

Appendix 1

Attachment

Statement pursuant to Section 5 - Protection of persons Referred to in the Senate

Senate Privilege Resolutions

By John Lloyd

1. The Merit Protection Commissioner (MPC) submitted a report to the Presiding Officers on 7 August 2018. The Report was titled:

Report of the Results of Inquiries by the Merit Protection Commissioner under Section 50(1)(b) of the Public Service Act 1999 to the Presiding Officers into Alleged Breaches of the Code of Conduct by the Australian Public Service Commissioner received on 11 January and 4 June 2018.

2. I resigned as Australian Public Service Commissioner on 8 August 2018.

3. I submit that I am named in the Report. I claim that I have been adversely affected in reputation by the references to me in the Report.

4. I set out in this paper a summary of the adverse references that adversely affected my reputation and my response to the references.

5. The impact of the adverse references was amplified by what I consider were most unsatisfactory processes adopted in the handling of the complaints leading to the Report. My rights to a fair hearing were not respected.

Findings of the Report

6. The Report finds that my decision to provide a document to the Institute of Public Affairs (IPA) amounted to a failure to uphold the good reputation of the Australian Public Service (APS).

7. The rationale for this conclusion is flawed.

8. The first aspect of the complaint against me is that the document was created for the sole purpose of providing it to the IPA. This was not sustained. Ample evidence was produced to prove that the paper was created for another purpose. The MPC accepted this point and made a finding that this ground of the complaint was not sustained.

9. The second aspect of the complaint was that providing the document to the IPA was inappropriate.

10. It is asserted that I should have diverted the request for the document to a Media Team, another SES officer or I should have directed the IPA to submit a Freedom of Information request for the material.

11. The reasoning for this conclusion is unsound. The Australian Public Service Commission (APSC) receives numerous requests for information. It is a normal and embedded part of the business of the

APSC. Agencies like the APSC have a responsibility to share information with outside bodies and the public.

12. The APSC as a central government agency compiles extensive information that is of interest to others. The APSC shares an enormous amount of data and information with outside entities. The entities typically include think tanks like the IPA, academic researchers, unions, employer groups, international entities e.g. the OECD and other government bodies in Australia and overseas. The clear operating context is to provide the information if it is within our possession.

13. The document containing the information that the IPA requested was in our possession. It was therefore straightforward to provide the document to the IPA.

14. I submit it would be ludicrous to request the IPA to submit a FOI report. This would involve unnecessary delay and cost for both parties. I have never adopted such an approach in circumstances like this.

15. A decision to pass the request to another SES officer would have the appearance of a contrived arrangement. It would be seen as simply a device for me to avoid responsibility. The document was in existence, a number of officers had contributed to it. I informed others of the request that was made to me by the IPA. The straightforward, efficient and simple approach was to email the document to the Executive Director of the IPA.

16. The Report observes that a contributing factor to its finding was that by providing the report controversy arose for myself, the APSC and the public service. I assume this view is based on a reaction from those opposed to the Government's bargaining policy, particularly union officials.

17. Such an assertion displays a staggering ignorance and naivety of the way workplace bargaining is conducted.

18. The APSC was responsible for coordinating the implementation of the policy in a hard bargaining environment. The policy contained an explicit objective of removing restrictive content from enterprise agreements. The unions and the Opposition were very critical of the Government's policy. As APS Commissioner I was expected to take a leading role in implementing the policy.

19. The Report argues the provision of the paper to the IPA would be seen as "building a coalition of support for his views." This observation misconstrues the nature and fierceness of the workplace bargaining circumstances and my responsibilities as APS Commissioner. It is entirely reasonable and appropriate to build support for the Government's policy. The opponents employed a range of tactics with vigour to build support for their position. It would be contrary to my obligation as APS Commissioner, responsible for the good reputation of the APS, not to build support for the policy position of the Government.

20. Most statements I or the APSC made were vigorously rebutted by strong language and attacks from union officials. Misrepresentation of APSC statements and advice by the unions occurred regularly. It is ridiculous in the extreme to assert that the action to build support and to use the term "soft

agreements" in these circumstances was inappropriate.

21. The MPC and the Report has consistently ignored the backdrop to this early period of my tenure as APS Commissioner. The unions and some ALP parliamentarians opposed my appointment to the position from day one. They indulged in very personal attacks. Any position I advocated inevitably generated strong opposition and criticism. I am accustomed to this tone of response from such people. I have never chosen to succumb to personal abuse. The reasoning in the Report takes one down the path of yielding to such tactics. Such an approach would have been contrary to my responsibilities as APS Commissioner.

22. The Report observes that I did not act with dishonesty or a lack of integrity. However, curiously I did not act ethically. I find the reasoning hard to follow. It conveys the sense of a hard search to find something adverse.

23. All other elements of the two complaints were not sustained.

Conduct of the Inquiry

24. I wrote to the Presiding Officers on 6 August 2018 setting out my concerns about aspects of the conduct of the Inquiry. I also wrote to the MPC on 2 August 2018 outlining the concerns in some detail. The letter to the MPC is attached to the Report.

25. I consider that the inquiry was conducted in such a deficient manner that it miscarried and that my right to a fair hearing were manifestly infringed.

26. I now summarise my concerns.

27. **Conflict of Interest.** Mr John McMillan was appointed by the Acting MPC on about 14 June 2018 to investigate the complaints. I discovered in late July 2018 that he had given a media interview in September 2015 strongly criticising an aspect of my performance as APS Commissioner. Mr McMillan was upset about views I had ventured about freedom of information. He described my position as "terrible." Three media outlets carried the interview and associated commentary. My discovery occurred at a time when the investigation was near completion.

