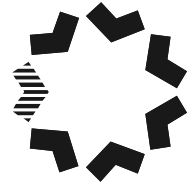


NATIONAL  
COMPETITION  
COUNCIL



# Whistleblowers Protection

National Competition Council  
Policy document



**September 2009**

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## **1. What is Whistleblowing?**

The Australian Public Service (APS) Code of Conduct establishes the standards of behaviour which are expected of all APS employees. The Code is set out in Public Service Regulation 7 and applies to all APS employees (see attachment 1).

Whistleblowing refers to the reporting, in the public interest, of information which alleges a breach of the Code of Conduct by APS employees. Legislative protection is available for whistleblowers within the APS. Section 16 of the Public Service Act and Public Service Regulation 9 provide protection against victimisation and discrimination for staff who report breaches or alleged breaches of the Code of Conduct. The Public Service Regulations also set minimum requirements for the procedures that an Agency Head must establish for the reporting and investigation of whistleblowing disclosures (regulation 11).

Examples (not prescriptive or all-inclusive) of the types of matters that could lead to whistleblowing disclosures include:

- fraud or other criminal behaviour
- waste, misuse or mismanagement of the agency's resources, or
- practices resulting in danger to public health or safety.

In general where a person making a report is not directly affected by the conduct concerned, the making of a report would generally be taken to be whistleblowing, whereas if the person is the subject of the conduct or is directly affected by the conduct, the report may more appropriately be considered to be a grievance. A report by an APS employee, expressing dissent with his or her agency over a policy issue, would not be treated as a whistleblowing disclosure.

## **2. Statement of support to whistleblowers**

The National Competition Council (the Council) is committed to the aims and objectives of the Public Service Act 1999 (the Act) and the Public Service Regulations with regard to whistleblowing. It does not tolerate improper conduct by its management and staff, or the taking of reprisals against those who come forward to disclose such conduct.

The Council recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal corrupt conduct, conduct involving a substantial mismanagement of public resources, or conduct involving a substantial risk to public health and safety or the environment.

The Council will take all reasonable steps to protect people who make such disclosures from any detrimental action in reprisal for making the disclosure. It will also afford procedural fairness to the person who is the subject of the disclosure.

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### **3. Purpose of these procedures**

The Council's whistleblowing policy establishes a system, as per the requirements of section 15(3) of the Act, whereby Council employees may report whether an employee (manager or staff) of the Council has breached the APS Code of Conduct.

These procedures are designed to complement normal communication channels between managers and staff. Staff are encouraged to continue to raise appropriate matters at any time with their managers. As an alternative, any employee may make a disclosure of a breach (or alleged breach) of the APS Code of Conduct in accordance with these procedures.

In cases where an employee wishes to report on conduct which has occurred in an agency other than their own employing agency, the report should, in most circumstances, be made to the head of the agency concerned.

### **4. The reporting system**

The reporting of information which alleges a breach of the APS Code of Conduct may be made to:

Mr John Feil  
Executive Director  
National Competition Council  
Level 9, 128 Exhibition Street  
Melbourne VIC 3000  
ph: (03) 9285 7499  
fax: (03) 9285 7477  
email: john.feil@ncc.gov.au

Alternatively where the alleged breach of the APS Code of Conduct relates to the Executive Director, the report may be made to the Council's Director Corporate Services (currently Mr Ross Campbell).

Mr Ross Campbell  
Director  
National Competition Council  
Level 9, 128 Exhibition Street  
Melbourne VIC 3000  
ph: (03) 9285 7485  
fax: (03) 9285 7477  
email: ross.campbell@ncc.gov.au

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**The steps and procedures outlined below will be followed by the Executive Director or the Director Corporate Services (as relevant to the matter reported).**

