SUBMISSION FROM THE AUSTRALIAN PUBLIC SERVICE COMMISSION

As at 30 June 2011, the Australian Public Service (APS) employed 166,495 people in over 100 agencies[1]. APS employees are engaged under the *Public Service Act 1999* (the Act), which also sets out the functions of the Public Service Commissioner (the Commissioner) and the Merit Protection Commissioner. The roles and responsibilities of the Commissioners and agency heads as they relate to preventing and addressing harassment and bullying are described in Attachment A.

The APS Code of Conduct places a statutory obligation on employees, when acting in the course of employment, to treat everyone with respect and courtesy, and without harassment.

Consistent with the devolved management environment in the APS, the Commissioner issues guidance to agencies from time to time on workplace matters including workplace harassment and bullying. In particular, the guide, *Respect: promoting a culture free from harassment and bullying in the APS*, makes clear that workplace harassment and bullying is unacceptable and is not tolerated in the APS. Workplace harassment, which includes bullying and may include sexual harassment, is defined in the APS as behaviour that could reasonably be considered to be humiliating, intimidating, threatening or demeaning to an individual or group of individuals. It can be overt or covert, inflicted by one person or by groups, and intentional or unintentional. This is usually but not always repeated[2]. The guide makes clear that in the case of sexual harassment it need only be shown that a reasonable person would anticipate the *possibility* that the behaviour would offend, humiliate or intimidate.

As well as monitoring the incidence of workplace harassment in the APS in annual surveys, the Commission has undertaken specific projects on embedding values, 'agency health' and managing employee complaints and disputes. These studies all point to the impact of workplace culture and leadership on such things as employee engagement and the capacity of organisations to attract and retain staff and to deliver high quality outcomes. The outcomes of these projects also suggest that a positive workplace culture and good leadership have an impact on reducing the incidence of harassment and bullying.

The APS is still learning about this complex behaviour and hence how to implement the best strategies for preventing it and for tackling it. It is a learning process too for employees, both to understand what workplace harassment and bullying is in practice and how to deal with it when they see it. Research and education have important roles to play in this regard.

One factor that we believe is beneficial to dealing with this issue in the APS is that roles and responsibilities for preventing and responding to harassment and bullying are clearly defined, and employees have several avenues through which they can receive advice or make complaints.

The Public Service Amendment Bill 2012 (the Bill), currently before Parliament, will strengthen the powers available to agencies to investigate suspected breaches of the APS Code of Conduct, including in relation to harassment and bullying, by former employees.

The Bill also amends the relevant element of the Code that requires employees to treat everyone without harassment to apply where there is 'a direct connection with' the employee's employment, rather than only 'when acting in the course of employment'. This amendment would assist in clarifying, for example, that after hours harassment and bullying on work related travel is a breach of the Code.

[1] *State of the Service Report 2010-11*, Commonwealth of Australia 2011, p86.
[2] *Respect: Promoting a Culture Free from Harassment and Bullying in the APS*, Commonwealth of Australia 2011.

ATTACHMENT A

The Role of the Public Service Commissioner and the Merit Protection Commissioner in relation to preventing and responding to workplace bullying

The Australian Public Service Commission (the Commission) supports two statutory office holders, the Public Service Commissioner, who is the agency head, and the Merit Protection Commissioner.

The functions of the Public Service Commissioner (the Commissioner) and the Merit Protection Commissioner are set out in the *Public Service Act 1999* (the Act).

Under the Act (s 20) agency heads[3] have all the rights, duties and powers of an employer. They are also responsible for promoting the APS Values and upholding the APS Code of Conduct, which are set out in the Act (ss 10(1) and 13 respectively) and are binding on APS employees. Agency heads must establish procedures for determining whether an employee has breached the Code of Conduct (ss 15(3)) and may impose sanctions set out in the Act (ss 15(4)) where employees are found to have breached the Code. Sanctions can range from a reprimand to termination of employment.

Public Service Regulation 2.4 requires agency heads to establish procedures for dealing with whistleblowing reports. Section 16 of the Act provides protection for APS employees who have reported breaches of the APS Code of Conduct to authorised persons. Generally the scheme is two tier and an employee may lodge a whistleblowing report with either of the Commissioners if they are not satisfied with the outcome of an agency investigation into the matter.

Among other things, the APS Code of Conduct requires employees when acting in the course of employment to:

- treat everyone with respect and courtesy, and without harassment (s 13(3)); and
- comply with all applicable Australian laws (s 13(4); this includes anti-discrimination and workplace health and safety laws).

The Commissioner's functions under the Act (s 41) include:

- promoting the APS Values and Code of Conduct
- inquiring into whistleblowing reports
- evaluating the extent to which agencies incorporate and uphold the APS Values, and the adequacy of agencies' systems and procedures for ensuring compliance with the Code of Conduct
- co-ordinating APS-wide training and development
- developing, promoting, reviewing and evaluating APS employment policies and practices.

The Commissioner's evaluation functions are principally discharged through the annual 'State of the Service Report'. Section 44 of the Act requires the Commissioner to report annually on the state of the APS and agency heads must give the Commissioner the information needed to prepare the report.

The Merit Protection Commissioner's functions under the Act (s 50) and the Public Service Regulations 1999 (Part 5) include reviewing any action affecting an APS employee, below Senior Executive Service (SES) level, in relation to their employment. Generally, this is after the matter has first been reviewed by the relevant agency head. An APS employee may, for example, apply for a review of actions which they believe to be bullying and harassment. If they

[3] The definition of an 'agency head' in the *Public Service Act 1999* includes a Secretary of a Department.

are not satisfied with the outcome of their agency's review of the matter they may apply to the Merit Protection Commissioner for independent external review.

APS employees (excluding SES employees) may also apply to the Merit Protection Commissioner for review of an agency head's determination that they have breached the APS Code of Conduct as well as any sanction imposed as consequence, with the exception of sanctions of termination of employment. The Merit Protection Commissioner has no jurisdiction to review such decisions, and they are generally reviewable by Fair Work Australia.

The Merit Protection Commissioner's functions also include inquiring into whistleblowing reports.

Both Commissioners play a role in assisting agencies prevent and address workplace harassment and bullying. The Public Service Commissioner has issued policy and procedural advice to agencies on supporting workplaces that are free of workplace harassment (*Respect: promoting a culture free form harassment and bullying in the APS*).

This guidance is also supported by presentations made by staff within the Commission to staff within agencies, on request, on topics related to bullying and workplace harassment.

In 2012, the Merit Protection Commissioner published *Not just about process: The review of actions scheme: A human resources practitioner's guide to responding to and managing employee complaints and disputes*. The guide helps agencies to implement best practice in dealing with complaints. It also suggests strategies for managing complaints and disputes in the workplace and options to de-escalate an issue to minimise the need for review and to support positive and appropriate relationships in the workplace.