

# SUBMISSION

To the Advisory Group on the Reform of Australian Government Administration

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## Introduction

The Federal Government has decided that Australian Government administration is in need of reform. This is an acknowledgement by Government that all is not well in the public sector and that reform is required to remedy any identified problems.

It is sufficient to say that the public sector provides a satisfactory service in most instances. Therefore this review is not about what works and is acceptable but rather it is about what is wrong with the current arrangements. This submission is strongly focussed on what is fundamentally wrong with the current public sector administration. No further reference is made to those aspects of public administration which adequately serve the public interest.

Attached to this submission are three previous submissions to government inquiries about shortcomings of the Australian Public Service .

1. Review of Freedom of Information - Exposure Draft
2. Parliamentary Joint Committee, Inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006 (LEIC)*
3. Inquiry into Whistleblowing in the Australian Public Service.

A summary of each submission is provided at the end of this submission.

Any plan to reform the Public Service to create 'a world's best practice' must surely start by considering the ethics and integrity of the Service. The core of any organisation is its integrity and ethical conduct. Any deficiency of those aspects means that the whole structure is built on sand based morality; it shifts to suit its needs.

The most telling measure of the Public Service is not the functions that work satisfactorily; it is the functions that do not work to a satisfactory standard. And the core area of the Australian Public Service which does not function properly is its ethics and probity standard. The dramatic failure in this standard is the misuse or abuse of public sector 'loyalty'.

In 40 years I have been unable to ascertain to whom every Public Servant must give their first loyalty. No Minister, Parliamentarian, Public Service Commissioner, Ombudsman, Parliamentary Inquiries, senior managers or supervisor has been willing to put in writing, precisely to which Public Servants owe their first loyalty.

### **LOYALTY – A matter for consideration and resolution.**

Therefore I ask this Advisory Panel to resolve this question; to whom should public servants owe their first loyalty? There is an obvious conflict between the respective entities, all of whom seem to claim a right to a Public Servant's first loyalty. Should it be to the public, the Government, the parliament or the agency or the head of the agency in which the public servant works? The question is now before the panel and I ask that an answer be provided.

Having addressed that question, I ask that the Panel note the ways in which 'loyalty' is used or misused to favour particular public sector interests. The Panel should also make recommendations to ensure that such 'loyalty' may be exercised without fear of reprisals.

In the absence of clear advice on the question of loyalty over 40 years, I have worked on the assumption that my first loyalty was to the public – rather than to an agency head or other senior managers or even the Government. As a consequence, efforts to tell the public about wrongdoing and malpractice in the Public Service have cost me dearly. But I am not alone. Most Public Servants believe their first loyalty should be to the public. Yet to put that belief into practice is a dangerous and career threatening pursuit.

Any analysis will show that Public Service managers persistently and arbitrarily prevent the public from access to information about their decisions, practices and operations. Similarly Parliamentarians are regularly denied access to information about the decisions, policies or operations of the Public Service. At times even the Government seems incapable of getting truthful information about activities in the Public Service.

It is therefore obvious that in practice, the Public Service is an entity in its own right and to a fairly great extent it is beyond the power of the public, Parliament or the Government to directly oversight their conduct or misconduct.

As a mechanism to avoid the oversight of their conduct and the conduct of their agencies, agency heads and senior managers insist on the 'loyalty' of their staff. 'Loyalty' is a term used as a tool by Agency managers when gauging an employee's unquestioning compliance to management control. The higher the loyalty, the greater is the unquestioning compliance. Loyalty is not a measure of skill, competence or ability. When used by Agency managers, it is a measure of blind and silent obedience.

This means that regardless of what happens within an agency, whether it is good or bad or horrendous, no unauthorised information is permitted to be disclosed to any organisation, the public, parliamentarians or the government without the label of 'disloyalty' being attached to the person making the disclosure. This is the fixed, immutable informal law of the Public Service; and the punishment for breaching this law can be beyond reason. It can lead to career ending banishment, and unbridled ostracising, harassment and discrimination and on some occasions, suicide. This power to demand and get 'loyalty' is unfettered, it is virtually without limit and totally pervasive. It is the foundation culture of the Public Service and creates partisanship and cliques of 'loyal' staff upon whom agency

heads can rely to ensure that an impeccable public face is always the face to be shown to the public.