## **5. Basic steps in reporting a breach**

- a) In the first instance, an employee should make the allegation to the Executive Director. The Executive Director may appoint an authorised officer to consider allegations of breach of the Code and to determine the most appropriate course of action.
- b) Where the employee is not satisfied with the findings of an agency-based investigation, he or she has the option of taking the matter to the Australian Public Service Commissioner or the Merit Protection Commissioner. The Australian Public Service Commissioner is a statutory position responsible for promoting and evaluating the implementation of the Australian Public Service Values and Code of Conduct, and for reporting on the health of the APS. The Merit Protection Commissioner has a key role within the APS in providing independent external review of actions affecting individual APS employees and plays an important role in supporting adherence to the APS Code of Conduct including that APS employees must at all times behave in a way that upholds the APS Values.
- c) An employee may make a disclosure **direct** to the Australian Public Service Commissioner, or the Merit Protection Commissioner, where the relevant Commissioner agrees that the matter is of such sensitivity that it would be inappropriate to report it within the agency concerned.
- d) An employee also has the right to make a complaint to the Commonwealth Ombudsman about the actions and decisions of Commonwealth bodies. However, the Ombudsman is unable to investigate complaints about politics, private individuals or companies, decisions of courts or tribunals, employment related matters (except in certain cases in the Australian Defence Force), actions of State or local governments, actions of government ministers, and actions of some government business enterprises.

## **6. Procedures to be followed when reporting breach to Executive Director**

All reports regarding breaches (or alleged breaches) of the APS Code of Conduct will be accepted and handled by the Executive Director in a professional manner and promptly and with due regard to procedural fairness and comply with the *Privacy Act 1988*.

In instances of alleged fraud, the procedures for fraud reporting and investigation will be followed as set out in the Council's *Fraud Control Policy* (as amended from time to time).

In instances of public interest whistleblowing disclosures that are not fraud related, the employee makes the allegation to the Executive Director.

Upon receipt of the allegation, the following procedures will be followed.

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- a) The Executive Director, upon receipt of the allegation(s), *may* appoint an authorised officer to consider allegations of breach of the Code and to determine the most appropriate action for dealing with the breach or the alleged breach of the Code. Such an authorisation is to be in writing, signed by the Executive Director. It is expected that the authorised officer would be a senior APS employee with managerial responsibilities. The authorised officer may be from within the Council or another APS agency
- b) The authorised officer will then initially consider the allegation(s) to determine:
1. whether the conduct referred to fits the definition of a breach of the Code of Conduct
  2. whether the matter should be dealt with under the whistleblowing provisions or is in the nature of a grievance and should be dealt with as a grievance
  3. whether the report is of some different nature and should be referred elsewhere, such as to
    - the Executive Director to follow the *Fraud Control Policy* (as amended from time to time)
    - the Australian Public Service Commissioner
    - the Australian Federal Police
    - the Ombudsman or
    - the Auditor-General, and
  4. if it fits the definition of whistleblowing, whether, on the basis of the material presented, the report appears to be vexatious or frivolous, and therefore should not be investigated.
- c) The authorised officer, having made a determination in relation to the above issues, will advise the Executive Director (if applicable) and the person making the report as to whether the report is thought to be in the nature of whistleblowing or of some other nature. If the report is of a whistleblowing nature the authorised officer will advise the Executive Director (if applicable) and the person making the report of steps to be taken to consider the matter further.
- d) If a report is considered to be frivolous or vexatious, the authorised officer will inform the Executive Director (if applicable) and the person making the initial report that no further action is recommended under these procedures. Provided the report has not previously been made to the Australian Public Service Commissioner or the Merit Protection Commissioner, it is open to the person making the allegation to take it to these persons as appropriate.
- e) In some cases the facts and all relevant circumstances will be sufficiently clear from the evidence placed before the authorised officer to enable him or her to decide on the appropriate course of action. In most cases, however, the authorised officer will want to make further inquiries to his or her own satisfaction before reaching any

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conclusion as to the course of action to be taken. The following principles will apply to the authorised officer investigating the alleged breach of the Code of Conduct.

