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The Secretary
House Standing Committee on Legal and Constitutional Affairs
House of Representatives
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Submission to inquiry into whistleblowing protections within the Australian Government public sector

Please note my following submission. The inquiry's **Terms of Reference are shown in bold**, *my recommendations are shown in italic*, and explanatory material is shown in plain text.

1. the categories of people who could make protected disclosures:

a. these could include:

- i. persons who are currently or were formerly employees in the Australian Government general government sector*, whether or not employed under the Public Service Act 1999,**
- ii. contractors and consultants who are currently or were formerly engaged by the Australian Government;**
- iii. persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants; and**

b. the Committee may wish to address additional issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise;

Whistleblower protection should be afforded to all persons who are in a position to make disclosures that are genuinely in the public interest, irrespective of their current or former employment. Nevertheless, it should not encourage the public disclosure of matters that are trivial or inadequately substantiated.

2. the types of disclosures that should be protected:

- a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment;**

Legislation, regulations and directions can have their intended effect only if their interpretation is consistent with their intended aims. The range of protected disclosures should include the interpretation of such matters.

For example, the APS Code of Conductⁱ, the Australian Public Service (APS) Valuesⁱⁱ and the Public Service Commissioner's Directionsⁱⁱⁱ require APS Employees to provide advice which is frank, honest and comprehensive, and based on a full understanding of all relevant issues and options.

It is well documented that since 1997 several APS agencies have endorsed an interpretation of the Public Service Commissioner's Directions that prevents APS Employees, when preparing internal advice or advice for the Minister, from taking into consideration any view which:

- they personally believe to be true;
- has been presented without supporting evidence or argument, or with evidence or argument that is judged to be incorrect or insufficient; or
- appears to be based on views such as the above, or on quoted views of that nature, rather than being developed from the Minister's or Portfolio's previously expressed policy position.

This particular interpretation is contrary to the APS Code of Conduct because it prevents the provision of frank, honest and comprehensive advice, whenever such advice would include, or be based on, any views of the nature described above.

b. the Committee should consider:

- 1. whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit;**

The public interest value of a disclosure should over-ride consideration of the motives behind the disclosure. The objective of allowing or withholding protection according to the purpose of disclosure has some merit, but presents difficulties such as:

- This provision could discourage the disclosure of disagreements about the interpretation of government policies, as discussed under 2.a. above.
- It could prevent the disclosure of matters whose disclosure is genuinely in the interest of the Government or of the public, simply because the person in a position to disclose them either has a particular purpose or might be perceived to have such a purpose;
- It can be difficult to establish the purpose for which the disclosure was made; and
- To the extent that such a provision might be applied broadly, it will discourage genuine potential whistleblowers from making disclosures.

- 3. the conditions that should apply to a person making a disclosure, including:**
- a. whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a));**

A low threshold of seriousness should be provided, to protect whistleblowers who raise issues at a relatively informal level where they are amenable to resolution. Higher level allegations might be subject to a higher threshold.

Setting a high threshold of seriousness for whistleblower protection will mean that some matters will be allowed to escalate until they reach that threshold, rather than being resolved before they become serious. It will also encourage potential whistleblowers to make high level allegations, rather than attempting to resolve matters in a less formal manner.

The current whistleblower protection^{iv} aims to prevent victimisation and discrimination against whistleblowers, but only if they allege breaches of the APS Code of Conduct. Alleging a breach of the Code of Conduct automatically invokes specific legislated procedures^v, with the possibility of serious consequences for the accused person^{vi}.

If a “whistleblower” raises an issue without alleging a breach of the Code of Conduct, then the current whistleblower legislation offers no protection against victimisation and discrimination.

As a case in point, some years ago I alleged that another APS Employee had breached the APS Code of Conduct, even though I did not expect a formal finding of a breach. I sought (and obtained) a formal correction of defamatory statements that he had circulated following my report of a suspected fraud against the Commonwealth. Had I reported his action other than as an alleged breach of the APS Code of Conduct, I would not have been protected from discrimination, victimisation or further defamation. My allegation necessitated an investigation that was largely unnecessary.

- b. whether penalties and sanctions should apply to whistleblowers who:**
- i. in the course of making a public interest disclosure, materially fail to comply with the procedures under which disclosures are to be made;**

This provision should be subject to consideration of:

- *whether, under the circumstances, the procedures were adequate; and*
- *whether, under the circumstances, the way in which the disclosure was made was appropriate.*

As a case in point, the Public Service Act^{vii} provides whistleblower protection only if an alleged breach of the Code of Conduct is reported to certain people. What use would it be to report a misinterpretation of the Public Service Commissioner’s Directions (see above under 2.a) to the head of an Agency that endorsed the misinterpretation?

