



COMMONWEALTH OF AUSTRALIA

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Commonwealth Department of
Health and
Aged Care

-2 NOV 2001

Senator Brett Mason
Chairman
Finance and Public Administration
Legislation Committee



Dear Senator Mason

Thank you for your letter of 6 September 2001 to the Minister for Health and Aged Care, the Hon Dr Michael Wooldridge, seeking written submissions on the private member's bill, *Public Interest Disclosure Bill, 2001*. Due to the announcement of the Federal election and the establishment of a Caretaker Government, I am responding on the Minister's behalf.

The Public Service Act 1999 (section 16) continues the protection of Australian Public Service employees who report breaches of the code of conduct (Public Interest Whistleblowing), previously articulated in the *Public Service Act 1922, Regulations*.

Further to the *Public Service Act 1999*, the Regulations and Commissioner's Directions require the establishment of Agency level procedures for dealing with reports (Regulations 2.4 to 2.7). Such procedures must:

- provide for the reporting of breaches to the Agency Head or the Public Service Commissioner or Merit Protection Commissioner in certain circumstances;
- ensure that if a report is made to the Agency Head, Public Service Commissioner or Merit Protection Commissioner that report will be investigated unless it is considered to be frivolous or vexatious;
- provide information about the protections available under section 16 of the Public Service Act 1999;
- enable the whistleblower to seek review of the investigation of the report where they are dissatisfied with the outcome; and
- ensure that the findings of an investigation are dealt with as soon as possible.

In response to the issues to be determined by the Committee, the Department of Health and Aged Care offers the following.

Does the Bill in its current form provide:



1. *Credibility, that is, would instil confidence in those who need to use it that their disclosures will receive proper consideration and investigation;*

The Department of Health and Aged Care has a policy in place that clearly articulates the above requirements in addition to outlining the support mechanisms available to an employee considering or making a report. The Departmental policy is provided at Attachment A.

On this basis, the Department of Health and Aged Care is satisfied that the necessary provisions are in place via the *Public Service Act 1999*, to ensure that employees are confident that in the event that they may need to use these procedures their report will receive proper consideration and investigation.

2. *Procedures that facilitate the correction of identified cases of maladministration and/or misconduct;*

The intent of the provisions in the *Public Service Act 1999*, Regulations and Commissioner's Directions is to ensure the necessary processes are in place to provide employees with confidence that should they choose to identify a breach of the code of conduct, action will be taken to correct the maladministration and/or misconduct. The confidence of some staff may be increased by the proposed Bill because it would:

- establish the offence of taking unlawful reprisals against a whistleblower; and
- provide for the relocation of the whistleblower where they are in danger of suffering unlawful reprisals.

3. *Appropriate public accountability reporting of processes commenced under the proposed legislation;*

The whistleblowing procedures, irrespective of the legislative base, should not operate in isolation but rather work in partnership with initiatives and policies on ethical awareness, misconduct, conflict of interest and fraud minimisation. The Department of Health and Aged Care has developed a comprehensive strategy aimed at minimising risks of misconduct and maladministration through the completion of an extensive fraud risk assessment; awareness programs on workplace ethics, risk management and fraud awareness; maintenance of a fraud investigation unit; and comprehensive policy statements on management of alleged misconduct (Attachment B) and conflict of interest (Attachment C).

The Department of Health and Aged Care does acknowledge that public accountability and confidence could be raised by the requirement to report on whistleblowing reports and investigations in the Departmental Annual Report. It should be noted that the Departmental Annual Report currently shows the number of fraud allegations investigated.

Whilst the Department of Health and Aged Care recognises the intent of the Bill in providing mechanisms aimed at increasing 'confidence in the system' and thereby provide reassurance to whistleblowers, the introduction of a separate piece of legislation, that will need to be read in conjunction with the *Public Service Act 1999* and its associated Regulations and Commissioner's Directions, is not supported.

Should there be general agreement on the need to better define the penalties for reprisals and further protections for whistleblowers, it would seem more appropriate to make these changes through variations to the Public Service Act and Regulations.