This power of agency heads and senior managers is reinforced by the common law of 'fidelity and loyalty.' Constantly, senior Public Service managers refer to this common law of loyalty, and they demand that all loyalty, obligations and duties must firstly be given to the agency. In practice this 'loyalty is a coercion code requiring binding loyalty to those who run the agency. Any disclosure of information, even if it is in the public interest is a breach of industrial law, and renders the person making the disclosure subject to severe industrial repercussions; i.e. termination of employment.

But the power of agency heads and senior managers does not stop there. They are assisted by legislators who have created hundreds of laws in Australia related to secrecy. These laws can and often do prevent the disclosure of Public Service information which if disclosed would serve the public interest. Though some of this legislation may also serve a legitimate purpose, it is currently being used extensively to protect the interests of agencies and perhaps even the political interests of the Government. The use of such legislation must be restricted to protecting public wellbeing and health and for no other purpose. It is not a legitimate practice (unconstitutional) for Governments to create laws that are enforced by agencies and which are increasingly used to protect Government policy and/or agency administration from public scrutiny.

The most onerous of these is the Commonwealth Crimes Act. This act prohibits the disclosure of any information arising from the Public Service regardless of the benefit the disclosure may bring to the public. Similarly there is no obligation on agency managers to justify whether there are reasonable ground to repress a disclosure. But most importantly, is that the Act is being used to prevent information, which actually serves the public interest from being disclosed to the public.

The Crimes Act (s70) is the most obvious and offensive example of this power which empowers agencies, agency heads and senior managers to keep secret, information about their conduct and the functioning of 'their' agency. Other legislation such as Public Service Regulation 2.1 has a similar function. It is used more often than not for the benefit senior managers so as to avoid scrutiny, rather than being used to protect the interests of the public.

To drive home the point, under proposals for a Commonwealth Whistleblowing Act, the Dreyfus Parliamentary inquiry has suggested that it should be permissible to disclose information in the public interest about imminent dangers to public health, safety or the environment. The disclosure of such information would undoubtedly touch on the conduct of agencies and perhaps even government policy.

Noting the principal that some matters which are in the public interest should not be prevented from disclosure, it raises serious questions as to why malpractice, maladministration, malfeasance, misfeasance, abuse of office, outright corruption, graft, theft, waste of public monies, misappropriation, intimidation, harassment, bullying, coercion and conspiracy should not also be matters which should be exposed in the public interest.

There is no logical reason why public servant can't disclose any public sector practice which they honestly believe harms or is likely to harm the public interest. More to the point, shouldn't it be the duty of all public servants to disclose any information about the Public Service if the public servant has an honest belief as to the existence of wrongdoing or

corruption. The only restriction on this duty should be to avoid misplaced or mistimed disclosures which would assist any offender to avoid action by a relevant authority.

Obviously any such disclosures must be based on an honest belief as to the truth of the disclosure and if that criterion is not met then the disclosure would not be lawful or appropriate.

In relation to free access to the disclosure of public administrative matters, Australia is lagging badly behind other countries particularly in Scandinavia, the United States, and parts of Europe. If the aim of this review is to achieve a worlds best practice Public Service there will be much to rectify before we are even in the race.

### **Continued opacity or eventual transparency?**

Going hand in glove with the issue of Public Service 'loyalty' are the issues of transparency, accountability and mechanisms to identify what is wrong within public administration.

These issues are fundamental to all functions of the Public Service. Until these issues are resolved, all other recommendations to reform the Public Service are little more than band-aides over a gangrenous wound.

It is ludicrous to contemplate building 'a world best practice public service' in the knowledge that any serious or systemic wrongdoing, which occurs in the Public Service cannot be rectified by our system of public administration. It is delusional to aspire to a world best practice Public Service if serious or systemic problems exist or can exist and there is no effective or efficient way to deal with those problems.

As discussed above, senior public sector managers are almost fanatical in their universal resistance against moves towards greater public sector transparency and accountability. It is clear that collectively they wish to maintain secrecy about the operations of 'their' respective agencies as this minimises the risk of accountability.

