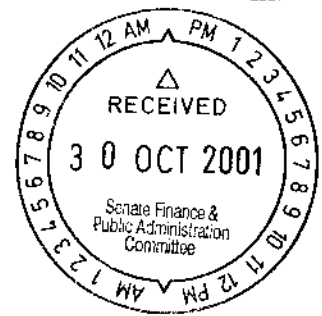




PUBLIC SERVICE & MERIT PROTECTION COMMISSION



Ms Helen Donaldson
Secretary
Finance and Public Administration Legislation Committee
Parliament House
Canberra ACT 2600

Dear Ms Donaldson

PUBLIC INTEREST DISCLOSURE BILL 2001

We refer to your letters dated 7 September 2001, inviting written submissions in relation to the above private member's bill.

Committee members may be aware that in the Australian Public Service (APS) there are arrangements in place for the facilitation of public interest disclosures and for the protection from victimisation and discrimination of those who make disclosures.

While experience to date has been limited, a number of practical issues relating to the management of the scheme have come to light since its introduction. We are currently conferring with a view to providing a joint submission to the inquiry with comments on those issues in the context of the provisions of the Public Interest Disclosure Bill 2001.

In the meantime, the following is an outline of the arrangements that currently exist in the APS. Copies of the relevant sections of the *Public Service Act 1999* and the *Public Service Regulations 1999* are at Attachment A.

Outline of the current arrangements

There are three main features of the current arrangements:

(a) Protection

Legislative protection for whistleblowers in the APS was first introduced by an amendment to the Public Service Regulations in 1998. In December 1999 the relevant regulations were superseded by the introduction of the *Public Service Act 1999* (the PS Act). Section 16 of the Act provides for protection for whistleblowers in the APS. The PS Act prohibits persons performing functions in or for an Agency from victimising or discriminating against APS employees who report breaches of the APS Code of Conduct to a person authorised to receive such a report. The wording 'in or for' in the preceding sentence means that, in addition to APS employees, persons contracted to perform work for an APS agency are subject to the same prohibition.

(b) Inquiry



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Centenary of Federation

The protection provision contained in the PS Act is supported by Division 2.2 of the *Public Service Regulations 1999* (the Regulations), which requires Agency Heads to establish procedures for inquiring into whistleblower reports and sets out the minimum requirements for such procedures.

An APS employee who believes that a breach of the APS Code of Conduct has occurred in their Agency is able to report the suspected breach to their Agency Head, or to a person authorised by the Agency Head, for inquiry. The Agency Head is obliged to arrange for the report to be investigated, unless they consider it to be frivolous or vexatious. If an employee observes behaviour in breach of the Code in another Agency, it may be reported to the Head of the Agency where the behaviour occurred, who will arrange for the matter to be inquired into.

In circumstances where it would be inappropriate for an employee to make a disclosure to an Agency Head, e.g., if the Agency Head, or an employee with whom they had a close working relationship, were implicated in the reported breach of the Code, reports may be made directly to the Public Service Commissioner or the Merit Protection Commissioner, or to persons authorised by them. As with a report to an Agency Head, if a Commissioner receives a report, they must arrange for it to be inquired into unless they consider the report to be frivolous or vexatious.

Sections 41 and 50 and of the PS Act provide the heads of power for the Commissioners to inquire into whistleblowing reports and Division 2.2 of the Regulations deals with their roles in conducting inquiries.

(c) Review

If an APS employee is not satisfied with the outcome of an inquiry conducted by their Agency Head, they may refer the matter to the Public Service Commissioner or the Merit Protection Commissioner or to persons authorised by them.

Yours sincerely



Helen Williams

Public Service Commissioner

24 October 2001



Alan Doolan

Merit Protection Commissioner

24 October 2001

**LEGISLATION
WHISTLEBLOWING AND MISCONDUCT**

PUBLIC SERVICE ACT 1999

SECT 16

Protection for whistleblowers

A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:

- (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or
- (b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.
- (c) an Agency Head or a person authorised for the purposes of this section by an Agency Head.