Yours sincerely



Shaun McCarthy
A/g Assistant Secretary
Staff Support and Development Branch

22 October 2001

Ministerial Number M01010809

Action Officer Ainslie Langshaw
(02) 6289 5866

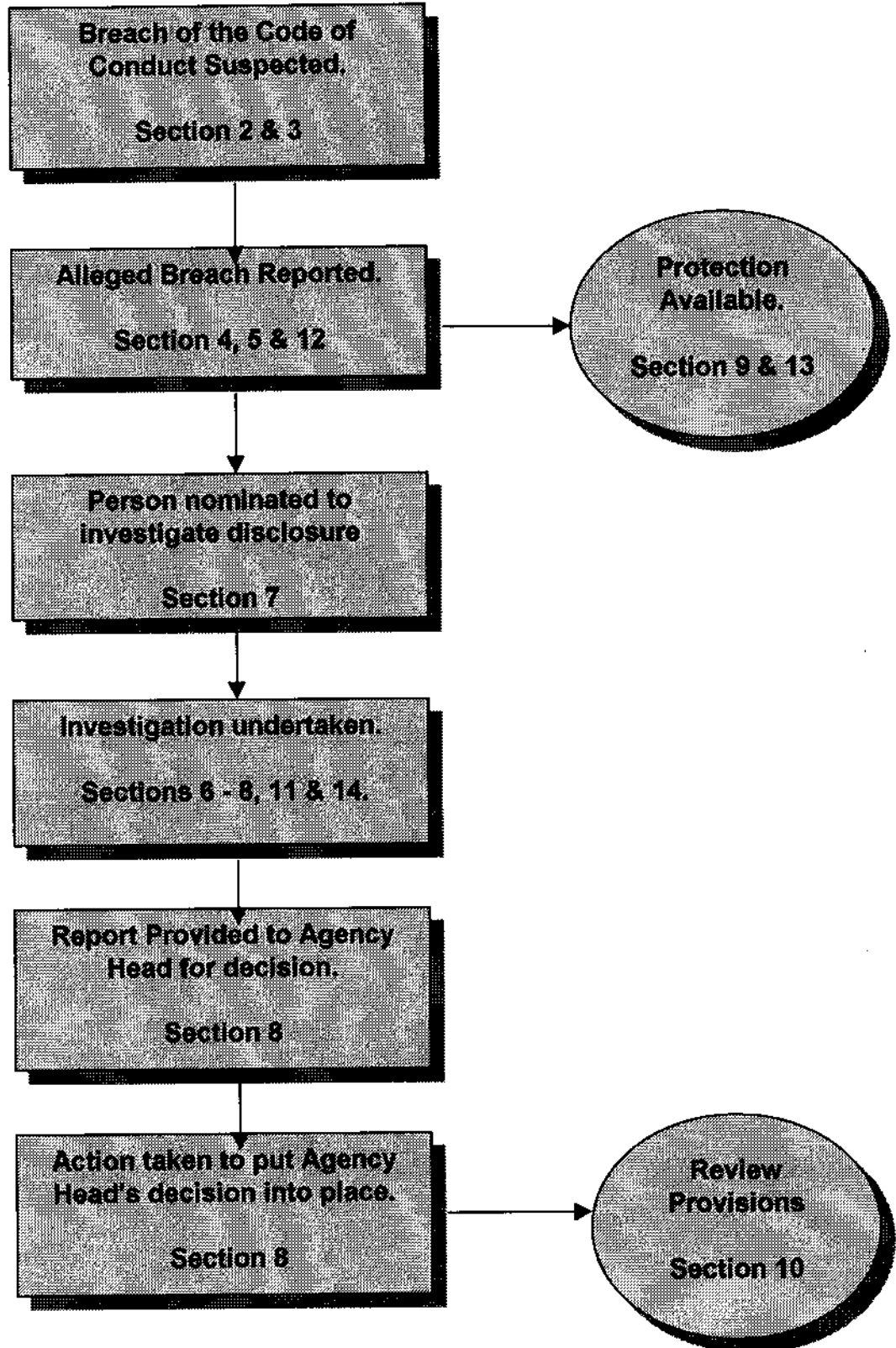
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Division/Branch CSD/SSDB