But such secrecy and the risk of accountability should only be of real concern to senior managers if matters under their control were 'not up to scratch'. And 'not up to scratch' could range between having to answer difficult Ministerial questions to matters of maladministration, incompetence, negligence or misfeasance through to abuse of office, public waste, graft, misappropriation or conspiracy. And even though these shortcomings may not necessarily be constantly present, it seems that maintaining a high level of secrecy is an insurance against an outbreak of staff awareness and conscience against agency malpractice, incompetence or neglect. So agency managers across the Public Service maintain a high level of secrecy at all times. This ensures protection against the occasional disclosure of wrongdoing. It is an insurance practice to thwart the risk of accountability.

This conduct is so universal at senior public service levels it has become institutionalised. This pathological obsession to secrecy is promoted as a cultural norm and peddled as a necessity throughout the Public Service by agency heads and the Public Service Commission. There is no attempt to justify such conduct, though excuses such as protecting privacy or business or national security are often thrown into the mix just to muddy the argument. The information which is being kept secret unnecessarily is about the functions, effectiveness or efficiency of agencies.

However the worst aspect of this conduct is that it can facilitate and mask various forms of wrongdoing and malpractice. Like any wrongdoing, it is always easier and safer if wrongful acts are done in secret.

Unfortunately whenever wrongdoing or malpractice is perceived in the public sector, there is virtually no action which can be taken to address and rectify the matter. There is no effective mechanism available in the Public Service to address and rectify wrongdoing or malpractice at middle or upper management levels.

The Rudd Government has already recognised the lack of transparency in public administration and is currently reforming the Freedom of Information Act. However, the reforms of that Act will not make public administration, transparent. It will only make it less opaque and impenetrable. Information which would assist the public in understanding the conduct of public administration can and will still be denied to the public for no purpose other than it helps senior bureaucrats to keep their conduct and their level of competence secret and untested.

Earlier this year the Attorney General directed all agencies to adopt a 'pro disclosure' attitude towards information held by agencies. At a recent Media sponsored conference called the Right to Know Campaign there was a resounding agreement that the direction has been ignored universally by agencies. There has been no change in the attitude of agencies. There remains the same Agency reluctance to disclose the reasons for decisions, the subsequent action planned or the operations put in place. In fact in some matters, this previous reluctance has turned to direct defiance of the direction.

There is a growing public opinion that the Public Service should serve the public rather than the interest of senior public sector managers or even that of Government. The powers of the Public Service only exist through the public election of parliamentary representatives to Government. The power of the people has not been ceded to the Public Service. Information held by the Public Service is public information and as such the public should be entitled to it provide that to do so does not put the public at risk of real harm.

As matters stand the decisions, processes and procedures of public administration are considered, particularly by senior Public Sector managers to be 'their' property. And as such, outsiders such as the public are not entitled to see how decisions are made, how those decisions are applied or how they are administered. Access to information about Public Service decisions and actions is at the sole discretion of those who make public sector decisions and determine the actions. The process of public administration is not transparent.

One must ask the question, who benefits from this practice? The answer is simple - senior Public Service managers. By keeping secret their decisions including how or why they made their decisions, senior managers can be as prejudiced and biased as they like. Decision can be made to suit their interests or in the interests of those they favour. Perhaps more importantly is that secrecy prevents scrutiny of effectiveness or efficiency.

But from an ethical viewpoint perhaps the worst aspect of keeping the processes of public administration secret is that very Senior Public Servants can dictate the culture of an Agency to meet their own personal interests, preferences and prejudices.

## **Accountability – what accountability?**

Lack of transparency facilitates the lack of accountability. No matter what is wrong in an agency, the restrictions imposed by legislation and eagerly enforced by senior public service managers, ensure that there is virtually no risk of accountability coming into play. Creating a Public Service where nobody is permitted to expose problems within the Public Service is a very effective self servicing device of public administration.

Much of the Australian Public Service management process works on a crisis management principle. Everything is assumed to be working properly until, against the odds, it is proved that something is wrong. Matters proceed regardless of their effectiveness or efficiency or despite wrongdoing, fraud or corruption until a) those engaged in the process stop of their own volition or b) a member of the public complains loud and long enough for a politician to take notice or c) the Ombudsman or the Auditor General discovers some wrongdoing or d) a whistleblower blows the whistle on some misconduct and the matter gets to the media.