- The matter will be discussed with the person alleging the breach of the Code of Conduct to determine the nature of the allegations. The scope of the investigation and the way in which it will be conducted will also be clarified with the person making the allegation.
  - The investigation will comply with all relevant legislation, such as the *Privacy Act 1988*.
  - The authorised officer should make it clear to people providing information voluntarily that they are not obliged to answer questions or supply information if they do not wish to do so.
  - In preparing a report, the authorised officer will have regard to the principles of procedural fairness, which include that there be an unbiased decision maker and there be an opportunity for the person(s) against whom the allegations have been made to know the case against them and to put their case. This must occur within a reasonable time to allow the person's response to be taken into account before a conclusion is reached.
- f) The authorised officer will decide whether there is substance to the allegation and recommend action that the Executive Director may take, for example, whether the disciplinary provisions of the *Public Service Act 1999* should be commenced.
- g) Upon receipt of the report, the Executive Director will consider the recommendations in the report and advise the person making the allegation and the person(s) against whom the allegation has been made of their decision on the matter, including whether the appropriate disciplinary processes will be commenced.
- h) Where the Executive Director recommends disciplinary procedures be pursued, a different officer will be appointed by the Executive Director to be the 'authorised officer' to consider whether an employee should be charged with misconduct. If the matter involves allegations against the Executive Director, the outcome of the investigation will be referred to the Public Service Commissioner or the Merit Protection Commissioner.
- i) Where the person who made the allegation is not satisfied with the actions of the Executive Director, or in the case of a subsequent disciplinary inquiry or fraud inquiry, the outcomes of such an inquiry, the person may take the issue to the Public Service Commissioner or the Merit Protection Commissioner.
- j) The employee reporting the alleged breach of the Code and person(s) against whom the allegation has been made may receive guidance or assistance from a staff representative at any stage of the procedure. Also an employee may seek the assistance of the Employee Assistance Program.

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## **7. Procedures to be followed when reporting breach to Public Service Commissioner or Merit Protection Commissioner**

The functions of the Public Service Commissioner are set out in section 41(1) of the Act and those of the Merit Protection Commissioner are set out in section 50(1). Included in these functions for both Commissioners is inquiring into whistleblowers' reports made to the Commissioner (or to a person authorised by the Commissioner) (s. 41(1)(c) and s. 50(1)(a) of the Act). Also relevant is Division 2.2 of Part 2 of the Public Service Regulations.

Whistleblowers' reports may be made to the Commissioners in two circumstances:

- a) where the Commissioner agrees that whistleblowers' reports relates to an issue that would be inappropriate to report to the Executive Director; for example if the person making the report believed that the Executive Director was directly involved in the alleged breach of the Code (regulation 2.4(2)(c)) or
- b) where an employee who has made a report to the Executive Director and is not satisfied with the outcome of the investigation of the report (regulation 2.4(2)(g)).

Where the Commissioners receive a report under the above circumstances, the regulations require that, unless they consider the report to be frivolous or vexatious, the Commissioners must investigate the report or authorise another person to investigate it (regulations 2.5(2) and 2.6(2)). In appropriate cases, where the report alleges what amounts to criminal conduct, the Commissioners will refer the matter to the Australian Federal Police.

Experience with cases handled by the Commissioners has brought to light a need to clarify their functions and powers, particularly in relation to any misconduct action that may follow a Commissioner's consideration of a report. When the Commissioners inquire into the allegations made in whistleblowers' reports, their task is to determine whether a recommendation should be made to the Agency Head to commence action under the Agency Head's procedures for determining breaches of the Code of Conduct. The Commissioners do not have the power to reach any determination about whether the alleged misconduct has actually occurred. Any such determination must only be made under procedures established under subsection 15(3) of the Act by an Agency Head. An Agency Head, as provided by subsection 15(1) may impose a sanction, where the employee or employees have been found to have breached the Code of Conduct. The Commissioners do not have the power to impose a sanction.

## **8. Protection for whistleblowers**

### **Victimisation**

Section 16 of the Public Service Act provides that:

*A person performing functions 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:*

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- (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or*
  - (b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.*
  - (c) an Agency Head or a person authorised for the purposes of this section by an Agency Head.*

Where an employee believes he or she is being victimised or discriminated against because of the whistleblowing report, the Act and the Regulations provide a general mechanism enabling employees to lodge grievances about actions which affect their own employment. Under this mechanism, grievances are dealt with firstly by the Executive Director who may:

- form a view that the action is not reviewable, or should not be reviewed, having regard to the criteria specified in the legislation and discussed earlier in this advice; or
- seek to refer the review request to the Merit Protection Commissioner for independent review; or
- conduct a review.

