

**INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE
AUSTRALIAN GOVERNMENT PUBLIC SECTOR**

Submission No. 54
Date Received M.R.

Background and Context

My name is Ivon Hardham. I hold a degree in Economics (ANU, 1972) and have post graduate qualifications in Public Economic Policy (ANU, 1993). I was, until September 2005, a Commonwealth public servant. My career spanned three decades and I worked in six departments. I had more than twenty years experience in Executive positions - including five years at the Senior Executive Service (SES) Band 1 level. Referees attest to my ability to continuously deliver high quality work under difficult circumstances¹ and until 22 July 2003 had a reputation for skilled staff management and excellence in public policy development, economic analysis and administration.

I hold strongly to the principles of acting with honesty, integrity and fairness and I do not exaggerate when making comments. Being proficient, having a real concern for the welfare of staff, and exhibiting the APS Values and Code of Conduct were important to me.

Due to a trauma accident in February 1996, I am a right leg (below knee) amputee. I have alleged that disability was later to be exploited by officers in the (then) Department of Transport and Regional Services (DOTARS) to harass me – presumably in retribution for having ‘whistle blown’ in regard to ongoing OH&S breaches that had staff being repeatedly exposed to diesel exhaust fumes. Why the act of harassment occurred has never been explained adequately. There is prima facie evidence to conclude, however, that officers in DOTARS Corporate area failed to perform their public duty to protect the health and safety of employees. There is also prima facie evidence to suggest that the Executive may have used Commonwealth resources unethically².

I had also alleged other breaches of the APS Values and Code of Conduct (‘the Values and Code’) by officers in DOTARS in regard to the management of myself and my team members at the time. Over the course of two years, none of my reports alleging breaches of the Values and Code was acted upon in accordance with APS or Departmental procedures. More importantly, no action was taken to protect me – despite my making repeated protests to the senior Executive alleging harassment and discrimination.

My complaints were not investigated, I was never advised of what had been decided in terms of further action and records of the complaints were not maintained by DOTARS. These were serious systemic and repeated failures that left me powerless in seeking a remedy to matters which directly and adversely affected my productivity, work place relations and my career aspirations. I was left with no option other than to accept continuing offensive and demeaning behaviour from the relevant manager because my own attempts to move myself to another area were being thwarted.³

¹ These attributes were self evident, for example, in the fact that I had been tasked to: personally advise portfolio Ministers in two separate Departments (Employment Education, training and Youth Affairs and DOTARS) on all cabinet matters; train and develop the analytical and policy skills of junior officers; and undertake work in DOTARS that had me reporting simultaneously to three different Division Heads.

² In breach of section 44 of the *Financial Management and Accountability Act 1997*.

³ The PSMPC has said that one outcome from an investigation is to transfer to an alternative work area the perpetrator or the complainant (but only if this is the complainant’s preference) or compensate the person subject to harassment. PSMPC, *Maintaining a Harassment-Free Workplace*, 2001, p 12.

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I was subjected to the most insidious forms of (concealed) 'passive aggressive' acts.⁴ In essence I consider it was psychological abuse. I have alleged those acts were deliberate and designed to trash my reputation, make me feel unwelcome and isolated, undermine my performance and productivity and demean the importance of my contribution in the workplace. It was soul destroying for me and would be for any conscientious employee. More generally it created a dysfunctional environment for staff to operate in and undermined productivity and professionalism in the Department. I was, however, not the only target of the behaviour as one of my team members was to also suffer a similar fate.

My allegations were brought to the attention of the Deputies and Secretary of the Department but they seemed to be in a state of torpor in regard to taking any action in accordance with APS guidelines. The silence of the senior Executive effectively condoned the breaches and would have been perceived by staff as endorsing the apparent indifference of senior managers to fulfilling their statutory obligations. The matters I had raised with the senior management were neither trivial nor vexatious and for upholding the Values and Code I was eventually 'forced'⁵ out of the Commonwealth Service in September 2005.

Incentives to Act Ethically

The APSC has stated that the "*purpose of the Code is to ensure effective administration and to maintain public confidence in the integrity of an organisation's processes and practices rather than to punish individuals.*"⁶ If this is the objective, I feel it has failed on both counts in a rather perverse way – 'whistle blowers' are actually being punished for upholding the Values and Code because of a lack of integrity in administrative processes. Where reviews of alleged breaches are undertaken, they are routinely conducted in confidence and the outcome remains confidential. A complainant may not even know that a report has resulted from an investigation since "*the reporting employee has no control over how the report of suspected misconduct will be handled within the Agency.*"⁷ The level of silence that surrounds reported breaches does little to instil confidence in employees that the system is actually working. Justice should not only prevail but be seen to have prevailed.

