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IPAA SUBMISSION TO INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE AUSTRALIAN GOVERNMENT PUBLIC SECTOR (BY HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS)

Andrew Podger
National President
Institute of Public Administration Australia

The Committee's secretary, Mark Rodrigues, advised me on 25 September 2008 that the Committee was interested in my perspective as the President of the Institute of Public Administration Australia and former Public Service Commissioner, and invited me to make a submission.

In the time available, I have not been able to prepare a detailed submission, but have reflected on my experience as a senior public servant, taking into account some of the recent research which I understand has been provided to the Committee. I have not sought endorsement of this submission by IPAA's National Council, so the submission is my own. Nonetheless, it is consistent with the National Council's policy of encouraging informed debate on public administration issues of national interest, and promoting improved public services.

GENERAL COMMENTS

Whistleblowing, or public interest disclosure, can be an important means of identifying wrongdoing and maladministration. Agencies should not only avoid having obstacles in the way of disclosure but should foster a culture that encourages whistleblowing.

That said, there can be risks to good administration if the processes involved:

- undermining essential trust, teamwork and healthy bonding or constraining organisational performance;
- facilitating frivolous and vexatious claims; or
- providing unnecessarily costly avenues to pursue self-interested claims such as grievances about employment decisions.

The current legislative arrangements at the Commonwealth level are not adequate, providing protection only for current APS employees (not other public sector employees, or former employees, or contractors and consultants) and lacking clarification of the principles involved or the procedures to apply. Some whistleblower advocates, however, overstate the problems suggesting a widespread climate of fear of reporting wrongdoing within the public service. In my experience as Public Service Commissioner, most concerns seemed to be handled adequately within agencies, the majority that were raised with me or the Merit Protection Commissioner related to employment decisions rather than fraud, corruption or other significant breaches of the APS Code of Conduct, and those that did relate to alleged breaches of the Code not involving employment decisions were investigated with reasonable cooperation from the agency concerned.

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It is possible of course, that the small number of complaints registered with the two Commissioners to some extent reflected unease or lack of knowledge of the processes available, but the dominance of employment decision complaints may also have suggested that most substantial concerns were dealt with adequately within agencies.

For these reasons, I was cautious as Commissioner in response to proposals for a significant widening of the current provisions, for example, to increase the rights of staff to take their allegations directly to the public. I did, however, endorse the need to widen protection to non-APS employees and others working within the public sector more broadly defined, and to former employees.

Subsequent work, including through the Griffith University research project supported by a number of Commonwealth agencies, has provided better evidence of current practice and the views of APS employees, and identified a possible more comprehensive approach building on lessons across Australian and overseas jurisdictions. I am attracted to many of the ideas involved.

In considering these proposals, however, I would still suggest careful consideration be given to achieve an appropriate balance, recognising the public interest in a relationship of trust within public service agencies and between the public service and ministers, as well as in honest and competent management of public resources. This suggests that internal agency arrangements should generally be given priority, and that capacity to use whistleblower processes for personal self-interest should be limited.

Equally, of course, there is a heavy onus on agencies to foster a culture of openness and staff consultation, and to have clear and widely understood processes for considering properly all reasonably held concerns of wrongdoing and maladministration. With the right culture, most concerns can be handled through reports by staff to their managers. Well managed organisations also ensure there are avenues outside the normal chain of command to review decisions, whether relating to employment (and 'fair treatment' of individual employees) or departmental administration (such as procurement being demonstrably based on value for money) or program management (including being procedurally fair in dealing with clients and citizens). These avenues should also be valued by line management because they provide vital feedback and lessons for ongoing management improvement.

Even well managed organisations, however, have occasional lapses, and access to external review is an important extra protection. The challenge is to avoid unnecessary and expensive layers of review, or to provide opportunities for trivial or vexatious claims.

The protection of legitimate complainants is also essential, and relevant to both well-managed agencies and poorly managed ones, as exaggerated notions of loyalty and teamwork can sometimes contribute to maladministration, and to rejection of different views even where reasonably held.

With these important balances and trade-offs in mind, I have set out below my response to each of the committee's terms of reference, with particular regard to the suggestions in the recent ANZSOG monograph, "Whistleblowing in the Australian Public Sector" edited by AJ Brown of Griffith University.

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RESPONSE TO SPECIFIC TERMS OF REFERENCE

1. Categories of people who could make protected disclosures

I support the protection of the groups identified by the Committee including former as well as current employees, and those not employed under the *Public Service Act 1999* as well as APS employees, and contractors and consultants currently or formerly engaged by the Australian Government, and people currently or formerly engaged under the *Members of Parliament (Staff) Act 1984*.

