whilst public servants are able to make a PID report to the Ombudsman, the disposition of the Ombudsman to allocate the matter back to the agency which is the subject of the report to investigate itself has delivered the same effect as putting the fox in charge of the chook house. This is particularly relevant when Senior Executive Service staff are the subject of the report, which then provides the agency the opportunity to manipulate the investigation. An example of the ineffectiveness of PID reporting of sensitive information is at [Attachment A](#). This is in regard to the APS Code of Conduct which states employees must *'(a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment', and 'not improperly use the employee's duties, status, power or authority (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person;'* At about the same time that a previous Australian Border Force (ABF) Commissioner was being pursued in regard to Code of Conduct issues, staff became aware of a similar situation of

. A PID report was made to the Ombudsman rather than an internal report, obviously given the sensitivity of the information related to the Secretary

. After three weeks, there had not been an acknowledgement from the Ombudsman so the issue was followed up and advice also sought from ACLEI. ACLEI advised that 'this does not appear to be matter (sic) in which ACLEI would normally be involved', although subsequent media reporting has shown it was interested in a similar matter involving the then ABF Commissioner. The Ombudsman then assigned the matter back to the Department of Home Affairs for investigation – by an Executive Level 1 (EL1) Assistant Director! After four months there had been no advice provided to the discloser, despite the PID Act requiring the discloser to be notified at various stages in the process and investigations having to be completed within 90 days. Anyone with knowledge of the APS would know that it would take a very courageous EL1 to undertake an investigation which may result in any adverse findings in a matter involving the Secretary of the behemoth that is the Department of Home Affairs. The investigation focussed on the semantics of the definition of 'promotion', rather than 'gaining a benefit or advantage'. Another tactic used by the agency in regard to PID reports is to change the investigating officer multiple times which ensures there is no continuity of knowledge or context and makes it extremely exhausting for the discloser to continue monitoring the matter.

Whilst is very common in the Department of Home Affairs and ABF, staff were concerned at the inconsistency in pursuit of the matters involving the Secretary and then Commissioner. A further example of the ineffectiveness of the PID Act regarding the provision of a benefit or advantage is at [Attachment B](#) which again occurred without a recruitment process, but rather was directly organised between the (who was the recipient of the benefit/advantage outlined above).

There was no attempt made to undertake an independent investigation of the Secretary's matter. The PID Act must not only ensure appropriate investigations, but **be seen to be** ensuring appropriate investigations. When reports are made relating to the Senior Executive Service, if the Ombudsman is not going to investigate PID reports, there must be seen to be a higher level of independent scrutiny, recommended with involvement at an appropriate senior level of PM&C and APSC, but with ongoing oversight of the Ombudsman (or a National Integrity Commission).

The _____ has exacerbated since that time with the FOM (Friends of Mandy (Newton)) principle involved in SES promotions, which is well known throughout the Australian Federal Police (AFP) and now ABF.

In regard to the appropriate regime for warrants, it should be expected that when Australia's national policing agency considers undertaking warrant activity which has the potential to severely diminish Australia's democracy and freedoms, it would adopt the highest standards of judicial oversight. Concerningly, the opposite appears to be the AFP's modus operandi. This was not only evident with warrants issued by Court Registrar _____ for the ABC warrant; in the Smethurst warrant issued by ACT Magistrate James Lawton who was appointed to the bench four weeks earlier; but also in the au pair warrants which were issued by ACT Magistrate Louise Taylor, who similar to Magistrate Lawton, had only been appointed one month earlier. The approving authority for the issuing of warrants related to all public interest disclosures, whistle blower reporting and media should be escalated to a Judge. There must be a public interest consideration. When the AFP touts that warrants are related to national security, it should be required to demonstrate **how** the matter is directly impacting National Security, not simply that it is.

(b) The whistle blower protection regime and protections for public sector employees

It is insufficient. Recent actions of the AFP have clearly been with the intent to deliver a chilling effect on whistle blowers and deter others such as to impact the free flow of information in the public interest of the Australian community. Legislation needs to support a change in mindset that whistle blowers are doing something wrong to whistle blowers are doing something right.

