



## MERIT PROTECTION COMMISSIONER

21 December 2001

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



Dear Ms Donaldson

### **SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE – INQUIRY INTO THE PUBLIC INTEREST DISCLOSURE BILL 2001**

I refer to your letter of 7 September 2001 inviting a written submission to the above inquiry, to my reply of 24 September 2001 and my joint response with the Public Service Commissioner of 24 October 2001. The joint response was by way of an interim submission setting out the current provisions under the *Public Service Act 1999* which constitute a whistleblower protection scheme.

The proposal to submit a joint submission recognises the fact that the working relationship between the Public Service Commissioner and the Merit Protection Commissioner must, by necessity, be close. In respect of the consideration of whistleblower reports the normal situation would be that employees in the Public Service and Merit Protection Commission would be asked to advise either the Public Service Commissioner or the Merit Protection Commissioner depending on to whom the report had been addressed. In these circumstances it is not viable to have divergent approaches to the handling of such reports.

At this stage the proposed joint submission with the Public Service Commissioner has not yet been finalised. However, my appointment as Merit Protection Commissioner expires on 31 December 2001. Accordingly, consideration of the joint submission will be a matter for an incoming Merit Protection Commissioner. In the circumstances, I am attaching a submission, based on my experience as Merit Protection Commissioner, which sets out my observations on some of the issues before the Committee.

While the comments in the attached submission address issues raised in the Public Interest Disclosure Bill, in my view it is essential that there should be one coherent, effective and credible whistleblowing scheme if such a scheme is to exist. Accordingly, it would not be appropriate to have both the scheme set out in the Public Interest Disclosure Bill and the scheme set out in the Public Service Act and Regulations operating in parallel – the existence of duplicate schemes would not be



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Centenary of Federation

consistent within an effective public sector whistleblowing arrangement. Consequently, either the Bill should be amended such that on its proclamation Section 16 of the Public Service Act and the associated regulations would be repealed or the provisions of the Bill should be incorporated into the Public Service Act. Proper transitional provisions would also need to be developed to deal with any reports then under investigation whether by agency heads, the Merit Protection Commissioner or the Public Service Commissioner.

Yours sincerely

A handwritten signature in black ink, appearing to read "Alan Doolan". The signature is written in a cursive style with a large, stylized initial 'A'.

Alan Doolan

## **Senate Finance and Public Administration Legislation Committee – Inquiry into the Public Interest Disclosure Bill 2001**

### **Submission of the Merit Protection Commissioner**

#### **Background**

The Merit Protection Commissioner is an independent statutory officer appointed under the *Public Service Act 1999* ('the Act'). Under section 50 of that Act the functions of the Merit Protection Commissioner include, among other things, the conduct of inquiries into whistleblowing reports made to the Merit Protection Commissioner (or to a person authorised by the Merit Protection Commissioner).

#### **Objectives of legislation concerning disclosures in the public interest**

The primary objectives of legislation concerning disclosure in the public interest are:

- to support proper and effective public administration by encouraging the disclosure of conduct in the public sector adverse to the public interest; and
- to provide protection against reprisals and victimisation for those with the courage to make such disclosures.

#### *Existing legislation*

The legislative head of power for the current whistleblowing provisions applying in the APS is found in section 16 of the Act. Section 16 both allows for the lodgement of whistleblowing reports by APS employees, and proscribes victimisation of and discrimination against those who have done so.

#### *The provisions of the Public Interest Disclosure Bill 2001*

In his second reading speech, Senator Murray noted that the objectives of the Public Interest Disclosures Bill 2001 ('the Bill') were to encourage the disclosure conduct adverse to the public interest in the public sector by establishing a legal framework which provides that:

- (a) all APS employees have the right to disclose impropriety;
- (b) such disclosures will be properly considered by an appropriate body, and appropriate action taken;
- (c) such disclosures may be made without fear of unlawful reprisal;
- (d) there will be arrangements allowing a person who has suffered unlawful reprisals to seek substantial redress.

