
The Parliament of the Commonwealth of Australia

Whistleblower protection: a comprehensive scheme for the Commonwealth public sector

**Report of the Inquiry into whistleblowing protection within the
Australian Government public sector**

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Canberra

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Foreword

All that pollution up at Molledal – all that reeking waste from the mill – it's seeped into the pipes feeding from the pump-room; and all the same damn poisonous slop's been draining out on the beach as well ... I've investigated the facts as scrupulously as possible ... There's irrefutable proof of the presence of decayed organic matter in the water – millions of bacteria. It's positively injurious to health, for either internal or external use. Ah, what a blessing it is to feel that you have done some service to your home town and your fellow citizens.¹

Blowing the whistle, or speaking out against suspected wrongdoing in the workplace can be a very risky course of action. Outcomes can fall far short of expectations. In Ibsen's play, Dr Stockmann assumed that his assessment of the town spa would be welcomed and that work would soon commence to address the contamination. Authorities took a different view and considered Stockmann a threat to the prosperity promised by the new town spa. Locals also turned against Stockmann and branded him an 'enemy of the people'.

Even when aware of the risks, whistleblowers may be confronted with a number of strong ethical tensions. They have a professional sense of loyalty to their employer, colleagues and clients. They have their personal interests to consider concerning their career progression and the welfare of their family. These may be set against higher principles of morality, conscience and truth. Yet all too often whistleblowers are left frustrated, humiliated or ostracised at great personal cost.

1 Dr Thomas Stockmann, in Ibsen, Henrik, *An Enemy of the People*, Act 1. Also cited in Bok, Sissela 1982, *Secrets: on the ethics of concealment and revelation*, Pantheon Books, New York, p. 210.

In principle, speaking the truth about what one considers illegal, immoral or improper practices should be supported and recognised as a positive contribution to the integrity of an organisation, even if further information reveals that the substance of the allegation was unfounded. Whistleblowing on matters of public interest is particularly serious because broader issues of concern to the community may be involved which could include public safety, the misappropriation of funds, or the misuse of authority.

Australia is blessed with a very high standard of public administration and professional conduct within the public sector.² However, wrongdoing within the sector does occur from time to time and legislation on whistleblower protection is piecemeal at best. Commonwealth provisions, primarily s. 16 of the *Public Service Act 1999*, stand out as particularly thin and limited in terms of the range of matters covered, the public servants included and the scope of protection available. That is why the Attorney-General asked the Committee to consider and report on a preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector. Whistleblowing is a complex area of law that desperately needs clarity.

This inquiry follows a long series of reviews and proposals for whistleblower or public interest disclosure legislation at the Commonwealth level. One of the more significant reviews in this area was the 1994 report of the Senate Select Committee into Public Interest Whistleblowing, *In the Public Interest*.³ That comprehensive report made ambitious recommendations for model whistleblower provisions including a two-stage process for internal and external disclosure, the creation of an independent Public Interest Disclosures Agency and Board, provisions covering employees and contractors in the Australian Government public sector and the academic, health care and banking sectors, and protecting disclosures to the media in certain circumstances.

In its response to the report, the Government rejected the Senate Committee's recommendations for a Disclosures Board, protecting disclosures concerning the private sector and disclosures to the media. The Government nonetheless agreed with the need to improve the system and signalled its intention to introduce legislation into Parliament. However, following the election of March 1996, the new Coalition government abandoned the preparation of specific legislation on whistleblowing.

2 Transparency International November 2008, *Corruption perceptions index 2008*, in TI Australia News, pp. 2-3.

3 Senate Select Committee on Public Interest Whistleblowing August 1994, *In the public interest*, Parliament of the Commonwealth of Australia.

On the introduction of the Public Service Bill in 1997, whistleblowing in the Australian public service received further consideration. Two Parliamentary Committees reviewed that Bill and expressed dissatisfaction with its limited whistleblowing provisions.⁴ However, those provisions came into force in 1999 following the passage of the *Public Service Act*. Three versions of a private member's Bill were introduced into Parliament by Senator Andrew Murray (2001, 2002 and 2007), but without government support, those Bills lapsed.

In the context of the unfulfilled expectations from the landmark Senate Committee report, this inquiry also found that the current Commonwealth public sector whistleblower protection system is inadequate and new separate legislation in this area is needed. The Committee has before it an important opportunity to put forward a comprehensive public interest disclosure framework that improves the current system and leads the development of similar second generation legislation in other jurisdictions.

The recommendations in this report reflect what the Committee considers to be primary legislative priorities. They promote integrity in public administration and support open and accountable government. They are informed by the view that legislation should be based on clear commonsense principles to provide reasonable certainty to any person reading it. Yet legislation alone is not sufficient. A shift in culture needs to take place to foster a more open public sector that is receptive to those who question the way things are done.

The main recommendations in the report are that:


- new legislation be introduced titled the Public Interest Disclosure Bill;
- the primary objective of the legislation is to promote accountability in public administration;
- the legislation cover a broad range of employees in the Australian Government public sector including APS and non-APS agencies, contractors, consultants and their employees and parliamentary staff;
- disclosures to be protected include serious matters relating to illegal activity, corruption, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment;

4 Joint Committee of Public Accounts September 1997, *Report 353 – An advisory report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997*, p. 64; Senate Finance and Public Administration Legislation Committee October 1997, *Provisions of the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997*, p. 4.

- decision makers have discretion to include other types of allegations even if they are not initially made through prescribed channels, as long as the whistleblower shows good faith in the spirit of the Act;
- the scope of statutory protection includes protection against detrimental action in the workplace and immunity from criminal and civil liability and other actions such as defamation and breach of confidence;
- the system comprise a two stage process of internal and external reporting with the Commonwealth Ombudsman to oversee the administration of the Act;
- agencies and the Ombudsman have a number of obligations and responsibilities including the provision of procedural fairness and reporting on the operation of the system; and
- the legislation be supported by an awareness campaign to promote a culture that supports disclosure within the public sector, where people feel confident to speak out when they are in doubt.

I would like to acknowledge the contribution of all those who shared their time, expertise and experience with the Committee during this inquiry. In particular, I would like to thank Dr AJ Brown and the Whistle While They Work project team, members of Whistleblowers Australia who enthusiastically contributed to the inquiry, key public sector leaders, the Australian Public Service Commissioner Ms Lynelle Briggs and the Commonwealth Ombudsman Professor John McMillian. Finally, I would like to thank the other Members of the Committee and the secretariat who worked on this important inquiry.

Mark Dreyfus QC MP
Chair



Membership of the Committee

Chair Mr Mark Dreyfus QC MP

Deputy
Chairman The Hon. Peter Slipper MP

Members The Hon. Kevin Andrews MP

Mr Mark Butler MP

Mr Petro Georgiou MP

Mr Daryl Melham MP

Mrs Sophie Mirabella MP

Ms Belinda Neal MP

Mr Shayne Neumann MP

Mr Graham Perrett MP

Committee Secretariat

Secretary	Dr Anna Dacre
Inquiry Secretary	Dr Mark Rodrigues (from 08.09.2008)
Research Officer	Mr Michael Buss (from 08.09.2008)
Administrative Officers	Ms Melita Caulfield Ms Claire Young



Terms of reference

The Committee is to consider and report on a preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector. The Committee's report should address aspects of its preferred model, covering:

1. the categories of people who could make protected disclosures:
 - a. these could include:
 - i. persons who are currently or were formerly employees in the Australian Government general government sector*, whether or not employed under the Public Service Act 1999,
 - ii. contractors and consultants who are currently or were formerly engaged by the Australian Government;
 - iii. persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants; and
 - b. the Committee may wish to address additional issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise;
2. the types of disclosures that should be protected:
 - a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds,

- dangers to public health and safety, and dangers to the environment;
and
- b. the Committee should consider:
 - i. whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit; and
 - ii. whether grievances over internal staffing matters should generally be addressed through separate mechanisms;
- 3. the conditions that should apply to a person making a disclosure, including:
 - a. whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a)); and
 - b. whether penalties and sanctions should apply to whistleblowers who:
 - i. in the course of making a public interest disclosure, materially fail to comply with the procedures under which disclosures are to be made; or
 - ii. knowingly or recklessly make false allegations;
- 4. the scope of statutory protection that should be available, which could include:
 - a. protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;
 - b. immunity from criminal liability and from liability for civil penalties; and
 - c. immunity from civil law suits such as defamation and breach of confidence;
- 5. procedures in relation to protected disclosures, which could include:
 - a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a

- whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two;
- b. the obligations of public sector agencies in handling disclosures;
 - c. the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education); and
 - d. whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted;
6. the relationship between the Committee's preferred model and existing Commonwealth laws; and
7. such other matters as the Committee considers appropriate.

*As defined in the Australian Bureau of Statistics publication Australian System of Government Finance Statistics: Concepts, Sources, Methods, 2003 p.256.



List of abbreviations

ABC	Australian Broadcasting Corporation
ACLEI	Australian Commission for Law Enforcement Integrity
ACTU	Australian Council of Trade Unions
AFP	Australian Federal Police
AGD	Attorney-General's Department
AIC	Australian Intelligence Community
ALRC	Australian Law Reform Commission
AM	Member of the Order of Australia
AO	Officer of the Order of Australia
APS	Australian Public Service
APSC	Australian Public Service Commissioner
AQIS	Australian Quarantine Inspection Service
ARB	Australian Racing Board
AS	Australian Standard
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ATO	Australian Tax Office
CPSU	Community and Public Sector Union

CSIRO	Commonwealth Scientific and Industrial Research Organisation
DEEWR	Department of Education, Employment and Workplace Relations
DIGO	Defence Imagery and Geospatial Organisation
DIO	Defence Intelligence Organisation
DSD	Defence Signals Directorate
ICAC	Independent Commission Against Corruption
IGIS	Inspector-General of Intelligence and Security
LIV	Law Institute of Victoria
MP	Member of Parliament
NTEU	National Tertiary Education Union
OECD	Organisation for Economic Cooperation and Development
ONA	Office of National Assessments
OPSSC	Office of the Public Sector Standards Commissioner
OSC	Office of Special Counsel
POAA	Post Office Agents Association
QC	Queen's Counsel
QCU	Queensland Council of Unions
QNF	Queensland Nurses Federation
UNCAC	United Nations Convention Against Corruption
WBA	Whistleblowers Australia
WWTW	Whistle While They Work

List of recommendations

2 Principles and definitions

Recommendation 1

The Committee recommends that the Australian Government introduces legislation to provide whistleblower protections in the Australian Government public sector. The legislation should be introduced to Parliament as a matter of priority and should be titled the Public Interest Disclosure Bill.

Recommendation 2

The Committee recommends that the purpose and principles of the Public Interest Disclosure Bill should reflect the following:

- the purpose of the Bill is to promote accountability and integrity in public administration; and
- the provisions of the Bill are guided by the following principles:
 - ⇒ it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
 - ⇒ people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
 - ⇒ people have a responsibility to raise those concerns in good faith;
 - ⇒ governments have a right to consider policy and administration in private; and
 - ⇒ government and the public sector have a responsibility to be receptive to concerns which are raised.

3 Categories of people who could make protected disclosures

Recommendation 3

The Committee recommends that the Public Interest Disclosure Bill define people who are entitled to make a protected disclosure as a 'public official' and include in the definition of public official the following categories:

- Australian Government and general government sector employees, including Australian Public Service employees and employees of agencies under the *Commonwealth Authorities and Companies Act 1997*;
- contractors and consultants engaged by the public sector;
- employees of contractors and consultants engaged by the public sector;
- Australian and locally engaged staff working overseas;
- members of the Australian Defence Force and Australian Federal Police;
- parliamentary staff;
- former employees in one of the above categories; and
- anonymous persons likely to be in one of the above categories.

Recommendation 4

The Committee recommends that the Public Interest Disclosure Bill provide that the Commonwealth Ombudsman is the authorised authority for receiving and investigating public interest disclosures made by employees under the *Members of Parliament (Staff) Act 1984*.

Recommendation 5

The Committee recommends that the Public Interest Disclosure Bill include a provision to enable a decision maker within the scheme to deem other persons to be a 'public official' for the purposes of the Act. Those who may be deemed a public official would have an 'insider's knowledge' of disclosable conduct under the legislation and could include current and former volunteers to an Australian Government public sector agency or others in receipt of official information or funding from the Australian Government.

Recommendation 6

The Committee recommends that, after a period of operation of the proposed legislation, the Australian Government consider introducing protection for members of the public to make public interest disclosures about the Australian Government public sector.

4 The types of disclosures that should be protected

Recommendation 7

The Committee recommends that the types of disclosures to be protected by the Public Interest Disclosure Bill include, but not be limited to serious matters related to:

- illegal activity;
- corruption;
- maladministration;
- breach of public trust;
- scientific misconduct;
- wastage of public funds;
- dangers to public health
- dangers to public safety;
- dangers to the environment;
- official misconduct (including breaches of applicable codes of conduct); and
- adverse action against a person who makes a public interest disclosure under the legislation.

Recommendation 8

The Committee recommends that, on the enactment of a Public Interest Disclosure Bill, the Australian Government repeal current whistleblower provisions in s. 16 of the *Public Service Act 1999* and s. 16 of the *Parliamentary Service Act 1999*.

Recommendation 9

The Committee recommends that Public Interest Disclosure Bill provide that the motive of a person making a disclosure should not prevent the disclosure from being protected.

5 Conditions that should apply to a person making a disclosure

Recommendation 10

The Committee recommends that the Public Interest Disclosure Bill provide, as the primary requirement for protection, that a person making a disclosure has an honest and reasonable belief on the basis of the information available to them that the matter concerns disclosable conduct under the legislation.

Recommendation 11

The Committee recommends that the Public Interest Disclosure Bill provide authorised decision makers with the discretion, in consideration of the circumstances, to determine to discontinue the investigation of a disclosure.

Recommendation 12

The Committee recommends that protection under the Public Interest Disclosure Bill not apply, or be removed, where a disclosure is found to be knowingly false. However, an authorised decision maker may consider granting protection in circumstances where an investigation nonetheless reveals other disclosable conduct and the person who made the initial disclosure is at risk of detrimental action as a result of the disclosure.

6 Scope of statutory protection**Recommendation 13**

The Committee recommends that the Public Interest Disclosure Bill define the right to make a disclosure as a workplace right and enable any matter of adverse treatment in the workplace to be referred to the Commonwealth Workplace Ombudsman for resolution as a workplace relations issue.

Recommendation 14

The Committee recommends that the protections provided under the Public Interest Disclosure Bill include immunity from criminal liability, from liability for civil penalties, from civil actions such as defamation and breach of confidence, and from administrative sanction.

7 Procedures in relation to protected disclosures**Recommendation 15**

The Committee recommends that the Public Interest Disclosure Bill provide an obligation for agency heads to:

- establish public interest disclosure procedures appropriate to their agencies;
- report on the use of those procedures to the Commonwealth Ombudsman; and
- where appropriate, delegate staff within the agency to receive and act on disclosures.

Recommendation 16

The Committee recommends that the Public Interest Disclosure Bill provide that agencies are obliged to:

- undertake investigations into disclosures that are made from within the organisation or referred to it by another agency;
- undertake an assessment of the risks that detrimental action may be taken against the person who made the disclosure;
- within a reasonable time period or periodically, notify the person who made the disclosure of the outcome or progress of an investigation, including the reasons for any decisions taken;
- provide for confidentiality;
- protect those who have made a disclosure from detrimental action; and
- separate the substance of a disclosure from any personal grievance a person having made a disclosure may have in a matter.

Recommendation 17

The Committee recommends that the Public Interest Disclosure Bill provide that the following authorities, external to an agency, may receive, investigate and refer public interest disclosures:

- the Commonwealth Ombudsman, including in his capacity as Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman and Postal Industry Ombudsman;
- the Australian Public Service Commissioner; and
- the Merit Protection Commissioner.

Recommendation 18

The Committee recommends that the Public Interest Disclosure Bill provide that the following authorities, external to an agency, may receive, investigate and refer public interest disclosures relevant to their area of responsibility:

- Aged Care Commissioner;
- Commissioner for Law Enforcement Integrity;
- Commissioner of Complaints, National Health and Medical Research Council;
- Inspector-General, Department of Defence; and
- Privacy Commissioner

Recommendation 19

The Committee recommends that the Public Interest Disclosure Bill provide that where disclosable conduct concerns a Commonwealth security or intelligence service, the authorised authorities to receive disclosures are the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.

Recommendation 20

The Committee recommends that the Public Interest Disclosure Bill establish the Commonwealth Ombudsman as the oversight and integrity agency with the following responsibilities:

- general administration of the Act under the Minister;
- set standards for the investigation, reconsideration, review and reporting of public interest disclosures;
- approve public interest disclosure procedures proposed by agencies;
- refer public interest disclosures to other appropriate agencies;
- receive referrals of public interest disclosures and conduct investigations or reviews where appropriate;
- provide assistance to agencies in implementing the public interest disclosure system including:
 - ⇒ provide assistance to employees within the public sector in promoting awareness of the system through educational activities; and
 - ⇒ providing an anonymous and confidential advice line; and
- receive data on the use and performance of the public interest disclosure system and report to Parliament on the operation of the system.

8 Disclosures to third parties**Recommendation 21**

The Committee recommends that the Public Interest Disclosure Bill protect disclosures made to the media where the matter has been disclosed internally and externally, and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety.

Recommendation 22

The Committee recommends that the Public Interest Disclosure Bill include Commonwealth Members of Parliament as a category of alternative authorised recipients of public interest disclosures.

Recommendation 23

The Committee recommends that, if Commonwealth Members of Parliament become authorised recipients of public interest disclosures, the Australian Government propose amendments to the Standing Orders of the House of Representatives and the Senate, advising Members and Senators to exercise care to avoid saying anything in Parliament about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures, which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.

Recommendation 24

The Committee recommends that the Public Interest Disclosure Bill provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*.

Recommendation 25

The Committee recommends that the Public Interest Disclosure Bill protect disclosures made to third parties such as legal advisors, professional associations and unions where the disclosure is made for the purpose of seeking advice or assistance.

Recommendation 26

The Committee recommends that the Public Interest Disclosure Bill provide authority for the Commonwealth Ombudsman to publish reports of investigations or other information relating to disclosures (including the identity of persons against whom allegations are made) where the Ombudsman considers it is in the public interest to do so.

Introduction

- 1.1 Colloquially, 'blowing the whistle' refers to informing on a person or exposing an irregularity or a crime.¹ The most important and valuable form of whistleblowing concerns 'the public interest' or matters that affect more than just the interests of the individuals involved in an allegation.
- 1.2 Those willing to speak out against what they consider to be improper conduct in the workplace might put at risk their personal wellbeing and professional standing. Whistleblowers are sometimes branded by their managers and colleagues as disloyal troublemakers. Yet they can play a valuable role in exposing wrongdoing and promoting integrity in government administration.
- 1.3 Public interest disclosure legislation has an important role in protecting the interests of those who speak out about what they consider to be wrongdoing in the workplace, encouraging responsive action by public agencies, strengthening public integrity and accountability systems and supporting the operation of government.
- 1.4 Facilitating public interest disclosures is part of a broader public integrity framework that is considered to be an essential feature of modern accountable and transparent democracies. The broader integrity framework can be said to include enabling public access to information held by government through freedom of information law and minimising secrecy in government activity.²

1 This broad definition was adapted from the Oxford English Dictionary, 2nd Edition, Volume 16, Clarendon Press, 1989, p.258.

2 The Australian Law Reform Commission is currently undertaking a review into secrecy provisions.

- 1.5 Since the early 1990s there has been a growing recognition of the need for specific legislation to promote whistleblowing or the making of public interest disclosures in the public sector and protecting the interests of those who disclose. Despite the existence of legislation on public interest disclosures in Australia, in practice whistleblowing has been described as ‘one of the most complex, conflict-ridden areas of public policy or legislative practice’.³
- 1.6 All Australian and many comparable overseas jurisdictions have enacted specific legislation to support the making of public interest disclosures by public sector employees. However, the current Commonwealth whistleblower provisions are limited. The task of the Committee is to consider and report on a preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector.
- 1.7 The formulation of public interest disclosure provisions is not straightforward. Responding to disclosures requires the consideration of a number of values including the interests of the public in exposing and addressing wrongdoing, the public’s general right to information, the government’s right to make decisions in confidence, the need to protect people who disclose and provision of natural justice for people under investigation.
- 1.8 The circumstances surrounding each disclosure are unique. New whistleblowing provisions should be flexible enough to appropriately respond to a range of scenarios, and set out clear guidelines for agencies and individuals involved with disclosures.
- 1.9 The Commonwealth Ombudsman told the Committee about relevant instances of official misconduct, underlying the need for legislation on whistleblower protection:

Over the past two decades across all levels of government in Australia we have witnessed the prosecution and at times imprisonment on corruption and fraud offences of a state premier, state government ministers, a commissioner of police, a chief magistrate, members of parliament, judges, numerous officials at all levels of government and prominent national businessmen. Royal commissions and special inquiries in Australia over the past decade have investigated allegations of corruption in political

3 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 1.

lobbying, policing, job recruitment, occupational licensing, vehicle registration, land and building development, offender management, public procurement, revenue collection, financial investment and foreign bribery, as well as within crime and anticorruption commissions themselves.⁴

- 1.10 This introduction provides an overview of the inquiry, the current legal framework for public interest whistleblowing at the Commonwealth level, the performance of those laws, other relevant legislation and inquiries on the subject and the approach of the Committee.

Referral of the inquiry

- 1.11 On 10 July 2008 the Attorney-General, the Hon Robert McClelland MP, on behalf of the Cabinet Secretary, Senator the Hon John Faulkner, asked the Committee to inquire into and report on whistleblowing protections within the Australian Government public sector.
- 1.12 The Committee agreed to undertake that inquiry and specifically examine:
- The categories of people who could make protected disclosures. This could include current and former public servants, contractors and consultants and parliamentary staff.
 - The types of disclosures that should be protected, such as allegations of illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds and so on.
 - The conditions that should apply to a person making a disclosure including whether a threshold of seriousness should be required for allegations to be protected.
 - The scope of statutory protection that should be available, which could include protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection.
 - Procedures in relation to protected disclosures, which could include how information should be disclosed for the disclosure to be protected and the obligations of public sector agencies in handling disclosures.⁵
- 1.13 The Committee sought submissions from Commonwealth and state government agencies, non-government organisations, relevant

4 Professor McMillan, *Transcript of Evidence*, 4 September 2008, p. 2.

5 The complete terms of reference for this inquiry are located at the beginning of this report.

professional associations, media bodies, unions, academics and from whistleblowers themselves. A total of 71 submissions and 16 supplementary submissions were received. A list of submissions is at Appendix A.

- 1.14 The Committee undertook 11 public hearings in Melbourne, Canberra, Sydney and Brisbane to enable people to provide oral evidence to the inquiry. Those hearings included two roundtable discussions with public administration experts, lawyers and academics held on 9 September 2008 and representatives of media related organisations held on 27 October 2008. Secretaries from two Commonwealth departments and a departmental Deputy Secretary shared their views on whistleblower protections with the Committee at a further hearing on 27 November 2008. Details of the public hearings are listed in Appendix B.
- 1.15 It is the normal practice of the Committee to conduct its activities in public and place as much of its evidence on the public record as possible. However, given the nature of the inquiry, the Committee decided to receive certain types of evidence in confidence.
- 1.16 A small selection of evidence was made confidential or partially confidential to protect the interests of submitters and witnesses who feared adverse consequences if identified. The Committee observed the sub judice convention by refraining from discussing matters that are awaiting adjudication in a court of law to avoid interfering in the course of justice.
- 1.17 The Committee received requests to investigate whistleblower cases or to make recommendations that particular investigations be reopened. The Committee could not meet these requests as it is not its role to investigate individual cases or provide legal advice. The Committee only considered individual cases to the extent that they revealed broader systemic or legislative issues within the terms of reference of the inquiry.

Current whistleblower protection laws

- 1.18 The current legislative framework for public interest disclosures in relation to Commonwealth public sector employees is set out in the *Public Service Act 1999*. Restrictions on the disclosure of official information are primarily contained in the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Privacy Act 1988* and the *Freedom of Information Act 1982*.⁶ Other sources of potential protection for whistleblowers can be found in parts of the *Workplace*

6 In its current review into secrecy laws, the Australian Law Reform Commission identified over 370 distinct secrecy provisions in 166 pieces of legislation.

Relations Act 1996, the Criminal Code Act 1995, and other specialised legislation.

- 1.19 Section 16 of the *Public Service Act 1999* provides protections against victimisation and discrimination for whistleblowers who report breaches of the Australian Public Service (APS) Code of Conduct by other APS employees. The Agency Head, Public Service Commissioner or Merit Protection Commissioner are authorised to receive whistleblower reports. Subregulation 2.4 of the Public Service Regulations requires agencies to establish procedures for dealing with whistleblower reports made under the Act.

Box 1.1 The Australian Public Service Code of Conduct

The Code of Conduct requires that an 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:
 - a. inside information, or
 - b. 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.⁷
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- 1.20 Section 2.5 of the Public Service Commissioner's Directions 1999 further requires that agency heads ensure that:

APS employees are aware of the procedures for dealing with whistleblowing disclosures, and are encouraged to make such disclosures in appropriate circumstances, and ... allegations of

⁷ Section 13, *Public Service Act 1999*.

misconduct are addressed in a fair, timely, systematic and effective way.

- 1.21 Sections 70 and 79 of the *Crimes Act 1914* (Cth) provide a general prohibition against the unauthorised disclosure of official information. The *Public Service Act 1999* further provides that employees are not to make improper use of 'inside information'. The Public Service Regulations subregulation 2.1 provides for a general duty not to disclose information.
- 1.22 The *Criminal Code Act 1995* (Cth) creates further offences for releasing certain types of official information and creates offences to protect people who are threatened with disadvantage during the normal course of their duties including making a whistleblower disclosure in accordance with the *Public Service Act 1999*.
- 1.23 Section 659(2)(e) of the *Workplace Relations Act 1996* (Cth) may provide protection against the termination of employment for employees of independent contractors on certain grounds including:
- ... 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 ...⁸
- 1.24 Section 76 of the *Occupational Health and Safety Act 1991* (Cth), similarly protects employees from detrimental action following the making of a complaint concerning a work-related health, safety or welfare matter.
- 1.25 Other portfolio or area specific legislation such as the *Aged Care Act 1997* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Clth) provides for certain categories of officers to make protected disclosures in certain circumstances. These are discussed further in Chapter 4.
- 1.26 There is a range of other bodies that may receive whistleblower type allegations, although they were not specifically set up for that purpose. These include the Commonwealth Ombudsman, the Privacy Commissioner, the Auditor-General, the Inspector-General of Intelligence and Security and the Commissioner for Law Enforcement Integrity.
- 1.27 Most other comparable liberal democracies and all Australian states and territories have whistleblower protection, public interest or protected disclosure laws. The performance of the Commonwealth laws is considered further below.
-

8 As discussed below, this protection is limited.

Whistleblowing under current law

1.28 In 2006-07, a total of 21 employees from 10 APS agencies were investigated following a whistleblower allegation under the *Public Service Act 1999*. In that year, the APS Commissioner received 21 whistleblower reports and the Merit Protection Commissioner received 20 whistleblower reports.⁹ A number of those reports were made by the same people and concerned individual grievances and personnel type matters rather than what could be considered more serious 'public interest' allegations.¹⁰

1.29 The Australian Public Service Commission (APSC) further indicated that from 1998 to October 2008:

... the Public Service Commissioner has received 138 reports of alleged breaches of the APS Code of Conduct. Of those, based on viewing summaries of cases, it would appear that 17 reports (or aspects of the report) could be considered to be 'public interest' disclosures. Of those only 5 were valid whistleblowing reports where the Public Service Commission conducted an inquiry.

During the same period the Merit Protection Commission has received 37 reports, none of which could be regarded as 'public interest' disclosures.¹¹

1.30 Until recently, there has been very little empirical evidence on the performance of public interest disclosure laws. The Whistle While They Work (WWTW) project, lead by Griffith University, collected and analysed survey data from 7663 public servants and 118 public agencies including 15 'case study' agencies. Key findings from that project include:

- less than two percent of public interest whistleblowers receive organised support from their government agency;
- more than half of all public interest whistleblowers were estimated as suffering a stressful experience, including around a quarter reporting reprisals or mistreatment;
- seventy one per cent of respondents had directly observed at least one of a wide range of nominated examples of wrongdoing in their organisation;

9 Australian Public Service Commission, *Submission no. 44*, p. 5.

10 The Australian Public Service Commissioner, Ms Briggs, and the Merit Protection Commissioner, Ms Godwin, *Transcript of Evidence*, 25 September 2008, pp. 12-18.

11 Australian Public Service Commission, *Submission no. 44a*, p. 2.

- seventy percent of the agencies surveyed had no procedures in place for assessing the risks of reprisals when officials in their agency blew the whistle; and
- three per cent of agencies surveyed were rated as having reasonably strong whistleblowing procedures assessed against the relevant Australian Standard.¹²

1.31 As noted in the Whistleblowers Australia submission to the inquiry, the WWTW research excluded the views of whistleblowers who had left the public service as a result of reprisals.¹³ Other submissions noted some concerns about the research.¹⁴ The APSC noted that the WWTW report failed 'to differentiate between serious malfeasance (e.g. fraud, corruption) and very minor misdemeanours (e.g. inadequate record keeping, failure to fully follow all selection procedures)'.¹⁵

1.32 While the WWTW project did not sample views from every government agency and so does not reflect whistleblowing across all of the public sector, it is the most comprehensive research to date. Importantly, it highlighted that whistleblowing was more common than previously thought and that it is not always the case that a whistleblower will suffer mistreatment:

On average, most public interest whistleblowers (at least 70 per cent) are treated either well or the same by management and co-workers in their organisation. While the employee survey did not sample former employees, even on an excessively pessimistic estimate of the experience of former employees, the total proportion of whistleblowers experiencing mistreatment would be unlikely to exceed 30 per cent.¹⁶

1.33 Some of the WWTW project findings complement the APSC annual survey of public servants published in the *State of the Service* reports. Findings of the 2007 *State of the Service* report includes:

12 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government. Whistleblowers Australia noted that the views of those who had left the public services due to reprisals were not included in the research. See Whistleblowers Australia, *Submission no. 26*, p. 6.

13 Whistleblowers Australia, *Submission no. 26*, p. 6.

14 For example, see Australian Public Service Commission, *Submission no. 44*, p. 6; Mr McMahon, *Submission no. 45a*, p. 11.

15 Australian Public Service Commission, *Submission no. 44*, p. 6.

16 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. xxvii.