All AFP warrant activity over recent years has been consistent in that it has been a disproportionate response to threat and risk, with seven officers often dispensed for the raids. Given the AFP has regularly reported over the past two years at Senate Estimates and in media interviews that it has a 'supply and demand challenge' with dwindling officer numbers and the most pressing needs were against national security and organised crime, it is an excessive and inappropriate response to provide deterrence to other public servants who may consider whistle blowing.

Irrespective of the rhetoric about protections for public sector employees, reprisal happens, usually slyly and often with the knowledge (and support) of senior executives. Continual movement of SES officers within agencies ensures a lack of continuity and historical knowledge of any particular issue, which makes it very easy for the organisation to implement stalling tactics when whistle blowers pursue issues such as impacts on promotion and development opportunities, when it becomes too exhausting and repetitive. Specific examples include not utilising merit pools if whistle blowers are in them and a lack of formal development opportunities. Further information on victimisation

experienced by whistle blowers can be found in the Australian Institute of Criminology report number 549 May 2018 ([Attachment C](#)).

Whilst the Ombudsman encourages agencies to refer allegations of reprisal to the AFP, the lack of separation of powers in the Department of Home Affairs portfolio means the AFP is investigating other agencies in the portfolio, who are all reporting to the one Secretary of Home Affairs. Whilst a whistle bower can apply to the Federal Court or Federal Circuit Court if they have been subject to reprisal, the expense and stress of this is prohibitive. It also needs to be considered that by this stage, the whistle bower is broken emotionally and mentally after enduring an extensive process over a prolonged period.

There is a need for an integrity body to support whistle blowers and monitor the consequences they are subject to, in much the same way as Human Sources are registered, supported and monitored by law enforcement agencies.

(c) The adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information

The Government must be made to substantiate there is a significant detriment to national security, not ministerial embarrassment, when referring leaks for investigation. An audit process must accompany this to ensure integrity and oversight.

(d) Appropriate culture, practice and leadership for Government and senior public employees

My comments in this regard are as a public servant of over 30 years service. My experience is that the rhetoric from agencies about integrity does not match the actions. The culture of the Department of Home Affairs and the ABF is best described as 'conceal, conform, collaborate and contradict'. It is therefore not surprising that the diminished capability of senior leaders is also at unprecedented levels. This is best evidenced in the attached relationship chart ([Attachment D](#)) which demonstrates 'real or apparent' conflicts of interest and benefits and advantage gained by some, but which similar actions by others have resulted in the pursuit of misconduct.

One example is the actual or perceived ministerial involvement in operational decision making. The operational activity to reopen the Christmas Island Immigration Detention Centre (CIIDC) earlier this year involved

. It would be difficult to believe that there was no involvement in the operational decision making by the Minister's office, given the reopening of the CIIDC was clearly politically motivated prior to the May 2019 Federal election.

The results of the Home Affairs and ABF staff census over the past few years have been noteworthy for all the wrong reasons. In 2018, the rating of ABF senior leadership was 30 percentage points below other APS agencies (even lower than Home Affairs), with only one in five officers stating the SES are of a high quality. In 2019, Home Affairs rated 97th out of 97 agencies in the category of engagement (and 94th and 91st in two other criteria). The ABF has not yet released its individualised ratings, however Home Affairs is 21 points below other agencies in the assessment of quality of SES.