An argument could be made to exempt employees, contractors and consultants of those agencies that are genuinely commercial as protection could impose a cost not faced by their competitors. On balance, I would be inclined to include them given that the assets involved are funded by taxpayers. Their inclusion, however, would add to the case for limiting the disclosures to be protected to avoid creating new avenues for appealing employment decisions which their competitors do not have to deal with.

My inclination would be to retain the provisions in the *Public Service Act 1999* for current employees, which relate to disclosures of breaches of the APS Code of Conduct (which has a broad list of unacceptable behaviour by public servants), perhaps widening the provisions to cover former employees. I would suggest complementing these with new legislation for the wider range of current and former employees, contractors and consultants, for whom relevant disclosures may not relate specifically to breaches of the APS Code of Conduct.

The current provisions under the PS Act do apply to current APS employees outside Australia. I suspect there would be practical problems in protecting people overseas who are not currently employed by the Australian Government.

2. Types of disclosure that should be protected

I agree that all the types of allegations listed in paragraph 2(a) should be protected disclosures, but with some indication of the seriousness of the wrongdoing that is alleged (see next section).

While I am concerned not to encourage self-interest claims, I firmly believe that the motives of the person making the disclosure should not be taken into account in the legislative provisions. Not only would this be unmanageable but it could also be counterproductive: some wrongdoing may significantly impact both public interest, and the interests of the person making the disclosure. The conditions that should apply (see next section) should limit opportunities for allegations that are frivolous or purely self-serving or aimed only at Government policies or to embarrass the Government, to be protected.

There will need to be guidance issued by the organisation(s) given authority to administer the proposed provisions. These should clarify the focus on serious wrongdoing or maladministration, and that matters of government policy are not encompassed by the provisions.

Internal staffing matters should generally be addressed outside of these 'whistleblower' processes. Those employed under the PS Act already have legislated arrangements under Part 5 of the Act. Over the last decade or so, there has been considerable success in streamlining the processes for the review of employment decisions involving much more emphasis on internal agency arrangements and reducing the load on external review by the Merit Protection Commissioner or Public Service Commissioner. This has

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sped up decision-making and reduced the costs while maintaining the merit principle. It is important that the 'whistleblowing' process not undermine this success.

That said, it is true that some allegations of wrongdoing may involve both employment decisions and broader public interest concerns. At least one case I investigated when Public Service Commissioner had both elements involved, and I found aspects of the allegations did reveal poor administration by the relevant agency. Accordingly, I do not think it is possible to exclude employment-related disclosures from protection, but the processes could effectively limit the number of such disclosures being made outside the agency concerned.

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

As mentioned, I do consider some form of threshold of seriousness should be required. Legal advice will need to be sought on this, but I would suggest the use of a term like 'significant wrongdoing or inaction that is contrary to the public interest', as suggested in the recent 'Whistleblowing' monograph (Chapter 13, by AJ Brown, Paul Latimer, John MacMillan and Chris Wheeler).

I also believe the whistleblower must have an honest and reasonable belief that his or her allegation is correct.

I doubt the need for penalties or sanctions in the whistleblower legislation where the whistleblower does not comply with procedures or makes false allegations. Such provisions do not exist in other administrative law such as the *Ombudsman Act 1977*. The APS Code of Conduct could be used to discipline a current APS employee who does not obey a reasonable and lawful direction or does not uphold the APS Values and I assume there would be civil law penalties available where any other whistleblower does not meet the requirement of having an honest and reasonable belief that the allegation is correct, and has acted recklessly or with malice.

Whatever provisions are included in the legislation, the processes need to be applied in practice with some commonsense and appreciation of the wider political context. On the one hand, senior public service managers can be overly sensitive to accusations they consider to reflect disloyalty or likely to cause embarrassment to their political masters. On the other hand, the media and the political system can give undue credibility to public servants who are indeed disloyal and who pursue allegations outside accepted procedures for their own personal motives, and it is not usually easy in practice to take action against such people who are publicly portrayed as heroes challenging powerful bureaucratic interests. In my time as Commissioner, I was aware of at least one case that might have been justifiably considered 'vexatious', but it was simply not worthwhile pursuing possible disciplinary action notwithstanding the extensive management problems caused by the continued 'whistleblowing'.

4. The scope of statutory protection that should be available

So long as the disclosures are of an appropriate type (section 2 above), and the appropriate conditions are met (section 3 above), protection should be given in all the areas identified in the terms of reference.