- 92% of APS employees are familiar with the APS Values and Code of Conduct;
- 77% of APS employees consider that their manager demonstrates honesty and integrity;
- 80% of APS employees consider that people in their work group treat each other with respect;
- 74% of APS employees consider that people in their work group are honest, open and transparent in their dealings;
- 71% of APS employees consider their agency operates with a high level of integrity; and
- 669 employees breached the Code of Conduct (0.4% of total APS).¹⁷

1.34 In launching the 2007 *State of the Service* report, the Australian Public Service Commissioner, Ms Lynelle Briggs, noted that some agencies do not fully recognise the importance of maintaining high ethical standards:

... I would have to say that one or two agencies still struggle to appreciate what our ethical codes are all about, and don't understand that they sail close to the wind. More often than not, this is due to agency leadership not appreciating that the public sector is different; that protecting the public interest is fundamentally different to protecting the bottom line or promoting particular Ministers' interests; and that in the public sector we must treat our people well. Any agencies that put "the way things are done around here" above the behavioural culture and standards set out in the public service Values and Code of Conduct will eventually find themselves in deepwater. I cannot emphasise too strongly that our Values and the Code are fundamental to what keeps us sound, professional and safe.¹⁸

1.35 Data collected by the WWTW team shows that the bulk of public interest whistleblowing occurs without being recorded, monitored or reported under public interest disclosure legislation.¹⁹ This conclusion accords with the findings of the APSC's 2003 evaluation of the management of

17 The Australian Public Service Commissioner, Ms Briggs, Address the launch the *State of the service report 2007-08*.

18 The Australian Public Service Commissioner, Ms Briggs, 2008 David Hawkes Oration, Australian Institute of Public Administration, Northern Territory Chapter, at <http://www.apsc.gov.au/media/briggs101108.htm> (accessed 20 February 2009).

19 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 265.

suspected breaches of the Code of Conduct which found that 'many reports of suspected misconduct from APS employees are not correctly identified and treated as whistleblower reports'.²⁰

- 1.36 The misidentification of whistleblower reports has the following consequences:
- employees may not be aware that they are entitled to protection for making a whistleblower report;
 - agencies may not investigate allegations as they are required to do under Division 2.2 of the public service regulations;
 - agencies may not report back to whistleblowers to advise of the outcome of any investigations; and
 - employees may not be aware of their ability to request that allegations are further considered by the Public Service or Merit Protection Commissioner.²¹
- 1.37 A further evaluation of managing breaches of the code undertaken in 2005 appears to support the earlier findings that there is 'confusion among agencies' in regard to the implementation of whistleblowing procedures and protections.²²

Problems with the current arrangements

- 1.38 Across submissions and hearings, a strong message to the Committee was that the current legal framework for whistleblower protection at the Commonwealth level was inadequate and more specific and comprehensive legislation is required. In summary, the existing whistleblower laws include only limited categories of public servants, provide a limited range of protections and there is little or no standardisation and oversight.
- 1.39 Only two-thirds of the 232,000 employees in the Australian Government sector are covered by the whistleblower protections under the *Public Service Act 1999*. Employees of agencies under the *Commonwealth Authorities and Companies Act 1997* are not covered. Others who may have access to information that may form the basis of a public interest

20 Australian Public Service Commission, *State of the service report 2003-04*, p. 112.

21 Australian Public Service Commission, *State of the service report 2003-04*, pp. 112-3.

22 Australian Public Service Commission, *State of the service report 2007-08*, p. 170.

disclosure are excluded, such as former public servants, contractors and consultants.²³

- 1.40 Within the APS, procedures for handling whistleblower disclosures are varied. There is no requirement for agencies to have standard procedures in place and no requirement for agencies to publicly report on the use of those procedures. Ten years after the enactment of the *Public Service Act 1999*, ten per cent of APS agencies are yet to put in place procedures for dealing with whistleblower reports.²⁴
- 1.41 Whistleblowers under the current arrangements remain exposed to the criminal law, and civil actions such as defamation and breach of confidence. There are currently no provisions to protect whistleblowers who make disclosures to law enforcement authorities. There is no public interest defence in statute for disclosing official information contrary to s. 70 of the *Crimes Act 1914*.
- 1.42 Protections against unlawful termination in the *Workplace Relations Act 1996* are limited to allegations made to bodies with the 'right capacity' such as courts, tribunals or 'competent administrative authorities'. The range of competent administrative authorities is not settled and disclosures to the wrong bodies will not qualify for protection.²⁵
- 1.43 There is some confusion in the public service as to what types of reported misconduct should be protected. The Australian Public Service Commissioner told the Committee that 'what is considered whistleblowing in one agency may be viewed differently in another'.²⁶
- 1.44 There are no provisions for public servants to make authorised and protected disclosures to third parties, which could include their professional association, trade union, legal advisor, Member of Parliament or the media.
- 1.45 The same process is used for quite different types of misconduct such as workplace grievances, personnel-type issues and genuine matters of public interest that, if not addressed, would result in a significant harm to the community.

23 Australian Public Service Commission, *Submission no. 44*, p. 6.

24 Australian Public Service Commission, *State of the service report 2007-08*, p. 169.

25 The Fair Work Bill 2008, currently before the Senate, contains broader provisions in relation to workplace rights and adverse action, however, these provisions were not designed to facilitate and protect public interest disclosures. See, Workplace Ombudsman, *Submission no. 69*, pp. 4-5.

26 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 2.

- 1.46 Common law principles that could potentially affect whistleblowers in administrative or legal action tend to favour the obligations of employees to their employers rather than supporting the release of information in the public interest.²⁷
- 1.47 Overall, the current Commonwealth public sector whistleblower protection provisions were described in many submissions as the most limited and problematic of all legislative approaches across Australian jurisdictions.
- 1.48 Whistleblowers Australia, the national representative and advocacy body for people who have blown the whistle across a range of matters expressed its view to the Committee on the 'standard' treatment of whistleblowers. Their perspective is reproduced in Box 1.2 below.

Box 1.2 Standard operating practice: A perspective from Whistleblowers Australia

When a Whistleblower discloses or seeks to disclose (allegations) of public interest wrongdoing the usual consequences are as follows:

The whistleblower receives no advice or assistance in making the disclosure i.e. preparing a statement or providing evidence.

The immediate focus of the matter is the Whistleblower rather than the alleged wrongdoing. It seems the most important issue to an Agency is the credibility of the Whistleblower rather than the validity of the allegations.

Invariably agencies do not provide any proactive protection. Usually the Whistleblower is faced with accusations that they have breached their employment contract or other restrictions and may/will be subject to disciplinary or other adverse action. The open resentment (if not hostility) of management towards the Whistleblower is an open invitation for reprisals to start. The situation is like a pack attack on a wounded animal. There are no rules, no protection and the Whistleblower becomes fair game.

Some peers and even some supervisors will see the injustice of this situation and will offer help. But within a short time it will become evident that supporting a Whistleblower will not be tolerated. The supporter is warned of companion reprisals. Individual survival becomes paramount. Support generally evaporates very quickly.

The accusations, the hostility and management's subtle declaration of an 'open season' for reprisals is crushing blow to a Whistleblower. The Whistleblower who had thought they were acting ethically in the public interest suddenly finds that they are alone and are subjected to an unrestricted 'pack attack' permitted or even orchestrated by agency managers.

Source Whistleblowers Australia, Submission no. 26, p. 46-47.

- 1.49 The costs of not having an appropriate legislative framework to facilitate the making of public interest disclosures are difficult to quantify but would include:
- the costs to agencies of undertaking formal investigations of frivolous, vexatious and unsubstantiated allegations and appeals that could otherwise have been addressed through more informal or streamlined processes;
-

²⁷ Dr Bibby, *Transcript of Evidence*, 27 October 2008, p. 4.

- the personal and financial costs to individual whistleblowers and their families where protected or (currently) unprotected disclosures have been made and their cases have been mishandled;
- the possible continuation of improper, unethical and illegal practices leading to increased costs to Australian taxpayers, lower quality service delivery, sub-optimal policy outcomes, or risks to public health and safety – because potential whistleblowers may have felt that they would not be adequately protected if they spoke out; and
- less efficient and effective public administration and lower public confidence in the integrity of governance and administration systems.

Legislation in other jurisdictions

- 1.50 Since the early 1990s all Australian states and territories have enacted legislation to facilitate and protect whistleblower or public interest disclosures:
- *Whistleblowers Protection Act 1993*, South Australia;
 - *Whistleblowers Protection Act 1994*, Queensland (Reviewed in 2006);
 - *Protected Disclosures Act 1994*, New South Wales (Currently under review);
 - *Whistleblowers Protection Act 2001*, Victoria (Currently under review);
 - *Public Interest Disclosures Act 2002*, Tasmania (Currently under review);
 - *Public Interest Disclosure Act 2003*, Western Australia;
 - *Public Interest Disclosure Act 1994*, Australian Capital Territory; and
 - *Public Interest Disclosure Act 2008*, Northern Territory.
- 1.51 There is no consistency across whistleblower laws in state and territory legislation. Each contains different provisions on who can make protected disclosures, matters subject to disclosure, the scope of protection afforded and the procedures for making a disclosure.
- 1.52 AJ Brown's comparative analysis of state and territory legislation has shown that no single jurisdiction offers best practice provisions on whistleblower protection. According to Brown, 'every jurisdiction has

managed to enact at least some elements of best practice, but all have problems – sometimes unique, sometimes general or common problems’.²⁸

- 1.53 A number of contributors to the inquiry called for national consistency on whistleblower legislation in order to address the possible confusion arising from the different schemes.²⁹ According to Dr Brown, uniformity across the nine federal, state and territory public sectors is important because:

... the key issues are fundamentally common, and public integrity and standards would benefit nationally from a clearer legislative consensus ...³⁰

- 1.54 Whistleblower laws continue to evolve. Queensland reviewed its legislation in 2006. The New South Wales legislation is currently under review by the state parliamentary Committee on the Independent Commission Against Corruption. The Victorian legislation is being reviewed by an inter-departmental committee. Both those reviews are to be finalised later this year.

- 1.55 This inquiry has taken into account relevant whistleblower legislation in several overseas jurisdictions including:

- *Protected Disclosures Act 2000* New Zealand;
- *Public Interest Disclosure Act 1998* United Kingdom;
- *Public Servants Disclosure Protection Act 2005* Canada; and
- *Whistleblower Protection Act 1989* United States.

- 1.56 Australia has international obligations with respect to the protection of whistleblowers as a signatory to the United Nations Convention Against Corruption (UNCAC) and the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention. Notably, Article 33 of the UNCAC requires:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts

28 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. i.

29 Law Institute of Victoria, *Submission no. 35*, p. 4; Mr Newlan, *Transcript of Evidence*, 21 August 2008, p. 8; Mr Leonard AM, *Transcript of Evidence*, 21 August 2008, p. 64; Ms Bulder, *Submission no. 32*, p. 7.

30 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 4.

concerning offences established in accordance with this Convention.³¹

- 1.57 In January 2006 the OECD Directorate for Financial and Enterprise Affairs reported on Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials. That report noted the 'low level of whistleblower protection' in the Australian public sector.³²

The movement towards Commonwealth legislation

- 1.58 This inquiry forms part of a long history of previous reviews, inquiries and efforts at the Commonwealth level to develop legislation on whistleblower or public interest disclosure protection including:
- Review of Commonwealth Criminal Law (The Gibbs Committee), 1991 *Final Report*;
 - Whistleblowers Protection Bill 1991 (introduced by Senator Vallentine);
 - Report on Protection of Whistleblowers, Electoral and Administrative Review Commission, October 1991;
 - Whistleblowers Protection Bill 1993 (introduced by Senator Chamarette);
 - Senate Select Committee on Public Interest Whistleblowing Report 1994, *In the Public Interest*;
 - Senate Select Committee on Public Interest Whistleblowing Report, 1995, *The Public Interest Revisited*;
 - Public Interest Disclosure Bill 2001 (introduced by Senator Murray);
 - Senate Finance and Public Administration Committee Report, Public Interest Disclosure Bill 2001 [2002];
 - Public Interest Disclosure (Protection of Whistleblowers) Bill 2002, (introduced by Senator Murray); and
 - Public Interest Disclosure Bill 2007 (introduced by Senator Murray) (the Murray Bill).

31 The Attorney-General's Department submitted that s. 16 of the *Public Service Act 1999* and s. 170CK(2)(e) of the *Workplace Relations Act 1996* implement Article 33 of UNCAC in Australian law. See *Submission no. 14*, p. 6.

32 *Australia - Phase 2: Report on implementation of the OECD anti-bribery convention* 16 January 2006, OECD, Paris, p. 31.

- 1.59 Each of the previous Commonwealth reviews and bills on public interest disclosures has recognised the role of whistleblowers in supporting the integrity of public administration and have put forward a range of possible provisions on key issues such as who can make a protected disclosures, the types of disclosures that should be protected and the scope of statutory protection that should be available.

The approach of the Committee

- 1.60 Some aspects of whistleblowing are inherently stressful, unpredictable and cannot be covered by legislative provisions and procedures. Each case of whistleblowing will invariably involve a unique mix of circumstances, historical context and personalities.
- 1.61 Legislation on whistleblowing can only meet part of the challenge of facilitating and protecting public interest disclosures. A successful disclosure scheme requires changes to workplace culture to support a pro-disclosure ethic, appropriate procedures in the workplace and leadership at all levels of the public service.
- 1.62 The Committee nonetheless considers that the current Commonwealth provisions on whistleblower protection are inadequate and that specific legislation on public interest disclosures is required for the Australian Government public sector.
- 1.63 The Committee anticipates that the sum of the recommendations presented here will provide the basis for drafting instructions for new Commonwealth whistleblower protection legislation for the Australian Government public sector. The legislation, based on these recommendations, may provide a model for the future revision of state and territory legislation.
- 1.64 The balance of this report comprises eight further chapters elaborating on model provisions for new public interest disclosure legislation. Chapter 2 deals with the objectives and principles of new public interest disclosure legislation and preferred definitions of key terms to be used in new legislation including the contested definition of public interest. Chapters 3-8 then consider the issues raised on each of the main terms of reference in turn.
- 1.65 Finally, Chapter 9 discusses other relevant issues raised beyond the terms of reference including public sector culture in relation to whistleblowing and public interest disclosures in the private sector. Chapter 9 discusses the relationship between the Committee's preferred model and existing Commonwealth laws.

- 1.66 Dispersed through the report are a number of case studies describing recent cases of whistleblowing or disclosures, and drawing observations in relation to the inquiry. It is not the intention of the Committee to inquire into or make comment on any current or past whistleblowing disclosures. However these case studies serve as a reminder of the possible consequences, personal costs and ramifications for individuals and organisations when public disclosures are made.

Principles and definitions

Introduction

- 2.1 It is important to establish the main objectives, guiding principles and key terms of new public interest disclosure provisions to both provide reasonable certainty to those who may be drawn into the scope of new public interest disclosure legislation, and to send a clear message about the intentions of the legislation and its coverage.
- 2.2 While there is broad agreement on the need for more comprehensive public interest disclosure legislation for the Australian Government public sector, evidence to the inquiry indicates that there is a range of views on what the purpose of the new legislation should be. A diversity of interpretations has been taken on certain key terms such as 'whistleblower' and 'public interest'.
- 2.3 This chapter first considers perspectives on the main purpose of new legislation, considering arguments about democratic accountability, government efficiency and protecting the interests of those who speak out. The second part of the chapter looks at possible principles that should underpin new public interest disclosure legislation.
- 2.4 The chapter then assesses the arguments put to the Committee concerning the nomenclature of new legislation, including why the Committee prefers the term public interest disclosure as the title for new legislation.

The purpose of public interest disclosure legislation

- 2.5 At its most practical level, new public interest disclosure legislation would have the purpose of filling a gap in existing Commonwealth legislation by

extending whistleblower protection to those outside the existing arrangements, strengthening the nature of that protection and improving related administrative procedures.

2.6 However, many contributors to the inquiry felt that new legislation should go further, setting out a clear statement of its overarching objectives. Professor Ronald Francis suggested that new legislation should have a preamble setting out the main values framing the approach to public interest disclosures.¹

2.7 The Committee heard a number of views on the broader purpose of public interest disclosure legislation. According to Mr Peter Bennett, national President of Whistleblowers Australia, public interest disclosure laws are about exposing official misconduct and facilitating the release of information in the public interest:

A fundamental issue is the unlawful conduct of public officials who misuse their discretionary powers to stop public interest disclosures and the unjust laws that currently exist which allow the prosecution of those making public interest disclosures which serve the public interest.²

2.8 The Commonwealth Ombudsman endorsed the thirteen principles for public interest disclosure legislation advanced by the WWTW project team. The first principle recommends that the objectives of the legislation should be:

- to support public interest whistleblowing by facilitating disclosure of wrongdoing;
- to ensure that public interest disclosures are properly assessed and, where necessary, investigated and actioned; and
- to ensure that a person making a public interest disclosure is protected against detriment and reprisal.³

The objects of state and territory legislation on public interest disclosures are generally consistent with this suggestion.

2.9 A common view of the purpose of legislation is that it should support transparency and accountability in government, a higher principle of the public good. This purpose was reflected in clause 3 of the Murray Bill:

1 Professor Francis, *Transcript of Evidence*, 21 August 2008, p. 34.

2 Mr Bennett, *Transcript of Evidence*, 27 October 2008, p. 32.

3 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 283.

The purposes of this Act are to increase the transparency and accountability of institutions of government by:

- (a) facilitating the disclosure of information in the public interest; and
- (b) ensuring that disclosures of information in the public interest are properly dealt with; and
- (c) providing protection for public officials who disclose information in the public interest, including relief from liability at law.

2.10 Another common theme concerning the main purpose of the legislation was the need to protect people who speak out. For example, the Community and Public Sector Union told the Committee:

The motivation for a statutory scheme is to ensure that individuals making public interest disclosures about the public sector are protected and those disclosures are appropriately investigated. For the scheme to be meaningful, the central principle should be that statutory protection is attached to any Government work.⁴

2.11 The Secretary to the Attorney-General's Department suggested an objective for a new Act in terms of promoting 'efficient and effective government':

... you are not doing it for politicians, you are not doing it for journalists, you are not doing it for public servants. You are doing it because there is a public interest in effective and efficient administration.⁵

2.12 The Australian Standard on Whistleblower protection programs for Entities AS 8004 - 2003 noted the need to detect misconduct and the benefits of establishing a protection program in its foreword:

A whistleblower protection program is an important element in detecting corrupt, illegal or other undesirable conduct (defined later in this standard as 'reportable conduct') within an entity, and as such, is a necessary ingredient in achieving good corporate governance.

An effective whistleblower program can result in –

- (a) more effective compliance with relevant laws;

4 Community and Public Sector Union, *Submission no. 8a*, p. 2.

5 Mr Roger Wilkins AO, *Transcript of Evidence*, 27 November 2008, pp. 2, 13, 15, 19.

- (b) more efficient fiscal management of the entity through, for example, the reporting of waste and improper tendering practices;
- (c) a healthier and safer work environment through the reporting of unsafe practices;
- (d) more effective management;
- (e) improved morale within the entity; and
- (f) an enhanced perception and the reality that the entity is taking its governance obligations seriously.

Key guiding principles

- 2.13 Many contributors to the inquiry noted the need for public interest disclosure legislation to balance a number of important public values such as the legitimate confidentiality requirements of government, the right of the public to access information, the right of those involved with disclosures to appropriate confidentiality, the rights of those against whom allegations have been made to natural justice, and the need to expose and address wrongdoing in the public sector.
- 2.14 The other twelve suggested principles from the WWTW project are:
- subject matter of disclosure
 - ⇒ 'Legislation should specify the topics or types of proscribed wrongdoing about which a public interest disclosure may be made. The topics should cover all significant wrongdoing or inaction within government that is contrary to the public interest'.
 - person making disclosure
 - ⇒ The primary condition for a disclosure to be protected is that the whistleblower 'holds an honest and reasonable belief' the allegation shows proscribed wrongdoing or that the disclosure 'shows or tends to show' proscribed wrongdoing.
 - receipt of disclosure
 - ⇒ 'Legislation should allow a public interest disclosure to be made to a variety of different people or agencies'
 - recording and reporting
 - ⇒ 'All public interest disclosures to an organisation should be formally recorded, noting the time of receipt, general subject matter and how the disclosure was handled'.
 - acting on a disclosure

- ⇒ An agency receiving a disclosure should be obliged to assess and act on the disclosure, keep the whistleblower informed, and report on the nature and outcome of disclosures in its annual report.
- oversight agency
 - ⇒ 'One of the external agencies with responsibility for public interest disclosures should be designated as the oversight agency for the administration of the legislation'.
- confidentiality
 - ⇒ 'Disclosures should be received and investigated in private, so as to safeguard the identity of a person making a disclosure to the maximum extent possible within the agency's control'.
- protection of person making a disclosure
 - ⇒ 'A person who has made a disclosure to which the legislation applies should be protected against criminal or civil liability, or other detriment, for making the disclosure'.
- disclosure to an outside agency
 - ⇒ 'A disclosure made to a person or body that is not designated by the legislation to receive disclosures (for example, the media) should be protected in exceptional circumstances as defined in the legislation'.
- agency responsibility to ensure protection
 - ⇒ Agencies should establish proper internal procedures, ensure staff are made aware of their responsibilities, assess the risk of detriment to whistleblowers, protect whistleblowers and take remedial action where whistleblowers suffer detriment.
- remedial action
 - ⇒ Agencies should prevent or remedy detriment to those who make disclosures.
- continuing assessment and protection
 - ⇒ Agencies or the oversight body should conduct assessments of those who make disclosures to determine the longer term impact of speaking out.⁶

2.15 Dr Kim Sawyer, who has written extensively on the subject, suggested the following principles devised by American academics Vaughn, Devine

6 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, pp. 283-287.

and Henderson as seven key principles on which to base public interest disclosure legislation:

- focus on the information disclosed, not the whistleblower;
- relate the law to freedom of expression laws;
- permit disclosure to different agencies in different forms;
- include compensation or incentives for disclosure;
- protect any disclosure, whether internal or external, whether by citizen or employee;
- involve whistleblowers in the process of the evaluation of their disclosure; and
- have standards of disclosure.⁷

Who is a whistleblower?

- 2.16 The introduction to this report commenced with a brief and very broad definition of blowing the whistle, adapted from the Oxford English Dictionary. According to this general definition an individual blows the whistle by informing on a person or exposing an irregularity or a crime.
- 2.17 The above definition broadly accords with a conventional understanding of whistleblowing. However, in defining the term, greater precision is necessary to avoid giving credibility to a range of activities that could be covered where people describe themselves as whistleblowers.
- 2.18 Whistleblowing can be distinguished from 'leaking' where an official covertly provides information directly to the media, 'to seek support and vindication in the court of public opinion'.⁸ As discussed in Chapter 4, unauthorised disclosures made to embarrass the government may infringe on the right of the government to make its decisions in confidence and therefore may not be eligible for protection.
- 2.19 A succinct academically recognised definition of whistleblowing is as follows:
- disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their

7 Dr Sawyer, *Submission no. 57*, p. 4.

8 Martin, B, 'Bucking the system: Andrew Wilkie and the difficult task of the whistleblower' in Anila V Menon (ed.) 2007, *Whistleblowers: impact and implications*, Hyderabad: Icfai University Press, pp. 23-32.

employers, to persons or organisations that may be able to effect action.⁹

- 2.20 An earlier study conducted by the University of Queensland includes the public interest aspects of disclosure among other matters in its definition of whistleblower:

The whistleblower is a concerned citizen, totally or predominantly motivated by notions of public interest, who initiates of his or her own free will, an open disclosure about significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrong doing.¹⁰

- 2.21 The University of Queensland definition of whistleblower incorporates the motive for the making the disclosure, the absence of coercion in making the disclosure, the publicity of the disclosure, the degree of wrongdoing disclosed, the occupational role of the discloser, and the entity to which the disclosure is made. All of those factors are important in determining the scope of protection that may be available to a whistleblower and are discussed further in subsequent chapters.
- 2.22 In 1999, one of the noted academics in the University of Queensland study, William De Maria, elaborated on other characteristics of being a whistleblower including the inevitable result of suffering. Dr De Maria argued that the 'non-suffering whistleblower is a contradiction in terms'.¹¹
- 2.23 The Commonwealth Ombudsman's view was that there must be something of the character of an 'insider's knowledge' involved for a matter to be a public interest disclosure.¹² Some state and territory whistleblower legislation does not restrict its application to public service insiders and provides for anyone to make a protected disclosure. The issue of who should be able to make a protected disclosure is addressed in Chapter 3.

9 Miceli, MP & Near, JP 1984, 'The relationships among beliefs, organisational position, and whistle-blowing status: a discriminant analysis', *Academy of Management Journal*, vol. 27, no. 4, pp. 689. This definition was adopted by the Whistle While They Work Project Team. See, Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 8.

10 De Maria, W 1994, 'Quarantining dissent: the Queensland public sector ethics movement', in *Australian Journal of Public Administration*, Vol. 54 no. 4, December 1995, p. 447.

11 De Maria, W 1999, *Deadly disclosures: whistleblowing and the ethical meltdown of Australia*, Kent Town, Wakefield Press, p. 25.

12 Professor McMillan, *Transcript of Evidence*, 4 September 2008, p 6.

- 2.24 A concept that features strongly in working definitions of whistleblowing used by Australian academics is the 'public interest'. Similarly, the national representative and advocacy body for whistleblowers, Whistleblowers Australia, defined the term 'whistleblower' as referring to a person who makes a 'public interest disclosure'.¹³ The public interest is discussed further in the section below.

Use of the term whistleblower

- 2.25 None of the current state and territory legislation on whistleblower protection defines the term 'whistleblower', despite the term forming part of the title of the legislation in South Australia, Queensland and Victoria.
- 2.26 State and territory whistleblower legislation refers instead to public interest disclosures, protected disclosures or both. These terms reflect the objects of the legislation, that is the facilitation of public interest disclosures, the proper handling of those disclosures once they have been made and the protection of the whistleblowers who made them.
- 2.27 The word 'whistleblower' is not defined in the *Public Service Act 1999*. However, by implication of s. 16 of that Act which provides for 'Protections for whistleblowers' a whistleblower is an 'APS employee [who] has reported breaches (or alleged breaches) of the Code of Conduct' to the Public Service or Merit Protection Commissioner or their agency head (or authorised delegate).
- 2.28 One of the key roles of the APSC is to evaluate 'the extent to which agencies incorporate and uphold the APS Values'.¹⁴ The most recent APSC Circular to agencies on whistleblower reports released in 2001, described a whistleblower as 'essentially an informant, assisting management in the performance of its function to maintain the standards of conduct set out in the Code of Conduct'.¹⁵
- 2.29 In 2005, the element of public interest appears to have emerged in the APSC's definition of whistleblowing. In the APSC publication on the practical implications of the APS values, 'whistleblowing refers to the reporting, in the public interest, of information which alleges a breach of the APS Code of Conduct by an employee or employees within an agency'.¹⁶

13 Whistleblowers Australia, *Submission no. 26a*, p. 2.

14 Section 41, *Public Service Act 1999*.

15 Australian Public Service Commission, Circular No 2001/4: *Whistleblowers' reports*, 2001.

16 See Chapter 17, *Whistleblowing*, APSC, *APS Values and code of conduct in practice*, 2005.

- 2.30 The Community and Public Sector Union did not favour the use the term 'whistleblower' because of negative connotations.¹⁷ Indeed there may be good reasons to avoid the term 'whistleblower' in legislation because of its imprecision, negative connotations and the further implications of placing individual whistleblowers at the centre of procedures:
- the term whistleblower can imply ethical choice and social ostracism yet it can form part of routine professional duty;
 - some consider whistleblowers as heroes and therefore entitled to unlimited protection but it may be unreasonable for that protection to extend to unrelated matters;
 - whistleblowers may be characterised as perpetual victims of their sacrifice, again this is not always the case;
 - another view of the whistleblower is of a 'dobber' who is not a team player and therefore untrustworthy; and
 - framing provisions around the whistleblower can distract from other important objectives of the legislation such as the treatment of the information disclosed.¹⁸
- 2.31 The word whistleblower was omitted from the Murray Bill. According to Senator Murray, the word whistleblower was not used:
- ... to emphasise that the focus should not be upon the person providing information (who may do so for a variety of reasons) but rather on the disclosure itself. The shift is designed to place primacy on addressing the issue raised rather than the person who raised it.¹⁹
- 2.32 Others names put forward for whistleblowers include 'internal witnesses', 'confidential informants', 'complainants', 'internal informers', 'reporters', 'professional reporters', and 'internal integrity witnesses'. Each of those terms comes with their own historical baggage, connotations and symbolic resonances.
- 2.33 Rather than adopting a new term or adapting one from another area, a minimalist approach would be to retain the word whistleblower in new legislative provisions and define the term with reference to the making of
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17 Mr S. Jones, *Transcript of Evidence*, 9 September 2008, p. 7.

18 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, pp. 6-7.

19 Senator Murray, Second Reading Speech, Public Interest Disclosures Bill 2007, Senate Hansard, 14 June 2007, p. 1.

a public interest disclosure, as suggested by Whistleblowers Australia. The definition of whistleblowers, for the purpose of the legislation, would then depend on how the term 'public interest' is defined.