Poor 'ethical' cultures in the APS are arising for a number of reasons - but an important contributing factor is that there has been neglect by the management of some APS agencies when it comes to portraying and upholding the Values and Code. In a society where individual competition is encouraged as healthy, behaviour traits that one might correctly expect to be seen as unethical can become tolerated, excused, overlooked or even 'normalised'. That is, they are adopted as being integral to the 'nature of managing' and the

⁴ International Psychological Services, an employee assistance enterprise, has advised that an abuser is usually in some position of authority over the targeted person. It is stated: "*Passive aggressive behaviours are common ...with abusers treating the victim unfairly, as in refusing to share information, not notifying them of meetings, regularly giving them least desirable tasks...failure to give credit for work done or limiting opportunities for promotion...*". I was subjected to these types of behaviours in DOTARS and the events were documented for management in the reports submitted alleging deliberate harassment. IPS has also confirmed that psychological abuse is often subtle and seems trivial on the surface. "*Abusers try to normalize these events as necessary for managing a particular person.*"

IPS World Wide, Psychological Abuse – A Workplace Issue, 2003 p 1.

⁵ In the sense of a constructed dismissal and from not receiving protection from harassment.

⁶ APSC, Handling misconduct: A human resources practitioner's guide, 19 February 2007, Part 2, section 6, page 4.

⁷ APSC, Handling misconduct: A human resources practitioner's guide, 19 February 2007, Part 2, section 3, page 2.

functioning of the institution. In the spectrum of the types of unethical conduct there tends to be a continuum of degrees of unethical conduct – and according to contextual factors such as place, gender, race and even time. The boundaries between segments in the continuum seem to be often ‘pushed’ and behaviour types become ‘normalised’. Therein may lie the reason for a high tolerance of poor behaviour.

For example, few would probably challenge the idea that ‘fraud’ was unethical behaviour. It may be defined as the use of ‘deception for potential personal gain’. Ask a group of public servants whether they know of a manager who has accepted personal credit for work done by others and I feel confident the answers given will be mostly in the affirmative. But then is that not ‘deception for potential personal gain’ and hence unethical conduct on the part of that employee?

While it is difficult to imagine that sanctions would not apply in regard to an act of financial fraud (eg credit card or TA abuse), I do not think it would be commonly accepted that sanctions should apply to taking credit for the work of others – if not simply because it was not seen to be unethical conduct but rather in nature of the ‘order of things’. Some may defend the distinction and to that I would respond: there is little difference between the two since both constitute unethical conduct, and both corrode the efficiency and efficacy of the public service⁸ and should be dealt with in the same way.

Controlling information flows is another form of ‘unethical’ behaviour that can have widespread acceptance. In some contexts it is seen as necessary and appropriate for national interest reasons but in others it is nothing more than self serving and detrimental to the objectives of the Agency, interests of the Government and welfare of Australians. It is a behaviour type in management that can be used by psychological abusers who are practicing ‘passive aggressive’ behaviour - but it is often not recognised as breaching the Values and Code and overlooked or ignored as a consequence. Regardless, I consider it is unethical behaviour that breaches a number of the Codes of Conduct⁹ and is most inimical to an employee who is endeavouring to uphold the Values.

A common perception amongst APS employees is that it is often easier for a manager to ignore a complaint, or to ‘deal with’ the person reporting the allegation,¹⁰ than to address the cause for a complaint. That is evidenced, for instance, when: a manager has to continue to work closely with a colleague that is the subject of a complaint; or that colleague may be seen to have special status (eg imprimatur of a more senior manager); or addressing the complaint may involve questioning management initiatives directed from above; or there is a political dimension involved. The ‘whistle blower’ is meant to succumb to the coercive forces at play in the unwritten code of public service conduct that says question the ‘order of things’ at your peril.

It is a fact of human nature that these forces can combine to result in retaliatory action against

⁸ It is not efficient to have unethical conduct rewarded (eg through promotion) when the merit based principle should apply in building an efficient and effective public service.

⁹ Sections 13 (1), 13 (2) 13 (3) 13 (8) and 13 (10) refer.

¹⁰ A Deputy Secretary of DOTARS reported in January 2004 that during 2003 ‘harassment contact officers’ in the Department had reported an increase in the number of reported incidents of harassment. One report stated: “my observations have been that people are feeling extremely overworked, under pressure and extremely stressed”. Another report stated: “people feel less able to get away from a problem manager and more frustrated that those higher up seem ill equipped or not inclined to deal with the situation”. During the period May to August 2003 the results of exit surveys also revealed that “ratings of satisfaction with the organization were quite low.”

the complainant - either in the form of retribution or deliberate side stepping of the issue. Side stepping an issue or failing to act on a complaint serves only to compound the severity of the problem for the aggrieved party and to embed a poor ethical culture in an agency. Neither course of action will correct the deficiency which, if allowed to persist, will fester at the expense of the 'whistle blower', other employees and the efficiency and productivity of the organisation.