This is a seriously critical issue of Australian Government administration. The systems which are supposed to deal with serious or systemic wrongdoing simply do not work. Therefore when things go wrong, either accidentally or negligently or intentionally they stay wrong. The only circuit breaker likely to rectify the situation is for those engaged in the practice to institute their own changes or the public to complain because of lack of service or a Whistleblower puts their career, livelihood and health on the line, and blows the media whistle.

The lack of accountability to which this submission refers concerns the upper levels of the public service, and in some cases to middle management levels as well. Junior public servants are regularly held to account and these events are flaunted by senior and middle managers as proof that accountability exists in the public service. A junior public servant cannot initiate or maintain serious or systemic wrongdoing without the cooperation or assistance of more senior people. Junior public servants cannot influence the conduct or culture of an agency by their actions. Conversely, the culture and conduct of an agency is usually set by the examples of senior or middle managers. Therefore, references herein to problems with accountability are focused on upper levels of the public service.

The Public Service Commission has been the primary agency tasked with the responsibility to oversight the public sector for many years. In fact and effect, the Public Service Commission has done little more than run interference on behalf of the senior bureaucrats. For example the Commission has known that many agencies have failed to properly implement the Public Service Act, Whistleblowing provisions (s16) which have been in existence since 1985. Yet the Commission persistently excuses those agencies for their failure to comply with statutory provisions for more than 24 years.

The Public Service Commission has been aware of the Ombudsman, courts and tribunals complaining about the conduct of agencies in respect of many matters for years. These matters include altering records, failing to keep proper records, misusing legal professional privilege, providing false or unreliable evidence, the manner in which agencies dealt with Comcare claims, discrimination offences, unlawful terminations, harassment and abuse of office offences, yet the Commission has done nothing to address those instances of misconduct. Such matters are under the direct control of senior managers or are carried out by junior officers at the forceful behest of senior managers.

The incidence of conspiracy to engage in conduct contrary to the Code of Conduct is exceptional. Virtually no serious or systemic misconduct can be maintained without the

cooperation of a number of people. Conspiracy is a Crimes Act offence punishable by a prison term. Yet even in the rare instances where an individual (mostly a junior officer) is found to have engaged in multiple acts of wrongdoing there has been no attempt to investigate the possible scope of a conspiracy.

The spectacular silence of the Public Service Commission seems only possible in a vacuum – and perhaps that could account for the Commission's lack of interest in such matters. I can find no record of the Commission taking any action against any senior bureaucrat on any matter. Yes there are records of junior staff being held to account. But no senior managers have been, to the best of my research, ever held accountable.

A few naïve whistleblowers have attempted to raise matters of senior administrative misconduct with the Commission, but I believe the records show that not one finding has been made against a senior public servant.

Any genuine analysis will show that senior managers are never held to account for any questionable conduct or even flagrant misconduct. While many junior officers are sacked, demoted, transferred or otherwise dealt with for individual breaches of the code of conduct, it is virtually impossible to find any middle manager facing such levels of accountability, and certainly no senior manager is ever held to such account.

Based on a long-standing history of senior managers seldom if ever having been held to account for any level of misconduct or corruption, is it little wonder that public servants who detect wrongdoing, remain silent.

Nonetheless some senior public sector managers have been held to account, but only because the Australian Federal Police are called in. This seldom ever happens because the agency head asked for police involvement. Usually this only occurs if somebody 'leaks' information about wrongdoing and the pressure on the agency becomes too great to resist AFP involvement.

### **The Australian Government Solicitors (AGS) office.**

The conduct of the AGS, in my view, tends to protect agencies, and particularly senior managers from accountability. The role of the AGS should not be to act as a defence lawyer for the actions of Government agencies.

The role of the AGS should be to offer objective legal advice to agencies about the way they should serve the public. The aim of the AGS should be to ensure that agencies are doing all in their power to serve the public interest as its first priority. The AGS should act as an independent legal advice service without any bias favouring agencies.

As matters stand, Government agencies adopt the position that they are in a conflict situation with the public generally and specifically in some instances. They expect the AGS to serve as 'their' legal team to defend them against any action by the public.

This is simply not right. The AGS should be providing legal advice on matters of public administration to all and sundry. There would be exceptions to this general rule particularly relating to prosecutions, security, confidentiality matters, business dealings or privacy

issues, but in matters of straight forward public administration any legal advice obtained from the AGS by an agency should be public information.