Public interest

- 2.34 Like the term whistleblower, the term 'public interest' can be defined in a number of ways and in a number of contexts. Indeed, it may not be possible to arrive at an all encompassing definition of the public interest.²⁰
- 2.35 In relation to the disclosure of official information, possible injury to the 'public interest' has been used as a justification for preventing the disclosure of information in common and statute law. The 'public interest' has also been used to provide an exemption from a duty of secrecy to enable the disclosure of third party information.²¹
- 2.36 The Australian Law Reform Commission notes that:
- Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations, high level advice to government, communications or negotiations between governments, national security, police investigation methods, and in relation to the activities of Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives.²²
- 2.37 In its submission to the inquiry, Whistleblowers Australia argued that agencies have tended to abuse the public interest argument to unduly withhold information from the public and avoid proper scrutiny:
- Agencies involved in such matters invariably claim that they have a public interest role and that the disclosure of any information about such matters is contrary to that public interest. But what these agencies are actually claiming is that the public should not know what they are doing.²³
- 2.38 The President of Whistleblowers Australia was critical of information being withheld by reason of details being contained in a document which could actually be excised so as to enable release of the rest of the

20 Australian Law Reform Commission 2008, *Review of secrecy laws: issues paper no. 34*, p. 100.

21 Finn, P 1991, *Integrity in government project: interim report 1*, Australian National University, p. 147.

22 Australian Law Reform Commission 2008, *Review of secrecy laws: issues paper no. 34*, p. 30.

23 Whistleblowers Australia, *Submission no. 26*, p. 5, emphasis in original.

document. He was of the view that public interest matters are relative, and a test of 'the greater public interest' might be developed.²⁴

- 2.39 Dr Peter Bowden suggested that rather than focusing on what is in the public interest, disclosable conduct should be defined by what harms the public interest:

An action that is illegal or that brings harm or has the potential to bring harm, directly or indirectly to the public at large, now or in the future, is not in the public interest.²⁵

- 2.40 Ms Cynthia Kardell argued that public interest is an elusive term that need not be defined in legislation because its meaning depends on the circumstances of particular disclosures:

Public interest is a term that we will all understand at our various sorts of levels and in our various capacities. We know what the intention is. We know what it implies. It is the beginning point, if you like; it is the criterion by which you then assess the circumstances that you are being asked to assess as to whether or not the disclosure should be protected, whether that person should have protection.²⁶

- 2.41 Reflecting on the elusiveness of the term, one witness offered a more personal definition of the public interest:

To me the public interest is when your grandchildren look back in 50 years time, and say, 'Well, he acted in the public interest.' In other words, he acted to preserve the long-term standing of the institutions, not the short-term returns.²⁷

- 2.42 The Committee received evidence that the lack of an agreed and general meaning of the term 'public interest', creates a difficulty for the use of the term for public sector disclosure legislation. As Professor Francis remarked:

I have a problem with the term 'public interest'. It is like the term 'integrity'. It does not really mean a lot to me. 'Integrity' means it is integrated, it is together, but it could be corruptly integrated. I think 'public interest' is a similar case. I would like to see the values set out and then have it judged against the values – not against public interest but against a set of values like openness,

24 Mr Bennett, *Transcript of Evidence*, 27 October 2008, p. 38.

25 Dr Bowden, *Submission no. 18*, p. 2.

26 Ms Kardell, *Transcript of Evidence*, 27 October 2008, p. 39.

27 Dr Sawyer, *Transcript of Evidence*, 27 October 2008, p. 49.

honesty, prudence, goodwill and so on. In that way you actually have standards against which you can make the judgements, not just against public interest.²⁸

- 2.43 In relation to discussions about government accountability and the integrity of public administration, it is recognised that the public has an interest in ensuring that serious wrongdoing by officials is exposed and addressed. As Justice Finn noted in his 1991 report on government integrity:

Consistent with the need to maintain public confidence in the integrity of government, its institutions and officers, it is important both that the public are made aware of serious instances of maladministration and misconduct and that the public be reassured that allegations of these properly investigated and, where substantiated, are remedied appropriately.²⁹

- 2.44 In putting that approach into practice, it would be in the public interest to disclose a matter when it is conduct involving 'suspected or alleged wrongdoing that affects more than the personal or private interests of the person making the disclosure'.³⁰ However, it can sometimes be difficult to draw a distinction between personnel or workplace grievances and official misconduct.³¹ Further, not all types of wrongdoing within that definition of public interest are particularly serious. Serious malfeasance such as systemic fraud and corruption might be treated in the same way as minor misdemeanours such as poor record keeping.³²

View of the Committee

- 2.45 The Committee considers that new legislation on public interest disclosures should have a clear and simple purpose so that anyone who reads the Act can immediately discern its intent. The primary purpose of

28 Professor Francis, *Transcript of Evidence*, 21 August 2008, p. 37.

29 Finn, P 1991, *Integrity in government project: interim report 1*, Canberra, the Australian National University, p. 49.

30 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. xxi.

31 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 36.

32 Australian Public Service Commission, *Submission no. 44*, p. 6.

the legislation should be to promote accountability and integrity in public administration.

- 2.46 The values of accountability and integrity support effective and efficient government while focusing on exposing official misconduct and bringing it to account through remedial action. Accountability in public administration, by exposing and rectifying wrongdoing in the public sector, is in the public interest.
- 2.47 In the Committee's view, the values of accountability, integrity and the public interest should be the values that guide public interest disclosure legislation. The Committee has received valuable suggestions concerning the ideas which should underlie this legislation. However, most of those suggestions focus on outcomes or procedure rather than fundamental values.
- 2.48 While not necessarily explicitly referring to principles and values, contributors to the inquiry referred to rights, responsibilities and obligations. A series of concise values-based principles, framed as rights and responsibilities, could provide a clearer message of the intention of the legislation. In principle:
- it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
 - people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
 - people have a responsibility to raise those concerns in good faith;
 - governments have a right to consider policy and administration in private; and
 - government and the public sector have a responsibility to be receptive to concerns which are raised.
- 2.49 The new legislation should be titled the Public Interest Disclosure Bill. The term public interest need not be explicitly defined, but rather reflected in the purpose of the legislation and its provisions on disclosable conduct. Similarly, the term whistleblower should not be defined in legislation. The purpose and key principles of the legislation described above should be included in a preamble to the Bill.

Recommendation 1

2.50 The Committee recommends that the Australian Government introduces legislation to provide whistleblower protections in the Australian Government public sector. The legislation should be introduced to Parliament as a matter of priority and should be titled the Public Interest Disclosure Bill.

Recommendation 2

2.51 The Committee recommends that the purpose and principles of the Public Interest Disclosure Bill should reflect the following:

- the purpose of the Bill is to promote accountability and integrity in public administration; and
- the provisions of the Bill are guided by the following principles:
 - ⇒ it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
 - ⇒ people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
 - ⇒ people have a responsibility to raise those concerns in good faith;
 - ⇒ governments have a right to consider policy and administration in private; and
 - ⇒ government and the public sector have a responsibility to be receptive to concerns which are raised.

Categories of people who could make protected disclosures

Introduction

- 3.1 Information that might form the basis of a public interest disclosure could potentially come from a wide range of sources. This chapter discusses the categories of people who may seek to make protected disclosures, such as:
- current and former Australian Government public sector employees including those employed by Australian Public Service (APS) agencies and non-APS Commonwealth authorities
 - members of the public including:
 - ⇒ public servants in their capacity as private citizens; and
 - ⇒ private sector employees.
 - contractors and consultants;
 - parliamentary staff;
 - volunteers;
 - overseas staff; and
 - other organisations and individuals.
- 3.2 The chapter refers to relevant provisions in other jurisdictions and in previous legislative proposals in considering the categories of people covered by public interest disclosure legislation.
- 3.3 The issue of who can make protected disclosures is linked to the types of disclosures that are to be protected, the conditions that apply to a person

making a disclosure and the scope of statutory protection available. These matters are addressed in subsequent chapters.

Members of the public

3.4 Some contributors to the inquiry argued that any member of the public should be able to make a protected public interest disclosure regardless of their formal relationship with the organisation that is the subject of the allegation.¹ Whistleblowers Australia submitted that:

There is no reason why any person who has knowledge of malpractice or other public service wrongdoing should not be entitled to report that information. Any person who makes a report must be protected from any harm as a consequence of making the report.²

3.5 Similarly, the Department of Defence submitted:

The experience of Defence with the Defence Whistleblower Scheme is that often reports are made by family members. Indeed, the scheme has also received vital information from the general public. This raises the issue of whether 'any person' such as a family member, contractor, service provider or member of the public, might be afforded the same statutory protections as those considered for Government personnel, so long as the disclosure is in the public interest.³

3.6 The Deputy Commissioner for the NSW Commission Against Corruption told the Committee:

... we get a lot more information from members of the public and people who are not making protected disclosures than we do from protected disclosures, which does raise the issue of whether protection should be more broadly available to people who have information of interest to the ICAC and like agencies.⁴

3.7 There are currently some avenues for members of the public to pursue suspected wrongdoing in the public sector. At the Commonwealth level, any member of the public can seek assistance or make a complaint about a

1 For example see Dr Sawyer, *Submission no. 57*, p. 4; Mr Arundell, *Submission no. 2*, p. 1; Post Office Agents Association Limited, *Submission no. 15*, p. 3.

2 Whistleblowers Australia, *Submission no. 26*, p. 16 (emphasis in original).

3 Department of Defence, *Submission no. 48*, p. 1.

4 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, p. 78.

range of government administration matters by directly approaching the relevant agency or responsible Minister.

- 3.8 Other specialist authorities that may receive complaints from the public concerning government administration include the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity, the Privacy Commissioner and the Australian Human Rights Commission.⁵
- 3.9 The Commonwealth Ombudsman submitted that the protection afforded to members of the public who complain to a government agency, Minister or complaint handling authority are limited.⁶
- 3.10 As discussed in Chapter 1, public servants are generally restricted in publicly disclosing information without authority. However, there is some scope for public servants to make general comments about government policy when speaking as members of the public. As private citizens, public sector employees are entitled to openly discuss government policy provided that they do not publicly criticise government policy in the areas in which they are working. Such public criticism of government policy could be considered a breach of the APS Code of Conduct and the value that the 'Australian Public Service is apolitical, performing its functions in an impartial and professional manner'.⁷
- 3.11 In principle, any person who provides information to assist with the detection of wrongdoing should be granted legal protection.⁸ Legislation in all Australian jurisdictions with the exceptions of the Commonwealth, New South Wales and Tasmania, has taken an open approach to who may make a protected disclosure by specifying that any person is able to make a protected disclosure about specified conduct in the public sector.⁹
- 3.12 The open or 'sector-blind' categorisation of people who can make protected disclosures under most of the state legislation reflects the intention of the original legislation in South Australia and Queensland that whistleblower protection laws cover both the private and public sector.¹⁰

5 Commonwealth Ombudsman, *Submission no. 31*, p. 3.

6 Commonwealth Ombudsman, *Submission no. 31*, pp. 3-4.

7 Australian Public Service Commission, *Submission no. 44*, p. 5; s. 10(1)(a) *Public Service Act 1999*.

8 Commonwealth Ombudsman, *Submission no. 31*, p. 3.

9 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 60.

10 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 8.

- 3.13 The Law Institute of Victoria supported the open approach of the Victorian legislation arguing that ‘outsiders’ to the public service may have an important contribution to make:

There will be situations where outsiders will be best placed to initiate and provide the pertinent evidence substantiating an allegation of serious wrongdoing. Those outsiders frequently have a pivotal position in being able to identify such serious wrongdoing and thus make a credible disclosure initiating investigations. For example, there are many persons working in the private and charitable sectors that can become aware of maladministration and be in a position to make a disclosure.¹¹

- 3.14 The issue of protection for people who make disclosures concerning misconduct in the private sector is examined in Chapter 9.

Public sector insiders

- 3.15 An alternative argument put to the Committee was that public interest disclosure legislation for the Australian Government public sector should apply only to those who have worked within that sector as their information is usually the most valuable, they are the most vulnerable to reprisals, and that they require specialised procedures to address the consequences of the disclosures.¹²
- 3.16 The insider’s knowledge of wrongdoing is a feature of public sector whistleblowing arrangements in the United States. When considering a whistleblower’s submission, the Office of Special Counsel (OSC) takes into account factors including whether the disclosure is reliable, first-hand information. Where the whistleblower’s knowledge is second-hand, an investigation is not usually conducted. Speculation does not provide OSC with a sufficient legal basis to initiate an investigation.¹³
- 3.17 The application of public interest disclosure protection to ‘insiders’ conforms to a conventional understanding of a whistleblower as a member of the organisation about which a disclosure is made. ‘It is their internal position in the organisation that is most likely to make them

11 Law Institute of Victoria, *Submission no. 35*, p. 5.

12 Aspects of this argument have been presented in the evidence noted below.

13 Office of the Special Counsel 2008, *Whistleblower disclosures*, at <http://www.osc.gov/wbdisc.htm>

aware of internal wrongdoing and also most likely to place them under pressure to stay silent'.¹⁴

- 3.18 For Associate Professor Thomas Faunce, the specialised knowledge of insiders and the constraints they face are fundamental to being a whistleblower:

... the whistleblower is presumptively an insider who acquires knowledge that the community does not have. The whole idea of a being a whistleblower is that they feel that the institution itself is somehow morally compromised and that they cannot go through the usual channels because the institution has locked in various things which make it impossible. That is the nature of whistleblowing.¹⁵

- 3.19 According to the Commonwealth Ombudsman, a protection scheme must be focussed and structured if it is to properly target internal public sector whistleblowers:

... conforms to the primary objective of public interest disclosure legislation, which is to facilitate disclosure of wrongdoing by those who have worked within an organisation ... Confining the legislation in that way also enables a more focussed and structured scheme to be devised. In particular, it will be simpler to define the responsibilities of government agencies if the disclosures to which the Act applies are all made by people who have some current or prior working relationship to an agency.¹⁶

- 3.20 In elaborating on this view, the Commonwealth Ombudsman cited the research of the WWTW project:

What [the research] shows is that an area in need of great improvement is internal procedures – recording whistleblowing complaints, inquiring into whether a person faces disadvantage or retaliation and so on. The area in need of greatest reform is internal processes. That is another strong reason for designing a scheme that is tailored to the problem and the challenge, but while bearing in mind that it is not the whole picture.¹⁷

14 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, pp. 9-10.

15 Associate Professor Faunce, *Transcript of Evidence*, 18 September 2008, p. 21.

16 Commonwealth Ombudsman, *Submission no. 31*, p. 3.

17 Professor McMillan, *Transcript of Evidence*, 4 September 2008, p. 6.

3.21 The Murray Bill considered that whistleblower legislation should focus on 'public officials' who were defined as:

- (a) any person employed by the Commonwealth of Australia, whether as an Australian Public Service employee or by any other Commonwealth body or agency;
- (b) a senator or member of the House of Representatives;
- (c) a judicial officer;
- (d) a person, organisation or corporation contracted to provide goods or services to a Commonwealth department or agency;
- (e) an employee of a person, organisation or corporation contracted to provide goods or services to a Commonwealth department or agency;
- (f) a person undertaking any activities as a volunteer subject to the supervision of a Commonwealth department or agency;
- (g) a person employed under the Members of Parliament (Staff) Act 1984;
- (h) a member of the Australian Defence Force;
- (i) a person who has occupied, but no longer occupies, one of the positions described in this definition, but only with respect to conduct which occurred while he or she occupied a position described in this definition.¹⁸

3.22 The merits of considering particular categories of people who, as insiders, could make a protected disclosure, including those proposed in the Murray Bill are discussed below.

Current and former public servants

Employees of the Australian Public Service

3.23 A majority of submissions supported the inclusion of current employees of the APS within categories of people who should be able to make public interest disclosures.

3.24 Section 9 of the *Australian Public Service Act 1999* provides that the APS consists of agency heads and APS employees, with 'agency' defined as

18 Clause 5, Public Interest Disclosure Bill 2007, introduced by Senator Murray.

departments, executive agencies and statutory agencies.¹⁹ However, not all APS agencies employ staff under the *Australian Public Service Act 1999*.

- 3.25 Only half of all Commonwealth agencies or two-thirds of Commonwealth government employees are covered under existing whistleblower provisions of the *Australian Public Service Act 1999*.²⁰ The Australian Public Service Commission (APSC) submitted that the current provisions for the APS are too narrow and that coverage should be extended to non-APS Commonwealth employees.²¹ A list of relevant APS agencies is outlined in the table below:

Table 3.1 Categories of Australian Public Service Agencies

Category:	APS Agencies:	Examples:
A	Departments	Attorney-General's Department, Department of Agriculture, Fisheries and Forestry
B	Statutory Agencies which employ all staff under the <i>Public Service Act 1999</i>	Aboriginal Hostels Limited, Administrative Appeals Tribunal
C	Statutory Agencies which have the capacity to employ staff under the PS Act as well as their own enabling legislation (dual staffing bodies)	Australian Bureau of Statistics, Australian Electoral Commission
D	Executive Agencies	Bureau of Meteorology CrimTrac Agency
E	Bodies which employ staff under the PS Act which operate with some degree of independence (eg. some are identified separately under the Financial Management and Accountability Act 1997)	Ausaid – Australian Agency for International Development (part of the Department of Foreign Affairs and Trade) Child Support Agency (part of the Department of Human Services)

Source Australian Public Service Commission, *Australian Public Service agencies*

- 3.26 Commonwealth agencies outside the APS include those subject to the *Commonwealth Authorities and Companies Act 1997* such as the Australian Wine and Brandy Corporation, the Australian Broadcasting Corporation, the Australian National University and the Tiwi Land Council.

Employees of the Australian Government general government sector

- 3.27 The inquiry terms of reference cited the following Australian Bureau of Statistics (ABS) definition of the general government sector:

19 See s. 7, *Australian Public Service Act 1999*.

20 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 1.

21 Australian Public Service Commission, *Submission no. 44*, p. 8.

[the] institutional sector comprising all government units and non-profit institutions controlled and mainly financed by government.²²

3.28 At the national level of government, the general government sector includes APS Agencies, and non-APS Commonwealth employees within a 'government unit' defined as 'unique kinds of legal entities established by political processes which have legislative, judicial or executive authority over other institutional units within a given area'.²³

3.29 Australian Government general government units therefore include Commonwealth agencies that employ staff under the *Australian Public Service Act 1999*, statutory agencies that employ staff under their own enabling legislation, and other non-APS Commonwealth authorities such as public non-financial corporations (eg. Australia Post) and public financial corporations (eg. the Australian Prudential Regulation Authority), and members of the Defence Force (employed under the *Defence Act 1903*).

3.30 The definition of Commonwealth officer relevant to the disclosure provisions in the *Crimes Act 1914* encompasses the above public sector employees and includes those who perform 'services for on behalf of the Commonwealth'. The complete definition is:

"Commonwealth officer" means a person holding office under, or employed by, the Commonwealth, and includes:

- (a) a person appointed or engaged under the Public Service Act 1999 ;
- (aa) a person permanently or temporarily employed in the Public Service of a Territory or in, or in connection with, the Defence Force, or in the Service of a public authority under the Commonwealth;
- (b) the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police (all within the meaning of the Australian Federal Police Act 1979); and
- (c) for the purposes of section 70, a person who, although not holding office under, or employed by, the Commonwealth, a

22 Australian Bureau of Statistics 2003, *Australian system of government finance statistics: concepts, sources and methods*, p. 256.

23 See, Australian Bureau of Statistics 2003, *Australian system of government finance statistics: concepts, sources and methods*, para 2.29.

Territory or a public authority under the Commonwealth, performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth; and

(d) for the purposes of section 70:

(i) a person who is an employee of the Australian Postal Corporation;

(ii) a person who performs services for or on behalf of the Australian Postal Corporation; and

(iii) an employee of a person who performs services for or on behalf of the Australian Postal Corporation.²⁴

3.31 Notably, the ABS classification allocates public universities to the national level of government because they are considered to be implementing national policy in the form of tertiary education. They are the only example of a multi-jurisdictional unit funded by both state and federal governments, not controlled by the Commonwealth level of government yet allocated to that level.²⁵

3.32 The National Tertiary Education Union submitted that the inclusion of university employees within new public sector whistleblower legislation would unduly interfere with the current whistleblower arrangements in the university sector:

... universities are unique and diverse institutions with considerable operational complexity – for example, a typical university's activities will involve teaching, research, administration, governance, collaboration with external organisations (including the various tiers of government) and community engagement. Therefore, situations that may be considered to be 'whistle blowing' may not only be covered by specific whistleblower provisions but may also encompass an institution's policy, principles and regulations around academic freedom, freedom of speech, research integrity, official misconduct and discipline processes, as well as relevant state legislation.²⁶

3.33 Other submissions to the inquiry from individual academics suggested that current university whistleblower arrangements were inadequate.²⁷

24 Section 3 of the *Crimes Act 1914*.

25 Australian Bureau of Statistics 2003, *Australian system of government finance statistics: concepts, sources and methods*, para 2.47.

26 National Tertiary Education Union, *Submission no. 63*, p. 4.

27 Dr Ahern, *Submission no. 56*, p. 3; Dr Stewart, *Submission no. 50*, p. 1.

Dr Kim Sawyer emphasised that universities are very different to government agencies due to the mix of public and private funding and that the shielding of that sector from broader public sector regulatory systems has compounded accountability issues:

In the university, the values of the institution become the values of the Vice-Chancellor. Many of our universities are sealed against outside regulation. Systemic problems occur because the culture is the homogeneous culture of the CEO. And systemic failure results because there is no questioning of that culture.²⁸

- 3.34 Universities are currently covered in public interest disclosure legislation in three Australian jurisdictions. The Queensland *Protected Disclosures Act 1994* includes universities as prescribed public sector entities. The Victorian *Whistleblowers Protection Act 2001* and the Northern Territory *Public Interest Disclosures Act 2008* include universities as 'public bodies'.

Employees of other organisations in receipt of Commonwealth funding or information

- 3.35 It was put to the Committee that employees of any body in receipt of Commonwealth funding or information should be covered by the new Commonwealth public interest disclosure scheme.²⁹ The Queensland Council of Unions argued:

... that if an enterprise is in receipt of Commonwealth funding the enterprise should be subject to the same standards of fairness, transparency and accountability as the Commonwealth public sector.³⁰

- 3.36 The Queensland Nurses Union noted that nurses work in diverse areas that attract federal funding:

Nursing is a regulated profession and nurses work across a broad range of settings, including aged care, public and private hospitals, doctors' surgeries, schools, the Red Cross blood service, the prison system, remote communities, the Defence Force and so on. Much of this work results in nurses being directly employed by government agencies or directly employed by organisations dependent upon government funding.³¹

28 Dr Sawyer, *Submission no. 57*, p. 3.

29 For example, Dr Sawyer, *Submission no. 57*, p. 4.

30 Queensland Council of Unions, *Submission no. 36*, p. 3.

31 Mr Ross, *Transcript of Evidence*, 28 October 2008, p 22.

- 3.37 The Attorney-General's Department suggested that consideration be given to the inclusion of state and territory government and private sector employees within a new whistleblower scheme where they are in receipt of information from the Commonwealth Government.³² The Community and Public Sector Union argued for the inclusion of state officials due to the sharing of Commonwealth information through joint initiatives.³³
- 3.38 The sharing of official information between Commonwealth and state public sector agencies and the private sector is likely to increase as governments seek more inclusive and innovative responses to ongoing policy challenges. As the Prime Minister noted in his address to the Commonwealth Senior Executive Service:
- While always protecting the Commonwealth's interests, I have a greater expectation that you will work constructively with State and Territory counterparts to achieve lasting reform.
- ... A more inclusive policy process means engaging average Australians as well as experts, think tanks and business and community groups in policy development and delivery.³⁴
- 3.39 The extension of whistleblower protection to employees of all entities in receipt of Commonwealth funding or official information could have far reaching implications. It would not only include private sector bodies directly contracted with the Australian Government public sector (discussed below), but include a very broad range of state and local government authorities, including hospitals, education providers and infrastructure developers.

Former public servants

- 3.40 The Australian Public Service Commission submitted that the category of 'former' be restricted to a time limit of five years. This would be consistent with the Administrative Functions Disposal Authority (AFDA) Entry No 1759, requiring that records documenting reviews of misconduct are held for up to five years after all action is completed. It was noted that the Commonwealth Spent Convictions Scheme under Part VIIC of the *Crimes Act 1914* provides a time limit of 10 years after which certain criminal convictions are disregarded.³⁵

32 Attorney-General's Department, *Submission no. 14*, p. 1.

33 Community and Public Sector Union, *Submission no. 8a*, p. 2.

34 The Prime Minister, the Hon Kevin Rudd MP, Address to heads of agencies and members of the senior executive service, Great Hall, Parliament House Canberra, 30 April 2008.

35 Australian Public Service Commission, *Submission no. 44*, p. 9.

- 3.41 Imposing a time limit on former public servants making protected disclosure could improve the efficiency and focus of the whistleblowing scheme, as the APSC explained:

This would ensure protected public interest disclosures are relevant, reduce potentially vexatious claims, avoid lengthy litigation and reduce 'decision-shopping'.³⁶

Contractors and consultants

- 3.42 Contractors, consultants and their employees directly engaged with the public sector make up a growing part of the workforce providing services to or on behalf of government. They are often in a similar position as public servants to observe wrongdoing, can face similar risks when speaking out and yet are excluded from the existing APS whistleblower framework.

- 3.43 The National Secretary of the Community and Public Sector Union, Mr Jones, noted the current overlap in responsibilities that may occur between public sector employees and contractors:

In many areas of Commonwealth government employment you have people working as employees and people working as contractors doing exactly the same job. In some workplaces they are working side by side and in some instances they are working in different workplaces. It would be absurd to regulate people performing the one function because they are employees in a particular way and not regulate people performing exactly the same function who are employed by the Commonwealth in a different way.³⁷

- 3.44 In reflecting on the inclusion of contractors, the Secretary to the Department of Immigration and Citizenship, Mr Metcalfe, told the Committee:

We have IT contractors with whom it just happens to be the way that their employment arrangements are. If they were raising issues about waste of public funds or other malfeasance then you would say that to all intents and purposes they are really within the organisation and that the processes should apply to them.³⁸

36 Australian Public Service Commission, *Submission no. 44*, p. 9.

37 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 7.

38 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 22.

- 3.45 There are some legislative provisions to enable protection for contracted service providers and their employees who make whistleblower type allegations. For example:
- section 466.1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* enable employees of Aboriginal and Torres Strait Islander Corporations and their suppliers to make protected disclosures in certain circumstances; and
 - section 96.8 of the *Aged Care Act 1997* enables protection for providers of residential care and their employees who make certain disclosures, with a broadly similar scope of protection.
- 3.46 Evidence to the inquiry showed strong support for including contractors and consultants within categories of people who can make a protected disclosure.³⁹ It was further noted that relevant procedures should ensure that protection for disclosures by contractors and consultants does not cover matters that are essentially disputes over contracting arrangements.⁴⁰

Parliamentary staff

- 3.47 Parliamentary staff are another category of public sector employees that may have 'insider' access to information, be in a position to observe serious conduct contrary to the public interest and face risks of reprisal for speaking out.
- 3.48 The Australian Public Service Commission (which supports the function of the Parliamentary Service Commissioner) submitted that persons who are currently or were formerly engaged under the *Members of Parliament (Staff) Act 1984* (Cth) should be included within the categories of people who could make protected disclosures.⁴¹ Section 4(1)(c) of the *Financial Management and Accountability Regulations 1997* (Clth) provides that staff employed under the *Members of Parliament (Staff) Act 1984* are allocated to the agency from which they are paid, currently being the Department of Finance and Deregulation.
- 3.49 The three main categories of employees engaged under the *Members of Parliament (Staff) Act 1984* are ministerial consultants, staff of office-holders (including Ministers), and staff of Senators and Members. The

39 Australian Public Service Commission, *Submission no. 44*, p. 1; Commonwealth Ombudsman, *Submission no. 31*, p. 2; Department of Defence, *Submission no. 48*, p. 1.

40 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 22

41 Australian Public Service Commission, *Submission no. 44*, p. 1.

allocation of staff to Members of Parliament and certain employment conditions are determined by the Prime Minister.⁴² There is currently no general code of conduct for employees engaged under the *Members of Parliament (Staff) Act 1984*, although a Code of Conduct for Ministerial Staff was established in June 2008.⁴³ The *Members of Parliament (Staff) Act 1984* does not contain whistleblower type provisions.

- 3.50 Employees of the Departments of the House of Representatives, the Senate and Parliamentary Services are appointed under the *Parliamentary Service Act 1999*. That Act contains the same whistleblower provisions as the *Public Service Act 1999*, that is, limited protection may be granted in relation to reported breaches of the Parliamentary Code of Conduct.⁴⁴ Employees engaged under the *Members of Parliament (Staff) Act 1984* and the *Parliamentary Service Act 1999* are subject to Commonwealth industrial relations provisions.⁴⁵
- 3.51 The Clerk of the Senate, Mr Harry Evans, expressed his support for the relevant provisions in the Murray Bill.⁴⁶ That Bill included employees engaged under the *Parliamentary Service Act 1999* and the *Members of Parliament (Staff) Act 1984* within categories of people who could make protected disclosures.⁴⁷
- 3.52 The Acting Clerk of the Department of the House of Representatives, Mr Bernard Wright, informed the Committee that since the commencement of the *Parliamentary Service Act 1999*, there have been no known cases of whistleblowing in the Department under the Act. While therefore not able to comment on the merits of amending the whistleblower provisions of that Act, the Acting Clerk indicated that if amendments to the *Public Service Act 1999* are to be recommended, parallel amendments to the *Parliamentary Service Act 1999* should be considered.⁴⁸
- 3.53 Employees under the *Members of Parliament (Staff) Act 1984* can be dismissed more easily than staff employed under the *Parliamentary Service Act 1999* or the *Public Service Act 1999*. Section 23(1) of the *Members of Parliament (Staff) Act 1984* provides for termination of employment where a member of parliament dies or ceases to be a member. Section 23(2)
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42 See ss. 12, 21 (3), *Members of Parliament (Staff) Act 1984*.

43 Department of Finance and Deregulation, *Members of Parliament (Staff) Act 1984, Annual report 2007-08*, Commonwealth of Australia, 2008.

44 Section 16, *Parliamentary Service Act 1999*.

45 Currently, the *Workplace Relations Act 1996*.

46 Mr Evans, *Submission no. 67*, p. 1.

47 Clause 5, *Public Interest Disclosure Bill 2007*.

48 Mr Wright, *Submission no. 70*, p. 4.

provides a further general power of a member of parliament to terminate the employment of a staff member.

- 3.54 Protecting staff employed under the *Members of Parliament (Staff) Act 1984* can be difficult due to the often highly charged political environment within members' offices. Staff of members are often members of political parties and could be subject to reprisal from their party. Members' staff can face harsh consequences for breaching confidentiality:

We have had cases in the past where a staffer actually released information without the consent of the member to another member, which caused political embarrassment to that member, and the Speaker of the day took the view that that was a breach of faith in terms of their relationship and dismissed the person, and that dismissal stood.⁴⁹

- 3.55 Members can be vulnerable if disclosure provisions are abused, for example, in cases where staff are politically active and working against their own member. The New South Wales Clerk of the Parliament told a NSW parliamentary committee:

... members are very vulnerable to malicious complaints against them. It is one of the things I counsel all new members on when they start here to be very careful about the employment of staff and the relationship that they have with staff. It is why we have put together the guide for members in employing staff. We have had situations where there has been irreconcilable breakdown between the member and the staff member. Sometimes those people have worked outside this organisation and worked very amicably, but once they have become a member of Parliament things have changed. I think there are a lot of tensions and stresses that can happen in a member's office that do not happen in other workplaces.⁵⁰

- 3.56 Personnel grievances within the offices of Commonwealth members of parliament are not uncommon. The latest Annual Report of the *Members of Parliament (Staff) Act 1984*, noted that in the year to June 2008, the total

49 Mr Grove, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 46.

50 Ms Lovelock, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 28. These comments were made in the context of the NSW Parliament but would generally apply in relation to members of the Commonwealth Parliament.

legal costs of termination of employment and unfair dismissal claims by the staff of members amounted to \$105,455.⁵¹

- 3.57 The *Protected Disclosures Act 1994* (NSW) applies to staff of the parliamentary departments and the staff of members. However, the use of those provisions by parliamentary staff is relatively rare. In New South Wales, only two formal disclosures have been made in relation to each of the Houses. Notably, none of those disclosures were made by staff of members.⁵²
- 3.58 The content of disclosures made by parliamentary staff could concern the conduct of members of parliament in relation to parliamentary proceedings. Matters about participants in parliamentary proceedings are related to the special powers, privileges and immunities of each House under the doctrine of parliamentary privilege.⁵³ Chapter 8 discusses procedures in relation to parliamentary privilege and disclosures relating to proceedings in parliament.

Volunteers

- 3.59 The volunteer sector is another growing part of the workforce that plays a role in providing services to the community on behalf of government. ABS surveys have found that about five million Australians, or 34% of the adult population, are volunteers. While most operate in the private not-for-profit sector, about 14% of volunteering occurs in government sector organisations.⁵⁴
- 3.60 The Committee heard that current and former volunteers with public sector bodies and current and former volunteers with organisations that work for public sector bodies on a contractual basis should be included within categories of people who could make protected disclosures.⁵⁵

51 Department of Finance and Deregulation, *Members of Parliament (Staff) Act 1984, Annual Report 2007-08*, Commonwealth of Australia, 2008, p. 43.