A consequential difficulty that arises when a complaint is not properly investigated - or not investigated at all - is for the complainant to maintain objectivity and decipher between what could legitimately be considered poor management practices or gross incompetence and /or deliberate abuse of power. The effect, however, of the administrative failure is the same for the 'whistle blower' – the matter may not have been addressed and retribution may be dispensed to the complainant for having broken an illegitimate but accepted 'code of silence' in the organisation.

These kinds of difficulties compound on the disincentives to report information alleging misconduct and most employees prefer not to 'get involved' despite 'something being obviously wrong'. It does nothing to dissipate the vicarious liability of the organisation and only serves to perpetuate and deepen the administrative failures that arise. It is also why abusers may feel their behaviour is considered acceptable or 'normal' when that behaviour has not been challenged. What is needed is tangible evidence that acting 'ethically' is demanded and a failure to act 'ethically' will attract sanctions.

I believe a comprehensive standard of ethics may also need to be codified in an administrative practices manual that could be in the form of regulations or a Commissioner's Direction, or the like. I prefer the use of regulations or Directions since experience in, and lessons learnt from, the application of the principles can be quickly translated to revised requirements.

APS Values and Code of Conduct

The Australian Public Service Commission (APSC) has stated:

“Good public administration is a protection not only against inefficiency and poor performance, but also against fraud, corruption, inequity, inability to conduct business confidently and infringement of human rights.

The APS Values and Code are not simply aspirational statements of intent. All APS employees are required to uphold the Values and comply with the Code. Failure to do so may attract sanctions. Agency Heads (and the Senior Executive Service) are required also to promote the Values.”¹¹

The Values require the APS to have the *highest ethical standards* and that applies to the personal behaviour of a Commonwealth employee. The Value is supported by elements in the Code of Conduct that require personal standards of behaviour such as honesty, integrity, care, diligence, respect and courtesy and behaviour that upholds the integrity and good reputation of the APS. The APSC has advised that ethical behaviour goes beyond the requirements of lawful behaviour and that it requires employees to merit the respect of the public from their conduct.

¹¹ APSC, APS Values and Code of Conduct in Practice, 2005, p14.

What Constitutes ‘Whistle Blowing’?

It may be helpful at the outset to define what is intended by the term ‘whistle blowing’. In this submission I am referring to the reporting, either orally or in writing, of information which alleges a breach of the Values and Code by a Commonwealth employee (or employees) within an Agency. A breach of the Values and Code includes unlawful conduct referred to in section 13 (4) of the PS Act 1999 and hence covers behaviour and conduct proscribed in an array of statutes – both Commonwealth and State.

The statutory duty to act with integrity and the highest ethical standards in the APS “*imposes a reporting obligation on all employees with regard to suspected misconduct*”.¹² That applies in regard to suspected breaches of statutes, the Values and Code and the Commissioner’s Directions. It also imposes an obligation on employees to act on reports received. In fact where an employee has managerial responsibilities it is likely to be a breach of the Code not to act on an allegation of misconduct. The Commission has said:

*“An employee’s duty is to be both accountable against formal standards and reporting requirements, and to be personally accountable for internalising acceptable behaviours, which includes the daily application of the Values”.*¹³

Accountability in this context is generally understood to be to the Head of the Agency and ultimately the relevant Minister and Parliament. I consider it is desirable to make that accountability principle explicit in either the *Public Service Act 1999* (PS Act 1999) or in any comprehensive ‘whistle blowing’ legislation.

The Public Service Commissioner’s Direction 2.5 imposes an obligation on an Agency Head to put in place measures in the Agency directed to ensuring that employees are aware of the content of the Code of Conduct; measures are in place for dealing with whistle blowing disclosures; and allegations of misconduct are addressed in a fair, timely, systematic and effective way.

Section 16 of the PS Act 1999 is intended to provide protection for a ‘whistle blower’, and any report of an alleged breach, whether oral or written, that is made to an authorized person is regarded as a ‘whistle blower’ report under that section. In my experience that was either not well understood or ignored by DOTARS because illegitimate attempts have been made to draw a distinction between ‘informal’ and ‘formal’ reporting of a breach of the Values and Code. Of more concern was that this ploy was adopted by a law firm acting for DOTARS in a self serving attempt to ‘lay off’ any blame from the Executive for not acting on my complaints.

The inference from the approach taken by DOTARS is that an ‘informal’ complaint does not require the APS ‘whistle blowing’ procedures to be applied or protection to be granted under section 16 of the PS Act 1999.¹⁴ Rather it was something that may be dealt with in a manner,

¹² APSC, Handling misconduct: A human resources practitioner’s guide, 19 February 2007, Part 2, section 3, page 3.