If the employee remains aggrieved after the Council has made its decision on the grievance, he or she may then take the grievance to the Merit Protection Commissioner. It is also open to the employee to take a grievance directly to the Merit Protection Commissioner, if:

- the Executive Director was directly involved in the action; or
- it is not appropriate, because of the seriousness or sensitivity of the action, for the Executive Director to deal with the application; or
- the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of action.

It should be noted that applications for review of actions under these provisions are limited to non-SES employees. Also former employees who have separated from the APS do not have the same formal rights to reviews of actions as are contained within the regulations. It is, however, open to the Council to deal with applications from ex-employees on a case-by-case basis in a manner they believe appropriate to the circumstances.

As the Regulations prohibit victimisation and discrimination against persons performing functions 'in or for an Agency', contractors, as well as employees, are prohibited from taking retaliatory action against whistleblowers. The Executive Director directs that potential contractors be advised of this obligation and appropriate clauses should be included in the contract which relate to the expected standard of conduct and the consequences of not meeting those standards.

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For more information on review of actions powers by the Merit Protection Commissioner refer to the PSMPC publication *Public Service Act 1999 Advice No. 13: Review of Actions*<sup>1</sup>

### **Termination**

Paragraph 170CK (2) (e) of the *Workplace Relations Act 1996* provides that an employee's employment must not be terminated for:

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

### **Defamation**

The Public Service Regulations provide no specific protection relating to liability for defamation in respect of disclosures made under whistleblowing provisions. Common law protection applies, as modified by State or Territory legislation where applicable. At common law, the defence of qualified privilege would be available to a whistleblower who was sued for defamation by a person to whom a disclosure alleging misconduct is made, provided that the statements alleged to be defamatory were made in good faith and to a person authorised to receive those statements.

There are also statutory protections in s.89A of the *Public Service Act* in relation to reports made in good faith in connection with the conduct of APS staff.

### **Confidentiality of complaint**

The details of disclosures will be kept confidential as far as possible and will be released only to those who have a need to know, including to meet the requirements of procedural fairness.

### **Freedom of Information**

Applications for access to any material received by the NCC or the Public Service Commissioner at the start of, or during the investigation, will be handled under the provisions of the Freedom of Information (FOI) Act. Certain documents are exempted from the access provisions of the FOI Act, and the Act also provides protections from certain legal actions, for those who grant access, as well as for authors and suppliers of documents.<sup>2</sup>

### **Unauthorised disclosure of information**

Section 70 of the *Crimes Act 1914* makes it an offence for a Commonwealth officer to publish or communicate any fact or document, which it is his or her duty not to disclose, except if the person is authorised to disclose the information. Public Service Regulation

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<sup>1</sup> Available online at <http://www.apsc.gov.au/circulars/psa99advice13.htm>

<sup>2</sup> For more detail refer to sections 91 and 92 of the FOI Act

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7(13) sets out the duty not to disclose official information without authority – consistent with the prohibition in s.70 of the Crimes Act.

A public interest whistleblowing disclosure, made to a person who is authorised to receive it under procedures established by the Council will not, of itself, be in breach of the regulation or an offence under s.70 of the Crimes Act. However unauthorised disclosure of information may be in breach of the regulation, and thus in breach of the Code of Conduct.

**Anonymity**

An anonymous disclosure can be made. Such disclosure, supported by sufficient evidence to justify an investigation proceeding, shall be dealt with in accordance with the whistleblowing procedures set out in this document.

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## **Attachment 1: The APS Code of Conduct**

The Code of Conduct requires that an APS employee must:

- behave honestly and with integrity in the course of APS employment
- act with care and diligence in the course of APS employment
- when acting in the course of APS employment, treat everyone with respect and courtesy, and without harassment
- when acting in the course of APS employment, comply with all applicable Australian laws
- 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 Minister's member of staff
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS 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 APS 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 Values and the integrity and good reputation of the APS
- while 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.