

Submission No.....	33
Date Received.....	M.R.

RECEIVED  
18 AUG 2008  
BY: LACA

*Inquiry into whistleblowing protections within the Australian Government public sector* by  
the House Standing Committee on Legal and Constitutional Affairs

**Submission by Peter Ellis**

7 August 2008

**Key messages**

- Amend s.70 of the Crimes Act so a jail term only applies to unauthorised disclosure of information if it damages national security – bringing the current draconian provisions into line with other countries.
- Require departments to establish procedures with concrete measures to protect whistleblowers, particularly from senior officers – rather than relying on asserting that retaliation does not happen.
- Broaden the issues about which protected disclosures can be made to include significant incompetence, inefficiency and ineffectiveness – rather than narrowly focusing on breaches by individuals of the Australian Public Servant (APS) Code of Conduct
- Give protection to contractors and members of the public who make disclosures or complaints
- Increase the independence of the Australian Public Service Commission
- Tackle the culture of secrecy through complementary reforms of the treatment of Freedom of Information and pro-active release of documents and information
- Strengthen training, selection/promotion, advice and support with regard to public sector ethics

**My background**

I was an Australian Commonwealth public servant in AusAID from February 1997 to April 2007. From mid 2002 I was an Executive Level 2, holding positions including the Director of Program Evaluation in Canberra, and Counsellor Development Cooperation in the Australian Embassy in Dili, East Timor.

In 2005 I used the existing whistleblowing provisions of the Public Service Act. I complained that senior officers in AusAID and DFAT were instructing me to lie about the basis of funding decisions in the Australian aid program to East Timor. Such an instruction to lie, if it occurred as I claimed, would be a breach of the APS code of conduct, the only current grounds for protection of whistleblowers.

I later claimed that individuals in AusAID and DFAT retaliated against me for the initial complaint. When the processes were finished with (after more than two years), I was not satisfied with:

- AusAID and DFAT's preliminary investigation of the initial complaint;
- the lack of measures by AusAID and DFAT for protection of me against retaliation by relevant senior officers
- AusAID and DFAT's preliminary investigation of my claim of retaliation
- The Australian Public Service Commission's (APSC's) investigation in response to my appeal against the results of AusAID and DFAT's two preliminary investigations

I left AusAID and am now working as a public servant in another country. Further details on my case are available at <http://www.netspeed.com.au/ellis/psa/index.html>. My experiences as a whistleblower, as well as my work roles as a public sector performance and accountability specialist, inform this submission.

**1. The categories of people who could make protected disclosures**

Contractors working within the public sector should be protected, in addition to the public servants who are governed by the Australian Public Service Act. The line between contractors and public servants is blurred. In many instances (of which aid is just the one I am familiar with), contractors are as likely to see wrongdoing as are public servants. Contractors are also often even more vulnerable to retaliation than career public servants, as it is easier for departments or powerful individuals within them to effectively blacklist contractors that offend them through their whistleblowing, ethics or politics.

Members of the public should also be protected in the event they wish to make a disclosure, for the same reasons. In particular, members of the public in many situations (eg welfare payments) can be highly vulnerable to retaliation.

**2. The types of disclosures that should be protected**

The types of disclosures that are protected should be broadened out from the current legislation (breaches of the APS Code of Conduct). At a minimum, those who make disclosures of significant incompetence, ineffectiveness or inefficiency should be protected, even when the issue does not involve a breach of the Code of Conduct. Issues of problems with an organisation, rather than just misdeeds of an individual, should also be covered. It is difficult to see any argument for the current, extremely limited scope.

**3. The conditions that should apply to a person making a disclosure**

I have no substantive comment on this item.

**4. The scope of statutory protection that should be available**

Internal protected disclosures must be protected by law better than they currently are. However, the law also needs clear means of enforcement. My own experience is that the existing protections, while adequate for my needs in *law* in my particular case, were non-existent when it came to administrative *reality*. See below.

If internal procedures fail, there should be statutory protection for an external disclosure. The Democrats' *Public Interest Disclosure Bill 2007* provided one model for doing this in a responsible fashion.

**5. Procedures in relation to protected disclosures**

Government departments should be required by law to develop procedures for the protection of whistleblowers. Currently no department that I am aware of has such procedures; the requirement is only for departments to have procedures for actually making a whistleblowing complaint. It seems to be assumed that no concrete protections are needed for whistleblowers; simply an assertion that there should be no retaliation. My case shows that

this is inadequate. Officers senior to me, whom I had accused of grave breaches of the code of conduct, were allowed to damage my career on the basis of unsubstantiated claims that were not even checked. It never occurred to either DFAT or AusAID to implement simple measures, such as are used in any other conflict of interest, to guard against such problems.