¹³ APSC, Handling misconduct: A human resources practitioner’s guide, 19 February 2007, Part 2, section 3, page 3.

¹⁴ The APSC has recognized that reports may be made by e:mail, orally and even anonymously. Moreover reporting information of an alleged breach of the APS Values and Code does not need to self identify that it is a ‘whistle blowing’ complaint. An identification of that kind could in itself be seen as offensive and not showing respect to the person(s) against whom an allegation is being made.

or not at all, at the sole discretion of the management. My complaints were made to an authorised officer and beyond that there was no prescription as to what had to be said to make a complaint anything but what would be self evident to a reasonable person – that they were complaints alleging breaches of the Values and Code.

The view that I hold is that a manager who is acting with care and diligence should not look to the form of the complaint but rather to its content and whether the allegation (oral or written) was in regard to an action concerning an employee, or act of an employee, that would constitute a breach of the Values and Code. Hence, all forms of ‘whistle blowing’ should be catered for with the focus to be placed ‘on what is being reported’ rather than how it is being reported.

It is also often portrayed as being a more ‘sensitive’ management style for a manager to have alleged he ‘discussed’ an employee’s complaint - with no record being kept of what was discussed by the management (if at all) – and that was sufficient and appropriate for satisfying the APS procedures for handling ‘whistle blowing’. It is my contention that such an approach is insufficient and all complaints need to be recorded in order to maintain integrity in the review process and any actions resulting therefrom.

It is implicit to reporting an alleged breach that the nature or type of breach should be identified – for example, fraud, unethical use of resources, staff harassment, exclusion, failure to consult, discrimination, etc. – or at least mention made of what actions, or failures to act, are suspected to constitute a breach of the Values and Code. Context may also be necessary in the reporting of the allegation since what may be regarded as ‘ethical behaviour’ in one context may be considered ‘unethical behaviour’ in another.

For example, a person deliberately excluded from information flows or access to information that is relevant to conducting their duties may have suffered deliberate harassment through an improper use of power.¹⁵ The behaviour can be easily concealed by managers through using any one of a multitude of pretexts - such as restricted access was required for security reasons or involvement was not possible at the time because the management did not want to distract an employee from other priorities. Repeated acts, however, suggest a pattern of behaviour that warrants an investigation – as a failure to investigate effectively condones bad management practices. These types of reviews require a skilled, careful and impartial analysis to be undertaken by the Agency – which it may not be inclined to do, or ill equipped to undertake, when facing other work pressures.

The foregoing principles – what constitutes ‘whistle blowing’ and obligations to record, report and act on information - need to be enshrined in statute and preferably a comprehensive piece of ‘free standing’ legislation. I argue later in this submission the agency that should be responsible for the oversight of such legislation is the Commonwealth Ombudsman since that organization already has expertise in complaints handling and operates at arms length to the APS.

‘Whistle Blower’ Protection Requirements

Being a ‘whistle blower’ is onerous – and particularly in strongly hierarchical organisations

¹⁵ This is unethical behaviour and breaches section 10 (1) (j) of the APS Act 1999 – an officer is being undermined in his performance because communication and consultation is being denied on a matter in which the employee has a legitimate interest or may have been expected to deliver an output.

like public service agencies.¹⁶ It takes a principled person to overtly allege misconduct or impropriety by others because of the potentially negative ramifications for their career, social standing and financial position. The ramifications from ‘whistle blowing’ often cannot be foreseen but they are nevertheless generally perceived to be detrimental to the complainant. That is, all ‘pain and no gain’. This is because the potential gain is largely restricted to matters that may be described as being ‘in the common good’ of an Agency, the Service or the society rather than yielding any specific and tangible benefit directly to the person providing information or lodging the complaint.

Since the culture of the organisation is paramount to whether current ‘whistle blowing’ procedures are likely to operate well (if at all), it is insufficient to assume that the Values and Code will be upheld in agencies and upon that foundation presume procedures and protections may be constructed. In my view it would be an unstable foundation. There is a need for better ‘sharing’ of the potential benefits from ‘whistle blowing’ with the complainant – rather than to rely on altruistic behaviour alone.