52 Ms Lovelock, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 16; Mr Grove, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 43.

53 Parliamentary proceedings have certain immunities from ordinary law in accordance with s. 49 of the Constitution of the Commonwealth of Australia and the *Parliamentary Privileges Act 1987*.

54 Australian Bureau of Statistics 2006, *Voluntary work Australia*, 4441.0, p. 3, 56.

55 Commonwealth Ombudsman, *Submission no. 31*, p. 2.

Persons overseas

- 3.61 Many Australian Government public sector employees work outside Australia supporting a wide range of international activities including immigration, humanitarian and trade services. They may be engaged under the *Public Service Act 1999* or other legislation to perform duties overseas or may be volunteers on government projects.
- 3.62 There was general consensus that Australian officials working overseas should be included within the categories of people who could make protected disclosures. As the Commonwealth Ombudsman pointed out, protection is particularly important in this context because ‘risk of reprisal or disadvantage can be greater where a person is working in a small office overseas’.⁵⁶
- 3.63 The Department of Defence submitted:
- Defence personnel, including contractors, and sometimes their accompanying spouses and families, are regularly posted overseas for both long and short term duty. It seems appropriate that the proposed statutory protection should be extended to these persons.⁵⁷
- 3.64 Another important category of staff employed by the Australian Government public sector but located outside Australia are locally engaged personnel employed under s. 74 of the *Public Service Act 1999* or other legislation. Foreign nationals working outside Australia, but paid by the Australian Government, are subject to the laws of the country they are in.
- 3.65 As locally engaged staff make up the majority of personnel in Australia’s overseas missions. They may have access to official information and are often involved with decision making across a range of matters such as visa processing. The Department of Immigration and Citizenship, for example, employs about 800 staff overseas who are not Australian citizens.⁵⁸
- 3.66 The Australian Public Service Commission agreed that protection should be extended to locally engaged staff in so far as it is possible to offer protection under Australian law from consequences in Australia.⁵⁹

56 Commonwealth Ombudsman, *Submission no. 31*, p. 4.

57 Department of Defence, *Submission no. 48*, p. 3.

58 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 18.

59 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 17.

- 3.67 The Justice and International Mission Unit of the Uniting Church of Australia told the Committee of the importance of whistleblower protection in addressing corruption in the context of international aid.⁶⁰
- 3.68 The OECD noted that the Department of Foreign Affairs and Trade is the only Commonwealth agency to encourage its staff overseas to report suspected foreign bribery and recommended further support for potential whistleblowers.⁶¹
- 3.69 Procedural difficulties in protecting public sector whistleblowers outside Australia, such as maintaining the confidentiality of the informant are discussed further in Chapter 8.

Other organisations and individuals

Commonwealth agencies with existing protected disclosure frameworks

- 3.70 The Committee heard from some areas within the Commonwealth public sector that have more comprehensive protected disclosures frameworks including law enforcement agencies, the Australian Intelligence Community (AIC) and the Australian Defence Force. In the case of the intelligence community and law enforcement agencies, these frameworks are set out in legislation.⁶²
- 3.71 The Australian Commission for Law Enforcement Integrity (ACLEI) is responsible for preventing, detecting and investigating serious and systemic corruption issues in the Australian Federal Police (AFP), the Australian Crime Commission and former National Crime Authority.⁶³ The AFP has a Professional Standards regime covering four categories of misconduct and AFP officers are encouraged to disclose their concerns through the 'Confidant Network' of officers trained in handling integrity issues.⁶⁴
- 3.72 The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer tasked with reviewing AIC agencies.⁶⁵ The

60 Dr Zirnsak, *Transcript of Evidence*, 21 August 2008, pp. 75-78.

61 *Australia - phase 2: report on implementation of the OECD anti-bribery convention 16 January 2006*, OECD, Paris, p. 34.

62 *The Inspector-General of Intelligence and Security Act 1986 and the Law Enforcement Integrity Commissioner Act 2006*.

63 Australian Commission for Law Enforcement Integrity, *Submission, no. 13*, p. 1.

64 Australian Federal Police, *Submission no. 38*, pp. 7-9.

65 Australian Intelligence Community agencies are: the Australian Security Intelligence Organisation, Defence Imagery and Geospatial Organisation, Australian Secret Intelligence Service, Defence Signals Directorate, Defence Intelligence Organisation, Office of National

IGIS is empowered to receive whistleblower reports and complaints concerning AIC activities and undertake formal inquiries.⁶⁶

- 3.73 The Department of Defence provided the Committee with information on its internal whistleblower scheme which has been in operation since 2002. The Defence scheme covers defence force personnel, public servants employed by the department, contractors and Defence civilians.⁶⁷

Anonymous disclosures

- 3.74 Many contributors to the inquiry argued that whistleblowers should be able to make a protected disclosure anonymously if they wish. It was suggested the prospect of remaining anonymous would encourage people to speak out.⁶⁸
- 3.75 STOPline, which provides whistleblower hotline services to the public and private sector, supported the view that people are more confident in speaking out if they can be assured anonymity:

Here at STOPline 64% of whistleblowers request total anonymity and 43% of those are happy for us to know their identity but do not want it provided to their employer. The principal reason for this is that they lack faith in their organisations capacity to keep their identity confidential. In other words it is not about suspected corruption at the top of the organisation; simply an incapacity to handle the matter with the required level of discretion and confidentiality.⁶⁹

- 3.76 The value of anonymity is recognised in the Australian Standard AS 8004 – 2003 Whistleblower protection programs for entities, paragraph 2.4.5:

A whistleblower who reports or seeks to report reportable conduct should be given a guarantee of anonymity (if anonymity is desired by the whistleblower) bearing in mind, that in certain circumstances, the law may require disclosure of the identity of the whistleblower in legal proceedings.⁷⁰

Assessments.

- 66 Inspector-General of Intelligence and Security, *Submission no. 3*, p. 2. Mr Nathan Rogers referred the Committee to a United States Congressional Research report which discusses pathways relevant to personnel in national security settings, *Submission no. 1*, p. 1.
- 67 Department of Defence, *Submission no. 48*, p. 1. Defence civilians are those subject to defence force discipline as defined in s. 3 of the *Defence Force Discipline Act 1982*.
- 68 Mr Newlan, *Transcript of Evidence*, 21 August 2008, p. 4.
- 69 STOPline Pty Ltd, *Submission no. 25*, p. 9.
- 70 Standards Australia, *Submission no. 16*, Attachment A, Australian Standard AS 8004 – 2003

- 3.77 It is often the case that a person will choose to speak out about serious wrongdoing anonymously at first, and then reveal their identity once they are assured that confidentiality can be maintained.⁷¹
- 3.78 In some cases, it can be difficult to conduct an investigation and afford natural justice to individuals on the basis of anonymous disclosures. The practical implementation of procedures in relation to protected disclosures is discussed further in Chapter 8.
- 3.79 Legislation in Victoria, Tasmania and the Northern Territory currently provides protection for people who make anonymous disclosures. The other jurisdictions are silent on the issue.⁷²
- 3.80 The Committee heard that anonymous disclosures from public sector insiders should be protected:
- ... to facilitate anonymous disclosures, the scheme should extend to any person who has provided information anonymously, of a nature that reasonably suggests the person falls into one of the listed categories.⁷³

View of the Committee

- 3.81 The Committee was asked to focus on whistleblowing protections within the Australian Government public sector. The Committee considers that the Australian Government public sector should remain the focus of the legislation because it is public sector insiders who are most vulnerable to reprisals and are more likely to provide the most critical information.
- 3.82 Public interest disclosure legislation should target 'insiders' to the Australian Government public sector, that is direct employees, and others who are most likely to have insider information such as former employees, current and former employees of contractors and consultants to the public sector, and current and former parliamentary staff, volunteers and overseas staff including locally engaged staff. People making anonymous disclosures who, on the basis of the information provided, are reasonably

Whistleblower protection programs for entities.

71 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 11.

72 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 11.

73 Commonwealth Ombudsman, *Submission no. 31*, p. 2.

viewed as being in one of the above categories of 'insiders' should receive protection.

- 3.83 The same categories of public sector insiders associated with Commonwealth agencies that have more comprehensive whistleblower protection schemes, such as the law enforcement and intelligence communities, should be treated no differently to categories of people who can make protected disclosures. However, the procedures in relation to protected disclosures from those bodies may differ with regard to the existing legislation for those agencies.
- 3.84 Staff of Members of Parliament should be included in whistleblower protection. In recognition of the political environment within which staff work and their employment arrangements which may not provide an internal disclosure option, the Committee considers that the Commonwealth Ombudsman should be the authority authorised to receive public interest disclosures from the employees of Members of Parliament employed under the *Members of Parliament (Staff) Act 1984*.
- 3.85 There may be situations where certain categories of employees with a more distant relationship to the Australian Government public sector seek to make a protected disclosure, for example, a former volunteer of a not for profit body contracted to a local government authority to implement a federally funded program. There should be no automatic protection afforded to people in such instances but a decision maker should be able to grant protection in appropriate circumstances.
- 3.86 Where the disclosure originates from a person connected with a state based entity and concerns the use of Commonwealth funding or information and has an 'insider perspective', the authorised recipient of the information should consider the nature of that information prior to granting protection in relation to the disclosure.
- 3.87 It may be that disclosures concerning the Australian Government public sector from people who do not qualify for automatic protection, such as those connected with a state-based or private sector entity, qualify under different conditions and the scope of statutory protection is limited or different procedures apply. These issues are discussed further in subsequent chapters.
- 3.88 Others who seek whistleblower protection who are outside the categories of those who can make protected disclosures described above, such as those who have a client-type relationship with a public sector agency, have recourse to the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Australian Commission for Law

Enforcement Integrity, the Privacy Commissioner and the Australian Human Rights Commission.

- 3.89 The Committee notes that members of the public who make disclosures or raise complaints against public sector service providers do not have the same scope of protection afforded to them as that under consideration for whistleblowers in this inquiry. The Committee considers that the issue of protection for members of the public who make such complaints outside the current terms of reference could be addressed in a future review.

Recommendation 3

- 3.90 **The Committee recommends that the Public Interest Disclosure Bill define people who are entitled to make a protected disclosure as a 'public official' and include in the definition of public official the following categories:**
- **Australian Government and general government sector employees, including Australian Public Service employees and employees of agencies under the *Commonwealth Authorities and Companies Act 1997*;**
 - **contractors and consultants engaged by the public sector;**
 - **employees of contractors and consultants engaged by the public sector;**
 - **Australian and locally engaged staff working overseas;**
 - **members of the Australian Defence Force and Australian Federal Police;**
 - **parliamentary staff;**
 - **former employees in one of the above categories; and**
 - **anonymous persons likely to be in one of the above categories.**

Recommendation 4

- 3.91 The Committee recommends that the Public Interest Disclosure Bill provide that the Commonwealth Ombudsman is the authorised authority for receiving and investigating public interest disclosures made by employees under the *Members of Parliament (Staff) Act 1984*.

Recommendation 5

- 3.92 The Committee recommends that the Public Interest Disclosure Bill include a provision to enable a decision maker within the scheme to deem other persons to be a 'public official' for the purposes of the Act. Those who may be deemed a public official would have an 'insider's knowledge' of disclosable conduct under the legislation and could include current and former volunteers to an Australian Government public sector agency or others in receipt of official information or funding from the Australian Government.

Recommendation 6

- 3.93 The Committee recommends that, after a period of operation of the proposed legislation, the Australian Government consider introducing protection for members of the public to make public interest disclosures about the Australian Government public sector.

The types of disclosures that should be protected

Introduction

- 4.1 As perceptions of wrongdoing can vary from individual to individual, it is important to establish clear standards about what sort of official misconduct threatens the integrity of public institutions. People may be motivated to make a disclosure by a range of factors.
- 4.2 This chapter considers possible model legislative provisions for the types of wrongdoing that should be covered by new public interest disclosure legislation and other factors that may be relevant in determining whether a disclosure is protected.
- 4.3 In considering the types of disclosures that should be protected, the chapter first reviews the evidence in relation to the suggested categories of wrongdoing referred to in the terms of reference for the inquiry.
- 4.4 The second part of the chapter considers the extent to which the motivation for making a disclosure should be relevant to whether the disclosure should attract protection.
- 4.5 The third part of this chapter examines whether grievances over internal staffing matters should be addressed through new public interest disclosure legislation. Finally, this chapter addresses the question of whose misconduct should form the basis of a protected disclosure.
- 4.6 The related issue of whether a threshold of seriousness should apply to misconduct for the disclosure to be afforded protection is addressed in

the following chapter on the conditions that should apply to a person making a disclosure.

Possible categories of disclosable conduct

- 4.7 A number of contributors to the inquiry argued that categories of official misconduct should not be too prescriptive in legislation. For example, the Secretary to the Attorney-General's Department suggested that legalistic definitions of conduct within the scope of legislation be avoided. It was considered that disclosable conduct should be classified in an 'open-ended' manner that would require judgement by the persons who make approaches, by their supervisors, by their chief executive officers and, ultimately, by the relevant oversight agency.¹
- 4.8 The Community and Public Sector Union was of the view that:
- ... the legislation should be clear within its scope and should not seek by reference to describe the sorts of behaviours that are subject to a disclosure ... the current Commonwealth regime ... provides protections ... (but) requires a degree of characterisation and knowledge – legal and otherwise, which is often beyond the scope of many lawyers let alone the normal public servant working within the Commonwealth²
- 4.9 Evidence received by the Committee was generally supportive of coverage extending to the conduct described in the Committee's term of reference 2(a), which lists allegations of the following activities in the public sector:
- illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment.
- 4.10 In its submission to the inquiry the Commonwealth Scientific and Industrial Research Organisation (CSIRO) cited the Australian Code for the Responsible Conduct of Research 2007 in reference to scientific misconduct. According to the Code:
- Research misconduct includes fabrication, falsification, plagiarism or deception in proposing, carrying out or reporting the results of research, and failure to declare or manage a serious conflict of
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1 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p 13.

2 Mr Jones, *Transcript of Evidence*, 9 September 2008, p 8.

interest. It includes avoidable failure to follow research proposals as approved by a research ethics committee, particularly where this failure may result in unreasonable risk or harm to humans, animals or the environment. It also includes the wilful concealment or facilitation of research misconduct by others.³

- 4.11 A distinction could be made between misconduct in undertaking scientific research and misconduct in terms of how the findings of the research are used. The misuse of research findings could be treated as other forms of misconduct in the provision of information and advice to government. Scientific misconduct, it was suggested, is a special category of wrongdoing because of its importance to community wellbeing, its high degree of technicality, and level of sensitivity (for example, in relation to stem cell research).⁴
- 4.12 The CSIRO is a non-APS statutory authority established by the *Science and Industry Research Act 1949*. Scientific misconduct does not currently form part of the CSIRO Code of Conduct although it is covered in the CSIRO Misconduct Policy and 'scientific fraud' is a reportable matter under the CSIRO Whistleblower Policy.⁵
- 4.13 The Staff Association of the CSIRO told the Committee that while CSIRO should be covered in a new whistleblower scheme, scientific conduct should be controlled within the current institutional framework.⁶
- 4.14 Of greater concern to the CSIRO Staff Association was the need to address official misconduct concerning the misuse of contracts, the increasing secrecy involved with industry collaborations and the protection of scientists who speak out about misleading development and commercialisation of their patents.⁷
- 4.15 It was submitted by the Australian Public Service Commission that only widespread or systemic forms of misconduct should be the subject of new public interest disclosure legislation. Such an example would be the Australian Wheat Board Bribery Scandal.⁸

3 Commonwealth Scientific and Industrial Research Organisation, *Submission no. 71*, p. 4.

4 Commonwealth Scientific and Industrial Research Organisation, *Submission no. 71*, p. 6.

5 Commonwealth Scientific and Industrial Research Organisation, *Submission no. 71*, p. 7.

6 Dr Borgas, *Transcript of Evidence*, 21 August 2008, p. 67.

7 Dr Borgas, *Transcript of Evidence*, 21 August 2008, pp. 68–72.

8 Australian Public Service Commission, *Submission no. 44*, p. 9.

Case study The Australian Wheat Board

Background

In 1995, the United Nations Security Council adopted Resolution 986, establishing the Oil-for-Food Programme. This program permitted Iraq to sell oil under UN-approved contracts, with the proceeds being paid into an account controlled by the United Nations and used to buy foodstuffs.

By November 2000, Iraq was breaching sanctions and ultimately generated billions of dollars in revenues. The illicit revenues were collected through kickback payments on the UN-approved contracts.

The Australian Wheat Board (AWB) circumvented the UN sanctions by failing to disclose its true contractual arrangements with the Iraqi Grain Board. AWB inflated the price of its wheat sales and recouped its kickbacks from the account controlled by the United Nations.

In his Report of Inquiry into Australian companies in relation to the UN Oil-for-Food Programme, Commissioner Cole observed that the failure by Australian companies, or their officers, to act in a manner consistent with UN sanctions should be regarded as serious criminal conduct. That conduct may cause harm to Australia's national interest as it affects our trading reputation and international standing.

Discussion

Conduct by a corporation or official that affects the national interest is a public interest matter. This includes conduct contrary to obligations that arise from Security Council resolutions and from treaties.

The United Nations Convention against Corruption obliges Australia to provide protection for whistleblowers. The OECD Anti-Bribery Convention criminalises bribery of foreign or local public officials. In 2006, the Anti-Bribery Working Group reported that Australia had 'a low level of whistleblower protection in the public sector'.⁹

Public Interest Disclosure legislation extends to matters that affect Australia's international obligations and responsibilities, including the conduct of corporations.

- 4.16 The Attorney-General's Department drew the Committee's attention to the requirement for Australian officials to monitor corporate compliance with Australia's international obligations, including those related to misconduct in bribery and corruption.¹⁰
- 4.17 The Community and Public Sector Union suggested the legislation focus on illegal activity, corrupt conduct, misuse or waste of public funds, maladministration, danger to public health or safety and danger to the environment.¹¹
- 4.18 Associate Professor Thomas Faunce emphasised the seriousness of fraud by describing the costs and difficulty of addressing Medicare fraud:
- Medicare fraud, for example, is estimated to cost the Australian Government billions of dollars per annum. While estimates of fraud are inherently difficult, and inaccurate, it is likely that the Health Insurance Commission's (HIC) estimate of \$130 million is
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9 *Australia - phase 2: report on implementation of the OECD anti-bribery convention* 16 January 2006, OECD, Paris, p. 31.

10 Attorney-General's Department, *Submission no. 14*, pp 5,6.

11 Community and Public Sector Union, *Submission no. 8a*, pp. 2-3.

highly conservative. Fraud, like most white collar crime, is a victimless crime. This does not mean that fraud imposes no costs on others but simply that the costs are spread out over a large number of shareholders, taxpayers and corporations. The absence of an identifiable victim makes fraud much more difficult to detect and prosecute than other forms of theft.¹²

- 4.19 In 1994, the Senate Select Committee on Public Interest Whistleblowing recommended the following types of disclosures be included in a public interest disclosure framework:
- illegality, infringement of the law, fraudulent or corrupt conduct;
 - substantial misconduct, mismanagement or maladministration, gross or substantial waste of public funds or resources; and
 - endangering public health or safety, danger to the environment.¹³
- 4.20 The WWTW project identified seven categories of perceived wrongdoing for the purpose of its analysis. Those categories were misconduct for gain, conflict of interest, improper or unprofessional behaviour, defective administration, waste or mismanagement of resources, perverting justice or accountability and personnel or workplace grievances.¹⁴
- 4.21 The Australian Standard for Whistleblower Protection Programs for Entities 8004 – 2003 covers the following types of misconduct:
- Conduct by a person or persons connected with an entity which, in the view of a whistleblower acting in good faith, is –
- (a) dishonest;
 - (b) fraudulent;
 - (c) corrupt;
 - (d) illegal (including theft, drug sale/use, violence or threatened violence and criminal damage against property);
 - (e) in breach of Commonwealth or state legislation or local authority by-laws (e.g. Trade Practices Act or Income Tax Assessment Act);

12 Associate Professor Faunce, *Submission no. 4*, p. 9.

13 Senate Select Committee on Public Interest Whistleblowing, 1994, *In the public interest*, p. 163.

14 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p xxi.

- (f) unethical (either representing a breach of the entity's code of conduct or generally);
- (g) other serious improper conduct;
- (h) an unsafe work-practice; or
- (i) any other conduct which may cause financial or non-financial loss to the entity or be otherwise detrimental to the interests of the entity.

An entity may also wish to consider including in its definition of reportable conduct such conduct as gross mismanagement, serious and substantial waste or repeated instances of breach of administrative procedures.

4.22 The Murray Bill included the following provision relating to 'improper conduct':

improper conduct means a breach or attempted breach of the standards of conduct that would be expected of a public official by reasonable persons with knowledge of the duties, powers and authority of the position, and includes but is not limited to:

- (a) conduct that involves, or that is engaged in for the purpose of, a public official abusing his or her office as a public official;
- (b) conduct of a person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public official's or a public body's functions; or
- (c) conduct of a public official that amounts to the performance of any of his or her functions as a public official dishonestly or with inappropriate partiality;
- (d) conduct of a public official, a former public official or a public body that amounts to a breach of public trust;
- (e) conduct of a public official, a former public official or a public body that amounts to the misuse of information or material acquired in the course of the performance of his, her or its functions as such (whether for the benefit of that person or body or otherwise);
- (f) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice;

(g) conduct that, having regard to the duties and powers of a public official, is engaged in for the purpose of corruption of any other kind;

(h) a conspiracy or attempt to engage in conduct referred to in paragraphs (a) to (g).

The motive for making a disclosure

- 4.23 Most contributors to the inquiry viewed the motive in making a disclosure as irrelevant in assessing whether a disclosure should qualify for protection and investigating the substance of the issue disclosed.¹⁵ Commissioner Pritchard of the NSW Police Integrity Commission commented:

You would tie yourself in knots if you tried to decipher whether there is a hidden agenda. You have to treat them at face value.¹⁶

- 4.24 The former Australian Public Service Commissioner, Mr Andrew Podger put forward his strong view that the motives of the person making a disclosure should not be a factor in determining whether a disclosure is protected, as this would be against the public interest:

I firmly believe that the motives of the person making the disclosure should not be taken into account in the legislative provisions. Not only would this be unmanageable but it could also be counterproductive: some wrongdoing may significantly impact both public interest, and the interests of the person making the disclosure.¹⁷

- 4.25 The Office of the Public Sector Standards Commissioner (OPSSC), Western Australia, observed:

A person's motives for disclosure may be self-serving, but their disclosure may nevertheless contain information that meets the definition of a disclosure that should be protected and further investigated.¹⁸

- 4.26 The Commonwealth Ombudsman advanced a number of reasons both in principle and practice, why the motive of the whistleblower should not be taken into account when receiving a public interest disclosure:

15 For example see, Professor Francis, *Transcript of Evidence*, 21 August 2008, pp. 39, 40, Dr Zirnsak, *Transcript of Evidence*, 21 August 2008, p. 82.

16 Commissioner Pritchard, *Transcript of Evidence*, 27 October 2008, p 74.

17 Mr Podger, *Submission no. 55*, p. 3.

18 Office of the Public Sector Standards Commissioner, *Submission no. 39*, p. 4.

- accurately assessing a person's motivation is rarely a straightforward matter, as motivations can be mixed, ambiguous and difficult to prioritise;
- it would allow an agency excessive latitude to pick and choose which disclosures to act upon;
- it would be threatening to a person making a disclosure to know that an agency could filter disclosures in this manner, especially if the person loses the protection afforded by the statute when a disclosure is assessed as falling outside the statute; and
- it is contrary to the spirit of a public interest disclosure statute to discourage disclosures: the objective of the statute is that wrongdoing should be dealt with, regardless of the motivation of the person making the disclosure.¹⁹

Disagreement with government policies

- 4.27 Under the Westminster system of parliamentary accountability, Ministers are collectively responsible to Parliament for the decisions of cabinet and their implementation. They are individually responsible to Parliament for their own conduct and the general conduct of their departments. It would therefore be inappropriate for a public servant or oversight agency to become involved in investigations of disputes over policy choices and matters of parliamentary accountability.
- 4.28 A public service employee is prohibited from engaging in public debate about government policy except in limited circumstances. Public Service Regulation 2.1(3) prohibits the disclosure of information by an employee which the employee obtains or generates in connection with their employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
- 4.29 Public Service Regulation 2.1(4) prohibits the disclosure of information by an employee which the employee obtains or generates in connection with their employment if the information was, or is to be, communicated in confidence within the government or was received in confidence by the government from a person or persons outside the government. The prohibition applies whether or not the disclosure would found an action for breach of confidence.

19 Commonwealth Ombudsman, *Submission no. 31*, p. 6.

- 4.30 The *Freedom of Information Act 1982* provides for a general right of access to information with limitations. One area where the release of information is generally held to be against the public interest is the discussion, within government, of options that were not settled and that recommend or outline courses of action that were not ultimately taken.²⁰ The reason for this is the potential for confusion or to mislead the public. Disclosures of that type would be unlikely to make a valuable contribution to the public debate and have the potential to undermine the public integrity of the Government's decision making process by not fairly disclosing reasons for the final position reached.²¹
- 4.31 Many contributors to the inquiry considered that protection should not be extended to people who disclose official information because they disagree with government policy.²²
- 4.32 The Member for Fremantle, Ms Melissa Parke MP, noted that:
- ‘whistleblowing’ can serve as the term of choice to characterise an individual’s principled dissent over government or organisational policy: this activity, directed as it is at ‘high policy’ rather than ‘wrongdoing’, has not been protected as whistleblowing activity in Australia, other OECD countries, or the UN Secretariat.²³
- 4.33 The NSW Council for Civil Liberties drew a line between whistleblowing and access to public information:
- Widespread debate about policy options is an important part of the democratic process. Freedom of information laws should ensure that information about the options is made public. That however is not the concern of whistleblower protection.²⁴
- 4.34 The Community and Public Sector Union added the caveat that claims to a disagreement over policy should not be used to ignore wrongdoing as defined in public interest disclosure legislation just because there is an associated policy issue.²⁵

20 See, for example, Part IV of the *Freedom of Information Act 1982*.

21 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, 456.

22 For example, see Australian Public Service Commission, *Submission no. 44*, p. 10

23 Ms Melissa Parke MP, *Submission no 51*, p. 6.

24 NSW Council for Civil Liberties, *Submission no. 17*, p 3.

25 Community and Public Sector Union, *Submission no. 8a*, p 3.

Disclosure of confidential government information

4.35 Professor McKinnon of the Australian Press Council observed that, in some cases, it has been difficult to draw the line between leaking government information and the making of a public interest-type disclosure.²⁶ The Committee draws distinctions between the unauthorised disclosure of government information, a lawful disclosure, such as when government information is obtained under the Freedom of Information Act and third party disclosures, which are discussed in Chapter 8.

4.36 Commonly, a leak occurs when a person wishes to advance a personal interest or cause embarrassment to government. Associate Professor McKnight drew the Committee's attention to:

the contradiction which is apparent to the public and to journalists – that is, that ministers leak, and will continue to leak, confidential material to journalists, but when a similar action is taken by a junior public servant it can result in the loss of their job, of their peace of mind and their income.²⁷

4.37 Most contributors to the inquiry accepted that protecting official information is a legitimate aspect of government, and that individuals should not be free to make unilateral decisions to disclose that information to the public. The Deputy NSW Ombudsman, for example, described circumstances when disclosure of information is, simply, inappropriate because a person is misinformed.²⁸

There are some bits of information held by government which should remain secret, either temporarily or permanently. There should not be any circumstances where that information is released, other than in particularly special circumstances. So you are not just looking at how to foster public interest disclosures and prevent unfounded defamatory statements; you are also looking at problems where you have a selective leak, a politically motivated leak.

You have a difference between where you have the smoking gun memo, which on its face is all the proof you need that there is a problem, and circumstances where somebody has only a part of the picture and what they can see looks really bad. But they do not

26 Professor McKinnon, *Transcript of Evidence*, 27 October 2008, p 53.

27 Associate Professor McKnight, *Transcript of Evidence*, 27 October 2008, pp. 51-52.

28 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 37.

know what the rest is and they might not even know that there is something more. By coming out too soon they may have caused incalculable damage to individuals or to the public interest.²⁹

- 4.38 The National Secretary of the Community and Public Sector Union argued that leaking should not be protected due to its harmful impact on the relationship between the government and the public sector:

I believe [leaking] fundamentally breaches the trust that is essential between an apolitical public service and the executive of the day. If the executive of the day believes that it cannot receive advice, indeed contrary advice, from the various agencies of state and be able to deliver upon that advice without fear that it is going to appear in the newspaper then it fundamentally breaks down the relationship between the Public Service and the executive and the capacity of the Public Service to give frank and fearless advice.³⁰

- 4.39 By contrast, Whistleblowers Australia told the Committee that a person who leaks confidential information should be protected from civil or criminal liability and the official responses to people who leak confidential information are outrageous:

The (Australian Public Service) commission goes so far as to want to remove protection for whistleblowers, presumably to allow them to be victimised, if they leak public interest information, even if the information serves the public interest. Frankly, that is outrageous and it is tantamount to malfeasance and misfeasance to suggest and recommend such a thing.³¹

- 4.40 Leaking, and the making of a public interest disclosure, can have similarities and relate to official wrongdoing. However, the conventional distinction is that leaking refers to the unauthorised release of official information outside the government.

29 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 37.

30 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 2.

31 Mr Bennett, *Transcript of Evidence*, 27 October 2008, p 33.

Case Study Mr Desmond Kelly: Leaking in the public interest?

Background

On 20 February 2004 an article appeared in the Herald Sun written by Michael Harvey and Gerard McManus with the headline *Cabinet's \$500 million rebuff to veterans*. The government had decided not to follow a number of spending recommendations contained in the Clarke Review. The Herald Sun appeared to have had access to confidential documents, press releases and Ministerial speech notes. The article included a direct quotation from a draft ministerial statement attached to an email of 16 February 2004.

Later, it was alleged that Desmond Kelly, a staff member from the Melbourne office of the Department of Veterans Affairs (DVA), had leaked the material. The documents had been distributed throughout Australia by DVA email to about 300 employees. Mr Kelly was charged under section 70 of the *Crimes Act 1914* and found guilty of communicating the draft ministerial statement to an unauthorized person. The conviction was overturned on appeal because evidence leading to his conviction was circumstantial and large numbers of people had access to the documents and it was not certain beyond a reasonable doubt that it was Mr Kelly who leaked.³²

Former Senator Murray argued that Mr Kelly's case was whistleblowing in the public interest.³³ Arguably, veterans' entitlements are matters that should be open to public scrutiny and debate. This follows the principle that, if all that a disclosure does is expose the government to public discussion and criticism, then that would not prevent publication of the matter if it is in the public interest to do so.³⁴

Discussion

The law recognises the public interest in making government information available, but it is well established that executive government has the right to confidentiality in its decision-making. This includes confidentiality of the communications between the executive and the public service, which is one of the features of the Westminster system of ministerial responsibility.