Outcome: <insert here>

WHISTLEBLOWING PROCEDURES

Process Overview - Key Stages



1. Introduction

Requirement to Establish Procedures	<p>Agency Heads are required to establish procedures to ensure that APS staff and contractors may report instances of breaches (or alleged breaches) of the APS Code of Conduct.</p> <p>The Australian community has a right to be satisfied that practices and actions by Commonwealth staff represent the best value for taxpayers and are of the highest standards. The <i>APS Code of Conduct</i> (Attachment A) sets out the appropriate standards and actions expected of staff at all levels and requires that staff uphold the <i>APS Values</i> (Attachment B).</p>
Encouraged to Report	<p>Under these procedures, staff and contractors are not only able to report breaches but are encouraged to address them in the workplace as an important means of promoting Public Service Values.</p>
Alleged Breaches in Other Agencies	<p>Where a staff member or contractor wishes to report on conduct that has occurred in another agency, the report should generally be made to the Head of that agency.</p>
Divulging Confidential Information	<p>It should be noted that divulging the Government's or the Department's confidential information beyond the intention of formally documented arrangements (eg. leaking drafts of policy documents) is considered both unacceptable and illegal. This is not considered to be whistleblowing and may in itself be a breach of the <i>APS Code of Conduct</i>. Such actions fall outside the scope of these procedures.</p>

2. What is Whistleblowing?

Definition	<p>For the purposes of this document 'Whistleblowing' refers to the disclosure, in the public interest, of information which alleges a breach of the <i>APS Code of Conduct</i> by a staff member/s within this Department.</p>
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The term whistleblowing should not be regarded as one of derision, nor of contempt, nor used in the context of being 'un-Australian'.

3. What is a breach of the APS Code of Conduct?

Types of Breaches	<p>take many different forms.</p> <ul style="list-style-type: none">• Fraud may be in the form of theft of property or goods or other actions, which indicate the intention to gain benefit or advantage from the Department.
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- Misuse of resources resulting in **substantial** waste of public funds. This type of breach may be as a result of negligent or improper management of public funds rather than personal disagreements over policy decisions.
- The use, or disclosure, of information obtained in the course of a staff member's employment for his/her own benefit or advantage.
- Harassment of staff or clients of the Department.
- Practices which may result in danger to the public, clients, contractors or staff members' health or safety and the environment. All staff have a duty of care to clients, colleagues, and the Department to ensure safe work practices are maintained at all times. Release of confidential information or unsafe work practices could result in staff or the public being at risk.

The above are just some examples, and are not intended to be prescriptive or all inclusive.

Other Types of Disclosures Generally, disclosures that amount to complaints against Government or Departmental policy, or complaints or grievances seeking review of an administrative decision, would not be dealt with under these provisions.

4. Reporting a suspected breach

Who Can Report a Suspected Breach Any staff member (non-ongoing or ongoing) and contractors may disclose a suspected breach of the *APS Code of Conduct* either in writing or orally. Such disclosures are considered by the Department to be in the public interest. (Contractors should note that the protection provided in section 16 of the *Public Service Act 1999* to APS employees is not extended to them).

Providing Information Anonymously Staff may not wish to disclose their identity when coming forward with information, either when fraud or other wrongdoing is suspected or when they wish to contribute to an investigation. In such cases, they may elect to provide information anonymously. An anonymous allegation will be investigated, provided it is accompanied by sufficient evidence to justify an investigation and is determined not to be frivolous or vexatious.