Currently the regulatory system focuses heavily on a mild punitive approach to those judged to have acted unethically (cf unlawfully) and does little to instil ethical behaviour traits in employees as the norm. That is, there is insufficient tangible support given to employees to encourage them to disclose unethical behaviour or nefarious practices and insufficient cost being borne by those who have acted unethically. This weakness in the present structure, I believe, has already been evidenced by some alarming failures in administration that have occurred in the last decade in public agencies.¹⁷

I consider comprehensive ‘whistle blowing’ legislation is now required that stands alone from the PS Act 1999. It needs to encompass the matters referred to above - principles in accountability and ethical and unlawful conduct and what constitutes whistle blowing – and the scope of protections provided for ‘whistle blowers’. The scope of statutory protections needs to broadly cover four pillars of support to a complainant as follows:

- (i) protection in employment;
- (ii) an independent and impartial review process that adopts a standardised set of principles and procedures common to all reviews – undertaken either within or outside of an Agency;
- (iii) financial protection in the event of an administrative failure occurring under (i) and /or (ii) above; and
- (iv) immunity from prosecution for disclosure of classified information in an authorised manner.

Each pillar is dealt with briefly below

Statutory Protection in Employment

It is self evident that employees who ‘whistle blow’ should have a right to statutory protection in employment. It is critical to any comprehensive model providing ‘whistle blower protections’ and does not need further elaboration here - other than to say it is problematic that the protections currently provided¹⁸ actually work as intended.

¹⁶ Compared, for example, to the structures that are in place in Microsoft.

¹⁷ AWB, Ms Rau, Mr Haneef, Children Overboard etc.

¹⁸ Section 16 of the *Australian Public Service Act 1999* refers.

Review Process

The review process and who undertakes the review is also of critical importance to 'whistle blowing' procedures. That importance is reflected currently in the APS Value that provides for a fair system of review of 'decisions' taken in respect of APS employees. 'Decisions' has been interpreted to cover actions and a refusal or failure to act. The APSC has advised that it is intended that this Value applies to most matters that could affect a non SES employee in the course of their employment - such as application of conditions of employment; performance management; discrimination; harassment; and a determination that an employee has breached the APS Code.¹⁹ It is a cornerstone to ensuring transparency and accountability in the management of an Agency but I consider there is a flaw at present.

It is not readily transparent that there can be a strong nexus between a decision relating to an employee's duties and a potential breach of the Values and Code. For example a reassignment of duties or reporting arrangements made pursuant to the PS Act 1999 (section 25) may have occurred in retaliation for 'whistle blowing'. An application for a review of that decision is, however, precluded under section 33 of the Act. Where an assignment of duties is judged to be a deliberate act of harassment or discrimination by an employee, that employee's recourse appears to be confined to alleging a breach of the Values and Code.

This does not lend itself easily to having a decision reviewed, amended or revoked as the focus of the Code is directed to establishing whether a breach has occurred and what if any sanctions may apply. Hence I consider the structure of the review procedures needs to be more balanced by facilitating actions that may be required to address the complaint directly. To that end, I consider the regulations should be amended to allow a request for a review of a decision made pursuant to section 25 to occur where it is reasonable to conclude a breach of the Values or Code may have occurred in the making of that decision. Of course this principle could be adopted within any 'stand alone' statutory framework covering 'whistle blowing'.

Under current procedures, the reporting and investigation of information relating to a suspected breach of the Values or Code is intended to be undertaken within the relevant Agency. The APSC says that where an employee is dissatisfied "*with the outcome of an investigation conducted by their agency*" the employee can "*refer the matter to the Public Service Commissioner or the Merit Protection Commissioner.*"²⁰ It is envisaged under the current model that "*Agencies would let the reporting employee know what has been decided in terms of further action in relation to their report*" and that could "*help to address any concern employees might have that action is not taken on complaints within an agency.*"²¹ There appears, however, to be no compulsion in regard to advising the reporting employee. Records of the process and decision taken are also meant to be kept - consistent with the provisions in the *Archives Act 1983*. The PSMPC has said: "*it is important to document any action taken to address complaints. Records enable recurring patterns of behaviour or continuing problems in a particular work area to be identified and corrective action to be taken.*"²²

¹⁹ APSC, Review of employment-related actions in the Australian Public Service, web page, 2005, p.1

²⁰ APSC, APS Values and Code of Conduct in Practice, 2005, p.106. This is prescribed in Part 2 of the *Public Service Regulations 1999*.

²¹ APSC, Handling misconduct: A human resources practitioner's guide, February 2007, Part 2, p. 2.

²² PSMPC, Maintaining a Harassment-Free Workplace, 2001, p 14.

This model presupposes that an Agency will comply with its statutory obligations and APS procedures in dealing with 'whistle blowing' allegations and / or the complainant will be advised of the outcome from a review of the allegations. In my experience that protection was not forthcoming. Hence what becomes important is that once information has been reported by an employee that, prima facie, indicates a possible breach of the Values and Code, it should be acted upon expeditiously within the Agency or otherwise referred by the Agency to a third party for resolution.