#### *Observation*

Intrinsic to the concept of a whistleblowing scheme is the notion that the subject of any disclosure is a matter with significant implications for the public interest. In particular, whistleblowing schemes are not intended to provide a vehicle for individuals to pursue their own personal interests. Thus, the overriding test to attract the statutory protections against victimisation and discrimination to those who 'blow

the whistle' should be whether the disclosure is made to protect the public interest from significant detriment. Care needs to be taken to ensure that provisions are drafted to minimise their use by individuals motivated by a desire to advance interests which are personal or private, albeit that those interests may have a minor element of public interest.

### **Disclosable Conduct**

Both the Act and the Bill seek to define the nature of the actions i.e. the substance of the whistleblowing report, which may be investigated under the framework they provide.

#### *Existing provisions of the Public Service Act*

Section 16 of the Act allows for the making of whistleblowing reports in relation to alleged breaches of the Code of Conduct. The Code of Conduct (copy at Attachment A), which is binding on all APS employees, is set out in section 13 of the Act.

#### *The provisions of the Public Interest Disclosure Bill 2001*

Under the Bill, the grounds for lodging a report would include any disclosure of information that the person making the disclosure believes on reasonable grounds tends to show:

- (a) that another person has engaged, is engaged, or proposes to engage, in
  - i. conduct that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial performance of official functions by a public official or agency;
  - ii. conduct of a public official which amounts to the performance of any official function dishonestly or with partiality;
  - iii. conduct of a public official, a former public official or an agency that amounts to a breach of the public trust;
  - iv. conduct of a public official, a former public official or an agency that amounts to the misuse of information or material acquired in the course of the performance of official functions (whether for the benefit of that person or agency or otherwise);
  - v. a conspiracy or attempt to engage in conduct referred to in i. to iv. above

where that conduct constitutes either a criminal offence; a disciplinary offence (i.e. grounds for "disciplinary action" under the *Public Service Act 1999* or the *Parliamentary Service Act 1999*); or reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of the relevant public official;

- (b) conduct by a public official that amounts to negligent, incompetent or inefficient management within, or of, an agency resulting, or likely to result, directly or indirectly, in a substantial waste of public funds, other than conduct necessary to give effect to a law of the Commonwealth;

- (c) that a person has engaged, is engaging, or proposes to engage in conduct that causes, or threatens to cause, an injury, damage, or loss; or intimidation or harassment; or discrimination, disadvantage or adverse treatment in relation to career, profession, employment, trade or business:
  - i. to a person in the belief that any person has made, or may make, a public interest disclosure; or
  - ii. to a public official because he or she has resisted attempts by another public official to involve him or her in the commission of an offence under an Act;
- (d) that a public official has engaged, is engaged, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public.

### *Observation*

The provisions of the Act do not adequately differentiate between issues of public interest and those which are primarily personal to the complainant, or limit whistleblowing investigations to significant issues. The provisions of the Bill, while appropriately more restrictive are not clearly defined.

It is noted in this regard that in 1994 the Senate Select Committee on Public Interest Whistleblowing ('the Newman Committee') recommended that the grounds for lodging a complaint by any person should be:

- (a) illegality, infringement of the law, fraudulent or corrupt conduct;
- (b) substantial misconduct, mismanagement or maladministration, gross or substantial waste of public funds or resources;
- (c) endangering public health or safety, danger to the environment.

These recommended grounds substantially incorporated the recommendations of the earlier Review of Commonwealth Criminal Law ('the Gibbs Committee').

Grounds similar to those recommended by the Senate Select Committee are to be preferred if the provisions are not to be used for essentially private purposes e.g. for the prosecution of allegations that the code of conduct has been breached in a relatively minor way, motivated by a desire for retaliation for actual or perceived inappropriate actions of an APS employee in respect of another APS employee.

### **Who May Disclose**

If it is accepted that the primary objective of a whistleblowing scheme is to support the public interest intrinsic to proper and effective public administration, it might be argued that that interest is best served by ensuring that, while the issues which are reported should be carefully described, there is no reason to limit access to the system to particular classes of people.

### *Existing provisions of the Public Service Act*

Section 16 of the Act refers only to whistleblowing reports made by APS employees.

### *The provisions of the Public Interest Disclosure Bill 2001*

Clause 12 of the Bill provides that “any person” may make a public interest disclosure.