If these results were evident in any private sector organisation there would, rightfully, be momentum for change at the highest leadership levels. The APS Commission has previously reported in the *State of the Service Report 2017-18* that the Secretary of the Department of Prime Minister and Cabinet and the Australian Public Service Commissioner conduct annual performance discussions with secretaries. If this is occurring, yet there is no improvement, then it is clearly out of step with community expectations and is failing the Australian community. Given these results and the plethora of issues which have been highlighted in the Home Affairs portfolio, including ANAO audit reports, Interpol red notices, Paladin contracts, budget overspends, mental health and bullying, we should be seeking the very best leaders **now**, to deliver improved outcomes for the Australian community. However, the attached video clip ([Attachment E](#)) evidences ABF Commissioner Outram's plan when he ran the selection process for Assistant Commissioners in 2018. Rather than adhering to merit principles to address significant issues by ensuring the highest quality leadership, he announced he had decided to take a risk which is confirmed by his statement *'I'm not looking for someone who's going to be the greatest Assistant Commissioner on day 1. I'm willing to take a bit of risk here, but I am looking for an Assistant Commissioner who'll be the greatest Deputy Commissioner in five years time not necessarily people who are going to be the best tomorrow.'* In his own private business he could take that risk, however the result has been that over half of the ABF Assistant Commissioners are not yet capable of doing the jobs they are paid to do in an environment of a severely underperforming organisation. Whilst Commissioner Outram has linked this risk to the selection of five women, there are actually a plethora of capable and qualified women who could have been selected on merit, though they may not be as indebted for the promotion and as ready to conform. To say that ABF officers were demoralised that they are required to abide by the APS merit principle in recruitment, yet the SES doesn't, is an understatement.

There are regular instances of 'do as I say, don't do as I do'. A recent example which highlights this is the current travel restrictions in the organisation ([Attachment F](#)). You will note that there are to be no support staff travelling. This is, however, unless you are the Secretary and travel to Darwin in the dry season in August 2019 with approximately 16 people including several support staff. Officers who earlier this year had their locality allowances decimated were outraged not only by the expenditure, but that the most noteworthy issues for the Deputy Secretaries were their personal shopping experiences buying earrings and Aboriginal art.

Ministers and their staff should also be required to conform with a Code of Conduct similar to what all public servants are required to. The establishment of a National Integrity Commission with sufficient and retrospective powers, also applicable to politicians, is essential.

(e) Mechanisms to ensure that the Australian Federal Police have sufficient independence to effectively and impartially carry out their investigatory and law enforcement responsibilities in relation to politically sensitive matters

Put simply, the _____ which has infiltrated the public service means there is no separation of powers to ensure accountability and transparency between the Minister for Home Affairs and the Department of Home Affairs. It is inexplicable that all law enforcement agencies report to one Secretary of Home Affairs and one Minister for Home Affairs. It is worthy of an episode of ABC's 'Utopia' that the AFP receives a referral from its master (Secretary Pezzullo) relating to a disclosure of information negatively affecting the Minister for Home Affairs and the AFP investigates another agency (ABF) in the same portfolio, reporting back to Secretary Pezzullo and Minister Dutton.

It was evidenced in the au pair raid that the AFP did not follow its '*AFP National Guideline on politically sensitive investigations*' ([Attachment G](#)) when a Whatsapp message was located as a result of an FOI from the AFP Deputy Commissioner to the Minister for Home Affairs' Chief of Staff advising of operational activity almost 24 hours in advance. This is in contravention of the AFP Guideline, section 11.3 *Ministerial reporting*, which addresses real or perceived conflict of interest and states that '*officers must consider briefing MHA parallel to, or after, operational activity has taken place to avoid any perception of irregularity.*' The simultaneous attendance of media at AFP raids should also be of concern in regards to leaks, however there is currently no accountability of the AFP by the Ombudsman or Auditor-General about this issue.

The politicisation of the AFP has also been recognised by the AFP Association ([Attachment H](#)), particularly since the AFP was subsumed into the Home Affairs portfolio.

The only means to correct this is to remove the AFP from the Home Affairs portfolio and return it to the Attorney-General portfolio.

(f) Any related matters

There is a need for a regular auditing process of responses to FOI applications, to ensure the factors of causing embarrassment to, or a loss of confidence, in the Government, (which are irrelevant factors under the *Freedom of Information Act 1982*) are not being considered in denying responses to requests.

Whilst there had been an emerging trend in over classification of documents in the public service, it has certainly exacerbated since the reporting of AFP raids. This would be worthy of regular audits to ensure accountability and transparency and compliance with security and record keeping guidelines.

The auditing function to ensure the highest levels of integrity with politicians and the public service could be the responsibility of a National Integrity Commission.