There are competing views about what serves the public interest and each case turns on its own facts. The merits of the public interest in the DVA disclosure are debatable. In this case, the confidentiality of the communications between the executive and the public service was compromised and so too was trust in the public service. It appears that the substance of the leak did not reveal official misconduct by the government or the public service.

- 4.41 The implications and appropriateness of protecting disclosures that are made directly to the media are discussed further in Chapter 8.

Grievances and staffing matters

- 4.42 Currently, individual complaints about action taken in relation to appointment, the terms and conditions of employment, promotion or termination, the management of performance, or the payment of remuneration of an employee are matters covered under the *Workplace Relations Act 1996*.
- 4.43 Most submissions to the inquiry considered that disagreements about management decisions, complaints about employment decisions and bullying in the workplace are not matters of public interest. For example, the Chairperson of the Queensland Crime and Misconduct Commission, Mr Robert Needham, told the Committee:
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32 *R v Kelly* (unreported, VSCA, Callaway and Redlich JJA and Coldrey AJA, 17 October 2006) para 34.

33 Hansard 10 August 2005, p. 51.

34 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52.

A staff member complaining to a manager two up that their immediate supervisor is bullying or harassing them should not come within the whistleblower regime. That is a managerial issue and it should be dealt with within that agency by a proper management response. If you elevate it to whistleblowing you are making a mountain out of a molehill and you end up with all sorts of fights over it.³⁵

- 4.44 Individual grievances and staffing matters are important and should be brought to the attention of management but they are not within the purpose of the proposed legislation. According to Cynthia Kardell:

It will be essential for the two systems to be separate and for the managers of the existing grievance or complaints handling systems in the federal sector to be educated about the fundamental distinction to be drawn between a public interest disclosure and a personal grievance or self interested complaint and why it matters that they get it right.³⁶

- 4.45 Some contributors to the inquiry argued that because it can sometimes be difficult to separate personal grievances from matters of genuine public interest, personal grievances should not be excluded from a public interest disclosure system.

- 4.46 Dr Bowden argued that by excluding personal grievances management will be able to easily dismiss the legitimate concerns of their staff:

... the whistleblowing system ... must always allow personal complaints. If you do not, senior public servants will still be able to sideline complaints by classifying the issue as a personal issue, and it gets out of the system. You have to have personal complaints come into the system, even if they are not in the public interest.³⁷

- 4.47 The Committee heard that internal staffing matters may arise as a form of retribution for whistleblowers as managers seek to protect their own self-interest once an allegation has been made. Dr Ahern argued:

... under conditions in which it is impossible to serve two conflicting roles, people are more likely to lie, especially when there is reward for lying. In the context of whistleblowing, this would suggest that many managers would choose to protect their

35 Mr Needham, *Transcript of Evidence*, 9 September 2008, p. 16.

36 Ms Kardell, *Submission no. 65*, p. 8.

37 Dr Bowden, *Transcript of Evidence*, 27 October 2008, p. 24.

employing organization over supporting the whistleblower. This self interest has been amply demonstrated in the research literature.³⁸

View of the Committee

- 4.48 Having regard to the evidence provided to the Committee and examples of types of protected disclosures used in other schemes, the Committee considers that provisions on disclosable conduct should be broadly defined and contain some flexibility. This is necessary to enable decision makers to exercise some judgement in considering additional matters based on the seriousness and relevance of the matter.
- 4.49 The issue of whether there should be a threshold of seriousness applying to a disclosure is discussed further in the next chapter. The types disclosures to be protected should be serious matters including, but not be limited to illegal activity, corruption, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health, dangers to public safety, dangers to the environment, official misconduct (including breaches of applicable codes of conduct), and adverse action against a person who makes a public interest disclosure under the legislation.

38 Dr Ahern, citing research by Grover and Hui, *Submission no. 56*, p. 3.

Recommendation 7

- 4.50 The Committee recommends that the types of disclosures to be protected by the Public Interest Disclosure Bill include, but not be limited to serious matters related to:
- illegal activity;
 - corruption;
 - maladministration;
 - breach of public trust;
 - scientific misconduct;
 - wastage of public funds;
 - dangers to public health
 - dangers to public safety;
 - dangers to the environment;
 - official misconduct (including breaches of applicable codes of conduct); and
 - adverse action against a person who makes a public interest disclosure under the legislation.
- 4.51 Given the range of matters to be protected in recommendation 7 includes breaches of applicable codes of conduct, current whistleblower provisions in s. 16 of the *Public Service Act 1999* and s. 16 of the *Parliamentary Service Act 1999* should be repealed.

Recommendation 8

- 4.52 The Committee recommends that, on the enactment of a Public Interest Disclosure Bill, the Australian Government repeal current whistleblower provisions in s. 16 of the *Public Service Act 1999* and s. 16 of the *Parliamentary Service Act 1999*.

- 4.53 In recognising that the purpose of new public interest disclosure legislation is to promote accountability and integrity in public administration by exposing and addressing wrongdoing, the motive of a person for making a disclosure should not, in itself, prevent that disclosure from being protected.
- 4.54 Decision makers should have regard to the purpose of the legislation when considering the merits of affording protection to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit. The following chapter further discusses why, in those circumstances, protection should generally not apply if it is shown that disclosure was not made in good faith or through particular channels. It would not be the intention of the legislation to authorise the leaking of official information.
- 4.55 Grievances over internal staffing matters should generally be addressed through internal mechanisms separate to the public interest disclosure scheme.

Recommendation 9

- 4.56 **The Committee recommends that Public Interest Disclosure Bill provide that the motive of a person making a disclosure should not prevent the disclosure from being protected.**

Conditions that should apply to a person making a disclosure

Introduction

- 5.1 Once formal processes are engaged, the making of a public interest disclosure can have serious consequences for the person who has made the disclosure, the person or persons who are the subject of an allegation, and the public interest matter to be addressed.
- 5.2 It is important that legislative provisions encourage the types of disclosures that are aligned with the objectives of the Act and promote behaviour that does not put at risk the interests of whistleblowers, other participants and investigations.
- 5.3 This chapter deals with the conditions that should apply to a person making a disclosure and the need for incentives and sanctions to encourage compliance with procedures and minimise the making of knowingly false or reckless allegations.

Threshold of seriousness

- 5.4 Views expressed to the Committee generally favoured the imposition of a threshold of seriousness for disclosures to receive protection. The Public Service Commissioner considered that there is a need to limit public interest disclosure legislation only to the most serious of public interest breaches including fraud, corruption, illegal activity and serious

administrative failure.¹ A similar view was advanced by the Law Institute of Victoria (LIV):

The LIV prefers a narrower definition of types of disclosures as the preferred model. We propose that it should be disclosures of serious wrongdoing that, if proved, would constitute grounds for criminal prosecution or at least summary dismissal for serious misconduct that should be caught by the proposed whistleblower legislation.²

- 5.5 The Ombudsman noted that while a qualifier such as 'serious' or 'significant' could apply to some of the categories of wrongdoing to recognise that the scheme does not capture trivial or academic concerns, some categories of wrongdoing are, in themselves, contrary to the public interest and to qualify those by degrees of seriousness is not appropriate.³
- 5.6 Similarly, the Community and Public Sector Union noted the threshold of seriousness applied in some state legislation where matters must be of a criminal nature or justify the termination of employment to qualify. Their submission argued that such thresholds were too high because some matters may not be illegal or affect employment but are still improper and important enough to warrant protection.⁴
- 5.7 One witness explained to the Committee the tendency of, apparently, less serious issues to grow into significant matters if not taken in hand at an early enough point:

I worked for a while each summer in a meatworks in the smallgoods section, and it was common practice for people to steal a few kidneys or some sweetbreads; a liver or two would go, and these people would go out with these little bulging bags under their clothes ... So it gets worse and worse, and more serious matters occur, and the same culture of secrecy then extends. The same pressure that is placed upon people not to talk about these things is readily extended to more serious matters. So the fostering of a culture in which even trivial matters are properly reported is important for the protection of the public and for the protection of the public purse.⁵

1 Australian Public Service Commission, *Submission no. 44*, p 1, 2.

2 Law Institute of Victoria, *Submission no. 35*, p. 6.

3 Commonwealth Ombudsman, *Submission no. 31*, p 7.

4 Community and Public Sector Union, *Submission no. 8a*, p. 4.

5 Dr Bibby, *Transcript of Evidence*, 27 October 2008, p. 2.

- 5.8 Rather than setting a standard of seriousness, another possible approach could be to describe a graded series of conduct that would then guide how the disclosure is treated.⁶
- 5.9 Some contributors to the inquiry considered that there should be no threshold of seriousness applied to disclosures in order to qualify for protection.⁷ Dr Bowden argued that qualifications of seriousness should not apply because of the difficulty in determining appropriate thresholds.⁸

Other qualifications for protection

- 5.10 Most submissions and witnesses to the inquiry agreed that a basic qualification for making a protected public interest disclosure is that the person making the disclosure should have an honest and reasonable belief that the allegation concerns the kind of reportable conduct referred to in Chapter 4.
- 5.11 The requirement for an honest and reasonable belief in making a public interest disclosure is a subjective test in that it depends on the view of the whistleblower. This can be contrasted with an objective test requiring that the disclosure 'shows or tends to show' wrongdoing. The subjective test is the most common test in state and territory legislation.⁹
- 5.12 The Community and Public Sector Union submitted that a person should be entitled to protection if:
- the person when making a disclosure honestly believes, on reasonable grounds, that there has been misconduct or wrongdoing; or
 - the person makes a disclosure not knowing it discloses misconduct or wrongdoing.¹⁰
- 5.13 In elaborating on this criteria, the Union explained that reasonable grounds referred to the information available to the person at the time of the disclosure, that protection should continue even if an investigation demonstrated that there was no substance to the allegation, and that whistleblowers would still be protected if they provided information in ignorance of its significance.¹¹

6 Professor Francis, *Transcript of Evidence*, 21 August 2008, pp.34-35.

7 Mr Newlan, *Transcript of Evidence*, 21 August 2008, p. 2.

8 Dr Bowden, *Submission no. 18*, p. 4.

9 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 22.

10 Community and Public Sector Union, *Submission no. 8a*, p. 3.

11 Community and Public Sector Union, *Submission no. 8a*, p. 3.

- 5.14 Other witnesses supported the subjective assessment for the initial receipt of disclosures. Miss Jessica Casben, of Australian Lawyers for Human Rights told the Committee:

The favoured position would be looking at a bona fide reasonable belief, which would be what the person believed at the time themselves. That would then be balanced by the more objective test of whether or not there are grounds as well.¹²

- 5.15 The Deputy Commissioner of the NSW Independent Commission Against Corruption, Ms Theresa Hamilton, observed that the requirement that a disclosure 'shows or tends to show' for example, corrupt conduct, under the *Protected Disclosures Act 1994*, has been interpreted narrowly and does not provide protection where a person believes that they had witnessed corrupt conduct. In such circumstances protection would not apply if it is later established that corrupt conduct did not occur or that maladministration had actually taken place.¹³

- 5.16 The NSW legislation was notable for its inflexibility because it prescribes the types of matters that must be disclosed to certain agencies and if a matter is disclosed to the wrong agency, even if the matter and the agency are covered under different provisions, the person would not be afforded protection.¹⁴

Frivolous and vexatious disclosures

- 5.17 Most jurisdictions permit administrative tribunals and oversight agencies to dismiss matters that are frivolous or vexatious or otherwise misconceived or lacking in substance. The circumstances would be that the information discloses no conduct relevant to the legislation or is groundless. A decision-maker might deem a matter to be frivolous, vexatious or otherwise misconceived or lacking in substance if it is so obviously untenable that it cannot possibly succeed, or if useless expense would be involved in allowing the matter to stand.¹⁵

- 5.18 Section 6 of the *Ombudsman Act 1976* (Cth) provides discretion not to investigate certain complaints:

(1) Where a complaint has been made to the Ombudsman with respect to action taken by a Department or by a prescribed

12 Miss Casben, *Transcript of Evidence*, 16 October 2008, p. 12.

13 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, p. 78.

14 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, p. 83.

15 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 8.

authority, the Ombudsman may, in his or her discretion, decide not to investigate the action or, if he or she has commenced to investigate the action, decide not to investigate the action further:

- (a) if the Ombudsman is satisfied that the complainant became aware of the action more than 12 months before the complaint was made to the Ombudsman; or
- (b) if, in the opinion of the Ombudsman:
 - (i) the complaint is frivolous or vexatious or was not made in good faith;
 - (ii) the complainant does not have a sufficient interest in the subject matter of the complaint; or
 - (iii) an investigation, or further investigation, of the action is not warranted having regard to all the circumstances.

5.19 The Commonwealth Ombudsman's Work Practice Manual provides the following guidance on what may be considered frivolous and vexatious:

Frivolous – of little weight, trivial, not worthy of serious notice, trifling. For example, complaints about a spelling mistake which in no way affects the meaning conveyed in a letter from an agency, or the colour of a person's shirt, could reasonably be considered "frivolous".

Vexatious – instituted without sufficient grounds or for the purpose of causing trouble or annoyance to the other party. The Courts have described a vexatious claim as one that is 'productive of serious and unjustified trouble and harassment' or a claim that is manifestly hopeless ...

Good faith – an action is taken in good faith if it is done honestly, even if it is done negligently or ignorantly. Thus a person who makes a false or misleading complaint, but does so with an honest belief in its truth, even if 'honestly blundering and careless', will be acting in good faith. Conversely, an act made with knowledge of the deception and with intent to defraud/deceive or to achieve a collateral outcome is not made in good faith.¹⁶

5.20 In practice however, the discretion to decline an investigation on frivolous or vexatious grounds is rarely used as it 'implies an element of personal criticism'. An alternative to using the label of frivolous or vexatious is to

16 Commonwealth Ombudsman, 2006, *Work practices manual*.

cite s. 6 (1)(b)(iii) of the *Ombudsman Act 1976*, that investigation is not warranted in all the circumstances.¹⁷

- 5.21 The NSW Council for Civil Liberties expressed concern that the NSW *Protected Disclosures Act 1994* enables an investigating authority to decline or discontinue an investigation if it is considered that a disclosure is frivolous or vexatious, and was concerned that legitimate public interest disclosures could be easily dismissed by recourse to that description.¹⁸
- 5.22 Other submissions referred to the need to exclude frivolous and vexatious allegations to ensure that the public interest disclosure system uses its resources most effectively by focusing on matters that are clearly in the public interest.¹⁹
- 5.23 In a submission to the Law Reform Committee of the Victorian Parliament, the Victorian Bar proposed that an applicant may request that a person's conduct be declared vexatious in circumstances where habitual and persistent conduct, without any reasonable ground, adversely affects the interests of the applicant.²⁰ Such a provision would be a relevant consideration in protecting the interests of persons adversely affected by a purported public interest disclosure.

Penalties and sanctions

- 5.24 The Committee was asked to consider whether penalties and sanctions should apply to whistleblowers who, in the course of making a public interest disclosure, materially fail to comply with procedures under which disclosures are to be made, or knowingly or recklessly make false allegations.
- 5.25 The former Australian Public Service Commissioner, Mr Andrew Podger, suggested that, rather than penalties or sanctions, the existing APS code of conduct disciplinary mechanisms and civil liability would be sufficient to deal with whistleblowers who do not follow procedure or make false allegations:

The APS Code of Conduct could be used to discipline a current APS employee who does not obey a reasonable and lawful direction or does not uphold the APS Values and I assume there

17 Commonwealth Ombudsman, 2006, *Work practices manual*.

18 Dr Bibby, *Transcript of Evidence*, 27 October 2008, p 5.

19 Attorney-General's Department, *Submission no. 14*, p. 2.

20 Submission of the Victorian Bar in response to a letter from Mr Johan Scheffer MLC, Chair of the Parliament of Victoria Law Reform Committee, 13 June 2008.

would be civil law penalties available where any other whistleblower does not meet the requirement of having an honest and reasonable belief that the allegation is correct, and has acted recklessly or with malice.²¹

- 5.26 On the general issue of penalties and sanctions, the Commonwealth Ombudsman concurred with the former APS Commissioner and argued that such disincentives for making a disclosure would run counter to the purpose of new legislation, that is to facilitate genuine disclosures, rather than creating 'a new weapon available to the state to penalise dissent'.²²
- 5.27 Provisions on procedures for making a protected disclosure are discussed in Chapter 7. In practice, non-compliance with procedures can have a range of consequences depending on what procedure is breached, the nature of the disclosure and who is affected.
- 5.28 The Queensland Council of Unions told the Committee that procedures adopted for making protected disclosure should be simple, clear and informal. The union noted that there are significant barriers which prevent persons from making disclosures and the process adopted by the whistleblower protection legislation should not present an additional barrier.²³
- 5.29 The undesirability of formalising exactly what steps must be taken for a disclosure to attract protection was explained in evidence from the NSW Independent Commission Against Corruption, which cautioned that, should legislation contain specific reporting procedures, a person who, for example, mistakenly approached the wrong agency would lack protection from legal liability.²⁴
- 5.30 Whistleblowers Australia suggested that the nature of the consequence of any failure to comply with prescribed procedure should be considered in determining whether penalties or sanctions are appropriate. For example, a serious offence could be committed where a breach of procedure results in harm to the public interest. However, no penalties or sanctions should apply where a disclosure is found to serve the public interest.²⁵
- 5.31 The Australian Public Service Commission submitted that whistleblowers who do not comply with public interest disclosure procedures should face

21 Mr Podger, *Submission no. 55*, p. 4.

22 Commonwealth Ombudsman, *Submission no. 31*, p. 8.

23 Ms Ralston, *Transcript of Evidence*, 28 October 2008, p. 21.

24 Deputy Commissioner Hamilton, *Transcript of Evidence*, 27 October 2008, p. 78.

25 Whistleblowers Australia, *Submission no. 26*, pp. 26-27.

some consequences similar to the sanctions outlined in s. 15(1) of the *Public Service Act 1999*, ranging from reprimand to termination of employment. However, different sanctions would be required for former employees and other categories of whistleblowers who cannot be demoted or have their employment terminated.²⁶

5.32 The APS Merit Protection Commissioner suggested to the Committee that sanctions could apply to the agency responsible for investigating a public interest disclosure if it is found that it has not complied with prescribed procedure in handling a disclosure.²⁷

5.33 In its submission to the inquiry, the Attorney-General's Department noted that penalties for those who do not comply with procedures could assist in improving the effectiveness of a public interest disclosure scheme. The Department considered that penalties for non-compliance were particularly important where disclosures related to classified and security sensitive information due to the potential harm that may be caused:

AGD would support the inclusion of penalties for failure to comply with any requirements for the protection of classified and security sensitive information due to the seriousness consequences that inappropriate disclosure could have to matters such as national security, law enforcement, intelligence or defence operations, and Australia's international relations.²⁸

5.34 It was put to the Committee that legislative provisions should include some flexibility to be able to receive reports of disclosable conduct even where the disclosure is not initially made in accordance with prescribed procedure.

5.35 According to Deputy Commissioner Hamilton of the NSW Independent Commission Against Corruption, protection should be afforded to whistleblowers once a good faith intention to make a disclosure is demonstrated:

At the moment under the Protected Disclosures Act in New South Wales, if you do not go to the right agency you do not get the protection ... I do not think it is helpful to make people have to be lawyers, in effect, and know exactly what the definition of corrupt conduct is and exactly what is serious maladministration. As long

26 Australian Public Service Commission, *Submission no. 44*, p. 11.

27 Ms Godwin, *Transcript of Evidence*, 12 September 2008, p. 12.

28 Attorney-General's Department, *Submission no. 14*, p. 3.

as they have a genuine go at going to the right organisation, I think they should be protected.²⁹

- 5.36 The Commonwealth Ombudsman and the National President of the Australian Institute of Professional Investigators expressed a similar view, arguing that provisions should be designed to encourage people to come forward with their concerns and that disclosures need not strictly comply with procedures where they are presented in good faith.³⁰

False allegations

- 5.37 A number of contributors to the inquiry considered that people who knowingly or recklessly make false allegations should not be afforded protection.³¹ Other contributors went further to argue that such disclosures should be subject to sanction.
- 5.38 If sanctions for people who knowingly or recklessly make false allegations should apply, the basis of those sanctions could be from within the new public interest disclosure legislation or through the application of other relevant legislation such as the *Crimes Act 1914* or the Criminal Code.
- 5.39 As discussed in Chapter 4, disclosures should not be disqualified from protection on account of the motive of the person making the disclosure. However, it was suggested that penalties should apply where a disclosure is found to be a false allegation and motivated by malice:

... if someone motivated by malice made a complaint about a professional and it turned out to be an unjustified complaint, then I think there ought to be sanctions against the person who exhibited the malice, because they knew perfectly well it was unjustified.³²

Sections 70 and 79 of the *Crimes Act 1914*

- 5.40 At the head of Australian secrecy legislation is the *Crimes Act 1914*. Section 70 deals with the unauthorised disclosure of information by Commonwealth officers and s. 79 deals with the disclosure of 'official

29 Deputy Commissioner Hamilton, *Transcript of Evidence*, 27 October 2008, p. 83.

30 Mr Newlan, *Transcript of Evidence*, 21 August 2008, p. 2; Commonwealth Ombudsman, *Submission no. 31*, p. 8.

31 For example, Community and Public Sector Union, *Submission no. 8a*, p. 3.

32 Professor Francis, *Transcript of Evidence*, 21 August 2008, p. 39.

secrets'. The net result is that ss. 70 and 79 make the unauthorised disclosure of any government information a criminal offence.³³

- 5.41 There was general agreement that a person should not be sanctioned under the confidentiality provisions of the *Crimes Act 1914* for making a disclosure in a manner that conforms to the public interest legislation. It was noted that there was need to clarify the law in this area. Mr Christopher Warren of the Media Entertainment and Arts Alliance told the Committee that there is too much uncertainty with how suspected breaches of s. 70 are treated:

One of the things that causes great uncertainty within the public sector at the moment if you make an unauthorised disclosure of information, whether it is a leak or whatever, is that there is no certainty about what will happen to you. It may be that you will be prosecuted under the Crimes Act or that absolutely nothing will happen. So I think the practice can also provide some uncertainty.³⁴

- 5.42 Some submitters to the inquiry argued that s. 70 should be amended so that it applies only to the most serious breaches rather than being a general provision against disclosure.³⁵ Mr Roger Wilkins AO cautioned against allowing people who become dissatisfied with the process to publicise their disclosure and cautioned about changes to s. 70 of the *Crimes Act 1914*. The appropriateness of protecting disclosures to the media is discussed further in Chapter 7.
- 5.43 The Committee was advised that, from 1 July 2005 to 30 June 2008, there had been 45 referrals to the Australian Federal Police (AFP) in relation to unauthorised disclosures under s. 70 of the *Crimes Act 1914*. Of those investigated by the AFP, four were referred to the Commonwealth Director of Public Prosecutions.³⁶

Rewards

- 5.44 Personal ethics and values are an important driving factor for people who speak out about suspected wrongdoing in the workplace. No Australian jurisdiction currently has a financial reward or other type of intangible

33 Gibbs, H, Watson, R & Menzies, A 1991, *Review of Commonwealth criminal law: Final report*, para 35.12.

34 Mr Warren, *Transcript of Evidence*, 27 October 2008, pp. 62-63.

35 For example, see Mr Ellis, *Submission no. 33*, p. 3.

36 Deputy Commissioner Negus, *Transcript of Evidence*, 23 October 2008, p. 12.

recognition system specifically in place for whistleblowers who contribute to the public good. According to Whistleblowers Australia:

... surviving a public interest disclosure is a good reward, surviving with restitution or compensation for harm suffered is better and surviving without harm is best.³⁷

- 5.45 Some contributors to the inquiry argued in favour of adopting 'qui tam' provisions to reward whistleblowers, such as that used in the False Claims Act in the United States.³⁸ Qui tam provisions enable individuals to collect a share of money recovered if they provide information that forms the basis of a successful prosecution for fraud against the government. As Associate Professor Faunce explained:

Qui tam is a truncated version of the Latin phrase 'qui tam pro domino rege quam pro se ipso', which translates to English as, 'Who sues on behalf of the King, as well as for himself'. Since the medieval period, qui tam provisions have allowed citizens to act as "private attorneys general" in bringing civil actions against those who violate the law. Under such provisions government's pay a reward or bounty to individuals to provide an incentives for them to provide information.³⁹

- 5.46 Dr Sawyer supported the qui tam provisions of the False Claims Act arguing that it provided strong protection for whistleblowers, recovered over \$20 billion in fraud since 1986, was open to anyone to bring forward a claim about any fraud against the government and that successful actions had a ripple effect in reducing fraud across other firms within a sector.⁴⁰
- 5.47 Associate Professor Faunce argued that while altruistic motives should be encouraged, qui tam rewards would offer practical compensation for the hardship that whistleblowers may face:

I think you have to be realistic how much we can expect these people to carry on doing this if it leads to the destruction of their lives and loss of employment. I do not see why, if someone believes that the government is being defrauded, they should not

37 Whistleblowers Australia, *Submission no. 26*, p. 12.

38 *False Claims Act 31 USC 3729-3733*; See Dr Bowden, *Transcript of Evidence*, 27 October 2007, p. 25, Associate Professor Faunce, *Submission no. 4*, p. 3; Dr Sawyer, *Submission no. 57*, p. 11; Ms Kardell, *Submission no. 65*, p. 15.

39 Associate Professor Faunce, *Submission no. 4*, p. 14.

40 Dr Sawyer, *Submission no. 57*, p. 11-12.

be entitled to receive recompense, just as any other form of public service is recompensed.⁴¹

5.48 Others contributors were more circumspect on the issue of rewarding whistleblowers. Professor Francis considered that while rewards can send an important message about the kind of behaviour that is valued in an organisation it may provide an incentive for people to report false or semi-frivolous allegations.⁴²

5.49 The Director of Transparency International Australia, Mr Grahame Leonard AM, expressed doubts about the value of financial rewards for whistleblowers and the signals that such a scheme could send:

... we would not want to have financial incentives for people to seek out – you do not want bounty hunters, so to speak – areas where they could get personal financial gain.⁴³

5.50 The issue of qui tam-style rewards for whistleblowers was considered by this Committee in 1989 as part of a review of the adequacy of existing legislation on insider trading in financial markets. That Committee heard concerns about the credibility of evidence that was induced by rewards and formed the view that such rewards were not suitable in Australia's context:

The Committee rejects any suggestion that a system of rewards or bounties be introduced in Australia. Such a system is incompatible with current attitudes in relation to the credibility of evidence. It is also incompatible with accepted principles and practice within Australian society.⁴⁴

5.51 Qui tam provisions such as those contained in the US False Claims Act are a mechanism to eliminate fraudulent claims against the government that any individual may initiate. While those provisions continue to have an important role in combating fraud in the US, the main focus of the Committee is in recognising and supporting those who make public interest disclosures within the Australian Government public sector concerning the conduct of public officials.

5.52 Other types of possible rewards for whistleblowers suggested to the Committee include additional financial increments to salary, tax

41 Associate Professor Faunce, *Transcript of Evidence*, 18 September 2008, p. 7.

42 Professor Francis, *Transcript of Evidence*, 21 August 2008, p. 43.

43 Mr Leonard AM, *Transcript of Evidence*, 21 August 2008, p. 63.

44 House of Representatives Legal and Constitutional Affairs Committee October 1989, *Fair shares for all: insider trading in Australia*, p. 45.

deductions, superannuation contributions and recommendations for Australia day honours.⁴⁵ Mr Chadwick of the Australian Broadcasting Corporation noted that bestowing honours to whistleblowers recognising their contribution as an act of bravery sends a message about cultural change in the workplace.⁴⁶

View of the Committee

- 5.53 Qualifications for affording protections to persons making disclosures should include a reasonable belief, on the basis of the information available, that the allegation is of disclosable conduct described in the legislation. An objective test, that a disclosure 'shows or tends to show' wrongdoing is an excessive requirement, would discourage disclosures and should not form part of the scheme.
- 5.54 In order to encourage the making of a public interest disclosure, disclosures should be protected until it is established that the substance of the issue revealed is frivolous, vexatious, knowingly false, misconceived, lacking in substance or that the matter should not be investigated in view of all the circumstances.

Recommendation 10

- 5.55 **The Committee recommends that the Public Interest Disclosure Bill provide, as the primary requirement for protection, that a person making a disclosure has an honest and reasonable belief on the basis of the information available to them that the matter concerns disclosable conduct under the legislation.**

Recommendation 11

- 5.56 **The Committee recommends that the Public Interest Disclosure Bill provide authorised decision makers with the discretion, in consideration of the circumstances, to determine to discontinue the investigation of a disclosure.**

45 Associate Professor Faunce, *Transcript of Evidence*, 18 September 2008, p. 7.

46 Mr Chadwick, *Transcript of Evidence*, 9 September, 2008, p. 28.

Recommendation 12

- 5.57 **The Committee recommends that protection under the Public Interest Disclosure Bill not apply, or be removed, where a disclosure is found to be knowingly false. However, an authorised decision maker may consider granting protection in circumstances where an investigation nonetheless reveals other disclosable conduct and the person who made the initial disclosure is at risk of detrimental action as a result of the disclosure.**
- 5.58 In order to promote a culture of disclosure, penalties should generally not apply to whistleblowers who do not comply with procedures. However, in cases where serious consequences arise from a person who knowingly makes a false allegation, or leaks official information, then the person should be liable for penalties under the *Criminal Code Act 1995* and the *Crimes Act 1914*.
- 5.59 The Committee considers that the new public interest disclosure system should focus on the removal of disincentives to making a disclosure. This is consistent with the goal of fostering open communication within agencies and a pro-disclosure culture where public officials can feel comfortable about raising concerns as part of normal business practice.
- 5.60 Australia's honours system should continue to recognise and celebrate those who have made a difference in their fields. The Committee considers that recognising whistleblowers where they have made a contribution to the integrity of public administration sends an important message about the value of an open pro-disclosure culture. Agency heads should actively consider recognising whistleblowers within their organisation through their own existing rewards and recognition programs.

Scope of statutory protection

Introduction

- 6.1 Research and anecdotal reports have shown that whistleblowing involves a range of risks and unintended consequences. A formal protection mechanism for people who make public interest disclosures will be an essential underpinning of the new scheme.
- 6.2 In considering model public interest disclosure provisions, this chapter examines the following:
- statutory protection in current legislation;
 - protection against victimisation, discrimination, discipline or an employment sanction, civil or equitable remedies including compensation;
 - immunity from criminal liability and from liability for civil penalties; and
 - immunity from civil actions such as defamation and breach of confidence.