#### *Observation*

The provisions of the Bill would provide a significant widening of the existing provisions. However, if a purpose of a whistleblowing scheme is to support public confidence in the integrity of public administration, then that interest would be best served by not restricting the nature of the person able to make disclosures. On the other hand, under current arrangements non-employees are able to make reports to the Commonwealth Ombudsman and seek action through that office. There may be some public benefit in adopting a single, unified scheme.

#### **Who May Receive Disclosures**

Both the regulations made under the Public Service Act and the Public Interest Disclosures Bill seek to identify the authorities which might receive reports made by whistleblowers.

#### *Existing provisions under the Public Service Act*

Public Service Regulation 2.4 imposes a requirement on Agency Head to develop procedures which, *inter alia*, allow for the lodgement of whistleblower reports with the Agency Head and, in certain circumstances, the Public Service Commissioner or the Merit Protection Commissioner. These circumstances are where:

- (a) the Agency Head has already investigated the matter and the complainant is not satisfied with the outcome; or
- (b) the Merit Protection Commissioner or Public Service Commissioner agree that it would be inappropriate to make the report to the Agency Head in the first instance.

### *The provisions of the Public Interest Disclosure Bill 2001*

Clause 12 of the Bill provides that public interest disclosures may be made to a “proper authority”, defined in section 9 to include the Agency Head, the Public Service Commissioner, and the Merit Protection Commissioner.

#### *Observation*

Under the terms of the Bill, the person making the disclosure is at liberty to choose the authority with which they lodge that disclosure or, indeed, to lodge with more than one authority simultaneously.

To aid effective administration this provision needs modification to ensure orderly lodgement and investigation processes, possibly similar to those under the Act which reflects the principle that Agency Heads should be given the opportunity to consider and rectify practices within their own agencies before matters are referred for

external consideration. At the same time, it recognises that there may be circumstances where that would be inappropriate, and direct access to an external agency preferable.

It should also be acknowledged that clauses 17 and 21 of the Bill provide a useful capacity for proper authorities to liaise amongst themselves regarding individual reports, a facility which does not exist under the Act. On the assumption that, whatever scheme is in place, both the Merit Protection Commissioner and the Public Service Commissioner will continue to have responsibility for investigating whistleblowing reports it is submitted that this degree of flexibility should remain.

### **Investigation of Disclosures**

Both the regulations made under the Act and the Bill contain provision for mandatory investigation of whistleblowing reports lodged with relevant authorities.

#### *Existing provisions under the Public Service Act*

Public Service Regulation 2.4 imposes a requirement on an Agency Head to develop procedures that, *inter alia*, require the Agency Head, or a person authorised by the Agency Head, to investigate reports received unless the report is considered to be frivolous or vexatious.

Where either the Public Service Commissioner or the Merit Protection Commissioner receives a report in accordance with the procedures established by the relevant Agency Head, they must investigate the report unless they consider the report to be frivolous or vexatious.

#### *The provisions of the Public Interest Disclosure Bill 2001*

Where a disclosure is made to a proper authority, that authority must investigate it if it involves:

- (a) its own conduct or the conduct of a "public official in relation to the authority;  
or
- (b) a matter, or the conduct of any person, that the authority has a function or power to investigate; or
- (c) the conduct of a person, other than a public official, performing services for or on behalf of the authority.

There are exceptions to this requirement. A proper authority may decline to investigate a disclosure if it considers:

- (a) that it is frivolous or vexatious; or
- (b) that it is misconceived or lacking in substance; or
- (c) that it is trivial; or
- (d) that there is some appropriate method of dealing with the disclosure; or
- (e) that it has already been dealt with adequately.

Further, where the subject of the disclosure has already been considered by a Court or Tribunal, the public authority "shall decline to act on the disclosure to the extent that the disclosure attempts to reopen the issue."

Under specified circumstances, it is also possible for a proper authority to refer a disclosure to another agency.

### *Observation*

In the event that a proper authority refers a disclosure to another agency, and that agency is not a proper authority within the meaning of the Bill but another organisation, it is not clear that there is a requirement within the Bill that that organisation will investigate the disclosure.

