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IN BRIEF

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Legislative Protection for Australia's Public Service Whistleblowers

Australia's *Public Service Act 1999*⁽¹⁾ provides protection for employees of Australian Public Service (APS) Agencies⁽²⁾ who "blow the whistle" by reporting breaches (or alleged breaches) of the APS Code of Conduct.⁽³⁾

The APS Code of Conduct, spelled out in the *Public Service Act 1999*, requires that APS employees must:

- behave honestly and with integrity in the course of their employment;
- act with care and diligence in the course of their employment;
- treat everyone with respect and courtesy, and without harassment (when acting in the course of their employment);
- comply with all applicable Australian laws, including federal, state and territorial statutes and instruments made under those statutes (when acting in the course of their employment);
- comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction;
- maintain appropriate confidentiality about dealings that the employee has with any Minister or the Minister's staff;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their employment;
- use Commonwealth resources in a proper manner;
- 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 employment;
- not make improper use of inside information or 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;
- at all times behave in a way that upholds the APS and the integrity and good reputation of the APS;
- on duty overseas, at all times behave in a way that upholds the good reputation of Australia; and

- comply with any other conduct requirement that is prescribed by the regulations.⁽⁴⁾

Agency Heads are bound by the APS Code of Conduct in the same way as APS employees.⁽⁵⁾

The *Public Service Regulations 1999*⁽⁶⁾ require each Public Service Agency Head to establish procedures for dealing with a report made by an APS employee under section 16 of the *Public Service Act 1999*.⁽⁷⁾ The latter states that a person performing functions in or for an APS Agency must not victimize or discriminate against an APS employee because he or she has reported breaches (or alleged breaches) of the APS Code of Conduct to the Public Service Commissioner, the Merit Protection Commissioner, an APS Agency Head, or a person authorized by any of these officials for the purposes of section 16.

The regulations provide that the procedures for inquiring into a report made by an employee under section 16 of the Act must:

- have due regard to procedural fairness and comply with the *Privacy Act 1988*;
- 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 authorized by the Agency Head;
- provide that if the Public Service 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 employee may make the report to either of them or a person authorized by either of them;
- ensure that if the report is made to the Agency Head, the Head will, unless he or she considers the report to be frivolous or vexatious, investigate it or authorize another person to investigate it;
- ensure that if the report is made to a person authorized by the Agency Head, the person will

investigate the report, unless he or she considers the report to be frivolous or vexatious;

- provide information about the protection available under section 16 of the Act (noted above) to persons making reports;
- 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 the Public Service Commissioner or the Merit Protection Commissioner or a person authorized by either of them; and
- ensure that the findings of an investigation are dealt with as soon as practicable.⁽⁸⁾

Section 15 of the Act concerns breaches of the APS Code of Conduct. Each Agency Head must establish procedures for determining whether an employee has breached the Code. The procedures:

- must comply with basic procedural requirements set out in the Public Service Commissioners' Directions;
- must have regard to procedural fairness; and
- may be different for different categories of APS employees.

The Public Service Commissioner must issue directions in writing for the purposes of the established procedures. Agency Heads must take reasonable steps to ensure that employees have ready access to the documents setting out the procedures referred to above.

An APS Agency Head may impose any of the following sanctions on an APS employee in the Agency who is found, under established procedures, to have breached the APS Code of Conduct:

- termination of employment;
- reduction in classification;
- re-assignment of duties;
- reduction in salary;
- deductions from salary, by way of fine;
- a reprimand.⁽⁹⁾

Regulations made pursuant to the Act may prescribe limitations on the power of an Agency Head to impose the above sanctions.⁽¹⁰⁾

A government circular⁽¹¹⁾ on the subject clarifies that, regardless of whether an employee's report alleging a breach of the APS Code of Conduct is being dealt with in an APS Agency or by one of the Commissioners, the legislative framework envisages a separation between the processes for inquiring into the report and those for investigating and determining whether an employee(s)

has breached the Code of Conduct. The legislation requires a two-stage approach.