5. Procedures in relation to protected disclosures

As a general rule, disclosures should first be made to or within the agency where the wrongdoing occurs, if possible directly to a supervisor. Agencies should all have arrangements which also allow for

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whistleblowing outside the normal line of command, so an individual disclosing wrongdoing that has occurred within the line of command has the opportunity to avoid directly confronting the alleged wrong-doer(s) and finding someone with expertise and experience in investigating wrongdoing. This general rule of internal disclosure first does not need to be made a legal requirement, however. A better approach is to provide guidance about where to make disclosures, and to allow a range of options for initial disclosure; referrals can then be used to direct the disclosure to the organisation or unit most suited to investigate.

The Australian Public Service Commissioner (and both the Public Service Commissioner and Merit Protection Commissioner) would probably be in the best position to investigate most disclosures by current APS employees warranting external review and, as suggested earlier, I would retain and perhaps extend the PS Act provisions for this.

The Commission is certainly best placed (outside the agency concerned) to clarify whether a disclosure is essentially employment-related rather than a public interest disclosure, and to ensure appropriate consideration of the complaint.

There is a case for an even more independent body, such as the Ombudsman, having overall responsibility for reporting on whistleblowing and the main role of investigating disclosures concerning agencies outside the scope of the *PS Act*. There is also a strong case for specialist agencies to investigate disclosures which require particular expertise (e.g. environmental damage or risks to public health or safety).

The main obligations on agencies should be to have widely known procedures to facilitate public interest disclosures and to protect the people making disclosures. Some assurance about these obligations could come from an associated obligation to report publicly the number of disclosures along with the type and assessment/action taken for each. The latter may present some challenges regarding disclosures made to supervisors and handled through normal day-to-day management processes, but the benefits of reporting disclosures essentially arise where the disclosures are other than to supervisors, as this places a clear discipline on the agency to properly investigate and take appropriate action.

I do see the need for one integrity agency to have coordinating responsibility, particularly for overall reporting of disclosures made within agencies and to external integrity agencies. I am inclined to that being the Ombudsman but could see the APS Commission playing this role. If the Ombudsman were given the coordination role, I would still expect the majority of whistleblowing cases by current and former APS employees that are referred beyond the agency concerned to be examined by the Public Service Commissioner or Merit Protection Commissioner under the PS Act provisions (appropriately broadened). The APS Commission is certainly in the best position to offer guidance and training to APS agencies on the management of public interest disclosures by current and former staff (and by consultants and contractors), and to advise on the relationship between these and appeals and grievance complaints about employment decisions.

I appreciate that the credibility of the scheme relies upon the confidence of individuals that their disclosures will be properly examined and their own positions protected. That requires independent oversight. Both the Ombudsman and the Public Service Commissioner (and Merit Protection Commissioner) have the necessary independence. The Ombudsman perhaps has slightly greater independence, but the Commissioner has the other advantage of closer understanding of public service management.

The appropriateness of disclosure to a third party is highly questionable given the sorts of procedures likely to emerge from the Committee's deliberations. Such disclosure, essentially to the media, is likely to be

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prohibited by Regulation 2.1 of the PS Act for APS employees. It is hard to see the case for protection of individuals who have not exhausted other available means of disclosure, nor to see that investigation by one or more integrity organisations is insufficient and warrants disclosure to the media. Nonetheless, a provision allowing protection in such unlikely circumstances could be included.

This raises some thorny issues that require good judgment and a dose of commonsense. Agency heads need to exercise judgement in considering action against individuals who do disclose wrongdoing or maladministration to the media without fully exhausting other approaches. They may have an exaggerated concern about inaction or slowness to act, and have acted unwisely. But to treat all such disclosures as "leaks" and major breaches of trust and loyalty may be equally unwise. The desired culture of openness, efficiency and ethical behaviour may be fostered more successfully by addressing the wrongdoing revealed by such disclosures, and encouraging future disclosures to be through normal processes, than by strong disciplinary action against the person doing the disclosing inappropriately to engender fear amongst others of doing the same (or something they think would be treated equally harshly).

For these reasons, while strongly denouncing "leaks" because they undermine trust within agencies and between ministers and public servants, and because they can reflect an arrogance amongst some public servants that they know better than elected ministers policies that are in the public interest, I was always reluctant to initiate police inquiries into leaks. I preferred to use internal processes to investigate, and to look to foster greater loyalty in more positive ways such as through improving the quality and professionalism of our policy advice and program management.

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

The only existing provision is in the *Public Service Act 1999*. I suspect the best approach for the future would be both to widen that provision somewhat, and to separately introduce a new law for a broad-based scheme not tied to disclosures of breaches of the APS Code of Conduct. The two would need to be consistent, and complementary, but I believe one does not need to displace the other.