5. To whom can a disclosure of a suspected breach be reported?

Informal Resolution - Fair Treatment Principles	<p>In the first instance staff are encouraged to seek informal resolution of the issue by discussing it with their team leader, next level manager, Branch Head And Unit Head. By applying 'fair treatment principles' a particular issue may be resolved/clarified informally at the workplace level. This step is optional and staff will need to make a judgement as to the appropriateness of undertaking it.</p>
Approaching the Human Resource Manager	<p>Staff are also able to approach their Human Resource area for advice. The HR Manager can provide advice on the appropriateness of using the Whistleblowing procedures. Depending on the issue, other avenues for resolution may be more appropriate. The HR Manager can also answer any question in relation to process. Approaching the HR Manager is optional.</p>
Formal Reporting - Points of Contact	<p>When making a formal report there are several points of contact.</p> <p>Where fraud is suspected the report should be made direct to the Assistant Secretary Audit and Fraud Control Branch. In other cases the formal report should be made to:</p> <ul style="list-style-type: none">• Assistant Secretary (Staff Support and Development Branch); or• State/Territory Manager. <p>Where disclosure to the above is not appropriate the report can be made direct to the Public Service Commissioner or the Merit Protection Commissioner.</p>
Public Disclosures	<p>It is not appropriate to make disclosures public except in the most extreme circumstances. Examples of extreme circumstances could include risks to our national security or actions that place other staff members and the public at risk. Public disclosure may impair any investigation into an allegation prior to it being finalised and lead to a reputation being unfairly damaged. This in turn could lead to legal action for defamation being taken against the whistleblower.</p>

Disclosure to the Ombudsman It should be noted that these provisions do not affect the right of staff to disclose suspected breaches directly to the Commonwealth Ombudsman. However, the Ombudsman is unable to investigate complaints about politics, private individuals or companies, decisions of courts or tribunals, employment related matters, actions of State or local government ministers, and actions of some government business enterprises.

Where a disclosure is made to the Ombudsman under the *Ombudsman Act 1976 (section 37)* the Act provides some protection from civil actions if a disclosure is made in good faith.

6. Investigating the disclosure

Who Will Determine if an Investigation Should be Conducted Depending on the nature of the disclosure the Assistant Secretary, Staff Support and Development Branch, your State/Territory Manager, the Assistant Secretary, Audit and Fraud Control Branch, the Public Service Commissioner or the Merit Protection Commissioner will make this decision. In order to do this, it may be necessary to seek further information/advice from various areas of the Department, other agencies or individuals. All inquiries will be treated in the utmost confidence.

If, for example, the nature of the disclosure identifies a potential health risk to Departmental staff, clients, contractors or members of the public, the Assistant Secretary, Staff Support and Development Branch or your State/Territory Manager will make the decision. However, if the disclosure identifies suspected fraud, the Assistant Secretary, Audit and Fraud Control Branch would be the decision-maker.

Where the disclosure is made directly to the Public Service Commissioner or the Merit Protection Commissioner and he/she considers that the matter is of such a sensitive nature that it is inappropriate for the Department to investigate, the relevant Commissioner may investigate the matter or authorise a person to investigate. The relevant Commissioner may refer the matter back to the Department if he/she considers this the appropriate course of action.

Vexatious or Frivolous Disclosures The Agency Head will be consulted in situations where there is concern that the disclosure may be vexatious or frivolous. Following consideration of the information the Agency Head will determine if the disclosure is vexatious or frivolous and if so, the whistleblower will be advised that the matter will not be investigated further.

Disagreement with such determinations by the Agency Head may be pursued with the Ombudsman, the Public Service Commissioner or the Merit Protection Commissioner, but vexatious and frivolous behaviour is of course inconsistent with the APS Values and Code of Conduct and may attract sanctions.

Where the matter has been the subject of an investigation via another avenue such as the review of actions process, further investigation will be refused unless there is new information provided that was not available to the previous investigator.

7. Who will investigate?

Nominating an Investigator The Assistant Secretary, Staff Support and Development Branch, your State/Territory Manager, the Assistant Secretary, Audit and Fraud Control Branch, the Public Service Commissioner or the Merit Protection Commissioner will nominate an appropriate person to investigate the matter. Consideration will be given to the nature of the disclosure, and if appropriate, the matter may be referred to the Australian Federal Police, for investigation, or there may be evidence that some other kind of investigation would be appropriate.

8. What will the internal investigation entail?

Investigation Process The investigator will:

- undertake a fair and unbiased investigation, giving all persons involved an adequate opportunity to present their case;
- conduct the investigation in accordance with the principles of natural justice (see Attachment C);
- maintain confidentiality and release information on a 'needs to know' basis only;
- interview all relevant people and provide each party with a record of the interview;
- prior to the interview, give each person the opportunity to nominate an independent person (friend, legal or union representative) to accompany them at the interview;
- following the interview/investigation give all parties concerned the right of reply, but not the right of cross examination; and

- provide the Assistant Secretary, Staff Support and Development Branch, your State/Territory Manager or the Assistant Secretary, Audit and Fraud Control Branch with a full report of the investigation including recommendations.