The problem is that there does not seem to be sufficient inducement at present in the applicable statutory provisions to ensure that an employee (and particularly a manager) sees it to be in their self interest to act promptly. In this regard the APSC has noted that "*it is often manager's handling of their workplace, as much as formal legislative and organisational systems, that determine whether conscientious staff speak-up*".²³ Hence I consider that when an Agency fails to act within a (statutorily) defined period the complainant should be entitled to make recourse to a further independent inquiry procedure outside of the Agency and that has its review and findings given to the relevant Agency and Government.

It is crucial that any report of an alleged breach that is made, whether oral or written, should be undeniably regarded as a 'whistle blower' report with a requirement on the employee in receipt of the complaint to record the allegation in writing and to provide the complainant with a written summary of the actions taken in response. A complaint made anonymously is problematic as context would need to be given to the nature of the allegations but a record of the complaint should still be made in writing with a summary of action taken, if any, recorded. The disclosure of actions does not need to extend to the detail of any sanctions imposed but should make reference to any impartial investigation and finding therefrom and whether a sanction was imposed on the alleged offender. Failure to comply with the procedure should also be considered a breach of the Values and Code that may be subject to the application of a penalty. By this means it becomes transparent as to whether the management of an Agency is actually living the culture intended under the provisions of the PS Act 1999.

It is also implicit to reporting an alleged breach of the Values and Code that the person who provides the information must conduct himself in a way that upholds the Values and Code. Hence a complaint should not be frivolous or vexatious and must be honest and accurate. This may well require a fulsome explanation by a complainant of the context for why an alleged breach has been reported and /or supporting information to be given that elaborates on the circumstances. This can be most important where it may not be self evident to those given the information as to why a breach has occurred. When I discovered that there was inaction on my initial complaint of discrimination and harassment, I provided further information and context – innocently thinking that would assist in overcoming the apparent inertia. As it transpired, I was naïve in making that assumption since there was not a shared understanding of what constituted unethical behaviour.

Ethical behaviour by the management demands, however, that when a report is made it should not be allowed to languish or later portrayed as being 'informal' or in the nature of 'suggestions' that did not require action to be taken in accordance with APS procedures. Where there is any doubt as to whether a complaint has been lodged, a manager acting ethically would obtain clarification rather than not act at all. Otherwise I believe it is legitimate to consider the management was incompetent or acting unethically. In that regard

²³ APSC, Handling misconduct: A human resources practitioner's guide, 19 February 2007, Part 2, p. 1.

the use of written records substantiating that action has been taken is, in my mind, an imperative to the procedures and their absence should be seen as an administrative failure of the management that is, of itself, considered to be a breach of the Values and Code.

I consider the existing statutory basis for 'whistle blowing' needs to be bolstered with provisions that explicitly require an employee in receipt of information alleging a breach of the Values and Code to be required to act upon that in accordance with prescribed procedures. A failure by an employee to act accordingly should itself explicitly be stated to be a breach of the Values and Code that is subject to sanction.

It should also be made quite explicit in the statutes that any report, oral or written, that advises of a potential breach, or describes behaviour that could reasonably be perceived as a breach of the Values and Code, is deemed to be a 'whistle blowing' report. These suggestions are directed at preventing attempted diversionary tactics being used by unscrupulous managers in an Agency who are endeavouring to deflect criticism for not taking action on a complaint.²⁴

Conflicts of interest can arise in reviews by Agencies and that recommends some reviews should be undertaken by an agency 'at arms length' to the Service. For example, it would be appropriate for a complaint concerning the actions of the Commissioner or Merit Protection Commissioner to be investigated by a third party 'outside'²⁵ of the Agency. The same could be said for Agency Heads and perhaps even Deputy Heads to Agencies – where ethical behaviour is of such fundamental importance to the operations of the Service that their behaviour should be, and be seen to be, beyond reproach. In other words, there is a public expectation that employees who hold high office have an undeniable responsibility to clearly demonstrate integrity in upholding the Values and Code as guardians of the Service standards.

I would consider an appropriate third party (or Agency 'at arms length') to review complaints would be the Commonwealth Ombudsman. Findings from a review by the Commonwealth Ombudsman could be made available to the APSC and the Government for any disciplinary action and other actions that may be required with a summary of outcomes published in the Ombudsman's annual report.

My suggestion here is to transfer the current roles of the APSC and PSMPC to an expanded role for the Commonwealth Ombudsman as part of omnibus legislation covering 'whistle blowing'. Under this model I believe conscientious employees who choose to provide information will have greater confidence that a review will be conducted impartially and that the procedures provide appropriate avenues for accountability to be brought to bear.

Financial Protection

If ethical behaviour is to be encouraged then it is not appropriate that an employee who has acted ethically to suffer detriment for being conscientious. The detriment may be of a financial and /or non financial nature – such as humiliation, defamation, and stress. If there is to be effective protection, a support mechanism is required to provide umbrella protection to 'whistle blowers' from any financial and non financial costs that may arise from having

²⁴ That could arise, for example, from defective administration, incompetence, having a conflict of interest, complicity etc.

