

Finance and Public Administration Legislative Committee

ANSWERS TO QUESTIONS ON NOTICE

Prime Minister and Cabinet Portfolio

Australian Public Service Commission

Estimates 2004-05 – Additional Estimates, February 2005

Question: PM 31

Topic: Whistleblowing

Senator Andrew Murray asked:

1. Does the PSC require independent medical advice to be provided or made available in instances of Commonwealth employees who are whistleblowers?

Answer:

No.

2. If so, is there an official list of the names of government or government-approved medical agencies, medical personnel and psychiatrists to be used?

Answer:

Not applicable.

3. Is the PSC advised or does it monitor complaints of maladministration received at the following agencies?

- Merits Review Protection Agency;
- Commonwealth Ombudsman;
- Administrative Appeals Tribunal;
- Public Service Commissioner;
- Any other.

Answers:

Under the *Public Service Act 1999* (PS Act) and Regulations, Australian Public Service employees are able to report breaches (or alleged breaches) of the APS Code of Conduct, which could cover ‘maladministration’, to persons authorised to receive them under section 16 of the Act (Protection for whistleblowers). An authorised person is:

- an Agency Head or a person authorised by them for the purposes of s.16; or

- the Public Service Commissioner or a person authorised by them for the purposes of s.16; or
- the Merit Protection Commissioner or a person authorised by them for the purposes of s.16

There are two circumstances in which a report can be made to the Public Service Commissioner or the Merit Protection Commissioner:

- an employee may make a report directly to either the Public Service Commissioner or the Merit Protection Commissioner where either Commissioner agrees that the report relates to an issue that would be inappropriate to report to the Agency Head; and
- an employee may refer a report to either Commissioner (or both) where the employee is not satisfied with the outcome of the Agency Head's investigation of the report.

The capacity of both Commissioners to inquire into alleged breaches of the Code of Conduct made in whistleblowing reports is limited by the legislation to considering reports made by APS employees about the conduct of APS employees. Reports from members of the public, or former employees, are in most circumstances directed to the relevant Agency Head or other appropriate review bodies such as the Commonwealth Ombudsman. The only exception to this is where the allegation relates to the conduct of an Agency Head. In these circumstances the Public Service Commissioner has specific inquiry powers under the PS Act to inquire into such allegations.

When the Commissioners inquire into the allegations made in whistleblowers' reports, their task is to determine whether a recommendation should be made to the Agency Head to commence action under the Agency Head's procedures for determining breaches of the Code of Conduct. The Commissioners do not have the power to reach any determination about whether the alleged misconduct has actually occurred. Any such determination must only be made under procedures established under subsection 15(3) of the Act by an Agency Head. An Agency Head, as provided by subsection 15(1) may impose a sanction, where the employee or employees have been found to have breached the Code of Conduct. The Commissioners do not have the power to impose a sanction.

The Australian Public Service Commission maintains records of reports of alleged breaches of the Code of Conduct received by the Public Service Commissioner, and records of reports received by the Merit Protection Commissioner (which is a statutory office created with the passage of the *Public Service Act 1999*, which superseded the Merit Protection and Review Agency).

The whistleblowing scheme in the APS is based on the expectation that in most cases reports will be dealt with by the relevant agency. The Commission does not monitor those reports, but collects statistical information from agencies, which is reported in the annual State of the Service Report.

The Commission does not receive or monitor complaints of maladministration received by other organisations.

4. If the PSC is advised of, or does monitor, these matters:
 - a) What percentage or number of those complaints constituting complaints under section 16 – protection of whistleblowers of the Public Service Act 1999?
 - b) How many whistleblower cases have there been and how many cases have been resolved in favour of the whistleblower?
 - c) At what level within the organisations are the complaints being made?
 - d) Have there been any successful complaints made against agency heads and/or senior Commonwealth employees?

Answer:

As noted in answer to the previous question, the Commission maintains records only of reports of alleged breaches of the Code of Conduct received by the Public Service Commissioner, and records of reports received by the Merit Protection Commissioner. The following information is provided in respect of those reports.

- a) Since the commencement of the *Public Service Act 1999* the Public Service Commissioner has received 52 reports alleging breaches of the APS Code of Conduct. Of these, 7 reports, or 13%, met the criteria for investigation as set out in the Public Service Regulations. During the same period the Merit Protection Commissioner received 15 reports alleging breaches of the APS

Code of Conduct. Of these, 3 reports, or 20%, met the criteria for investigation.

- b) As per (a), 7 reports have been investigated by the Public Service Commissioner and 3 by the Merit Protection Commissioner. In all 10 cases it was concluded that there was insufficient evidence to recommend to the relevant Agency Head that they commence an investigation under the agency's misconduct procedures, or for the Public Service Commissioner to exercise his or her powers under s. 41(1)(f) of the PS Act to inquire into reports of alleged breaches of the Code by Agency Heads.
- c) The Commission does not record the level of employees who make reports.
- d) None of the reports made have been substantiated.

5. Has there been any public or private survey or study done by the Public Service Commission on the efficacy of Commonwealth whistleblower legislation?

Answer:

There has been no study or survey done by the Commission specifically on the efficacy of the whistleblowing provisions in the PS Act and Regulations. During 2004 the Commission undertook an evaluation of how six agencies manage suspected breaches of the Code of Conduct. While the evaluation focused on agencies' management of misconduct and not on the management of the APS whistleblowing scheme, it did examine the methods agencies use to facilitate and encourage the reporting of misconduct, including agency whistleblowing procedures. The findings of the evaluation were reported in the 2003–04 State of the Service Report (Chapter 6; Personal Behaviour).

6. What is the advice provided to staff of Commonwealth agencies who are or may be complaining about lack of Whistleblower protection?

Answer:

Advice is tailored to the particular circumstances of the person making the complaint as well as the nature of the complaint. Depending on the circumstances, APS employees may be directed to the relevant legislative provisions, including the review

of action provisions, and their agency's policies and procedures on reporting misconduct, including workplace harassment.

7. Has any consideration been given to applying immediate protection to a whistleblower against on-the-job harassment before the matter is investigated or during the process of investigation?

Answer:

The obligation to protect an APS employee who reports a breach or alleged breach of the Code of Conduct to an authorised person is activated when the report is made.

8. Is there any monitoring of whistleblowers after the matter is resolved to ensure that there is no ongoing harassment taking place?

Answer:

For reports made to the Public Service Commissioner or the Merit Protection Commissioner, if the matter is resolved, there is no further action.

The arrangements for protecting APS employees who make reports to Agency Heads or persons authorised by them are a matter for Agency Heads.

In either case, it is open to an employee who has made a report to make a complaint of victimisation and harassment as a result of having made the report.

9. How many Commonwealth whistleblowers have left their place of work within two years of blowing the whistle?

Answer:

In respect of the 10 allegations of misconduct that were accepted by the Public Service Commissioner or the Merit Protection Commissioner as valid whistleblower reports, four of the employees who lodged the reports have left their place of work within two years of making the report. Of those, two lodged their reports just prior to ceasing employment.

The Commission has no information about whether there is any correlation between the former employees reporting misconduct and subsequently leaving their places of work. Moreover, it is not possible to make a comparison with the rate of separations

in the general APS population, as the size of this group is too small to enable any statistical conclusions to be drawn from the data.

10.
 - a) How many have ended up having COMCARE cases?
 - b) What has the cost been?
 - c) How many still remain in treatment after two years?

Answer:

This information is not recorded by the Commission.