Investigation Outcomes The report and its recommendations will be forwarded to the Agency Head for a decision. In accordance with the Agency Head's decision, action will be taken as soon as possible to finalise the process. Possible outcomes may include the following actions:

- commencement of action under the Department's Breach of the Code of Conduct procedures;
- referral to Audit and Fraud Control Branch;
- referral to the Australian Federal Police; or
- no further action.

Advising the Outcome The Whistleblower will be advised of the results of the investigation. Depending on the outcome of the investigation it may also be appropriate to advise other relevant parties. Documentation relating to the investigation may also be disclosed, subject to any Freedom of Information exemptions. Reports relating to the investigation will not be stored on staff members' personal files.

9. What protection is available?

No Victimisation / Discrimination Section 16 of the *Public Service Act 1999* states that a person performing 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:

- the Public Service Commissioner or a person authorised for the purposes of this section by the Public Service Commissioner; or
- the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner; or
- an Agency Head or a person authorised by an Agency Head.

Protection to Contractors While contractors are expected to comply with the *APS Values and APS Code of Conduct*, they are not afforded protection under section 16 of the *Public Service Act 1999*.

The *Workplace Relations Act 1996* provides that a staff member's employment must not be terminated for:

- filing a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.

Protection is contained in the *Occupational Health and Safety (Commonwealth Employment) Act 1991, (section 76)* in respect of staff who complain about a matter concerning the health, safety or welfare of staff at work.

The Department expects all staff to be treated in a fair and equitable manner, in accordance with the *APS Code of Conduct*. Actions by staff that differ from this, will not be tolerated. Action under the Department's Breach of the Code of Conduct procedures may be taken against staff who do not adhere to these guidelines of behaviour.

The *Public Service Act 1999* does not provide specific protection against liability for defamation in respect of disclosures made under whistleblowing provisions. Providing statements are made in good faith and to an authorised person, there may be some protection available under the various State/Territory legislation. The defences available vary from jurisdiction to jurisdiction. In accordance with Department of Finance and Administration guidelines the Department may arrange legal representation, if appropriate, and meet the legal costs of defending such an action.

If a genuine disclosure has been made and the whistleblower feels he/she is suffering discrimination or harassment both personally and professionally as a result of the disclosure, a review of action may be lodged under the *Public Service Regulations* detailing the concerns. Claims will be investigated and appropriate action will be taken.

10. If not satisfied with the action taken, what other avenues are available?

Review of Department's Action	If the whistleblower is not satisfied with the internal investigation he/she may discuss their concerns with the Assistant Secretary, Staff Support and Development Branch, the relevant State/Territory Manager or the Assistant Secretary, Audit and Fraud Control Branch in the first instance. A request for review of the Department's decision may be lodged with the Public Service Commissioner or the Merit Protection Commissioner.
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11. What rights and responsibilities do staff members have when disclosing information of a suspected breach?

Interviewing Staff

As a result of a disclosure it may be necessary to interview a number of people in order to take supporting statements and collect evidence.

All staff are encouraged to assist the investigator. It is expected that any interview would be carried out on 'neutral territory', away from the local work area of both the investigator and the person assisting in the investigation.

Support During Interviews

Staff may wish to have a person of their choice (e.g. friend, legal or union representative) present during the course of the investigative interview. Please note, staff who choose to be legally represented will be responsible for the costs incurred.

Interpreters

If appropriate, an interpreter can be arranged by the Human Resource Management area. The cost of this service will be met from Corporate funds. To ensure impartiality, the interpreter will be engaged from a publicly recognised interpreting service.

Referral to the AFP

If the matter is referred to the Australian Federal Police, all staff have a duty not to obstruct the police in their inquiries.

If during the course of the interview the staff member feels that what he/she says might lead to the belief that they are implicated in fraud or other wrong doing, they have the right to not answer any questions.