Statutory protection in current legislation

- 6.3 Where there is no whistleblower protection, a person making a public interest disclosure may be liable for criminal, civil and administrative sanction and adverse treatment in the workplace. On the other hand, employers are under a duty to provide a system of protection. Such a system includes active steps to prevent or stop harassment and

persecution and legal protection, plus positive obligations placed on the employer.¹

- 6.4 Currently in the Australian Government public sector, there is limited whistleblower protection available through s. 16 of the *Public Service Act 1999* and s. 16 of the *Parliamentary Service Act 1999*. The protection available is protection against victimisation or discrimination of a person who reports a breach of the Code of Conduct provisions of those Acts.²
- 6.5 Given the lack of protection for whistleblowers in the Australian government public sector, a program of reform to provide protection has received broad support in submissions to the Committee.
- 6.6 The Community and Public Sector Union submitted that the provision of statutory protection for public sector whistleblowers is essential and long overdue. The Union was of the view that, because of its limited scope, the legislative protection in the *Public Service Act 1999* does not ensure that those individuals who make a disclosure are properly protected.³
- 6.7 In addition to the potential legal and administrative penalties a whistleblower might face, adverse action may occur in the workplace including dismissal, harassment and injury to individuals and independent contractors.⁴
- 6.8 Adverse treatment against an employee who has made a public interest disclosure is likely to involve a series of events over time. Research shows that reprisals might be officially sanctioned or they could be the result of an individual or individuals acting without authority.⁵
- 6.9 The number of whistleblowers who report adverse treatment from management or co-workers as a result of their disclosures is between 20 and 30%, which represents a sizeable proportion of those who responded to the WWTW surveys.⁶

1 *Wheadon v State of New South Wales* (unreported, District Court of New South Wales, Cooper J, 2 February 2001).

2 A number of submissions noted problems with the implementation of the Commonwealth whistleblower provisions. For example see, Name Withheld, *Submission no. 46*.

3 Community and Public Sector Union, *Submission no. 8a*, p. 1.

4 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 1.

5 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 130.

6 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 137.

6.10 The types of adverse treatment experienced by whistleblowers were documented in the WWTW project report. Table 5.13 from that report is reproduced below.

Table 6.1 Types of treatment and harm experienced by whistleblowers

Type of bad treatment and harm ^a	All whistle blowers	Whistle blowers experiencing any harm	Case handlers and managers ^b
Threats, intimidation, harassment or torment	43.1	63.9	59.1
Undermined authority	29.9	44.3	38.2
Heavily scrutinised work	29.2	43.3	40.0
Ostracism by colleagues	28.5	42.3	56.9
Questioning of motives for whistleblowing	25.0	37.1	53.8
Unsafe or humiliating work	21.5	32.0	14.2
Forced to work with wrongdoers	20.8	30.9	25.8
Financial loss	18.1	26.8	9.8
Essential resources withdrawn	17.4	25.8	12.4
Missed promotion	16.7	24.7	22.7
Poor performance report	16.7	24.7	30.7
Involuntary transfer	16.7	24.7	29.3
Reference denied or poor reference given	16.0	23.7	16.0
Training denied	15.3	22.7	20.4
Given little or no work	15.3	22.7	20.4
Overworked	13.9	20.6	15.6
Made to see psychiatrist or counsellor	13.2	19.6	26.2
Disciplinary action or prosecution	13.2	19.6	15.1
Forced to take leave	11.8	17.5	20.4
Harassment of friends, colleagues or family	11.1	16.5	13.8
Property destroyed, damaged or stolen	11.1	16.5	11.6
Lost entitlements	7.6	11.3	8.4
Sacked	5.6	8.2	5.3
Suspended	4.9	7.2	8.0
Demoted	3.5	5.2	6.7
Put on probation	3.5	5.2	4.9
Assault or physical harm	1.4	2.1	6.2

a Percentages in columns total more than 100% owing to multiple outcomes being reported. See the source document for a fuller description of the data.

b Percentages in the column refer to case handlers and managers who reported direct experiences of whistleblowers experiencing reprisals. See the source document for more details.

Source *Brown, AJ (ed.) 2008, Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations, Australia and New Zealand School of Government, p 127.*

6.11 The WWTW study noted that 65 percent of whistleblowers who reported adverse treatment believed it was deliberate action by one or more levels

of management.⁷ Many submissions supported that finding. For example, Mr Smythe told the Committee:

Managers go to inordinate lengths to protect themselves and their colleagues regardless of the true intentions of the complainant, and even if they act within the letter of the law they may not be acting in the spirit of the law. Remembering that placing managers in positions of confidence only serves to support the retaliation or to allow the best form of defence is attack approach.⁸

6.12 The detriment caused by reprisals is usually of a type that falls short of the legal thresholds required to prove criminal liability on the part of any individual. The result is that it is unlikely that criminal sanction, alone, is the appropriate strategy for reducing the risk of reprisal.⁹

6.13 Several submissions to the Committee referred to the problem of proving that detrimental action had occurred. Dr Kathy Ahern told the Committee that while a matter may appear ‘rational on the surface’, retribution can be subtle and similar to workplace bullying. For example, people might be not copied into emails for important meetings and then ‘told that they are too sensitive or they are making too much out of it’.¹⁰

6.14 The Deputy New South Wales Ombudsman, Mr Chris Wheeler, observed that some things, such as people being moved against their will or being transferred to a lower paying position might be relatively easy to prove but detrimental action can often be difficult to demonstrate:

... a lot of the things that are alleged to occur as detrimental action leave no fingerprints. For example, ‘I was treated differently to my colleagues. They got an opportunity to act up or they got this or that, whereas my career has slowly but surely gone downhill. I cannot point to anything that I could prove in a court or a tribunal, but the overall issue is that it appears to me that I am being detrimentally treated because I made my disclosure.’¹¹

6.15 It was noted that despite there being a reverse onus of proof in New South Wales – where an employer has to show that detrimental action was not

7 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 130.

8 Mr Smythe, *Submission no. 42*, p. 5.

9 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 130.

10 Dr Ahern, *Transcript of Evidence*, 28 October 2008, pp 29-31.

11 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, pp. 22, 27.

the result of a disclosure – the five cases that had been prosecuted had ‘failed on evidentiary or technical grounds’.¹²

- 6.16 The WWTW team noted that the general lack of success in obtaining compensation under state and territory laws can be blamed on a process that would either require demonstrating detriment to a criminal standard of proof or, in other circumstances, the behaviour giving rise to detriment not being discernible from other behaviour.¹³
- 6.17 Dr Brown subsequently drew the attention of the Committee to what he described as a ‘nationally significant’ case where the Ombudsman Victoria has recommended that compensation be paid to a number of mistreated public sector whistleblowers, rather than leaving them to exercise their right to initiate civil action on their own behalf under the *Whistleblowers Protection Act 2001 (Vic)*.¹⁴
- 6.18 The significance of the development in Victoria is that a Victorian legislative provision provides for the Ombudsman to review how a person is treated and that resulted in the Ombudsman substantiating a claim of detriment. The implication being that authority to make a finding that has evidentiary value should be given to a regulatory or oversight agency, as a more suitable arrangement for whistleblower protection, than the legislation simply allowing self-help through a private action in tort.
- 6.19 While aspects of protection can be designed into procedures such as confidentiality, the two main forms of protection for those who make public interest disclosures are the removal of the threat of legal consequences arising from disclosure and workplace protection of people from reprisal or adverse treatment for having made the disclosure.¹⁵

Statutory protection in the states and territories

- 6.20 In the Australian states and territories, public interest disclosure legislation tends to protect whistleblowers through the following:
- relief from criminal liability for breach of statutory secrecy provisions;

12 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 27.

13 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 273.

14 Dr Brown, *Submission no. 68*, p. 4.

15 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 272.

- relief from civil liability for defamation or breach of confidence;
 - protection against disciplinary or other workplace sanctions, such as reduction in salary or reclassification or termination of employment; and
 - legal redress for any detriment suffered as a result of making a disclosure.¹⁶
- 6.21 Section 23(1)(b) of the *Public Interest Disclosure Act 2003* (WA) places a positive obligation on the principal executive officer of all public authorities to provide protection from detrimental action or the threat of detrimental action for any employee who makes an appropriate disclosure of public interest information. This is regarded as ‘the benchmark’ in existing legislation.¹⁷

Scope of protection for the Australian Government public sector

- 6.22 Most submissions to the Committee recommended that protection be provided against those matters listed in the terms of reference: victimisation; discrimination; discipline or an employment sanction; civil or equitable remedies, including compensation; and to include immunity from criminal liability and from liability for civil penalties.¹⁸
- 6.23 A number of witnesses drew the Committee’s attention to the distinction between the substance of a disclosure and the needs of a person making a disclosure, including protection from adverse consequences. It was argued that each is a discrete matter and should be handled through separate processes.¹⁹
- 6.24 The reasons for separating the substantive issue from personnel management matters include: the need to develop and improve upon workplace culture; the skill sets and authority required to resolve the substantive issues will generally be different to those required to resolve workplace issues at an agency level; and, with the exception of the APSC, the role of oversight or integrity agencies likely to be involved does not include management of workplace issues.

16 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 272.

17 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 268.

18 For example, Ms Merrylin Bulder, *Submission no. 32*, p. 8.

19 For example, Australian Commission for Law Enforcement Integrity *Submission no. 13*.

Protection against adverse action

- 6.25 It was submitted to the Committee that public interest disclosure legislation should cover as many employment-like relationships as necessary to reflect the ways in which government does business, and that volunteers and contractors could be included.²⁰
- 6.26 Victimisation, discrimination, discipline or employment sanctions are adverse actions taken against an employee. Different forms of adverse action, such as not accepting goods and services, could be taken by a principal against a contractor.
- 6.27 Adverse action by an employer against an employee is described in the Fair Work Bill 2008 as action to dismiss the employee, injure the employee in his or her employment, altering the position of the employee to the employee's prejudice, or discriminating between the employee and other employees of the employer.²¹
- 6.28 The Fair Work Bill 2008 describes adverse treatment in contractual relationships as adverse action by the principal when the principal terminates the contract, injures the independent contractor in relation to the terms and conditions of the contract, alters the position of the independent contractor to the independent contractor's prejudice, refuses to make use of, or agree to make use of, services offered by the independent contractor or refuses to supply, or agree to supply, goods or services to the independent contractor.²²

Existing remedies

- 6.29 The CPSU is of the view that the concept of 'prejudicial alteration', for example through termination of a contract or refusal to re-engage under the *Workplace Relations Act 1996*, would be an appropriate remedy for adverse action because of a person having made a public interest disclosure.²³
- 6.30 Where remedies are provided for in state and territory legislation, there has been almost no success in obtaining a remedy. This is because the laws, except for Queensland and Victoria, rely largely on self-help in civil matters and, as the WWTW team noted, in *Howard v State of Queensland*, the whistleblower's entitlement to seek damages under s. 43 of the

20 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 1.

21 Clause 342(1), Fair Work Bill 2008

22 Clause 342(1), Fair Work Bill 2008.

23 Community and Public Sector Union, *Submission no. 8a*, p 4.

Whistleblower Protection Act 1994 (Qld) still did not extend to an entitlement to establish that the employer was vicariously liable for the detriment that the whistleblower had suffered.²⁴

- 6.31 When the Commonwealth is vicariously responsible for the tortious acts of its employees, the matter is governed by ss. 56 and 64 of the *Judiciary Act 1903*. The issue of employer responsibility for acts or omissions by employees is not straight-forward and this may be a matter to be included in legislation to ensure that there is no legislative gap.
- 6.32 In the Commonwealth setting, except for a very narrow range of circumstances related to codes of conduct, there is no specific protection for people making a public interest disclosure.
- 6.33 The *Workplace Relations Act 1996* may have the effect of providing limited protection against dismissal.²⁵ As the *Workplace Relations Act 1996* is directed at matters other than public interest disclosures, protection from criminal and civil liabilities arising out of public interest disclosures are not available under that Act and, as with some of the state and territory legislation, protection only extends to complaints to the correct body.²⁶

Period of transition in legislation

- 6.34 The Committee's reference for this inquiry predated by some five months the introduction of a new workplace relations bill, the Fair Work Bill 2008, on 25 November 2008. The Committee's public hearings took place up until 27 November 2008. The Bill has passed the House of Representatives and, at the time of tabling this report, was being considered by a Senate committee.
- 6.35 The effect of the timing of this inquiry and the introduction of the new legislation was that neither those making written submissions, nor those who appeared as witnesses, had the opportunity to give evidence in the light of what is proposed in the Fair Work Bill 2008.
- 6.36 As the Fair Work Bill 2008 is under consideration by Parliament, a synopsis of the types of protective provisions contained in it is at Appendix D. Those protective provisions cover adverse treatment in the workplace and are not significantly different to the types of workplace protection that witnesses before the Committee supported.

24 *Howard v State of Queensland* (unreported, QCA, McMurdo P, Thomas JA, Ambrose J, 9 June 2000), 23.

25 *Workplace Ombudsman, Submission no. 66*, p. 6.

26 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, pp. 82, 83.

Proposals to the Committee on workplace protective measures

- 6.37 Witnesses recommended against providing unique legislative arrangements to protect employees from adverse treatment in the workplace. Instead, they promoted the use of industrial relations laws and processes, occupational health and safety arrangements and personnel management practices for protection against adverse treatment.
- 6.38 The preference for the use of existing industrial relations mechanisms reflects the practice in the United Kingdom and Japan, where public interest disclosure legislation has its genesis in workplace laws. By way of contrast with the UK and Japan, the initiative for this inquiry arises from issues of accountability and integrity in the public sector.
- 6.39 The thrust of the submissions received by the Committee was that workplace protection under a disclosure scheme should be seen as a part of an agency's values and personnel and workplace activities.²⁷ Nevertheless, there is an inevitable cross-over with workplace matters owing to the potential for a whistleblower to be treated adversely in the workplace despite the fact that an employer is required to promote and develop measures to ensure employees' health, safety and welfare at work.²⁸
- 6.40 Dr Brown wrote to the Committee subsequent to the publication of the WWTW report to suggest that the interrelationship between whistleblower schemes and an employer's existing obligations be recognised as a part of normal workplace practice because:

It is becoming clearer that these obligations are more akin to employers' other responsibilities to ensure their organization functions in a way which recognizes and protects the occupational health and safety (OH&S) of employees, than has previously been recognized in research and policy-making relating to whistleblowing.

I believe it may be very valuable for the Committee to note in its report that there are important links - hitherto unappreciated - between issues of whistleblower management and issues of OH&S.²⁹

27 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11. Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 23. Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 22.

28 *Occupational Health and Safety Act 1991* s. 16(2).

29 Dr Brown, *Submission no. 68*, p. 2.

- 6.41 The CPSU submitted that, in addition to the judicial remedies that are available, there should be remedies available through the existing mechanisms to provide mediation and conciliation functions and dispute resolution so that there is 'not just a rush to judicial remedies'.³⁰ This was supported by the Australian Council of Trade Unions.³¹ Typically, in a workplace setting, these functions are provided through industrial relations mechanisms.³²
- 6.42 The existing industrial relations mechanisms for dispute resolution include courts, tribunals and the Workplace Ombudsman. There are no other authorities equipped with relevant expertise and experience, and the Committee has heard that it is preferable not to create new regulatory or oversight bodies when existing ones are adequate to undertake the task.
- 6.43 The current *Workplace Relations Act 1996* and the Fair Work Bill are not well adapted to protecting persons who make disclosures. The Workplace Ombudsman has described the limitations as to what he can investigate under the Bill in the following terms:
- Whilst the proposed workplace rights provisions may provide more protection against reprisals taken against persons who make public interest disclosures than the current freedom of association provisions, they are not designed, or adequate, for this purpose. For example, workplace rights arise out of workplace entitlements and complaints about an individual's own employment. Matters of corruption, malpractice and the like may not fall into this category if they do not relate to workplace entitlements or the whistleblower's own employment.³³
- 6.44 The Workplace Ombudsman's concerns reflect earlier submissions about the need to investigate issues such as corruption and maladministration in isolation from issues of adverse treatment in the workplace and for those issues to be regarded as matters related to employment.³⁴
- 6.45 It would not be the intention of legislation to require that the Workplace Ombudsman investigate matters of corruption, malpractice and the like nor to provide the immunities from civil and criminal sanction that are recommended in this report. The intention would be that making a public

30 Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 9.

31 Australian Council of Trade Unions, *Submission no. 64*, p. 1.

32 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 16.

33 Workplace Ombudsman, *Submission no. 69*, p. 6.

34 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11. Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 23. Dr Brown, *Submission no. 68*, p. 2.

interest disclosure is a workplace right for the purposes of workplace laws and that complaints about an individual's own treatment in his or her employment, arising as a result of making a public interest disclosure, would be referable to the Workplace Ombudsman.

- 6.46 The Department of Defence submitted that Defence personnel should be covered by the statutory protections provided by a public interest disclosure scheme but asked that the Committee take note of the particular arrangements whereby Defence personnel are employed.³⁵ For example, conditions of service are determined by the Minister under the *Defence Act 1903* (Cth) and, under s. 42A of the *Naval Defence Act 1910* (Cth), an authorized person determines conditions of employment.
- 6.47 Various other Acts provide for particular conditions of employment and remuneration of office-holders and specialist categories of employees. These arrangements may cut across a number of agencies, for example the Remuneration Tribunal does not determine the entire range of employment provisions available for office holders.³⁶
- 6.48 It is relevant that other groups of employees may have particular employment schemes that exclude them from having workplace relations problems dealt with in courts and tribunals, for example volunteers. Nevertheless, this would not prevent the Workplace Ombudsman investigating a claim of adverse treatment. In that case, rather than using the workplace courts and tribunals, resolution of any matter that arose might rely on the Workplace Ombudsman providing an evidentiary certificate for use in other venues.
- 6.49 Dr Brown has suggested that the Committee consider the merit in empowering a person who is investigating allegations of adverse treatment to make a determination that the treatment took place and issue a certificate to that effect.³⁷ This could be useful where a person does not come under the jurisdiction of workplace courts or tribunals and assist a person to seek redress through other avenues.

Compensation for detriment

- 6.50 There are potentially many issues that would attract compensation arising from adverse treatment in the workplace, including the need for remedies connected with the termination of employment. There are matters related
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35 Department of Defence, *Submission no. 48*, p. 4.

36 Australian Government Remuneration Tribunal, Judicial and Related Offices at <http://www.remtribunal.gov.au/judicialRelatedOffices/default.asp?menu=Sec3&switch=on>

37 Dr Brown, *Submission no. 68*, p. 4.

to rehabilitation through occupational health and safety laws that might arise as a result of a person making a public interest disclosure.

- 6.51 These issues support the position that standard workplace systems should be used to manage an individual's workplace difficulties should they arise after making a disclosure.
- 6.52 The Committee heard that it would be preferable that, rather than focus on compensation for detriment, disclosure legislation should support the ideas of prevention and restitution. Whistleblowers Australia for example, commented that most people do not look for compensation. 'All they want to do is go back to the position they were in without a loss and accept a really nice, genuine apology'.³⁸
- 6.53 Whistleblowers Australia proposed that should financial remedies and compensation be proposed for reprisals against a public interest disclosure, payment must rest with the relevant agency, but that the agency should reclaim against those who carried out the reprisals or who failed to comply with statutory duties.³⁹
- 6.54 It was suggested that a scheme would have to build in special measures for support and for compensation of people who suffer real injury such as psychological distress.⁴⁰
- 6.55 With the exception of New South Wales, state and territory legislation allows a person suffering adverse treatment to sue for detriment in the Supreme or District Court. The following table from the WWTW report sets out the current arrangements.

38 Mr Bennett, *Transcript of Evidence*, 9 September 2008, p. 25.

39 Whistleblowers Australia, *Submission no. 26*, p. 30.

40 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11.

Table 6.2 Civil, equitable and industrial remedies for detriment

Legislation	Civil Action (Tort)	Equal opportunity/ anti-discrimination	Workplace relations law	Injunction relief
SA 1993	Yes	<i>Equal Opportunity Act 1984</i>	No	No
Qld 1994	Yes	<i>Unfair treatment of Office</i>	<i>Industrial Relations Act 1998, unfair dismissal</i>	Yes
NSW 1994	No (common law only)			
ACT 1994	Yes	No	No	Yes
Cth 1999	No	Victimisation or discrimination	No	No
Vic 2001	Yes	No	No	Yes
Tas 2002	Yes	No	No	Yes
WA 2003	Yes	<i>Equal Opportunity Act 1984</i>	No	No

Source Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations, Australia and New Zealand School of Government*, p 272.

6.56 The majority of evidence received about rewards being paid to whistleblowers related to qui tam schemes.⁴¹ Those schemes are discussed in Chapter 5 of this report. Otherwise, the distinction was drawn between compensation which would restore a person to their previous position and monetizing a whistleblowing scheme. A number of witnesses resisted that idea on public policy grounds:

It is important that truth-telling not be monetized as a good for which one is paid, but as a public service that is the duty of every citizen.⁴²

6.57 Mr Wheeler remarked that, a scheme should not provide compensation mechanisms that allow a person to 'take on an organisation or a colleague at a tribunal' in the expectation that a person 'might get some money at the end of the day'.⁴³

6.58 Many submissions noted the damaging personal effects of adverse treatment, including depressive illnesses.⁴⁴ Any legislation that provides

41 In the United Kingdom, the suggestion that qui tam claims be introduced has been seen as likely to undermine cultural values that support a disclosure scheme. See Public Concern at Work 30 November 2007, *Rewarding whistleblowers as good citizens*, Response to the Home Office consultation, p. 8.

42 NSW Council for Civil Liberties, *Submission no. 17*, p. 4.

43 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 27.

44 Dr Lennane, *Transcript of Evidence*, 27 October 2008, p. 18.

for compensation would not take away a personal right to sue for damages in a situation where the detriment included an injury.

Immunity from criminal and civil liability

- 6.59 Evidence to the Committee indicated broad agreement that protection under a public interest disclosure system should include providing protection for individuals (and contractors) from administrative sanction and criminal and civil liability.
- 6.60 There was broad agreement that there should be no sanction in the legislation for a person making a public interest disclosure although there should be no protection if the public interest disclosure was made knowingly to be false or misleading.⁴⁵

We do not suggest that there is a need for specific statutory provisions within, say, public interest disclosure legislation which provide sanctions against a vexatious whistleblower. We think the provisions of the Public Service Act, where they apply, or the general law, where it applies, provide a sufficient regime to deal with that sort of behaviour.⁴⁶

- 6.61 Apart from disciplinary measures that could arise out of either common law or equitable duties of an employee to an employer, a person or body corporate is potentially exposed to detriment through action for:
- breach of the *Crimes Act 1914*, *Public Service Act 1999*, or other agency legislation and regulations and departmental instructions;
 - breach of privacy principles;
 - breach of confidence;
 - breach of a code of conduct;
 - criminal defamation;
 - defamation; and
 - injurious falsehood.
- 6.62 The range of relationships between agencies and their 'employees' includes conventional employer-employee arrangements, contractual arrangements and volunteers among others. In addition, special provisions apply in defining employee relationships for the purposes of
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45 Community and Public Sector Union, *Submission no. 8a.*, p. 3.

46 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 11.

particular legislation, for example the *Financial Management and Accountability Act 1997* and the *Occupational Health and Safety Act 1991*.⁴⁷

- 6.63 Each employment-like relationship attracts different types of duties and degrees of protection at common law and equity and there is no precision in how the law works. For example, an employer may be vicariously liable for the actions of an employee but when the actions of a contractor attract a liability, the exact circumstances will determine who is liable.
- 6.64 At other times it is difficult to discern the exact nature of a relationship because it turns on specific issues in the relationship, such as the amount of control that is exercised, which is a matter of fact to be decided judicially.⁴⁸
- 6.65 The Chief Executive Officer of the Post Office Agents Association (POAA), gave evidence that the organisation represents a group of people providing an essential public service and that, although in a contractual relationship with a government agency, they are doing almost identical work to that being done by government employees.⁴⁹
- 6.66 In the circumstances described by POAA, a contractor's employee, who makes a disclosure about his employer's practices to Australia Post, could be in breach of a common law or equitable obligation to his or her employer, yet the matter may relate to an essential public service and be in the public interest.
- 6.67 The Community and Public Sector Union described for the Committee the arrangements for veterinary officers and meat inspectors who are engaged as contractors and are at the front line of national biosecurity and the multimillion dollar meat trade. The CPSU's view was that it would be 'inconceivable' to exclude them from a protection scheme.⁵⁰
- 6.68 Unlike the postal workers who are employed by a contractor, the veterinary officers and meat inspectors are on individual contracts for programs, which is an increasingly common means of delivering government services and yet another employment-like arrangement.
- 6.69 The complex relationship issues have been handled in state legislation by legislating liability away or for absolute privilege to apply. For example, the Queensland *Whistleblowers Protection Act 1994* legislates away liability

47 Department of Education, Employment and Workplace Relations, *Submission no. 66*, p. 2.

48 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 73 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

49 Mr Kerr, *Transcript of Evidence*, 21 August 2008, p 27.

50 Mr Jones, *Transcript of Evidence*, 28 August 2008, p 7.

for civil, criminal and administrative matters, provides a defence of absolute privilege for defamation proceedings and makes specific provision for a breach of confidence, breach of other laws and disciplinary matters, as set out below:

Section 39 General limitation

(1) A person is not liable, civilly, criminally or under an administrative process, for making a public interest disclosure.

(2) Without limiting subsection (1) –

(a) in a proceeding for defamation the person has a defence of absolute privilege for publishing the disclosed information; and

(b) if the person would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice – the person –

(i) does not contravene the Act, oath, rule of law or practice for making the disclosure;

(ii) is not liable to disciplinary action for making the disclosure.

6.70 The Queensland legislation covers the critical points raised in the terms of reference, and it appears to cover employment and employment-like relationships. For example, s. 39(2)(b)(i) would appear to cover situations like the postal contractor's employee bypassing his or her employer and making a disclosure to Australia Post and, likewise, a contractor in possession of in-confidence information going to an oversight agency.

6.71 The protection against liability for having made a disclosure does not rule out the possibility of consequences arising from an offence or other misconduct that is revealed when making a public interest disclosure. In those circumstances other common law or *Evidence Act 1995* safeguards would apply to the treatment of that information.

6.72 That type of circumstance is covered in the Queensland *Whistleblowers Protection Act 1994* which makes it clear that a disclosure is not a means of escaping an earlier liability so that criminality and misconduct cannot be rewarded by making a disclosure. The Queensland provision is set out below.

Section 40 Liability of discloser unaffected

A person's liability for the person's own conduct is not affected only because the person discloses it in a public interest disclosure.

6.73 A further view put to the Committee was that there should be no penalty arising from a disclosure having not been upheld except in cases where a

person has knowingly provided false information.⁵¹ This matter is dealt with elsewhere in this report.

- 6.74 The Queensland legislation is one model for providing protection against civil, criminal and administrative liability and by all categories of persons eligible to make a report.

View of the Committee

- 6.75 The current scope of protection for people who make whistleblower reports in accordance with s. 16 of the *Public Service Act 1999* is inadequate and discourages people from speaking out. People within the public sector should have a right to raise their concerns about wrongdoing within the sector without fear of reprisal. The public sector should aim to prevent victimisation, discrimination, discipline or employment sanction from occurring in the first place. The next chapter discusses relevant procedures that aim to achieve that goal.
- 6.76 Where reprisal occurs, mechanisms should be available to protect an individual and to compensate for real detriment suffered by a person making the disclosure.
- 6.77 The Committee considers that a reliance on workplace legislation for dispute resolution is the most appropriate approach and should be a principle for developing public interest disclosure legislation.
- 6.78 In the Commonwealth setting there are relevant workplace laws and agencies with expertise to manage workplace disputes including those that equate to detrimental or adverse treatment in the workplace. Legislative linkages should be created between public interest disclosure legislation and workplace laws by defining the entitlement to make a public interest disclosure as a workplace right. This would allow any adverse treatment in the workplace to be a matter referable to the Workplace Ombudsman in the same manner as any other workplace dispute.

51 Commonwealth Ombudsman, *Submission no. 31*, p. 8. See Australian Public Service Commission, *Submission no. 44*, p. 11

Recommendation 13

- 6.79 **The Committee recommends that the Public Interest Disclosure Bill define the right to make a disclosure as a workplace right and enable any matter of adverse treatment in the workplace to be referred to the Commonwealth Workplace Ombudsman for resolution as a workplace relations issue.**
- 6.80 The Committee considers that protections for those who make a public interest disclosure should include immunity from criminal liability and from liability for civil penalties and immunity from civil actions such as defamation and breach of confidence.

Recommendation 14

- 6.81 **The Committee recommends that the protections provided under the Public Interest Disclosure Bill include immunity from criminal liability, from liability for civil penalties, from civil actions such as defamation and breach of confidence, and from administrative sanction.**
- 6.82 The following chapter provides a discussion of other aspects of protection that concern the administration of a public interest disclosure system and the responsibilities of agencies.

Procedures in relation to protected disclosures

Introduction

- 7.1 Administrative procedures in relation to a public interest disclosure scheme, informed by the overarching aim of accountability and integrity in public administration, provide a framework for participants to negotiate the somewhat tricky path of addressing suspected misconduct in the workplace.
- 7.2 This chapter discusses how information should be disclosed to attract protection, the obligations of public sector agencies and the responsibilities of integrity agencies. The themes examined by the Committee include:
- the type of pathways that should be available in a protected public interest disclosure scheme, including procedures for disclosures to be made within an agency or to another body;
 - the obligations of public sector agencies in handling public interest disclosures, including the treatment of whistleblowers;
 - the responsibilities of integrity agencies including possible roles in monitoring the system and providing education and training; and
 - the procedures applying in relation to intelligence and security matters.

Pathways for protected disclosures

Internal disclosure

- 7.3 A strong view expressed in evidence to the Committee was that whistleblowers should have more than one avenue through which to make a public interest disclosure.¹ There was general agreement that the first point of disclosure should, where possible, be within the whistleblower's own agency.
- 7.4 The Committee heard that protecting disclosures made to senior officers close to the whistleblower, starting at the supervisor level, would facilitate a prompt and potentially low key handling of the allegation.² Indeed, disclosures to lower level officers in the first instance could be made informally, providing some flexibility on how the matter is treated.
- 7.5 The Australian Public Service Commission (APSC) submitted that the internal reporting of disclosures enabled the agency to efficiently assess the nature of the allegation, how it should be handled and promotes awareness of, and confidence in, the system.³ The Commissioner added that 'internal mechanisms should be exhausted before using an alternative avenue for reporting'.⁴
- 7.6 It was submitted that it is a 'matter of ethics' that a disclosure should be made internally first, to give an organisation a chance 'to fix itself up'.⁵ The making of internal disclosures supports the common law duties of public servants to serve to promote the accomplishment of the principal purposes of their employers.⁶
- 7.7 Research indicates that the making of disclosures internally is common practice. Ninety seven percent of the public interest whistleblowers

1 For example see, Commonwealth Ombudsman, *Submission no. 31*, p. 9; Australian Public Service Commission, *Submission no. 44*, p. 13; Whistleblowers Australia, *Submission no. 26*, p. 45; Attorney-General's Department, *Submission no. 14*, p. 3.

2 Commonwealth Ombudsman, *Submission no. 31*, p. 9.

3 Australian Public Service Commission, *Submission no. 44*, p. 13.

4 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 3. The Commissioner supports serious matters being taken to oversight agencies at first instance.

