



Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
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Thank you for inviting me to make a submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Public Interest Disclosure Bill 2013 (the PID Bill). My submission is at Attachment A. I have consulted the Merit Protection Commissioner in its preparation.

As you are aware, the House of Representatives Standing Committee on Social Policy and Legal Affairs is conducting an inquiry into the PID Bill. I am making a similar submission to that Committee's inquiry.

Yours sincerely

Stephen Sedgwick AO

18 April 2013

Public Interest Disclosure Bill 2013
Submission from the Public Service Commissioner

An effective framework for the reporting and investigation of wrongdoing by public officials is a core component of any public sector integrity regime.

A statutory framework for reporting wrongdoing has been in place in the Australian Public Service (APS) for over a decade, codifying a long-standing expectation that public servants will not ignore suspected misconduct and have channels available to them to report.

This framework is set out in section 16 of the *Public Service Act 1999* (the Act), which provides explicit protection for APS employees from victimisation and discrimination for reporting suspected breaches of the APS Code of Conduct to an authorised person, and Division 2.2 of the *Public Service Regulations 1999* (the Regulations), which provide a framework for the investigation of such reports.

In practice, the outcome of a whistleblowing investigation is a decision about whether there is sufficient substance to the report to warrant a further inquiry to determine whether there has been a breach of the Code of Conduct.

If an APS employee is not satisfied with the investigation of their whistleblowing report within an agency, they may refer their report to the Public Service Commissioner or the Merit Protection Commissioner for a new investigation into the matter. The Commissioners' role in the whistleblowing framework therefore has the effect of providing guidance and clarity to agencies in relation to APS conduct matters.

The *Public Service Amendment Act 2013* and the *Public Service Amendment Regulation 2013* amend these provisions with effect from 1 July 2013. The operation of the scheme will be clarified by including in the Act a specific regulation-making power to prescribe how the scheme will operate, and by providing for some matters to be excluded from inquiry as whistleblower reports to help ensure that any complaint made by an APS employee is handled under the framework that is best able to provide an appropriate outcome. A small number of other operational improvements are made; however, the scope of the scheme remains the same.

The framework proposed by the Public Interest Disclosure Bill 2013 (the PID Bill) for the disclosure and investigation of misconduct matters in the public sector builds on and significantly enhances the core elements of the APS whistleblowing scheme by providing a comprehensive framework for public interest disclosures in the Australian Government public sector, and by specifying broad protections for making a qualifying disclosure.

I note that the Government has announced its intention to introduce a bill to make consequential amendments in support of the PID Bill, and that these will include amendments to repeal section 16 of the *Public Service Act* and the *Parliamentary Service Act 1999*. I consider this to be a sensible approach that will avoid double-handling of reports.

In my view, it is important that a public interest disclosure scheme for the Commonwealth meet several key objectives:

1. The scheme should work effectively with the existing APS misconduct regime.

Consistent with the devolved management framework in the APS, in which agency heads exercise the rights, duties, and powers of an employer on behalf of the Commonwealth, they are required to establish procedures for determining misconduct by their employees. These procedures must be consistent with binding standards set by the Public Service Commissioner in the *Public Service Commissioner's Directions 1999*.

The Act and Regulations provide for employees (other than Senior Executive Service employees) to seek review by the Merit Protection Commissioner of a determination that they have breached the Code, and review of any sanction other than termination (in respect of which they have access to the Fair Work Commission).

An agency head cannot terminate the employment of a Senior Executive Service employee unless the Public Service Commissioner has issued a certificate stating, in effect, that proper process has been followed and that the termination is in the public interest.

2. The scheme should not provide an avenue for 'forum shopping'. Providing multiple avenues for people to make disclosures may result in confusion, and may also undermine confidence in public administration if different statutory office holders reach different conclusions based on the technical requirements.
3. The scheme should not impinge on the existing statutory responsibilities of statutory office holders, or provide for one office holder to be in the position of second-guessing another. Such an approach could have the effect of creating a hierarchy of statutory office holders, and would undermine the principle that office holders should be able to exercise their functions independently.

It is difficult to assess whether the PID legislation is consistent with these principles until the Government has introduced the consequential bill that will support the PID Bill. For example, the PID Bill does not compel the Commonwealth Ombudsman, or the Inspector-General of Intelligence and Security, to transfer matters which are the statutory responsibility of the Public Service Commissioner or the Merit Protection Commissioner to those office holders

Stephen Sedgwick, AO
Public Service Commissioner
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