Alternatively, if that agency is a "proper authority", care needs to be exercised to ensure that referral does not lead to a requirement for duplicate investigations i.e. by the referring proper authority and the agency to which the matter is referred.

### **Powers of Investigation**

Although both the Act and the Bill contain provisions imposing an obligation on certain authorities to conduct investigations, it is not always clear what powers are available to particular agencies to conduct those investigations.

#### *Existing provisions under the Public Service Act*

Under current provisions, Agency Heads are required to set their own procedures for dealing with whistleblowing reports and might be expected to have broad powers to investigate given their role as the relevant employer and person responsible for administrative matters generally within the Agency.

The powers available to the Public Service Commissioner to investigate whistleblowing provisions are set out in section 43 of the Act, and include powers analogous to those available to the Auditor-General under sections 32, 33 and 35 of the *Auditor-General Act 1997*. These include powers to obtain information (including the provision of documents, and the taking of evidence on oath) and to gain access to premises.

The Merit Protection Commissioner, within the current statutory arrangements, has no equivalent powers to investigate whistleblowing reports, despite having a statutory function to do so.

#### *The provisions of the Public Interest Disclosure Bill 2001*

Although the Bill would impose an obligation of the Public Service Commissioner and Merit Protection Commissioner to conduct investigations under certain circumstances, it contains no specific investigations powers.

### *Observation*

Appropriate powers should be available to those responsible for investigating whistleblower reports. At a minimum the Merit Protection Commissioner and Public



Service Commissioner should have powers akin to those available to the Auditor-General under sections 32, 33, and 35 of the *Auditor-General Act 1997*.

### **Findings and Actions**

An effective whistleblowing system should provide mechanisms to enable any findings arising from a completed investigation to be passed to the relevant parties, and appropriate remedial action taken.

#### *Existing provisions of the Public Service Act*

The existing provisions of the Act do not specify action to be taken after an investigation. In practice, it is expected that:

- (i) where breaches are found to have occurred an Agency Head would take formal action against relevant employees under section 15 of the Act; and
- (ii) both the Merit Protection Commissioner and the Public Service Commissioner would provide reports on their findings, and any recommendations, to both the person making the disclosure and the relevant Agency Head.

#### *The provisions of the Public Interest Disclosure Bill 2001*

Pursuant to clause 19, where a proper authority forms a view that there has been the requisite level of improper conduct (subject to the defence that the conduct was necessary to give effect to a law of the Commonwealth) it must take necessary action to stop the conduct from recurring and to discipline the person responsible for the conduct.

#### *Observation*

If a scheme is to be credible there need to be provisions requiring disclosure of the findings of the investigations and a requirement to take appropriate action where allegations are sustained. Where the Merit Protection Commissioner or the Public Service Commissioner makes recommendations to an Agency Head there is a need for an accountability mechanism to ensure that there is an appropriate response to them. A provision similar to section 33(6) of the Act could be considered.

### **Protections/Unlawful Reprisals**

Both the Act and the Bill contain provisions which seek to protect those people who make whistleblowing reports from victimisation, discrimination, or other forms of reprisal.

#### *Existing provisions of the Public Service Act*

In relation to APS employees, section 16 of the Act directs any person performing functions in or for an Agency not to victimise, or discriminate against, an APS employee (which includes non-ongoing employees) because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct.

In the event that an employee is victimised or discriminated against they have recourse to the review of actions arrangements set out within Division 5.3 of the Public Service Regulations. In the first instance it might be expected that any such complaint will be lodged with the Agency Head but, where it is alleged that the Agency Head is involved in that victimisation or discrimination, the employee may apply directly to the Merit Protection Commissioner to review their circumstances and make appropriate recommendations for further action.

#### *The provisions of the Public Interest Disclosure Bill 2001*

Part 4 of the Bill sets out provisions which are to apply in relation to "unlawful reprisal". It creates a new criminal offence (clause 20) i.e. engaging in, or attempting or conspiring to engage in, an unlawful reprisal.

An unlawful reprisal itself may be the subject of a public interest disclosure, and specific obligations are imposed on the proper authority that receives that disclosure to advise the complainant about available remedies and protections, and provide access to counselling.