5 Dr Bibby, Dr Bowden, *Transcript of Evidence*, 27 October 2008, pp 8, 26.

6 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 279. *Herscu v R* (1991) 173 CLR 276, para 8 (Mason CJ, Dawson, Toohey and Gaudron JJ).

reported internally in their agency in the first instance. Of all public interest whistleblowing, 90% ended within the agency.⁷

7.8 Alternative internal avenues for disclosure were proposed for situations where, for example, the allegation concerns a whistleblower's immediate supervisor or colleagues.⁸ The Commonwealth Ombudsman described these as 'safe' channels to receive disclosures and provide confidential advice and to be used to develop in-house expertise on public interest disclosures.⁹

7.9 The Australian Taxation Office's existing whistleblower scheme allows multiple internal reporting pathways and differentiates between the substance of a disclosure and any adverse treatment an employee might suffer. The ATO is of the view that legislation for a disclosure scheme should not be overly-prescriptive, but that certain outcomes and a degree of formality should be part of a scheme.

The ATO accepts that different circumstances apply in different agencies for the effective handling of public interest disclosures. In our experience, disclosures should be handled by persons or areas trained and authorised to do so, to ensure that such reports are handled sensitively, treated confidentially, and so that proper consideration can be given to the possibility that the reporting employee may suffer ...¹⁰

7.10 The Australian Institute of Private Investigators noted that too much emphasis on internal disclosure mechanisms may leave an agency open to claims of suppression of information and a lack of independence and transparency in its investigations. The Institute suggested that a private agency would be a relevant disclosure pathway.¹¹

7 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, pp. xxv.

8 Commonwealth Ombudsman, *Submission no. 31*, p. 9.

9 Commonwealth Ombudsman, *Submission no. 31*, p. 9.

10 Australian Taxation Office, *Submission no. 24*, p. 2.

11 Australian Institute of Professional Investigators, *Submission no. 20*, p. 2.

Case study The need for systems: Equine influenza

Background

On 23 April 2008, the Hon Mr Ian Callinan AC presented his report on the outbreak of equine influenza in Australia to the Minister for Agriculture, Fisheries and Forestry.

Commissioner Callinan concluded that the most likely explanation for the outbreak was that the virus escaped from Eastern Creek Quarantine Station on the person, clothing or equipment of a person who had contact with an infected horse and who then left the Station without cleaning or disinfecting adequately or at all.

The Commissioner characterised the administration of quarantine in Australia as being run along lines of 'inertia, inefficiency, lack of diligence, incompetence and distraction by unproductive bureaucratic process'.¹² Dr Phillip Widders, Chief Quarantine Officer (Animals) NSW, was alert to the risk of equine influenza in May 2004 and wrote of it to other regional officers. At about the same time, the Chairman of the Australian Racing Board (ARB) wrote to the Minister on two occasions, expressing the same concerns.

Dr Widders and others sought advice 'plaintively and futilely' about their powers in relation to aspects of the veterinary health operations at the airport, including permitting access and giving directions, but there was a continued failure by management to provide advice.¹³

Between May 2005 and August 2007 there was no training regime for AQIS officials attending airports and the procedures relative to horses were still not finalised. The Commissioner found that the failure to attend to a lack of procedures contributed to the outbreak of equine influenza in August 2007.

Discussion

This example of maladministration was the result of a poorly implemented management structure of overlapping responsibilities. Despite persistent attempts by the veterinarians, through management, and the ARB, through the Minister, there was inertia by AQIS.

The case demonstrates the need for clear pathways for raising concerns and the availability of external channels. It demonstrates that there may be occasions where it is appropriate for Commonwealth officers to seek advocacy and support through an external integrity or oversight body when management failures have the potential to compromise public health or safety.

External disclosure

- 7.11 An external disclosure is a disclosure to an authorised agency but not the agency whose interests are directly concerned with the disclosure. This may be a disclosure made to an integrity agency, such as the Public Service or Merit Protection Commissioners under current APS arrangements or the Inspector-General of Intelligence and Security for intelligence agencies.
- 7.12 In addition to considering the role on external integrity agencies, the Committee took evidence on the possible role of a central oversight agency within a new public interest disclosure system.
- 7.13 In the Australian states and territories, only Western Australia and Victoria provide legislation for a lead agency to administer the relevant Act across the whole of government.¹⁴ In the former, the Public Sector Standards Commissioner fulfils the role and, in the latter, the Ombudsman.
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12 Callinan, Hon. Ian AC April 2008, *Report of the equine influenza inquiry*, p. 248.

13 Callinan, Hon. Ian AC April 2008, *Report of the equine influenza inquiry*, p. 49.

14 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 270.

- 7.14 In NSW it is seen as unnecessary to provide a whole of government approach in administering the legislation. The NSW Joint Parliamentary Committee on the Independent Commission Against Corruption heard that the NSW protected disclosure system can be satisfactorily managed on an agency-by-agency basis and that oversight agencies are better suited to exploring trends and policy issues on a consultative basis.¹⁵
- 7.15 The Member for Fremantle, Ms Melissa Parke MP, submitted that an independent agency with responsibility for administration and coordination of the proposed law on Public Interest Disclosures be established and that such a function could be appropriately established by extending the current functions and powers of the office of the Commonwealth Ombudsman or by creating a new independent statutory body.¹⁶
- 7.16 The empirical evidence from the WWTW project shows that successful implementation of protected disclosure schemes is uneven when done agency-by-agency, producing poor outcomes and, on reviewing the record of non-compliance with recording, monitoring and reporting statistics, it is evident that, in some jurisdictions, the scheme is not readily open to accountability.¹⁷
- 7.17 Evidence to the Committee showed very strong support for protecting disclosures made to an external agency. Disclosure to an external agency should occur following an internal disclosure. The accessibility of disclosure to an external integrity agency was considered critical to the success of a public interest disclosure scheme:
- The success of the legislation will hinge on whether the requirements of the Act are understood throughout government and applied consistently and professionally. That is unlikely to occur unless there is a central agency (or agencies) that is responsible for monitoring and promoting the operation of the Act.¹⁸
- 7.18 While the specific responsibilities of an integrity agency are discussed in a subsequent section below, the main perceived benefits of enabling disclosures to such an external body include:

15 Parliament of NSW, the Joint Parliamentary Committee on the Independent Commission Against Corruption 18 August 2008, *Transcript of Evidence* before that Committee, pp. 21-22.

16 Ms Melissa Parke MP, *Submission no. 51*, p. 5.

17 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 235.

18 Commonwealth Ombudsman, *Submission no. 31*, p. 10.

- providing an alternative avenue for the reporting of public interest disclosures where whistleblowers do not feel they are able to safely report within their own agency;¹⁹
- undertaking investigations or referring disclosures to a more appropriate body for investigation;
- reviewing investigations carried out by agencies where the whistleblower is not satisfied with the outcome; and
- monitoring and reporting on the general operation of the public interest disclosure system.²⁰

7.19 A number of options for a new system of external disclosure were put to the Committee including the appointment of the current external disclosure recipients under a revised framework, the creation of a new dedicated public sector integrity body, or expanding the role of an existing body such as the Australian Public Service Commission or the Commonwealth Ombudsman. The merits of these options are discussed below.

Continuation of the current external disclosure recipients

7.20 Under the current APS whistleblower protection framework, the Public Service and Merit Protection Commissioners, the Inspector-General of Intelligence and Security (IGIS) and the Integrity Commissioner are authorised recipients for disclosures from the general APS, intelligence and security agencies and law enforcement agencies respectively.

7.21 These existing integrity agencies could continue to receive disclosures under a new public interest disclosure framework. In working together to implement a new system, the agencies would require a mechanism such as a coordinating committee to coordinate their education, monitoring and reporting functions.²¹

7.22 The APSC warned that adopting the option of continuing the current external disclosure system could lead to confusion in the public sector over which agency to approach in relation to a range of allegations.²² However, this risk would be mitigated if the existing agencies implemented the same system with cross-referral powers.

19 Commonwealth Ombudsman, *Submission no. 31*, p. 10.

20 Summarised from a number of submissions including, Whistleblowers Australia, *Submission no. 26*, pp. 41-42, Australian Public Service Commission, *Submission no. 44*, p. 13-15; Commonwealth Ombudsman, *Submission no. 31*, p. 10.

21 Australian Public Service Commission, *Submission no. 44*, p. 17; Commonwealth Ombudsman, *Submission no. 31*, p. 11.

22 Australian Public Service Commission, *Submission no. 44*, p. 17.

A new public sector integrity body

- 7.23 Whistleblowers Australia recommended that one of two possible new integrity bodies could be created. A Protected Public Interest Disclosure Commission comprising of an Investigatory and Prosecution Office and a Whistleblower Protection Office could handle the separate functions of assessing disclosures and protect the interests of those who make them. Alternatively, similar functions could be performed by the one, new, Public Interest Disclosure Agency.²³
- 7.24 Another suggestion for an integrity body was the creation of an Australian Whistleblower Protection authority to protect whistleblowers, gather evidence on disclosures, fund legal action for adverse treatment against whistleblowers, and be accountable to the people by oversight through a parliamentary committee.²⁴
- 7.25 In 1994 the Senate Select Committee on Public Interest Whistleblowing recommended the creation of two related integrity bodies, a Public Interest Disclosure Agency to receive, refer and investigate disclosures and report to Parliament, and a Public Interest Disclosures Board comprising of public sector appointees and parliamentarians to oversee the work of the Agency.²⁵
- 7.26 The possible benefits of a new dedicated integrity agency would be to have an integrated, clear and unambiguous process for whistleblowers. However, the perceived disadvantages of this approach include cost compared to expanding an existing agency and the estimated scale of misconduct to be addressed, the challenge of building public confidence in a new agency and the potential confusion over the role of the new body in relation to the role of other agencies.²⁶
- 7.27 It is administratively difficult to establish a new agency and have it in operation within a short period:

It is very hard to create a new, purpose-built agency, to give it a national coverage, to have it start overnight with a staff of 10 or 20 to develop tradition, training capacity and resources – the existing agencies already have that.²⁷

Building on an existing integrity agency

23 Whistleblowers Australia, *Submission no. 26*, p. 42.

24 Mr Lindeberg, *Submission no. 12*, p. 3.

25 Senate Select Committee on Public Interest Whistleblowing 1994, *In the public interest*, p. xv. This was supported by some submissions, for example, Ms Kardell, *Submission no. 65*, p. 21.

26 Australian Public Service Commission, *Submission no. 44*, p. 14.

27 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11.

- 7.28 Most submissions to the inquiry supported extending the role of an existing integrity agency as an authorised external recipient of public interest disclosures. The main candidates suggested to the Committee for taking on the expanded role are the Commonwealth Ombudsman and the Australian Public Service Commission.
- 7.29 The primary considerations for choosing an existing integrity agency on which to build were the actual and perceived independence of the organisation, and the experience and expertise of the organisation in conducting complex and sensitive investigations into serious aspects of public administration.
- 7.30 In advancing its credentials for taking on an expanded role in public interest disclosures, the Commonwealth Ombudsman cited its high profile, reputation for independence and working relationship with other agencies:
- The office has a high profile in government and the community. The respected independence and powers of the office mean that people are confident to approach it with complaints against government. The office deals with allegations of a kind that are likely to be made under a public interest disclosure Act. The office also has excellent working relationships with all agencies in government, and is accustomed to referring matters to other agencies for investigation when appropriate. The stature of the office in administering the Act would be enhanced by the statutory creation of a new position in the office of Deputy Commonwealth Ombudsman (Public Interest Disclosures).²⁸
- 7.31 A number of other contributors to the inquiry supported the possibility of the Ombudsman taking on the new role including the Attorney-General's Department, Associate Professor Thomas Faunce, Dr Peter Bowden, Mr Andrew Podger, Mr Ivon Hardham, the Community and Public Sector Union and Dr Harris Rimmer.²⁹
- 7.32 According to the Secretary to the Attorney-General's Department the Commonwealth Ombudsman is an appropriate institution to build on:
- ... building on existing institutions and not creating a whole lot of new ones is often a useful rule of thumb. So, if you have got an Ombudsman there, then you should use the Ombudsman. The

28 Commonwealth Ombudsman, *Submission no. 31*, p. 11.

29 Attorney-General's Department, *Submission no. 14*, p. 4; Associate Professor Faunce, *Submission no. 4*, p. 3; Dr Bowden, *Submission no. 18*, p. 2; Mr Podger, *Submission no. 55*, p. 5; Mr Hardham, *Submission no. 54*, p. 10; Community and Public Sector Union, *Submission no. 8a*, p. 5; Dr Harris Rimmer, *Transcript of Evidence*, 16 October 2008, p. 9;

Ombudsman is a very successful institution of administrative review. I do not see why it would not be the correct institution to use for this purpose.³⁰

- 7.33 The Secretary to the Department of Immigration and Citizenship preferred the Ombudsman for the new role due to its expertise in handling administrative complaints:

My personal view is that that needs to be a properly resourced external body, and of the existing bodies the most appropriate would be the Ombudsman, who has a clear complaints management role and who is skilled at dealing with people who are raising concerns about administrative decisions.³¹

- 7.34 Dr Brown observed that:

... the Ombudsman's Office would be logical...you are really talking about an agency that needs to be able to oversight, monitor and then second-guess, where necessary, quite complex investigation processes in a way that an integrity agency that has high existing case handling responsibility is the better starting point in terms of the types of skills and resources it has, whether it is an anticorruption body or an ombudsman's office that is actually already handling, processing and monitoring high levels of cases. That would also mitigate in favour of attaching it to the Ombudsman's Office rather than the APSC because the Ombudsman's Office is dealing with a higher number across a much wider range of more public interest related types of wrongdoing.³²

- 7.35 Administrative convenience may be a consideration in favouring a particular organisation to assume the role of the oversight integrity agency. The Australian Commission for Law Enforcement Integrity told the Committee:

... the Law Enforcement Integrity Commissioner Act, at section 23(5), and also the Ombudsman Act, at sections 6(16) and 6(17), provide the legislative framework by which our agencies interact in relation to corruption issues. I think the point is that were the Ombudsman to also be conferred the role of receiving whistleblower issues under new legislation then our relationship with the Ombudsman would already be safeguarded.³³

30 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 16.

31 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 5.

32 Dr Brown, *Transcript of Evidence*, 9 September 2008, p. 19.

33 Mr Sellars, *Transcript of Evidence*, 23 October 2008, p. 4.

- 7.36 Some of the previous reviews and proposals for public interest disclosure legislation have nominated the Commonwealth Ombudsman as the preferred central integrity agency including the Australian Government's 1995 public interest disclosure proposal.³⁴ The Murray Bill provided for the Ombudsman to act as the central oversight body of the system.
- 7.37 The APSC expressed interest in taking on an expanded role as a public interest disclosure oversight integrity agency arguing that it was well suited to take on such a role, on the basis of:
- the Public Service Act contains the only disclosure protection provisions in the Australian government sector
 - the Public Service Act covers everyday matters where officials make allegations about breaches of the APS Values and Code of Conduct and more serious issues that might fall under the new protected public interest disclosure scheme
 - a proven track record in research, monitoring, analysis and reporting arrangements of a range of public interest disclosure matters
 - a comprehensive background in handling sensitive and complex investigations, including mediation
 - as part of its existing work, the Commission has robust arrangements for the handling and providing of sensitive and confidential advice, including through the SES Advisor role and the advice provided through the Public Service Commissioner and Deputy Commissioner
 - expertise in communicating new and ongoing arrangements for whistleblowing in the APS, as well as developing education material and providing necessary training
 - being able to provide a 'one-stop-shop' for all disclosures and thereby avoiding the confusion of having to deal with different agencies
 - the Public Service Commissioner's other current statutory independent roles.³⁵
- 7.38 The Commissioner's current role includes responsibilities for Code of Conduct investigations and providing leadership in public sector employment and management. These responsibilities could be augmented by opening a new area of business to deal with disclosures and act as a clearing house for referring disclosures for investigation.
- 7.39 The Commissioner noted the following risks with expanding the role of the Commonwealth Ombudsman as an integrity agency:

34 Kerr, Hon Duncan MP, 26 October 1995: *Report of the Senate Select Committee on public interest whistleblowing: Government response*, Ministerial Statement, House of Representatives.

35 Australian Public Service Commission, *Submission no. 44*, p. 16.

- the likely confusion by APS employees of the extent to which the Ombudsman could consider employment matters
- the Ombudsman's legal obligations to attend to all complaints received, including relatively minor issues under the office's existing role, which may detract resources and focus from the most serious allegations of fraud and corruption.³⁶

7.40 Some whistleblowers spoke out against the Ombudsman taking on an expanded role in public interest disclosures. For example, Mr Greg McMahon argued that the Ombudsman has an excessively high rate of declining to investigate complaints.³⁷

7.41 The Ombudsman's discretion to decline to investigate complaints is reflected in the Ombudsman's Annual Report for 2007-2008, which notes that:

The legislation administered by the Ombudsman gives the office a range of discretionary powers not to investigate complaints in particular circumstances. The most common reason for not investigating a complaint is that the person has not raised the matter with the agency involved. There are advantages for both the complainant and the agency if an issue is first raised at the source of the problem and an attempt made to resolve it before external intervention.³⁸

7.42 The Australian Public Service Commissioner and the Deputy Commonwealth Ombudsman indicated that to establish a scheme would involve about \$1.5 million including appointing a statutory officer as a Deputy responsible for activities under the legislation. It was expected that the level of demand would decline after two to three years, down to the order of \$1 million and six or seven people.³⁹

36 Australian Public Service Commission, *Submission no. 44*, p. 17.

37 Mr McMahon, *Submission no. 45a*, p. 5.

38 Commonwealth Ombudsman, *Annual Report 2007-2008*, p. 21.

39 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p 8. Mr Brent, *Transcript of Evidence*, 4 September 2008, p. 5.

Case study The obligations of agencies: Mr Allan Kessing

Background

On 29 June 2007, Deputy Chief Justice Bennett of the New South Wales District Court sentenced Allan Robert Kessing to a suspended period of nine months imprisonment for an offence against s 70 of the *Crimes Act 1914*.

While Mr Kessing was working with Customs, he had drafted and circulated documents relating to security at Sydney airport. These reports had been submitted to line management at the airport but senior managers in Canberra were not aware of their existence. Details of the documents later appeared in the press.

The charge against Mr Kessing was that he had published or communicated the contents of those documents when he ceased to be a Commonwealth officer, and it was his duty not to disclose that information.

After sentencing, Mr Kessing warned that anybody who knows of maladministration or corruption ... would be well advised to say nothing, do nothing, keep their heads down and look after their career and mortgage.⁴⁰

Much attention was focused on the apparent irony that Mr Kessing ended up with a criminal record but the leak resulted in a major review of airport safety and security by Sir John Wheeler after which the Government implemented a \$200 million package to improve airport security. In some circles, Mr Kessing is considered a 'hero'.

Discussion

It is common for people who detect criminal activity, maladministration or corruption to take the matter up with their line managers in the expectation that line managers will take action. Line managers may not necessarily have the same understanding of the importance of an issue as the person raising it. Staff members may have expectations about what line managers should do when presented with information, yet those expectations might not be met.

Informal reporting is normal and acceptable, but there must be a reporting scheme that opens pathways to bypass line management and to formalise matters of concern. In this case, such a scheme could have provided an opportunity to press the issues of concern directly to senior management or to an oversight agency.

Obligations on agencies

7.43 Evidence to the inquiry indicates that imposing obligations on public sector agencies in handling public interest disclosures will be a very important aspect of the new system.

7.44 The Queensland Public Service Commission noted that managing the expectations of whistleblowers can be very challenging and that poor management of disclosures leads to further complications.

Ensuring that whistleblowers are aware of the circumstances under which they can make a public interest disclosure and awareness of the process that is to come, is vital...The impacts of poorly managed public interest disclosure can be widespread' and have broad negative effects'.⁴¹

7.45 The Secretary to the Department of Immigration and Citizenship told the Committee that a thorough-going cultural change is required to create a

40 *The Law Report*, ABC Radio 29 May 2007.

41 Queensland Public Service Commission, *Submission no. 47*, p. 4.

culture of disclosure and that this needs to be supported by placing a positive obligation on management to accept, assess and investigate disclosures.⁴² The role of cultural change in a new public interest disclosure system is discussed further in Chapter 9.

- 7.46 The Committee heard that a legislated scheme is not a complete solution to managing disclosures, but considers that placing positive obligations on agency heads should provide for a measure of confidence in a disclosure system.⁴³

Obligation to receive disclosures

- 7.47 Legislation, common law and equitable principles cannot fully answer the question of what obligations should exist in making or receiving disclosures.

- 7.48 Disclosures are usually made by people in good faith. The analysis of reporting patterns conducted by the WWTW project shows that disclosures are often received at a relatively low supervisory level within an organisation:

... effective public sector procedures for dealing with whistleblowing should be focused on anyone who has a supervisory role. The pattern of reporting to line managers appears so strong that procedures stipulating that only certain officers in the organisation can receive disclosures, perhaps removed from the immediate workplace of many employees, are unlikely to shake the frequency of this behaviour.⁴⁴

- 7.49 The view most commonly represented to the Committee was that legislating positive obligations to receive disclosures will assist in the implementation of a scheme and ensure that the burden for its operation and management is at an appropriately senior level within an organisation, but that the system supports people at relatively junior supervisory levels in understanding their roles and responsibilities in receiving disclosures.⁴⁵ This appears to be best practice in furthering the purposes of the legislation.

42 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 5.

43 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 15.

44 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 92.

45 See, eg. Dr Brown, *Transcript of Evidence*, 9 September 2008, p. 6. Commander Walters, *Transcript of Evidence*, 23 October 2008, p. 14. Mr Mrdak, *Transcript of Evidence*, 27 November 2008, p. 10.

Obligation to act on disclosures

7.50 The Murray Bill set out a range of obligations on agencies once in receipt of disclosures. These included the following:

- to provide protection of employees;
- to make risk assessment;
- to give notice of official action taken; and
- to provide for confidentiality.

7.51 Legislated requirements of that type were generally supported by evidence before the Committee. An agency receiving a disclosure would be obliged to assess it to determine if it is was a disclosure that the legislation provided for, and take prompt and appropriate action including a risk assessment of the likelihood of the person making the disclosure being exposed to detrimental action.

7.52 Appropriate action includes investigating the disclosure or referring it to a more appropriate agency or to refuse to investigate the matter further. In terms of means of investigation available, the WWTW team found that:

... the professionalism of an agency's systems for assessing and investigating possible wrongdoing will determine not only whether the primary issues are identified and problems rectified; they will bear directly on whistleblowers' experiences of reporting, their level of stress, the risk that they will suffer reprisals or become engaged in organisational conflict and on the messages that pass to other employees about whether the organisation is a safe environment in which to speak up.⁴⁶

7.53 This suggests that, while the initial process of making a disclosure could be less formal, the referral, investigation and ongoing management system should be a formal process.

7.54 An example of positive obligations being legislated is found in the Western Australian legislation. The obligations set out in s. 8 of the WA legislation are:

- (1) A proper authority must investigate or cause to be investigated the information disclosed to it under this Act if the disclosure relates to –
 - (a) the authority;

46 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 292.

- (b) a public officer or public sector contractor of the authority;
or
 - (c) a matter or person that the authority has a function or power to investigate.
- (2) A proper authority may refuse to investigate, or may discontinue the investigation of, a matter raised by the disclosure if it considers that –
- (a) the matter is trivial;
 - (b) the disclosure is vexatious or frivolous;
 - (c) there is no reasonable prospect of obtaining sufficient evidence due to the time that has elapsed since the occurrence of the matter; or
 - (d) the matter is being or has been adequately or properly investigated by another person to whom an appropriate disclosure of public interest information has been made in accordance with section 5(3).⁴⁷

- 7.55 The validity of controlling the availability of information, minimising the extent of publicity given to a disclosure and delaying or stopping public disclosure was recognised in evidence to the Committee.⁴⁸ A legislated scheme would include the requirement to provide a report when an investigation is completed or discontinued. This would be similar to measures in other legislation such as the Western Australian Act and it would address the issue of keeping a person informed within the limits of what is appropriate in the circumstances.
- 7.56 The Committee considers that, when, on receiving a report, a person considers that the outcome is inadequate, it would be appropriate for the legislation to provide for reconsideration by the agency concerned, or review by an oversight agency. Under Tasmanian legislation, this issue is partially addressed by providing for a review of reasons by an integrity or oversight agency where a matter is said to not be a public interest disclosure.⁴⁹ A similar provision that provided for reconsideration by the agency concerned, or review by an oversight agency, no matter whether a matter is deemed to be a public interest disclosure or not, would be relevant for Commonwealth legislation.

Obligation of confidentiality and privacy

- 7.57 There is no single policy or unique doctrine governing the protection of information imparted in confidence. The law is unsettled.⁵⁰ Nevertheless,

47 *Public Interest Disclosure Act 2003 (WA)*.

48 *Whistleblower's Australia, Submission no. 26*, p. 3. Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, pp. 2, 3.

49 *Public Interest Disclosures Act 2002 (Tas)* s. 36.

50 Dean, R 2002, *The law of trade secrets and personal secrets* (2nd edition), Pyrmont, Lawbook Company, pp. 28, 29.

some principles should be relied upon in order to provide protection to those who make public interest disclosures and those who may be adversely affected by a disclosure.

7.58 Public interest disclosure legislation establishes, either implicitly or explicitly, an obligation of confidence. Legislation arising from this inquiry should establish that obligation explicitly.⁵¹

7.59 When confidential information is disclosed to a person, the disclosure will commonly result in an obligation on that person to maintain the confidentiality of the information. This obligation extends to all persons to whom it is necessary to make subsequent disclosures when seeking to resolve issues about which the original disclosure was made and includes 'entirely innocent third parties' who can be required to protect a confidence.⁵²

7.60 The Commonwealth Ombudsman submitted that disclosures be received and investigated in private as a means of providing safeguards:

Disclosures should be received and investigated in private, so as to safeguard the identity of a person making a disclosure to the maximum extent possible within the agency's control. Avenues should be available for disclosures to be made confidentially, and where practical, individual disclosures should be dealt with in ways that do not disclose the identity of the person making the disclosure, and preferably even that a disclosure has in fact been made.⁵³

7.61 This was the view put forward in the submission of the Community and Public Sector Union.⁵⁴ Privacy and confidentiality provisions encourage confidants to express their views without fear and assist in protecting them from harassment. The same provisions would protect any other person whose interests are adversely affected.

7.62 The confidentiality principle has three limbs:

- confidentiality of the information contained in the disclosure;
- confidentiality of the identity of the person making the disclosure and an obligation to protect the privacy of named individuals; and

51 For a discussion on the features of confidential information, see Dean, R 2002, *The law of trade secrets and personal secrets* (2nd edition), Pyrmont, Lawbook Company, Chapter 3.

52 For a discussion on the obligations surrounding confidentiality, including third party obligations, see Dean, R 2002, *The law of trade secrets and personal secrets* (2nd edition), Pyrmont, Lawbook Company, pp. 60-63.

53 Commonwealth Ombudsman, *Submission no. 31*, p. 14.

54 Community and Public Sector Union, *Submission no. 8*, p. 2.

- confidentiality in conducting any enquiries arising from the disclosure.

Confidentiality of information

- 7.63 A statute that confers a power to obtain information for a particular purpose defines, expressly or impliedly, the purpose for which the information can be used or disclosed.
- 7.64 There is a duty on the person who obtains information to not disclose the information obtained except for the purpose for which it was obtained and to treat the information obtained as if it is confidential whether or not the substance of the information is of a confidential nature.⁵⁵
- 7.65 New legislation on public interest disclosure would define the purpose for which information can be obtained, used or disclosed. The Committee considers that any provision that does this should reflect the National Information Privacy Principles as adapted for the protected disclosure scheme.⁵⁶

Confidentiality of identity and right to privacy

- 7.66 The principle of confidentiality should encourage and facilitate disclosures. Confidentiality is an obligation to the person who provides information. Protection of privacy is an obligation owed to persons who may be affected by a disclosure of information especially those whose reputations may be affected by the allegations made in a disclosure.⁵⁷ Employees reporting concerns in accordance with legislated procedures are not in breach of privacy or confidentiality principles.⁵⁸
- 7.67 Disclosed information is to be kept confidential to those who genuinely need to know. Those with a genuine need should only be told as much as they need to know.⁵⁹
- 7.68 A person who has a proper interest in receiving information is under a duty to consider privacy rights of all people affected by a disclosure. A

55 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423 (Brennan J).

56 See Schedule 3, *Privacy Act 1988*.

57 National Information Privacy Principle 11 prohibits record keepers with the possession or control of records containing personal information from disclosing that information to a person, body or agency other than the individual concerned except in specified circumstances. National Information Privacy Principle 4 provides that an organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

58 *Privacy Act 1988* s. 14.

59 National Information Privacy Principle 9 provides that a record-keeper who has possession or control of a record that contains personal information shall not use the information except for a purpose to which the information is relevant.

duty of confidence means any duty or obligation arising under the common law or at equity pursuant to which a person is obliged not to disclose information, but does not include legal professional privilege.⁶⁰

- 7.69 Where an obligation of confidentiality has arisen, a party who purports that the obligation does not extend in the current circumstances must prove that is the case.⁶¹ Should it be shown that confidentiality or privacy have been breached, then penalties similar to those contained in the *Privacy Act 1988* would be appropriate.

Confidentiality in conducting inquiries

- 7.70 Witnesses emphasised the need for confidentiality when conducting enquiries.⁶² There was some caution that too much confidentiality in a disclosure system might bring it into conflict with transparency and accountability of government. Dr Lesley Lynch of the NSW Council for Civil Liberties saw open government leadership as a requirement to support concepts of accountability.⁶³
- 7.71 In circumstances when an inquiry is undertaken, the person undertaking the inquiry should be satisfied that it is necessary to invoke confidentiality principles. This is consistent with the National Privacy Principles, which include the option that all or part of the inquiry may be conducted in private.
- 7.72 Confidentiality provisions should not be used to withhold information from the person who has directed that the inquiry take place or from an oversight body. Confidentiality is limited to the extent that it does not obstruct the course of justice.⁶⁴
- 7.73 The principle of confidentiality is subject to the need to disclose a person's identity to other parties - for example, where this is absolutely necessary to facilitate the effective investigation of a disclosure, provide procedural fairness, protect a person who has made a disclosure, or make a public report on how a disclosure was dealt with or by the operation of law.⁶⁵

60 See *Privacy Act 1988* s. 80G.

61 *A v Hayden* (1984) 156 CLR 532, 546 (Gibbs CJ).

62 Dr Bowden, *Transcript of Evidence*, 27 October 2008, p. 29.

63 Dr Lesley Lynch, *Transcript of Evidence*, 27 October 2008, p. 3.

64 *A v Hayden* (1984) 156 CLR 532, 597 (Deane J).