If the investigator comes to the belief that the staff member may be implicated in fraud or wrong doing, the investigator must suspend the interview immediately and refer the matter back the Assistant Secretary Staff Support and Development Branch, the Assistant

Secretary, Audit and Fraud Control Branch or your State/Territory Manager who will then decide what course of action is appropriate in the circumstances. This may include referral to the Australian Federal Police.

All staff have the right to have allegations against them objectively and professionally investigated in a confidential manner. In the interests of natural justice, any staff member being investigated will be given the opportunity to offer an explanation for their behaviour or circumstances.

12. Disclosure points of contact.

- **Assistant Secretary, Staff Support and Development Branch (02) 6289 5966**
- **Assistant Secretary, Audit and Fraud Control Branch (02) 6289 7877**
- **Individual State/Territory Managers**
- **Public Service Commissioner**
- **Merit Protection Commissioner**

13. Application to Contractors.

Contractors employed by this Department are expected to uphold the *APS Values and the APS Code of Conduct* and may make disclosures under these procedures. However it should be noted that the protection afforded to Departmental staff under section 16 of the *Public Service Act 1999* does not extend to contractors.

14. Who can be contacted for support?

There are a number of avenues of support available to you. The following is a list of possible contacts, but is not considered to be all inclusive.

- **Personnel Consultancy and Recruitment**

Contact: Free call 1800 500 583

If calling from Canberra 6289 1009;

- **Your State/Territory HR Manager;**
- **Your local Employee Assistance Program in Central Office or your State/Territory;**
- **Your local Workplace Harassment Contact Officers or Workplace Diversity Advisers**

Contact numbers for your local Workplace Harassment and Workplace Diversity Advisers are available on the National OH&S Intranet site;

- **Assistant Secretary, Audit and Fraud Control Branch (02) 6289 7877.**

15. Further information

Should you wish to discuss any aspect of these procedures please contact Personnel Consultancy and Recruitment in Central Office on free call 1800 500 583 or on extension 1009 if calling from Central Office or your State/Territory Human Resource Manager.

16. References

Public Service Regulations 1999

Public Service Act 1999

Workplace Relations Act 1996

Occupational Health and Safety (Commonwealth Employment) Act 1991, s76

Crimes Act 1914, s70

Financial Management and Accountability Act 1997, s44 (1)

Fraud Control Plan 1996-98 Chief Executive Instructions – incorporating the Procedural Rules

Departmental Fraud Awareness Handbook

Freedom of Information Act 1982

Associated Material

Workplace Ethics Information Kit – Fork in the Road Cafe

Section 9.3: Public Interest Whistleblowing

Chief Executive Instructions

- 9.3.1. A person performing functions in or for the Department must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the *APS Code of Conduct*.
- 9.3.2. Alleged breaches of the *APS Code of Conduct* may be reported to:
- the Chief Executive Officer or authorised person; or
 - the Public Service Commissioner or Merit Protection Commissioner or authorised person.

References

Public Service Act 1999

Public Service Regulations 1999

Workplace Relations Act 1996
Occupational Health and Safety (Commonwealth Employment) Act 1991
Crimes Act 1914
Freedom of Information Act 1982
Financial Management & Accountability Act 1997
Essential Booklet No 3 - APS Values and Standards of Conduct
Fraud Control Plan
Departmental Fraud Awareness Handbook .

Related Instructions

All CEIs and related Procedural Rules

Procedural Rules

Procedural Rule 9.3: Public Interest Whistleblowing is to be maintained by the Assistant Secretary, Staff Support and Development.

Section 9.3: Public Interest Whistleblowing

Procedural Rules

1. Officials must have regard to the Public Interest Whistleblowing Procedures established under Public Service Regulation 2.4 for dealing with reported breaches of the *APS Code of Conduct*

Commonwealth of Australia

Department of Health and Aged Care

Chief Executive Instructions

I, ANDREW STUART PODGER, the Chief Executive to the Department of Health and Aged Care, pursuant to regulation 6 of the Financial Management and Accountability Regulations and section 52 of the *Financial Management and Accountability Act 1997*, give to officials in my Department, Chief Executive Instructions on Public Interest Whistleblowing.

A. S. PODGER
Chief Executive

December 1999