Clause 24 of the Bill imposes an obligation on the public authority, under some circumstances, to relocate the person making the complaint to another position which may be in another agency.

Clause 26 of the Bill would create a new damages-based remedy, but requires a curial process. Similarly, clauses 27 and 28 allow for applications for an injunction or order to take specific action to prevent unlawful reprisals. The order may be sought by either the complainant or the Public Service Commissioner, but not the Merit Protection Commissioner.

#### *Observation*

The Bill does not recognise that, consistent with the employment arrangements in the Act which provide that Agency Heads exercise employer powers in respect of their agency, Agency Heads, the Merit Protection Commissioner and the Public Service Commissioner have no powers to relocate an employee from one agency to another.

The protection available under the existing scheme relies on the exercise of rights under Division 5.3 of the regulations. Those arrangements apply to non-Senior Executive Service APS employees in relation to actions other than termination decisions or decisions not to re-engage a non-ongoing employee whose term of employment has expired (in those circumstances redress would be through the unfair dismissal provisions of the *Workplace Relations Act 1996*).

The existing regulation 5.24(3)(c) allows an APS employee to apply directly to the Merit Protection Commissioner concerning allegations of harassment consequent upon having lodged a previous application for review of action. Consideration could be given to extending this right of direct access to the Merit Protection Commissioner to circumstances (other than termination) where an APS employee is subjected to

victimisation or discrimination as a consequence of having made a whistleblowing report..

## **Reporting**

### *Existing provisions under the Public Service Act*

The present arrangements contain no explicit provisions for reporting the numbers of whistleblowing complaints, the issues concerned, or the outcomes arrived at.

### *The provisions of the Public Interest Disclosure Bill 2001*

Clause 11 of the Bill proposes three distinct forms of records to be kept by public authorities for annual report to Parliament:

- (a) the whistleblowing procedures developed by the public authority;
- (b) a general statistical overview of the cases dealt with (by type); and
- (c) each substantiated report, including details of remedial action taken in relation to it and any Public Service Commissioner or Parliamentary Service Commissioner recommendations (there is no reference to recommendations by the Merit Protection Commissioner or the Parliamentary Service Merit Protection Commissioner).

### *Observation*

While it is recognised that reporting requirements involve a cost for administration, a scheme which is designed to support public confidence in the integrity of public administration should contain reporting requirements as an adjunct to the achievement of that objective.

## **Conclusion**

In providing these observations consideration has been given to the Committee's concern to determine whether "in its current form the Bill provides:

- credibility, that is, would instil confidence in those who need to use it that their disclosures will receive proper consideration and investigation;
- procedures that facilitate the correction of identified cases of maladministration and/or misconduct; and
- appropriate public accountability reporting of processes commenced under the proposed legislation."

There are elements of the Bill which could be seen to enhance the credibility of a whistleblowing scheme, namely, the provision for a wide range of people to make reports, a definition of reportable conduct which seeks to ensure that reports deal with substantial matters, and the inclusion of public accountability and reporting processes.

In its current form, the Bill does raise a number of procedural issues which require further consideration. Some provisions would benefit from further consideration of their operation both individually and in relation to other elements of the Act.

Any whistleblowing regime must be coherent and easily understood if it is to be effective and credible. Accordingly, it would not be appropriate to have overlapping provisions in different pieces of legislation. It would not be helpful to have both the scheme in the Bill and the scheme in the Act operating in parallel.

Alan Doolan  
Merit Protection Commissioner  
21 December 2001

## Attachment A

- (1) An APS employee must behave honestly and with integrity in the course of APS employment.
- (2) An APS employee must act with care and diligence in the course of APS employment.
- (3) An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
- (4) An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, *Australian law* means:
  - (a) any Act (including this Act), or any instrument made under an Act; or
  - (b) Any law of a State or Territory, including any instrument made under such a law.
- (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
- (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
- (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
- (8) An APS employee must use Commonwealth resources in a proper manner.
- (9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
- (10) An APS employee must not make improper use of:
  - (a) inside information; or
  - (b) the employee's duties, status, power or authority;in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- (11) An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
- (12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.