²⁵ At arms length to the APS and not remunerated by the relevant Agency.

'blown the whistle'.²⁶

It is unreasonable to require a 'whistle blower' to rely on legal remedy (eg breach of common law or contract, sex or disability discrimination etc) to obtain redress for financial or other detriment that arises from acting ethically. If the scope of statutory protection is not widened to encompass compensation, it is effectively endorsing an approach which says we expect you to 'whistle blow' in order that you uphold the Values and Code but you are on your own if you want compensation for any detriment you suffer as a consequence of fulfilling your public duty. That clearly discourages 'whistle blowing' - since it forces the individual (with limited, if any, financial means) to consider litigation against an adversary (with significant financial means) for detriment arising.

The absence of readily transparent compensation mechanisms remains a serious impediment to 'whistle blowing' in the current structures that, I believe, is well recognised (and sometimes exploited) by officers in the APS. Hence I would argue that financial compensation under an administrative scheme (underpinned by comprehensive legislation) is not only appropriate but also an essential protection that is required.

It is also conceivable that the seriousness of a complaint may be such as to make it untenable for a 'whistle blower' to remain in the Agency when he has reported allegations of misconduct by other employees. In those circumstances compensation for 'whistle blowing' should be addressed in the investigation as an avenue of redress.

Disclosure of Classified Information

If we are to encourage 'whistle blowing' then an employee is entitled to expect that they will have the right to receive protection when reporting a suspected breach of the Values and Code. An additional avenue for reporting directly to Government is needed, however, when information is being provided that may be considered to be highly sensitive - such as a systemic administrative failure in an Agency - or where matters could potentially affect the national interest.

Hence the protection afforded to a complainant should extend to automatic granting of immunity from criminal prosecution for disclosing classified information that is contained in a 'whistle blowing' complaint made to an 'authorised' person. In this context an 'authorised' person would include a Minister or a member of Parliament. The source of the classified information - whether obtained in the course of employment or otherwise - should not be relevant to providing protection in employment and immunity from prosecution.

It remains a very strong disincentive to a conscientious employee to provide information alleging a breach of the Values and Code where a possibility arises that they may face legal sanctions for making a disclosure of confidential information that would be required to support the allegations. The application of sanctions to an employee reporting a breach is counter productive to encouraging transparency in accountability that is implicit to section 10(1) of the *Public Service Act 1999*. That is, a public servant should ultimately be accountable to the relevant Minister and Parliament in regard to performing his /her duties and meeting his / her statutory obligations.

²⁶ Subject to the breadth of a new scheme, it is conceivable for example that a Commonwealth contractor could be disadvantaged in future tenders as retribution for having made a complaint in regard to improprieties in past tenders.

Summary of Views:

Terms of Reference No. 1

I consider all Australian Government sector, and former Australian Government sector, employees should be encompassed within a scheme for protection. It is important to cover former employees because:

- the circumstances for their leaving the government sector may be germane to a disclosure of information or arises from a disclosure of information;
- past employees may have relevant and pertinent information to assist in uncovering administrative and / or other failures that may not otherwise come to light;
- it would help to discourage managers from using tactics that 'force' out a 'whistle blower' (or potential 'whistle blower') to conceal impropriety, administrative failures or unethical behaviour.

Contractors and consultants should also fall within the ambit of protections extended but with a limitation that excludes short term contractors and consultants who have contracts of less than three months (including by duration, renewal or renegotiation). That limitation is suggested for pragmatism.

I cannot foresee much danger from granting protection as widely as possible subject to the caveat that sanctions are available for vexatious or frivolous reporting of information. A public sector that upholds the Values and Code and that adopts administrative practices in support of those Values is unlikely to attract significant criticism and attendant work load for investigating complaints. Otherwise it is deserving of the information to permit a cultural change to be brought about.

Terms of Reference No. 2.

Any type of disclosure that currently falls within the ambit of the Values and Code is worthy of protection. That includes illegal activity, corruption, misconduct, maladministration and breaches of occupational health and safety and environmental laws etc.

I do not think it would be useful to attempt to classify or rank disclosures types in order to attract protections since these are not matters that need to be predetermined. Ethical and lawful conduct is what underpins the proper functioning of the public sector in support of the welfare of Australians and our democratic system of government. Ethical conduct is important since a behaviour that may qualify as 'legal' may patently not be ethical. It is the higher standard to which the benchmark should be set. As a guiding principle, I consider reports of information concerning all forms of unethical or unlawful conduct should be granted protection under a comprehensive 'whistle blowing' model. That model should embrace a review system that adopts administrative law principles and has scope for making findings and recommended sanctions or referral to another agency for appropriate action.