Current guidelines and procedures seem to neglect the obvious point, that many times those making protected disclosures will be inferior in power to those against whom they are making the complaint. Significant, tangible steps are needed to address this situation.

#### **6. Relationship with existing Commonwealth laws**

Obviously, I advocate amending the *Australian Public Service Act* as necessary for the above changes.

Section 70 of *The Crimes Act 1914* should also be amended. Currently, this acts as a catch-all – nearly any information that a public servant releases can lead to two years of jail. In comparable jurisdictions such as New Zealand, the USA, and UK the equivalent provision applies only to information that damages national security.

#### **7. Other matters**

My experiences in 2005 and 2006 led me to believe that there is a serious ethical deficit in the Australian Public Service. Senior managers, far from modeling ethical behaviour, instructed me to lie. Other senior managers went to considerable lengths to turn a blind eye to the behaviour and implausibly claimed that only “exploratory discussions” had taken place. Retaliation was alleged. A shoddy investigation by the APSC, supposedly the guardian of public sector standards and ethics, was the ultimate icing on the cake.

Beyond my personal experience, 48% of Australian voters think that ‘corruption such as bribe taking’ amongst public servants is very or quite widespread; only 9% think it hardly happens at all.<sup>i</sup> About one in ten Commonwealth public servants have seen serious breach of the APS Code of Conduct. Only half of them report it. The reasons they give for not reporting:

- the suspected breach had already been reported and nothing had been done;
- concern about retribution or victimisation resulting from reporting; and
- concern about the negative effect reporting would have on their career.<sup>ii</sup>

Reforms such as those outlined above would be a step in the right direction in addressing these issues. However, the root causes of the ethical problems are complex, and need a range of tools to address them. In addition to what I have proposed above, I suggest:

#### Institutionalise the APS Values and Code Conduct and depoliticise the APS

- a) Make commitment to APS Values and Code of Conduct a compulsory selection a criterion for *all* APS positions and provide guidance on how to *test* for this
- b) Make APS Values and Code of Conduct training compulsory - with certification based on *demonstrated* knowledge - for all newcomers to the APS, promotees, and

those who have not received the certification in the past five years. Training should be practical and based on case studies, rather than abstract.

- c) Examine the feasibility, costs and benefits of appointing specialist ethics advisors or a fully independent service (comparable to counselling services under Employee Assistance Programs) to support staff with ethical concerns or questions, and independently monitor, analyse and publish analysis of ethics in the APS
- d) Carefully monitor the status of APS Values by strengthening the APSC's *State of the Service Reports* with methods such as:
  - o tests on the content of the Values and Code of Conduct to give a better sense of whether the public servants genuinely understand the issues
  - o releasing confidentialised micro-data for academics and others to analyse
- e) Amend the *Public Service Act 1999* to make the Public Service Commissioner's appointment bipartisan with Parliamentary involvement in his/her appointment, and a clearer responsibility to a Parliamentary Committee than to the Government. Consideration should also be given to a model (such as that which applies for the head of the World Bank's Independent Evaluation group) where the APS Commissioner is disqualified from future employment in the APS, to strengthen their independence.

#### Tackle the culture of secrecy - jolt the culture of resistance to Freedom of Information

- f) Introduce regulations that make it an offense to over-classify material or to classify material on grounds other than those in the Protective Security Manual<sup>iii</sup>
- g) Publish the briefings agencies prepare for incoming Ministers on a change of government – as is done in New Zealand
- h) Pro-actively publish the Cabinet submissions on the budget after the budget is released – as is done in New Zealand

#### Ensure the public service works for democracy in the long term

- i) Review the whole public sector accountability framework - *Public Service Act, The Financial Management and Accountability Act* (outcomes-based budgeting), Ombudsman, Freedom of Information, etc, with an eye to establishing how the accountability systems of the Commonwealth promote an apolitical and competent public service, good governance and democracy.

I look forward to the report of your Inquiry.

Peter Ellis

<sup>i</sup> Bean, C., I. McAllister, R. Gibson and D. Gow 2005. *Australian Election Study, 2004* Australian Social Sciences Data Archive, Australian National University, Canberra.

<sup>ii</sup> Australian Public Service Commission, *State of the Service Report 2005-06*.

<sup>iii</sup> Such rules exist in the USA