SECT 15

Breaches of the Code of Conduct

- (1) An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under subsection (3)) to have breached the Code of Conduct:
 - (a) termination of employment;
 - (b) reduction in classification;
 - (c) re-assignment of duties;
 - (d) reduction in salary;
 - (e) deductions from salary, by way of fine;
 - (f) a reprimand.
- (2) The regulations may prescribe limitations on the power of an Agency Head to impose sanctions under subsection (1).
- (3) An Agency Head must establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct. The procedures:
 - (a) must comply with basic procedural requirements set out in Commissioner's Directions; and

- (b) must have due regard to procedural fairness; and
- (c) may be different for different categories of APS employees.
- (4) The Commissioner must issue directions in writing for the purposes of subsection (3).
- (5) An Agency Head must take reasonable steps to ensure that every APS employee in the Agency has ready access to the documents that set out the procedures referred to in subsection (3).

SECT 41

Commissioner's functions

- (1) The Commissioner's functions include the following functions:
 - (a) to evaluate the extent to which Agencies incorporate and uphold the APS Values;
 - (b) to evaluate the adequacy of systems and procedures in Agencies for ensuring compliance with the Code of Conduct;
 - (c) to inquire into reports made to the Commissioner (or to a person authorised by the Commissioner) as mentioned in section 16;
 - (d) to consider and report to the Public Service Minister on any matter relating to the APS (including such a matter referred to the Commissioner by the Public Service Minister);
 - (e) to promote the APS Values and the Code of Conduct;
 - (f) to inquire into alleged breaches of the Code of Conduct by Agency Heads and to report to the appropriate authority on the results of such enquiries (including, where relevant, recommendations for sanctions);
 - (g) to develop, promote, review and evaluate APS employment policies and practices;
 - (h) to facilitate continuous improvement in people management throughout the APS;
 - (i) to co-ordinate and support APS-wide training and career development opportunities in the APS;

- (j) to contribute to, and foster, leadership in the APS;
- (k) to provide advice and assistance on public service matters to Agencies on request;
- (l) any function prescribed by the regulations.
- (2) A report by the Commissioner under subsection (1) may include recommendations.
- (3) For the purposes of paragraph (1)(f), the *appropriate authority* for a report about an Agency Head is:
 - (a) the Prime Minister, if the Agency Head is a Secretary; or
 - (b) the Agency Minister, if the Agency Head is the Head of an Executive Agency; or
 - (c) the Presiding Officers, if the Agency Head is the Head of a Statutory Agency that is prescribed by the regulations for the purposes of this paragraph; or
 - (d) the Agency Minister, if the Agency Head is the Head of a Statutory Agency that is not prescribed by the regulations for the purposes of paragraph (c).

SECT 50

Merit Protection Commissioner's functions

- (1) The Merit Protection Commissioner's functions include the following functions:
 - (a) to inquire into reports made to the Merit Protection Commissioner (or to a person authorised by the Merit Protection Commissioner) as mentioned in section 16;
 - (b) to inquire into alleged breaches of the Code of Conduct by the Commissioner and report to the Presiding Officers on the results of such enquiries (including, where relevant, recommendations for sanctions);
 - (c) to inquire into an APS action, at the request of the Public Service Minister, and to report to the Public Service Minister on the results of the inquiry;
 - (d) such functions as are prescribed by regulations made for the purposes of section 33;
 - (e) such other functions as are prescribed by the regulations.
- (2)

The following provisions apply in relation to an inquiry under paragraph (1)(c) (with references to the Auditor-General being replaced by references to the Merit Protection Commissioner):

- (a) sections 32, 33 and 35 of the *Auditor-General Act 1997*;
- (b) any other provisions of the *Auditor-General Act 1997*, or of regulations under that Act, that are relevant to the operation of section 32, 33 or 35 of that Act.
- (3) The regulations may authorise the Merit Protection Commissioner to charge fees (on behalf of the Commonwealth) for the performance of functions prescribed under paragraph (1)(e).