The model presupposes a third party agency operating at arms length to public sector agencies – such as the Commonwealth Ombudsman – to conduct reviews of information at a higher level. Under this model, matters concerning alleged misconduct or grievances within an Agency should initially be open to review internally but with a protection that affords the

complainant access to the Ombudsman where: an administrative failure is perceived to have occurred in the conduct of a review; or the outcome from a review is considered objectionable; or the misconduct concerns an Agency Head or Deputies (by actions that may be considered complicit in or wilful misconduct). Any review – whether within an Agency or by the Ombudsman - should be conducted in accordance with prescribed standards and conditions that will withstand public scrutiny.

Where a matter affects, or could be seen to affect, the national interest a separate avenue should be available to report information directly to a member of Parliament or responsible Minister. In those cases disclosure of any confidential information should be clearly identified and protection of that information granted within the context of a review of the information – either by a review under a Standing Committee or otherwise. In this context the breach of confidentiality would not fall to the person reporting the information but disclosure that arises from the use of that information by the party to whom it has been reported. Inherent confidentiality would be an important principle in this situation – as, for example, the distinctions that might be drawn between private information and classified information that is already in the public domain. The aim here would be not to facilitate vexatious reporting but to protect and encourage legitimate reporting of information.

Frivolous or vexatious reporting of information should be subject to similar sanctions as any breach of the Values and Code and immunity from prosecution denied for more serious cases of such abuse.

Terms of Reference 3.

An important principle in prescribing any ‘whistle blowing’ procedures, is not to discourage or exclude oral and anonymous disclosures of information. In those cases it could be required that the person receiving the complaint is required to materially comply with the applicable procedures for recording the complaint as much as the disclosure sensibly permits.

If it is judged desirable to circumscribe the terms under which a disclosure may be made, I would consider that may best take the form of a qualification such as ‘an honest and reasonable belief that there has been a breach of the Values and Code’. In that context it would be desirable to revise and extend the Values and Code. Such a qualification would, of course, be irrelevant to anonymous or hearsay reporting of information.

It is reasonable to expect that those to whom protection is extended under the application of ‘whistle blowing’ procedures should themselves be bound to the same ethical standards and lawful behaviour. All reports of misconduct should qualify for protection. The only condition applying being that the complainant should be explicitly made aware that in the reporting of information their own conduct is subject to the application of the Values and Code.

In essence this implies that sanctions can and may be applied to a complainant who has been judged (under a properly conducted review) to have knowingly and recklessly made false allegations against another party. In essence that type of behaviour would constitute harassment and should be subjected to the same level of sanction. Any sanction should not, however, apply to a person who is reporting information honestly and accurately and that they believe, or perceive, to be an act or acts that breach the Values and Code.

The reporting of any hearsay (from an identifiable party) should be required to be stated that it is of that kind since it may not only require a different level of evaluation but may also warrant investigation as to whether an administrative failure has arisen. The party recording, or in receipt of, a report of hearsay or anonymous information should similarly receive protection unless it is reasonable to conclude that it was contrived or mischief was intended by the party recording the information (ie preparing a knowingly false report of information).

Terms of Reference 4.

I have suggested above that the 'scope' of statutory protection for parties who report information alleging breaches of the Values and Code needs to cover four pillars. They are:

- (i) protection in employment²⁷;
- (ii) an independent and impartial review process that adopts a standardised set of principles and procedures common to all reviews – undertaken either within or outside of an Agency;
- (iii) financial protection in the event of an administrative failure occurring under (i) and /or (ii) above; and
- (iv) protection from prosecution and immunity from criminal liability, liability for civil penalties or breach of confidence etc. for disclosure of classified information in an authorised manner.

Terms of Reference 5.

In order to apply the four pillars referred to above, I consider it would be useful to have prescribed procedures for attracting protection in disclosures of information. Broad principles that could apply are:

- Internal review by the relevant Agency of a report of information be the first course of action - unless the report is in regard to a systemic failure in the Agency or involves actions by an Agency Head or the Deputies to an Agency.²⁸
- A second, or default, level of review by a third party²⁹ when a complaint has not resulted in action or has given rise to an objectionable outcome or when it is inappropriate for the matter to be reviewed within the Agency concerned (such as a systemic administrative failure or an allegation that may implicate the Agency Head or the Deputies).
- A safety net exists for reviews by a Minister or a member of Parliament in defined circumstances.

I Hardham
September 2008

²⁷ That is protection against victimisation, harassment, discrimination etc.

²⁸ Here conflicts of interest may arise that recommend against an internal review.

²⁹ That is outside of, and independent to, the relevant Agency. I have suggested that this should be the Commonwealth Ombudsman reporting its review and findings to the relevant Agency and the Government.