



M.R.

Deputy Secretary
John Kovacic

RECEIVED
16 DEC 2008

BY: L.A.C.A.

Dr Anna Dacre
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Dr Dacre

**Inquiry into whistle blowing protections
within the Australian Government public sector**

Thank you for your recent letter to the Secretary of the Department of Education, Employment and Workplace Relations, Ms Lisa Paul PSM, concerning further questions in relation to the *Inquiry into whistle blowing protections within the Australian Government public sector* (the Inquiry). Ms Paul has asked me to respond on her behalf.

You asked three questions, one directly relating to our submission and two of additional interest, each of which I will address separately below.

1. The 'difficulties in giving protection to people outside immediate Government employment, such as contractors, consultants and volunteers.'

Section 16 of the *Public Service Act 1999* (PS Act) provides protection to whistle blowers employed under the PS Act. I am advised that this protection does not extend beyond PS Act employees and therefore does not cover contractors, consultants and volunteers who work in APS agencies.

Other than the Defence Whistleblower Scheme, which I understand the Department of Defence has discussed in its submission to the Inquiry, the Department is not aware of any other Commonwealth legislation that provides whistle blower protections for contractors, consultants and volunteers in broader Australian Government employment.

Given current legislative protections would not appear to cover contractors, consultants and volunteers, the question arises as to whether or not it is appropriate to extend protection to these groups. The Australian Public Service Commission (APSC) has provided a submission canvassing options to address this issue. To this end, the APSC would be best placed to elaborate.



2. The extent to which 'deeming' provisions have been used to bring persons into the category of 'employee.'

Due to the devolved environment within which APS agencies operate, we are not in a position to provide definitive advice on all approaches taken across the Commonwealth public sector in relation to deeming provisions. However, I can provide three examples of where I understand that some form of 'deeming' may occur more generally within the APS.

Firstly, I am advised that the *Financial Management and Accountability Act 1997* (FMA Act), which in general applies only to Australian Government entities, contains provisions that deem external contractors who provide financial related services to FMA Act agencies as 'officials' for the purposes of the FMA Act. For example, a payroll provider or salary sacrifice provider, conducting work on behalf of an APS agency for the benefit of that agency's employees, would meet the definition of 'official' for the purposes of the FMA Act. Should the Inquiry require further information on the arrangements under the FMA Act, the Department of Finance and Deregulation would be best placed to assist the Inquiry.

Secondly, I am advised that section 16(4) of the *Occupational Health and Safety Act 1991* deems that the general duty of care that applies to employees in the Commonwealth scheme is to also apply to contractors over 'matters' which employers have control or would reasonably be expected to have control. Comcare would be best placed to provide further information on these legislative requirements to the Inquiry if required.

Finally, the *Long Service Leave (Commonwealth Employees) Act 1976*, which has general application to Commonwealth employees, also contains a deeming provision. Section 10(2) of that Act deems that a person who constitutes (or is acting as) a public authority of the Commonwealth, a person who is (or is acting as) a member of such an authority, or a person who is a deputy of a member of such an authority, is deemed to be employed in 'Government service' for the purposes of that Act and is therefore entitled to long service leave under the terms of that Act. My Department is able to provide further information on the operation of these provisions if required.

You have sought advice as to whether there are any significant barriers to the use of deeming provisions to recognise persons such as volunteers and contractors into the category as 'employees'. In our opinion this is essentially a policy question; both in terms of the specific purpose within which deeming is proposed to be used. Having said that, considerable care would need to be exercised when considering deeming to ensure that its use did not inadvertently assign associated rights and obligations to those deemed to be 'employees'. For example, care would need to be exercised when expanding the definition of employee in the *Public Service Act 1999* not to provide deemed employees with (a) other rights afforded Commonwealth employees such as redundancy provisions in the *Public Service Act 1999* and (b) rights arising from related legislation. By way of background, the *Workplace Relations Act 1996* does not provide for individuals to be deemed to be 'employees' for the purposes of that Act.

3. The distinctions between a Commonwealth employee, a Commonwealth Office Holder and a member of the Defence Force.

I can advise the Committee that there is no single definition set out in legislation that adequately covers these separate categories of employment. With respect to your request to highlight the differences between the categories you identified, I can advise the Committee as follows:

- 1) A Commonwealth employee encompasses persons employed under the PS Act or, in the case of non-APS employees, employed under other Commonwealth enabling legislation;
- 2) Commonwealth Office Holders are not employed under the PS Act and are appointed either by the Governor-General, Prime Minister or Ministers. The appointee's workplace relations instrument is usually a common law contract or a Determination made under the applicable legislation by the relevant Minister, Board or the Remuneration Tribunal;
- 3) Members of the Defence Force fall under the provisions of the *Defence Act 1903* and as such, their terms and conditions of service (including whistle blowing) are separate to the general employment conditions within the APS. In recognition of the unique nature of their service, Commonwealth employment legislation generally does not apply to Defence Force members.

In the event you wish to discuss these answers further you may do so by contacting

Yours sincerely

John Kovacic

16 December 2008