(4)

In this section:

action includes a refusal or failure to act.

APS action means an action in relation to the employment of an APS employee, being an action by another APS employee or by an Agency Head.

PUBLIC SERVICE REGULATIONS 1999

REG 2.4 Procedures for dealing with whistleblowers reports (Act s 16)

(1)

An Agency Head must establish procedures for dealing with a report made by an APS employee under section 16 of the Act.

Note Section 16 deals with reports of breaches (or alleged breaches) of the Code of Conduct.

(2)

The procedures must:

(a)

have due regard to procedural fairness and comply with the *Privacy Act 1988*; and

(b)

provide that an APS employee in the Agency may report breaches (or alleged breaches) of the Code of Conduct to the Agency Head, or a person authorised by the Agency Head; and

(c)

provide that if the Commissioner or the Merit Protection Commissioner agrees that a report relates to an issue that would be inappropriate to report to the Agency Head, the APS employee may make the report to:

(i)

the Commissioner, or a person authorised by the Commissioner; or

(ii)

the Merit Protection Commissioner, or a person authorised by the Merit Protection Commissioner; and

(d)

ensure that if a report is made to the Agency Head, the Agency Head will, unless he or she considers the report to be frivolous or vexatious:

(i)

investigate it; or

(ii)

authorise another person to investigate it; and

(e)

ensure that if a report is made to a person authorised by the Agency Head, the person will investigate the report, unless the person considers it to be frivolous or vexatious; and

(f)

provide information about the protection available under section 16 of the Act to persons making reports; and

(g)

enable an APS employee who has made a report, and who is not satisfied with the outcome of the investigation of the report, to refer the report to:

(i)

the Commissioner, or a person authorised by the Commissioner; or

(ii)

the Merit Protection Commissioner, or a person authorised by the Merit Protection Commissioner; and

- (h) ensure that the findings of an investigation are dealt with as soon as practicable.

REG 2.5 Commissioner's functions relating to whistleblowers reports (Act s 41)

- (1) For the purposes of paragraphs 41 (1) (c) and (l) of the Act, if:
 - (a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and
 - (b) a report is made, in accordance with the procedures, to the Commissioner; the Commissioner's functions include the functions set out in subregulation (2).

Note Section 16 of the Act deals with reports of breaches (or alleged breaches) of the Code of Conduct.

- (2) The Commissioner must, unless he or she considers the report to be frivolous or vexatious:
 - (a) investigate it; or
 - (b) authorise another person to investigate it.

REG 2.6 Merit Protection Commissioner's functions relating to whistleblowers reports (Act s 50)

- (1) For the purposes of paragraphs 50 (1) (a) and (e) of the Act, if:
 - (a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and
 - (b) a report is made, in accordance with the procedures, to the Merit Protection Commissioner; the Merit Protection Commissioner's functions include the functions set out in subregulation (2).

Note Section 16 of the Act deals with reports of breaches (or alleged breaches) of the Code of Conduct.

- (2) The Merit Protection Commissioner must, unless he or she considers the report to be frivolous or vexatious:
 - (a) investigate it; or
 - (b) authorise another person to investigate it.

REG 2.7 Other functions relating to whistleblowers reports

- (1) Subregulation (2) applies if:
- (a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and
- (b) a report is made, in accordance with the procedures, to a person authorised by the Commissioner or the Merit Protection Commissioner.

Note See para 2.4 (2) (c).

- (2) The person must investigate the report, unless the person considers it to be frivolous or vexatious.

- (3) Subregulation (4) applies if:

- (a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and
- (b) a report is made, in accordance with the procedures, to the Commissioner or the Merit Protection Commissioner; and
- (c) the Commissioner or the Merit Protection Commissioner authorises a person to investigate the report.

Note See para 2.5 (2) (b) and 2.6 (2) (b).

- (4) The person must investigate the report.