Legislation prevented disclosing this information to the person with the greatest interest in it – the Minister.

ii. knowingly or recklessly make false allegations;

Such allegations would warrant exemption from protection. Penalties and sanctions are provided for in other legislation.

4. the scope of statutory protection that should be available, which could include:

- a. protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;**
- b. immunity from criminal liability and from liability for civil penalties; and**
- c. immunity from civil law suits such as defamation and breach of confidence;**

The Committee should recommend a level of protection that will give genuine public interest whistleblowers confidence that they will be protected.

5. procedures in relation to protected disclosures, which could include:

- a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two;**

There should be an option for disclosure to an independent party. Public interest disclosures need to be dealt with rigorously and in ways that are in the public interest. Disclosures addressed within the bureaucracy will be dealt with in ways that the bureaucracy perceives to be in the best interests of the bureaucracy. This does not always coincide with the interests of the public or of the Government.

- b. the obligations of public sector agencies in handling disclosures;**

Public Sector agencies are not independent. They should be held independently accountable, to their Ministers and by the courts, for their handling of disclosures.

- c. the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education);**

Training and education should include training for investigators in how to understand the legislation, and in how to apply rigour in an investigation.

- d. whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted;**

Yes. However, it would be better to provide specifically for disclosure to an independent third party.

The case discussed above under 3. b. i. could have been resolved by disclosing the matter to the Minister, if such disclosure had been an available option.

6. the relationship between the Committee's preferred model and existing Commonwealth laws

This is an opportunity to improve and expand on the Whistleblower Protection measure of the Public Service Act (Section 16) and Public Service Regulation 2.1^{vii}.

Leon Arundell
17 July 2008

i PUBLIC SERVICE ACT 1999 - SECT 13

The APS Code of Conduct

...

(11) An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

...

ii PUBLIC SERVICE ACT 1999 - SECT 10

APS Values

(1) The APS Values are as follows:

...

(f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;

...

iii PUBLIC SERVICE COMMISSIONER'S DIRECTIONS

2.7 The APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs (Act s 10 (1) (f))

...

(2) In upholding the APS Value mentioned in paragraph 10 (1) (f) of the Act, an APS employee must, taking into account the employee's duties and responsibilities in the Agency, help to ensure that:

(a) advice provided to the Government:

(i) is frank, honest, comprehensive, accurate and timely; and

(ii) taking into account resource and time constraints, is based on a full understanding of all relevant issues and options, the Government's objectives and the environment in which it operates; and

...

iv PUBLIC SERVICE ACT 1999 - SECT 16

Protection for whistleblowers

A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:

(a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or

(b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.

(c) an Agency Head or a person authorised for the purposes of this section by an Agency Head.

v PUBLIC SERVICE ACT 1999 - SECT 15

Breaches of the Code of Conduct

...

(3) An Agency Head must establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct. The procedures:

(a) must comply with basic procedural requirements set out in Commissioner's Directions; and

(b) must have due regard to procedural fairness; and

(c) may be different for different categories of APS employees.

(4) The Commissioner must issue directions in writing for the purposes of subsection (3).

...

vi PUBLIC SERVICE ACT 1999 - SECT 15

Breaches of the Code of Conduct

(1) An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under subsection (3)) to have breached the Code of Conduct:

(a) termination of employment;

...

vii PUBLIC SERVICE REGULATIONS 1999 - REG 2.1

Duty not to disclose information (Act s 13)

(1) This regulation is made for subsection 13 (13) of the Act.

(2) This regulation does not affect other restrictions on the disclosure of information.

(3) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.

(4) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:

(a) was, or is to be, communicated in confidence within the government; or

(b) was received in confidence by the government from a person or persons outside the government; whether or not the disclosure would found an action for breach of confidence.

(5) Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee if:

(a) the information is disclosed in the course of the APS employee's duties; or

(b) the information is disclosed in accordance with an authorisation given by an Agency Head; or

(c) the disclosure is otherwise authorised by law; or

(d) the information that is disclosed:

(i) is already in the public domain as the result of a disclosure of information that is lawful under these Regulations or another law; and

(ii) can be disclosed without disclosing, expressly or by implication, other information to which subregulation (3) or (4) applies.

(6) Subregulations (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.