In a case where an APS employee makes a report alleging a breach of the Code of Conduct to the Agency Head (or a person authorized by the Agency Head to receive the report), the Agency Head (or authorized person) must, unless he or she considers the report to be frivolous or vexatious, inquire into the allegations and determine whether there is sufficient evidence to justify an investigation under the Agency Head's procedures for determining whether there has been a breach of the Code of Conduct. In appropriate cases, where the report alleges what amounts to criminal conduct, the circular notes that the matter should be referred to the Australian Federal Police. The Agency Head (or person authorized by the Agency Head to receive the report) making the inquiry must make a decision either that:

- the procedures to determine whether there has been a breach of the Code of Conduct by a particular employee or employees will be invoked; or
- such an investigation is not warranted.

If the decision is that an investigation (to determine whether a breach of the APS Code of Conduct by an employee or employees) is warranted, the Agency Head must appoint a person to conduct the investigation in accordance with the Agency's misconduct procedures established pursuant to section 15 of the Act referred to above.

The respective functions of the Public Service Commissioner and the Merit Protection Commissioner are set out in the *Public Service Act 1999*. Included among the functions of each Commissioner is the task of inquiring into whistleblowers' reports.⁽¹²⁾ Reports by APS employees concerning breaches or alleged breaches of the APS Code of Conduct may be made to either of the two Commissioners in two circumstances:

- where either Commissioner agrees that the report relates to an issue that would be inappropriate to report to the employee's Agency Head; or
- where an APS employee has made a report within the Agency in which he or she is employed and is not satisfied with the outcome of the investigation of the report.

Where either of the Commissioners receives a report under the above circumstances, then, unless he or she considers the report to be frivolous or vexatious, the Commissioner must investigate the report or cause another person to investigate it. In a case where the

report alleges criminal conduct, the Commissioner will refer the matter to the Australian Federal Police.

The government circular referred to above clarifies the functions and powers of the Commissioners when they inquire into allegations contained in APS employees' reports about breaches or alleged breaches of the APS Code of Conduct. The Commissioner's task is to decide whether a recommendation should be made to the Agency Head to commence actions under the Agency Head's procedures for determining whether there has been a breach of the Code of Conduct. The Circular points out that the Commissioners do not have the power to reach any determination about whether the alleged misconduct has actually occurred. Such a determination must only be made under the procedures established by the Agency Head pursuant to section 15 of the Act.

Finally, as noted earlier, the *Public Service Act 1999* sets out the sanctions that an Agency Head may impose where an employee(s) has been found, under the procedures established pursuant to section 15, to have breached the APS Code of Conduct. As noted in the government circular on the subject, the Commissioners do not have the power to impose a sanction.

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- (1) The Act may be viewed at:
<http://www.lawsearch.gov.au/SubDetail.asp?ID=6104>.
 - (2) Australian Public Service (APS) Agencies comprise Australia's federal government departments, "executive agencies," and "statutory agencies" as defined in the *Public Service Act 1999*.
 - (3) At the time of writing, in addition to this legislation at the federal level, the writer is aware of specific whistleblower protection legislation in three of the six states and one of the two territories in Australia as follows: South Australia, *Whistleblowers Protection Act 1993*; New South Wales, *Protected Disclosures Act 1994*; Queensland, *Whistleblowers Protection Act 1994*; and Australian Capital Territory, *Public Interest Disclosure Act 1994*.
 - (4) Australia, *Public Service Act 1999*, section 13.
 - (5) *Ibid.*, section 14.
 - (6) The *Public Service Regulations 1999* were made pursuant to the *Public Service Act 1999*; the relevant regulations regarding whistleblowing are regulations 2.4-2.7. The regulations may be viewed at:
<http://www.lawsearch.gov.au/SubDetail.asp?ID=6538>.
 - (7) Australia, *Public Service Regulations 1999*, regulation 2.4(1).

- (8) *Ibid.*, regulation 2.4(2).
- (9) Australia, *Public Service Act 1999*, section 15(1).
- (10) *Ibid.*, section 15(2).
- (11) Government of Australia, Public Service Merit Protection Commission, Circular 2001/4: *Whistleblowers' reports*. This document may be viewed at:
<http://www.psmpc.gov.au/circulars/circular014.htm>.
- (12) Australia, *Public Service Act 1999*, sections 41(1)(c) and (l); 50(1)(a) and (e); see also *Public Service Regulations 1999*; specifically, regulations 2.5, 2.6 and 2.7.