Legal advice is simply one more piece of information to help the senior agency managers carry out their functions. Similarly it helps members of the public understand the practices and procedures of public administration. The fact that the information comes from the AGS should not give the agency the right to claim client legal privilege.

Government agencies are not private organisations with a right to conceal what they know about matters of public administration. They are not in competition with any other organisation. They have a Government sponsored monopoly on the functions they are supposed to carry out. There is a constant in house exchange of information which if it was carried out between private organisations would amount to restrictive trade practices or collusion.

A charter of the AGS must be introduced. The charter should address the following;

- a) Compel the AGS to objectively consider the ethical and probity conduct of agencies in respect of any legal advice sought.
- b) Compel the AGS to consider the public interest as the foremost critical factor when providing advice to agencies.
- c) The AGS must have a formal responsibility to disclose to the Ombudsman any conduct by an agency, which is suspected of being a breach of the integrity standards of the Public Service
- d) Failure by the AGS to disclose information about the conduct of an agency about which there is any suspicion of wrongdoing, must be considered an attempt to aid or abet such conduct, and appropriate penalties should ensue.
- e) Inform the Ombudsman, the Minister and any member of the public directly concerned, should an agency seeks to withhold information from the public when there is no likely risk of harm to the public interest if the information is disclosed.

### **Voluntary National Identifier – (the Australia Card).**

Australian citizens/residents have no unique national or universal identifier. Therefore their interaction with Government, private businesses and others is problematic and open to abuse by identity theft.

The Government requires citizens/residents to provide information in relation to services and compliance with laws.

Citizens and residents also interact with private organisations which also provide services. These organisations are usually subject to federal laws and related standards which in turn affect their dealings with Australian residents.

Examples of private organisations which provide services to citizens or residents and act under federal/state legislation include banking, finance, mortgages, shares, superannuation, tax, employment, insurance, health insurance, travel, telecommunications, pharmaceuticals, property, professional or educational standards and so on.

Each Government agency or relevant private organisations create their own unique client identifier for each citizen or resident to facility their transactions.

Therefore each citizen and resident has dozens if not hundreds of different personal identifiers spread across multiple government agencies and related private organisations.

Other private organisations require extensive personal information to establish a business/client relationship.

None of these government agencies or private organisations have common client identifiers.

This process imposes an enormous cost on the nation. The inefficiencies of this process is ongoing and incremental. As client information is not upgraded this information becomes inaccurate, incomplete and unreliable. At times it can be wrong and false by omission.

For those who want it, a National identifier should be available. For those who don't, it should be an option to opt out. Of course the benefits that would flow to those who accept identification (eg reduced passport costs, tax clarity, business transactions, GST, medical records, centrelink and so on) should reap the benefit (by lower/reduced costs) than those who opt out. This would be a fair solution that would help public sector efficiency, better service those who wished to participate and leave those who did not free from any administrative interference.

## **Summaries of Attachments**

The three attached submission are all concerned with matters of public administration.

### ***Review of Freedom of Information - Exposure Draft.***

This review shows the extent to which Government agencies use unconscionable conduct to avoid releasing information about the activities of agencies. The submission points out that agencies actively and deliberately obstruct the disclosure of 'their' information even when there is nothing pointing to any wrongdoing within the respective agency. Matters are deliberately misclassified for the sole purpose of obstructing the disclosure of information.

The submission calls for a redraft of the FOI Act to ensure that only those matters which would be likely to cause harm to the public interest would be barred from public access.

**Parliamentary Joint Committee, Inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006 (LEIC)***

This submission shows that there is no organised integrity oversight of the Australian Public Service. It further shows that some agencies are run like private fiefdoms where the rule of law is determined at the discretion of senior management.

The submission calls for a Federal Integrity Commission to oversight all Commonwealth agencies.

**Inquiry into Whistleblowing in the Australian Public Service.**

This submission proves that the disclosure of public sector information in the public interest is stopped by bad laws which favour the interests of the Government and senior public service managers.

The submission shows that there is no protection available for those who attempt to disclose public sector information which would serve the public interest.

The submission calls for the introduction of a national Public Interest Disclosure Act and a Commission to administer disclosures and the protection of whistleblowers.

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