



AUSTRALIAN PUBLIC SERVICE COMMISSIONER  
LYNELLE BRIGGS

Dr Anna Dacre  
Committee Secretary  
House of Representatives Standing Committee on Legal  
and Constitutional Affairs  
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CANBERRA ACT 2600

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*Anna*  
Dear Dr Dacre

**Inquiry into Whistleblowing Protections within the Australian Government public sector**

Thank you for the opportunity to appear before the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) on 25 September 2008.

At this hearing, I undertook to provide further information regarding a number of the Committee's questions. This information is provided below.

*Are we aware of any whistleblowers who have gone to the media once all available review options were exhausted?*

We are aware of one case that was investigated by both an agency and the Public Service Commissioner where that employee raised the matter in the press. It is relevant to note that at the time the matter was raised in the press the individual was no longer an Australian Public Service (APS) employee.

*How many whistleblowers have been sent by their agency for psychiatric assessments as part of the management of their case?*

While we do not keep records on such situations we are aware of one case where an employee alleging breaches of the APS Code of Conduct was sent by an agency for a medical examination.

*How many of the whistleblowing cases seen by the Merit Protection Commissioner and Public Service Commissioner were 'true' public interest cases?*

In terms of the statistics provided to the Committee, 1 of the 21 reports received by me in 2006-07 could be regarded as a disclosure in the public interest, i.e. the report did not relate to a personal or employment issue, but a broader issue in

respect of a particular agency's operations. That report was a valid report under the scheme and an inquiry was conducted by the agency and myself.

As noted by Ms Godwin, no reports referred to her had a public interest 'flavour'.

#### *General statistical information*

It is relevant to note that Ms Godwin's description (on page 18 of the transcript) of what is reported in our statistics for whistleblowing purposes may be misleading and needs to be corrected for the record.

The statistics quoted for 2006-07 reflect all reports of alleged breaches of the APS Code of Conduct made to myself or the Merit Protection Commissioner. These reports may be from private citizens, former employees, current employees or in some cases are anonymous. On receipt of these reports we then determine their validity, i.e. those that meet the requirements for inquiry under the APS scheme by either Commissioner. Where they are not valid we provide advice on other appropriate forums where the person's concerns may be able to be addressed, for example the relevant agency head, Commonwealth Ombudsman, or Privacy Commissioner.

To date, since the introduction of the whistleblowing scheme in 1998, the Public Service Commissioner has received 138 reports of alleged breaches of the APS Code of Conduct. Of those, based on viewing summaries of cases, it would appear that 17 reports (or aspects of the report) could be considered to be 'public interest' disclosures. Of those only 5 were valid whistleblowing reports where the Public Service Commissioner conducted an inquiry.

During the same period the Merit Protection Commissioner has received 37 reports, none of which could be regarded as 'public interest' disclosures.

#### *Decision making power*

I think it is important that the Committee is aware of an important difference in the power to make a decision between the Commonwealth Ombudsman and myself. In a formal whistleblower scheme, it is important for complainants to be able to clearly identify the decision maker.

Under the *Public Service Act 1999* (the PS Act), the Commissioner's decision making powers relate to agency heads (section 41(1)(f)). This power allows me to investigate alleged breaches of the Code by an agency head and recommend sanctions where a breach has been found.

In relation to whistleblower reports (under section 41(1)(c) of the PS Act), I have the power to inquire into whistleblower allegations made to me and make recommendations to the relevant agency head regarding whether a Code of Conduct investigation should be conducted. This power is replicated under

section 50(1)(a) for the Merit Protection Commissioner. The Commissioners cannot determine whether misconduct has occurred or recommend a sanction.

Conversely, under section 5 of the *Ombudsman Act 1976* (Ombudsman Act), the Commonwealth Ombudsman has the power to investigate complaints about Australian Government agencies, and section 15 of the Ombudsman Act provides for the Ombudsman to make recommendations to the relevant agency head for resolving those complaints, rather than providing specific decision-making power. The agency head has the power to make decisions based on these recommendations.

*Agency heads and Code of Conduct matters*

The final point I want to bring to your attention is about the risks of removing the current whistleblowing scheme from the Australian Public Service Commission (the Commission). As you know, I have responsibility for investigating Code of Conduct and whistleblowing allegations made against agency heads. I have some concerns about a possible escalation in allegations against agency heads (to whistleblower status) under a new scheme with a different investigator, with most such complaints against agency heads conceivably becoming 'whistleblowing' matters over time, depending on the legislative definition.

This would potentially undermine section 41(1)(f) of the PS Act regarding the Public Service Commissioner's role in investigating alleged breaches of the APS Code of Conduct by agency heads. Such a situation could also undermine agency heads' rights to privacy and natural justice. I currently deal with such arrangements in a way that protects the privacy of the individuals concerned. This is particularly important because, more often than not, the allegations are not found to be proven.

I would be happy to provide further information on these points, if necessary. I can be contacted on (02) 6202 3501.

Yours sincerely

  
Lynelle Briggs  
15 October 2008