28. I then learnt from the Report on 7 August 2018 that the Acting MPC knew of this public criticism at the time Mr McMillan was appointed. Apparently, he and the MPC concluded that this did not constitute a conflict of interest. It is reasoned that the comments concerned matters unrelated to this inquiry.

29. That position with respect does not stand scrutiny. The criticism are adverse comments about how I was discharging my responsibilities in the position of APS Commissioner. The position subject to the investigation Mr McMillan conducted. It is crucial that such inquiries are seen to be impartial in a manner that is beyond doubt. I deal with many code of conduct complaints. I treat conflict of interest considerations with the utmost care. I would decline to personally conduct an investigation in these circumstances.

30. Mr McMillan has, given his career experience, some expertise in the area of freedom of information. He was obviously aggrieved by my comments; to such an extent he felt compelled to call them out in a media interview about his career. Debate about FOI is ongoing and many people articulate views on the matter. It is clear however that Mr McMillan took note of my views to such an extent that he wanted to challenge and denigrate them publicly. This to me presents a real conflict situation.

31. The Acting MPC did not bother to alert me to this potential conflict. Neither did Mr McMillan. I was denied the opportunity to make a submission on the question of whether Mr McMillan should recuse himself. If I had been given the opportunity I would have sought that outcome.

32. The course of events gives rise to an alarming incongruity. I was being examined on the question of whether my actions constituted a conflict of interest. However, the inquiry itself is compromised by a potential conflict of interest that was concealed from me.

33. **Terms Exceeded.** The terms of the inquiry conducted by Mr McMillan were to investigate whether the document had been prepared for the sole purpose of providing it to the IPA. These terms are clear and are stated in letters that passed between the Acting MPC, Mr McMillan and myself.

34. Mr McMillan concluded that the document was not created for the sole purpose of providing it to the IPA. However, he proceeds to make a finding that the provision of the document resulted in a breach of the Code of Conduct. This meant he made a finding that was beyond the terms of his investigation. I submit due process was ignored.

35. I was never informed that the investigation was going to travel beyond its terms. If I had been so informed my evidence and the documents I relied on would have been materially different. This is a crucial point. My interpretation of the limited scope of the inquiry was not challenged nor explicitly repudiated in any form. The MPC case rests on me interpreting the subtleties in the scope of questioning during an interview of almost 2 hours conducted by Mr McMillan. The MPC clearly failed to clarify a changed or expanded scope of the inquiry on any occasion. No advice was provided such as - the terms of the inquiry advised to you by the Acting MPC and Mr McMillan are limited/repudiated and a broader scope of Inquiry is to be followed.

36. In a conversation responding to Mr McMillan's draft report I raised this issue of going beyond the terms of the inquiry. Mr McMillan responded with words that troubled me. He said something like "they (or there would be) disappointment if the broader issue was not addressed." When I challenged him who they were he was evasive and did not answer.

37. Also, the Acting MPC decided in June 2018 that there was no case to answer regarding the provision, rather than the creation, of the document to the IPA. It was a concluded decision. The decision was then reflected in the terms of Mr McMillan's investigation. It is invalid for the MPC to subsequently reopen and reconsider the June 2018 decision. Even if the MPC believed this course was defensible, I should have been afforded an opportunity to respond to the broader considerations. I was not given such an opportunity.

38. **Transcript.** Mr McMillan conducted a 1 hour 50 minute recorded interview with me. I was promised a transcript of the interview. This would allow me to verify its accuracy and rely on the transcript to respond to any findings that emerged from the interview.

39. This arrangement failed to be upheld. I had to request the transcript to be provided to me. I received it only hours before I was required to reply to the draft findings of Mr McMillan. The reports that encompassed those findings were 21 and 12 pages in length respectively. The transcript was 102 pages in length.

40. **Haste of Inquiry.** The inquiry was delayed. Several months elapsed between the lodging of the first complaint and the commencement of the inquiry. I then announced my retirement from the APS Commissioner position with effect from 8 August 2018. The announcement was made on 4 June 2018.

41. This has resulted in rushed processes and unreasonable timelines compounded by a very formal and legal disposition to the conduct of the matter. The end result was unreasonable deadlines being imposed on me and a firm resistance to any extensions of time.

42. Witnesses were not interviewed to my knowledge. I find it surprising that witnesses such as Mr Roskam of the IPA, senior APSC executives and former Minister Abetz were not approached to give evidence.

43. **Leaks.** I have been dismayed by at least two very damaging leaks to media outlets. One was the details of a complaint. The other was the leaking of large and important aspects of the Report almost two weeks before it was tabled in the Senate.

44. I complained on both occasions to the MPC. I have not even had the courtesy of a response to my complaints. I have no evidence or assurance therefore that the MPC takes the leaking of material as a serious transgression.

45. The leaks of course were intended to damage my position and reputation. The result was more adverse publicity pre-judging the outcome of proper process and an enlivening of abusive social media commentary.

46. **Conclusion.** Many aspects of the inquiry have been most unsatisfactory and prejudiced my right to a fair procedure. Also, the report's finding adversely affected my reputation.

47. I acted openly, honestly and with integrity in providing the document to the IPA. I made no attempt to disguise my actions. I have throughout my career been prepared to challenge union policies and tactics. This has been expected of me in a number of senior roles, including as APS Commissioner. It is important that senior leaders embrace such responsibilities to ensure the APS Employment Principles and APS Values are upheld.

28 August 2018