65 Commonwealth Ombudsman, *Submission no. 31*, p. 14.

Procedural fairness

- 7.74 Where a person's real rights or interests are affected, legislation should be construed as being subject to an implied general requirement of procedural fairness, save to the extent of a clear contrary provision.⁶⁶
- 7.75 The rules of procedural fairness are minimum standards of fair decision-making imposed by the common law on administrative decision-makers. The rules of procedural fairness are generally formulated as the rule against bias and the right to a fair hearing.
- 7.76 An administrative decision-maker may, after considering the material presented, put a person on notice that a decision adverse to that person's rights or interests is being contemplated, and the person then be afforded an opportunity to put a case. In these circumstances the right to a fair hearing is honoured.⁶⁷ If the rules of procedural fairness are not complied with, an aggrieved person will (usually) be able to seek judicial review of a decision.⁶⁸
- 7.77 A number of submissions covered the balance between providing procedural fairness to a person whose interests are adversely affected by a public interest disclosure and the protection offered a person making a disclosure.⁶⁹ This suggests that the protection afforded by procedural fairness should be positively legislated rather than be implied into new legislation.

Obligation to provide protection

- 7.78 The scope of protection that should apply to a person making a disclosure was discussed in Chapter 6. In terms of an obligation of agencies to provide protection, the Murray Bill provided:
- ... a regime of candid disclosure and protection ... (through) a robust framework whereby public sector officials know these options are open to them and that they are fully supported by senior officials as a means to ensure that problems are raised and solutions are found.⁷⁰

66 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ).

67 *Retnaraja v Morauta* (1999) 93 FCR 397, 412 (von Doussa J).

68 Ombudsman NSW March 2008, *Administrative decision-making delegations and avoiding bias*, - Seminar Paper.

69 For example, Community and Public Sector Union, *Submission no. 8a*, p. 6.

70 Murray, Senator Andrew Public Interest Disclosures Bill 2007, Second reading speech, p 3.

- 7.79 Mr Kevin Lindeberg proposed that protection should be part of a system that gives a ‘new understanding’ to the meaning of a safe working environment.⁷¹ Australian Lawyers for Human Rights argued that protection should include indemnities and support services to mitigate risks to whistleblowers.⁷²
- 7.80 The Australian Lawyers for Human Rights’ submission is supported by the evidence that there has been a low level of support services for whistleblowers. The WWTW project determined that there were many factors contributing to this, including:
- the low level of resources dedicated to such programs;
 - a previous shortage of data about the overall level of whistleblowing;
 - uncertainty or confusion about the types of employees intended to be targeted;
 - an absence or inadequacy of procedural guidance on how employees should access the support, including an over-reliance on whistleblowers self-identifying for the purposes of gaining support;
 - lack of management information systems for ensuring that all deserving whistleblowing cases can be identified and assessed for support; and
 - inadequate or misapplied statutory definitions.⁷³
- 7.81 The effectiveness of a public interest disclosure scheme relies on the scheme protecting persons from adverse repercussions arising from making a disclosure.

Separating disclosures from personal grievances and management issues

- 7.82 Whistleblower arrangements currently exist either under the APS Code of Conduct provisions of the *Public Service Act 1999* or because agencies have implemented internal programs. A number of agencies currently deal with the substance of a disclosure independently of an individual’s interest in it. This practice appears to be a common-sense approach, noting that it may not always be possible to completely disentangle some issues involved in a

71 Mr Kevin Lindeberg, *Submission no. 12*, p. 5.

72 Australian Lawyers for Human Rights, *Submission no. 9*, p. 5.

73 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. xxxiii.

disclosure, but many so-called public interest disclosures are personnel management issues.⁷⁴

7.83 The Committee heard that a substantive issue in a disclosure that is escalated to an oversight or integrity agency would need to be separated from any personal issues because the oversight or integrity agencies, with the exception of the Public Service Commission, would not be in a position to remedy pre-existing personal or management disputes. What oversight and integrity agencies can do in these circumstances is to hold a watching brief over the treatment of a person in the workplace once a disclosure has been made.

7.84 The approach adopted by the Commissioner for Law Enforcement Integrity is to distinguish between the substantive issue and the personal matters surrounding it. In doing so there would not normally be a personal remedy available from the Commissioner for a wrongdoing, nor personal restitution, arising out of an investigation of the substance of a disclosure.⁷⁵ That is the approach adopted by the NSW Police Integrity Commission which is of the view that it is not interested in the circumstances surrounding a decision of a person to make a disclosure: 'how we came about the information is irrelevant'.⁷⁶ This approach was supported by the Community and Public Sector Union.⁷⁷

7.85 Dr Brown commented that management of personnel issues related to a person making a disclosure should be within the system of values and norms of an agency's overall human resources management framework:

It is becoming clearer that these obligations are more akin to employers' other responsibilities to ensure their organization functions in a way which recognizes and protects the occupational health and safety (OH&S) of employees, than has previously been recognized in research and policy-making relating to whistleblowing. As discussed in our report, there has been a tendency to treat whistleblowing as something 'rare and special' when in fact this is not the case – and hence also to overlook the reasons why the obligation to properly recognize and support employees who make internal disclosures, should be treated as a basic, routine part of public sector management.⁷⁸

74 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 2.

75 Commissioner for Law Enforcement Integrity, *Submission no. 13*, p. 8.

76 Commissioner Pritchard, *Transcript of Evidence*, 27 October 2008, p. 76.

77 Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 23.

78 Dr A. J. Brown, *Submission no. 68*, p. 2.

Responsibilities of integrity agencies

- 7.86 The term ‘integrity agencies’ as used in this section refers to agencies that are authorised as external recipients of public interest disclosures. Many contributors to the inquiry identified a similar grouping of agencies that should assume this role including the Commonwealth Ombudsman, the Australian Public Service Commissioner, the Australian National Audit Office, the Inspector-General of Intelligence and Security.⁷⁹
- 7.87 The responsibilities of integrity agencies proposed to the Committee include a duty to genuinely assess the soundness of the allegation made and to assess whether the matter is within power to investigate; a duty to investigate the matter or, where relevant, refer it to other persons to carry out an investigation; a duty to report the result of an investigation; and a duty to provide reasons for not further investigating a matter when that decision is made.
- 7.88 The reason for comprehensive responsibilities for integrity agencies is primarily because the data from the WWTW project shows a ‘patchiness’ and ‘generally low comprehensiveness and substantial variability of procedures’ in all jurisdictions. The WWTW Project reported that this requires:
- development of new ‘best-practice’ or ‘model’ procedures, clearer statutory requirements and better oversight of the quality of procedures and the adequacy of their implementation.⁸⁰
- 7.89 There was general agreement that there should be legislated obligations related to confidentiality and privacy.⁸¹
- 7.90 In an attachment to the APSC submission, the submission from the Department of Education, Employment and Workplace Relations noted the following issues in relation to determining the role of the central oversight agency:
- the powers of the integrity agency to review agencies’ decisions/mechanisms;
 - any requirements for a level of commonality to be maintained across all agencies for how to deal with disclosures and whistleblowers;

79 For example see, Commonwealth Ombudsman, *Submission no. 31*, p. 10.

80 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. xxxvi.

81 Australian Commission for Law Enforcement Integrity, *Submission no. 13*, p. 7. Commonwealth Ombudsman, *Submission no. 31*, p. 14.

- reporting obligations of the integrity agency, perhaps annually, especially to avoid any scope for third party reporting; and
 - Options for appeals and/or review including consideration of what status would be accorded to any decision of the integrity agency.⁸²
- 7.91 A consistent theme in evidence was that people must have sufficient knowledge of the scheme to build confidence in it and, therefore, a duty should exist to provide relevant education.⁸³
- 7.92 Broadly, the evidence received by the Committee was that the role of an agency administering legislation would be to set standards by which disclosures are properly assessed, investigated, actioned, reconsidered, reviewed and reported, to set standards for the protection of persons from reprisals and to monitor the treatment of people making disclosures.
- 7.93 The majority of evidence before the Committee supported an administering agency having an investigative role and powers to refer cases to other agencies and to have powers to investigate matters of its own motion, possibly with the assistance of other agencies.
- 7.94 It was proposed to the Committee that an administering agency, in addition to its other roles, would have the role of assisting agencies to implement comprehensive models of best practice in the management of whistleblowing and playing an educative role.⁸⁴
- 7.95 In summary, it was suggested that the oversight integrity agency could have the general responsibilities of the other integrity agencies and in addition, monitor the system, report to parliament on the implementation and operation of the system and provide training and education.⁸⁵

82 Department of Education, Employment and Workplace Relations in Australian Public Service Commission, *Submission no. 44*, p. 21.

83 Mr McMullen, *Transcript of Evidence*, 21 August 2008, p. 80; Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 6.

84 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 3.

85 Commonwealth Ombudsman, *Submission no. 31*, p. 11.

Case study When the system doesn't suit: Lieutenant Colonel Collins

Background

Lieutenant Colonel Lance Collins was an Army intelligence analyst. In his view, the Defence Intelligence Organisation (DIO) was pro-Indonesian and, as a result, intelligence was being 'doctored', intelligence support to Australian troops in East Timor had been deliberately cut by DIO, and his criticisms of DIO had caused his career to suffer.

Of his own initiative, Collins analysed DIO assessments about Indonesia to evaluate their accuracy. He circulated his critiques through an informal network within the intelligence community, including a pejorative report in September 1999. His conduct was said to be at times 'divisive and unprofessional' and 'jaundiced' when it came to Indonesia.⁸⁶

In December 2000 Collins wrote to the Defence Minister setting out his concerns. That complaint was passed to the Inspector-General of Intelligence and Security (IGIS). Collins then formed the view that IGIS was not proceeding in the way he should. Collins lodged an application for redress of grievance in May 2003 just as IGIS was completing his inquiry. In his report, IGIS rejected Collins's assertions.

Captain Martin Toohey was appointed to investigate and report into the redress of grievance application, which now covered old ground but included fresh complaints about IGIS' handling of Collins' complaint to the Minister.

In his report in September 2003, Toohey supported Collins' original assertions. Subsequently, the 'Toohey Report' was found to have lacked jurisdictional authority and to lack evidence to substantiate the findings. Toohey's inquiry had miscarried, was inadequate to resolve the Collins matter and, as a result, a decision was made to not release it until the matter was settled.

In March 2004, Collins wrote to the Prime Minister to ask that a Royal Commission inquire into intelligence and on 11 April 2004, the 'Toohey Report' was in the hands of the Bulletin magazine. There is no public knowledge about who leaked the report.

Discussion

The leak of the 'Toohey Report' led to two successful actions for defamation by the former head of the DIO and created an atmosphere which the Chief of the Defence Force described as 'a miasma of innuendo' that was detrimental to DIO in doing its job.⁸⁷

Even where there is determination to settle complaints and considerable resources are used to do so, no disclosure scheme will be attractive when a person is intent on having a strongly held opinion predominate, irrespective of whether or not it is correct.

Procedures for security related disclosures

7.96 Under the current legislative framework, the Inspector-General of Intelligence and Security (IGIS) is tasked with reviewing the activities of the six main Australian Intelligence Community (AIC) agencies:

- the Australian Security Intelligence Organisation (ASIO);
 - the Defence Imagery and Geospatial Organisation (DIGO);
 - the Australian Secret Intelligence Service (ASIS);
 - the Defence Signals Directorate (DSD);
 - the Defence Intelligence Organisation (DIO); and
 - the Office of National Assessments (ONA).
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⁸⁶ *Lewincamp v ACP Magazines Limited* [2008] ACTSC 69.

⁸⁷ Transcript of Chief of Defence Force, General Peter Cosgrove, interview with Matt Brown, ABC AM program, Monday 19 April 2004, 8 am.

- 7.97 The Inspector-General of Intelligence and Security, Mr Ian Carnell, submitted to the Committee that it should continue to be 'the appropriate external recipient of whistleblower reports', and that third party disclosures are not appropriate for intelligence agencies due to secrecy obligations.⁸⁸ This position was supported by the Director-General of the Office of National Assessments who addressed the Committee on behalf of the AIC agencies.⁸⁹ The issue of disclosures to third parties is discussed further in the next chapter.
- 7.98 In expanding on the submission Mr Carnell explained that intelligence agencies should be exempt from broader public interest disclosure procedures under possible new legislation so that intelligence related disclosures can only be made to his office.⁹⁰
- 7.99 The Committee was told that the exception should apply to all allegations concerning the activities of AIC agencies, even where the substance of the allegations are of an administrative character, because all matters within those agencies can be linked to intelligence or security. According to Mr Carnell:
- Even if it is an administrative matter they have brought to you, the more general matter they might disclose is invariably operational security, so it is the very mixed nature of these things that means in practice that you could not give people clear instruction such as, 'If it's a security matter go to IGIS but if it's an administrative matter then you have an option of going to the Ombudsman or Public Service Commissioner.'⁹¹
- 7.100 Given the argument for the separation of AIC from general public interest disclosure legislation, it was suggested that reviews of IGIS whistleblower investigations, where warranted, could be undertaken on a consultancy basis, rather than being handled by the Ombudsman.⁹²
- 7.101 Mr Carnell identified areas where he considered that provisions of the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) should be improved by being brought into line with new public interest disclosure provisions. Currently s. 33 of the IGIS Act does not provide for protection of witnesses against criminal action. The range of protective measures that the Committee recommends as part of public interest disclosure legislation
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88 Inspector-General of Intelligence and Security, *Submission no. 3*, pp. 2-3. Mr John Wilson argued that public interest disclosure provisions should include means by which action can be bought against intelligence agencies, *Submission no. 40*, p. 3.

89 Mr Varghese, *Transcript of Evidence*, 16 October 2008, p. 1.

90 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 3.

91 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 6.

92 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 8.

should be provided under the IGIS Act so that people from AIC agencies are protected during investigations under the IGIS Act.⁹³

- 7.102 An area of potential for commonality of public interest disclosure provisions and the *Inspector-General of Intelligence and Security Act 1986* is the existing legislative relationship between the Ombudsman, the Committee's preferred central oversight agency, and the IGIS. Section 16 of the *Inspector-General of Intelligence and Security Act 1986* provides for consultation between the IGIS, the Ombudsman and the Auditor-General with respect to investigations.⁹⁴
- 7.103 Another view put to the Committee was that there should not be a blanket exclusion for security matters from public interest disclosure legislation. Rather, security matters should be treated differently 'only in so far as it concerns actual military and intelligence operations and conceivably puts our operatives at risk'.⁹⁵
- 7.104 Dr A. J. Brown expressed concern about 'carving out' intelligence and security from the general public interest disclosure legislation arguing that there will be no additional check to ensure that the system is working well without the additional oversight of the Ombudsman.⁹⁶
- 7.105 Whereas s. 70 of the *Crimes Act 1914* provides for a general prohibition on the disclosure of official information, there is no equivalent in, for example, New South Wales legislation. However, Mr Roger Wilkins AO, Secretary to the Attorney-General's Department and former Director-General of the NSW Cabinet Office, told the Committee that the 'order of magnitude in terms of sensitivity' is much broader at the Commonwealth level compared to the state level and it was unwise to draw any direct comparisons between state and Commonwealth activities.⁹⁷
- 7.106 Providing a separate set of provisions for security related information can be problematic because that information is not confined to discrete range of agencies. For example, national security matters now extend to previously unrelated areas such as climate change.⁹⁸

93 Mr Carnell, *Transcript of Evidence*, 16 October 2008, 4; Mr Varghese, *Transcript of Evidence*, 16 October 2008, p. 7.

94 It was noted that the Ombudsman can act as the Inspector-General of Intelligence and Security from time to time. See Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 7; Mr Moss, *Transcript of Evidence*, 23 October 2008, p. 4.

95 Ms Kardell, Submission no. 65, p. 19.

96 Dr Brown, *Transcript of Evidence*, 9 September 2008, p. 17.

97 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 2.

98 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 4.

- 7.107 The Australian Federal Police are not part of the AIC and their intelligence and security related activities are not reviewable under the *Inspector-General of Intelligence and Security Act 1986*. Both the IGIS and the AFP commented that AFP areas should be covered under general public interest disclosure provisions.⁹⁹
- 7.108 Given that there is no reason why the IGIS should not exercise powers under the IGIS Act for the purposes of public interest disclosures, a common system of disclosure would be achievable.

Finalisation

- 7.109 Many submissions to the Committee recounted the considerable delays and the complex processes that whistleblowers had experienced in attempting to resolve an issue.¹⁰⁰ Many whistleblowers indicated that they had never received satisfaction and continued to advance their causes for many years.¹⁰¹
- 7.110 Where there are competing interests, a matter should be brought to a close by a final decision. A final decision may be a decision in which it is not possible for a decision-maker to reach a concluded view because, for example, the available evidence is not sufficient to support or reject the accusation that has been made.
- 7.111 A final decision is necessary out of fairness to the parties involved and reasonableness. There is little merit in pursuing matters once avenues of investigation have been exhausted, particularly where the issue has become a disagreement about the outcome of an investigation.

I recently had a situation where a person who was a contractor for the department for a month or so a couple of years ago continued to make allegations. They raised them with members of parliament, raised them with the minister, raised them with myself; and even though we had two or three quite rigorous processes, the person continued to basically not accept the decision.¹⁰²

- 7.112 A final decision in an administrative investigation does not restrict the right of a person to any appeals process that might be available through a court or tribunal.

99 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 7; Mr Whowell, *Transcript of Evidence*, 23 October 2008, p. 21.

100 Ms Merrylin Bulder, *Submission no. 32*; Mr Neil Winzer, *Submission no. 59*.

101 Mr Keith Potter, *Submission no. 43*.

102 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 6.

- 7.113 The proposed disclosure scheme sets out what is disclosable within the scheme and allows some discretion for agencies and oversight and integrity bodies to make an assessment of how to deal with what might not be precisely described. The discretion available under the scheme would enable decision-makers to act in the spirit of the 'open-ended' approach to categories of disclosure recommended by the Secretary to the Attorney-General's Department.¹⁰³ In doing so, however, the scheme should prevent creating 'a culture of forum shopping, with complainants approaching several agencies shopping for the best outcome'.¹⁰⁴
- 7.114 The administration of the new legislation would provide for points at which a matter might be closed and the legislation could provide that the statutory officer responsible for the general administration of the new legislation may bring an issue to finality within the scheme, subject to a person's right to seek review of administrative decisions by courts and tribunals.
- 7.115 The detailed structure of the process is best left to administrative action, but it would provide for assessment of a claim, investigation, report, reconsideration, review and reasons being given along the way.
- 7.116 Finality is an important issue in managing the expectations of whistleblowers so that the protracted situations such as those described to the Committee are avoided to the extent possible.¹⁰⁵ Some issues will not be amenable to resolution through a disclosure scheme and the legislation would not expunge any existing legal rights.

View of the Committee

- 7.117 A clear message to the Committee from the evidence was that a public interest disclosure system should provide more than one avenue for reporting disclosures. Decision makers should have some discretion to exercise flexibility in the initial receipt of disclosures so long as the person making the disclosure shows good faith in the spirit of the new legislation. The Committee agrees with these suggestions.

103 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 13.

104 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 3.

105 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 20.

- 7.118 The vast majority of whistleblowing-type disclosures that are made are reported internally in the first instance.¹⁰⁶ Legislation on public interest disclosures should encourage this practice of making disclosures internally because of the agencies' proximity to the issue and ability to effect action.
- 7.119 However, a subsequent disclosure to an external entity could be protected, for example, where an agency has failed to meet its obligations under the Act or where the whistleblower considers on reasonable grounds, that the matter has not been handled appropriately by the agency.
- 7.120 It is the view of the Committee that agency heads should be obliged to establish public interest disclosure procedures appropriate to their agencies, report on the use of those procedures to the Commonwealth Ombudsman, and delegate powers to appropriate staff within the agency to receive and act on disclosures.
- 7.121 Under new legislation, agencies should be obliged to undertake investigations into disclosures that are made from within the organisation or referred to it by another agency; undertake an assessment of the risk that detrimental action could be taken against the person who made the disclosure; within a reasonable time period or periodically, notify the person who made the disclosure of the outcome or progress of an investigation, including the reasons for any decisions taken; provide for confidentiality; and separate the substance of a disclosure from any personal grievance a person who had made a disclosure may have in a matter.
- 7.122 The Committee is of the view that the Public Service Commissioner and the Commonwealth Ombudsman could each bring expertise to the role of providing the central oversight function.
- 7.123 The Public Service Commissioner manages the strategic performance in the public sector and has a key role in fostering the 'embedding (of) ethics and integrity' within the public sector.¹⁰⁷ In addition to the Commissioner's role in developing an ethical public service, the Commissioner's responsibilities and, therefore, expertise, can be best described as in those areas that develop, promote, review and evaluate APS employment policies and practices, foster continuous improvement in the management of people, and provide strategic direction in those personnel functions that have an APS-wide application.

106 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, pp. xxv.

107 Australian Public Service Commission, *State of the service report 2007-2008*, p. 160.

- 7.124 The Committee is of the view that the agency responsible for administering the new legislation should have extensive experience and an established reputation for handling complex and sensitive investigations in matters of public administration beyond individual grievances. This is beyond the current administration of matters that traditionally fall within the Public Service Commissioner's responsibilities.
- 7.125 In the Committee's view, the Commonwealth Ombudsman, as the Commonwealth's only generalist investigative agency, already possesses the requisite skills, experience and public profile to fulfil the roles of providing the central oversight function and general administration of the new legislation.
- 7.126 The disclosure system should provide that once the matter has been disclosed internally, a whistleblower can request a reconsideration of the matter or request a review of the agency's investigation by a different external agency. To prevent the possibility that whistleblowers may continuously seek forums to obtain a desired outcome, protection would only be provided to internal disclosures in the first instance and to one subsequent disclosure made to an external agency. Protection would not apply to additional disclosures of the same matter to other agencies.
- 7.127 The Committee considers that the new public interest disclosure system should include the flexibility for a number of authorities to receive disclosures on matters within their responsibility and act together or individually to resolve them, while providing a clear line for reporting security and intelligence matters to the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.
- 7.128 The role of the Commonwealth Ombudsman as the central oversight agency for the new public interest disclosure system should include general administration of the legislation under the Minister, setting standards for the investigation, reconsideration, review and reporting of public interest disclosures, referring public interest disclosures to other appropriate agencies, receiving referrals of public interest disclosures and conducting investigations or reviews where appropriate. In addition, the role could include providing assistance to agencies in implementing the public interest disclosure system including, providing assistance to employees within the public sector in promoting awareness of the system through educational activities and providing an anonymous and confidential advice line. Finally, a further role would include receiving data on the use and performance of the public interest disclosure system and reporting to Parliament on the operation of the system.
- 7.129 The Committee notes that public interest disclosures that implicate the Ombudsman or Deputy Ombudsman may arise. As the Office of the

Ombudsman is a portfolio agency, currently of the Department of Prime Minister and Cabinet, disclosures that implicate the Ombudsman or Deputy Ombudsman would be referable to the head of the agency with responsibility for the general administration of the portfolio.

Recommendation 15

7.130 The Committee recommends that the Public Interest Disclosure Bill provide an obligation for agency heads to:

- **establish public interest disclosure procedures appropriate to their agencies;**
- **report on the use of those procedures to the Commonwealth Ombudsman; and**
- **where appropriate, delegate staff within the agency to receive and act on disclosures.**

Recommendation 16

7.131 The Committee recommends that the Public Interest Disclosure Bill provide that agencies are obliged to:

- **undertake investigations into disclosures that are made from within the organisation or referred to it by another agency;**
- **undertake an assessment of the risks that detrimental action may be taken against the person who made the disclosure;**
- **within a reasonable time period or periodically, notify the person who made the disclosure of the outcome or progress of an investigation, including the reasons for any decisions taken;**
- **provide for confidentiality;**
- **protect those who have made a disclosure from detrimental action; and**
- **separate the substance of a disclosure from any personal grievance a person having made a disclosure may have in a matter.**

Recommendation 17

7.132 The Committee recommends that the Public Interest Disclosure Bill provide that the following authorities, external to an agency, may receive, investigate and refer public interest disclosures:

- the Commonwealth Ombudsman, including in his capacity as Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman and Postal Industry Ombudsman;
- the Australian Public Service Commissioner; and
- the Merit Protection Commissioner.

Recommendation 18

7.133 The Committee recommends that the Public Interest Disclosure Bill provide that the following authorities, external to an agency, may receive, investigate and refer public interest disclosures relevant to their area of responsibility:

- Aged Care Commissioner;
- Commissioner for Law Enforcement Integrity;
- Commissioner of Complaints, National Health and Medical Research Council;
- Inspector-General, Department of Defence; and
- Privacy Commissioner

Recommendation 19

7.134 The Committee recommends that the Public Interest Disclosure Bill provide that where disclosable conduct concerns a Commonwealth security or intelligence service, the authorised authorities to receive disclosures are the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.

Recommendation 20

7.135 The Committee recommends that the Public Interest Disclosure Bill establish the Commonwealth Ombudsman as the oversight and integrity agency with the following responsibilities:

- general administration of the Act under the Minister;
- set standards for the investigation, reconsideration, review and reporting of public interest disclosures;
- approve public interest disclosure procedures proposed by agencies;
- refer public interest disclosures to other appropriate agencies;
- receive referrals of public interest disclosures and conduct investigations or reviews where appropriate;
- provide assistance to agencies in implementing the public interest disclosure system including;
 - ⇒ provide assistance to employees within the public sector in promoting awareness of the system through educational activities; and
 - ⇒ providing an anonymous and confidential advice line; and
- receive data on the use and performance of the public interest disclosure system and report to Parliament on the operation of the system.

Disclosures to third parties

Introduction

- 8.1 The Committee was asked to consider whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted. The term third party refers to an entity outside both the organisation and authorised external integrity agencies that does not have a direct concern with the subject of a disclosure and is unable to effect action in response to a disclosure.
- 8.2 Examples of third parties include the media, Members of Parliament, unions, professional associations and privately engaged legal advisors. Disclosures to third parties are generally not provided for in most public interest disclosure legislation in other jurisdictions. It is more common for legislation to remain silent on the issue, so that the focus on handling disclosures remains within government.
- 8.3 The appropriateness of protecting public interest disclosures made directly to the media was one of the more contentious aspects of the inquiry. Disclosures to the media can cut across some of the key principles driving public interest disclosure legislation such as confidentiality, procedural fairness and the value of internal disclosures. Many of the arguments concerning the treatment of disclosures to the media apply to disclosures to other third parties.

- 8.4 The Committee received a large amount of evidence in relation to disclosures to the media, Members of Parliament and unions. This chapter covers each of those in turn.

Disclosures to the media

Current legal framework

- 8.5 Section 70 of the *Crimes Act 1914*, and Public Service Regulation 2.1 prohibit the making of unauthorised disclosures by public servants to any third party, including the media. As noted in Chapter 1, common law protections available to whistleblowers who disclose to the media are not reliable.
- 8.6 Research findings of the WWTW project indicates that whistleblowing directly to the media is a very rare course of action amounting to less than one per cent of recorded disclosures.¹
- 8.7 The Australian Federal Police indicated that, in the three years to June 2008, there were 45 referrals made in relation to the unauthorised disclosure of information, predominantly to the media. Of those, 30 were investigated and four were referred to the Commonwealth Director of Public Prosecutions.² In terms of the outcome of those for cases:
- One of those is subject to appeal at the moment and has been reported on in the media just recently, one received a \$1,000 recognisance for good behaviour for three years, in another the defendant was convicted and fined \$750 and ordered to pay court costs of \$70 and in the final one the DPP advised there was insufficient evidence to proceed.³
- 8.8 These figures do not include other action that may have been taken in relation to unauthorised disclosures apart from referral to the AFP, for example disciplinary action, however the data appear to suggest that the measures available under the *Crimes Act 1914* are used sparingly.

1 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand, School of Government, p. 91.

2 Deputy Commissioner Negus, *Transcript of Evidence*, 23 October 2008, p. 12.

3 Deputy Commissioner Negus, *Transcript of Evidence*, 23 October 2008, p. 13.

8.9 Prosecutions for unauthorised disclosures to the media inevitably become high profile matters. There is a perception that action against those who disclose to the media without authorisation is designed to send a broader message to the public sector. As one former journalist told the Committee:

I believe calling in the police is designed more to intimidate and spook public servants who may have public interest in their mind. It is designed to intimidate them from leaking something they might have been intending to leak. That seems to me to be the objective, rather than actually finding the leaker. There is always a burst of publicity when the police become involved.⁴

8.10 It is not an offence for journalists to publish material received in breach of the general provision against disclosure in s. 70 of the *Crimes Act 1914*. However, it is a serious offence for journalists to possess documents or publicise material from documents covered under the official secrets provision of s. 79 of the *Crimes Act 1914*.⁵

8.11 The Standing Committee of Attorneys-General is currently considering changes to journalists' 'shield laws' to strengthen the power of the media to withhold the identity of their sources.⁶ This could potentially encourage whistleblowers to approach the media. However, strengthening the protection of journalists' sources would not prevent the investigation and potential prosecution of persons responsible for unauthorised disclosures.

8.12 The rate of disclosure to the media may reflect current legislative provisions that do not authorise disclosures to third parties and the effect of a number of high profile prosecutions for unauthorised disclosure to the media.⁷ This suggests that if legislation enabled or protected disclosures to the media, the rate of such disclosures could increase.

8.13 The rate of disclosure to the media can be seen as a measure of the level of confidence that whistleblowers have in the current ability of the system to appropriately address wrongdoing.⁸ As Mr Peter Bennett told the Committee:

... people go directly to the media [where] they have no faith in the existing system. They simply say, 'I don't trust them. The system doesn't work. There is no sense in going there. I'm going to get

4 Mr Thomas, *Transcript of Evidence*, 28 October 2008, p. 13.

5 Deputy Commissioner Negus, *Transcript of Evidence*, 23 October 2008, p. 19.

6 Standing Committee of Attorneys General 7 November 2008, *Communiqué*.

7 See, for example, case studies on Mr Allan Kessing and Mr Desmond Kelly.

8 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 64.

done like a turkey if I do that. The only option I've got is the media.'⁹

- 8.14 This suggests that the establishment of a comprehensive public interest disclosure system that achieves recognition and strong support in the public sector would reduce the incentive for people to disclose to the media.

The role of the media

- 8.15 The media plays a key role as the 'fourth estate' in the democratic process by scrutinising the actions of government, exposing official wrongdoing and bringing matters of public interest to the attention of the public. In fulfilling that role, the media rightly considers whistleblowers as a valuable source of information.
- 8.16 Mr Anthony Maniaty, Director for the Australian Centre for Independent Journalism, told the Committee of the value of whistleblowers to the media:
- ... in general and in principle, we can never have too many public servants willing to tell us in the media about wrongdoings that involve the use of taxpayers' money or the abuse of public trust. As journalists, we welcome strong leads, and we take it from there.¹⁰
- 8.17 Mr Paul Chadwick, Victoria's first Privacy Commissioner and now Director of Editorial Policies at the Australian Broadcasting Corporation, argued that whistleblowing plays an important role as a kind of 'safety valve' in democratic societies. The media, he argued, possess the appropriate resources and skills to assess the impact of a disclosure on the public interest and can take that into account in determining the timing and manner of a publication.¹¹
- 8.18 Similarly, the Committee was told of the role of the media in fulfilling the public's right to know about corruption, maladministration and other forms of wrongdoing in the public service or government. In performing this service, the media is said to act responsibly by applying a filtering mechanism to ensure the quality, rigour and appropriateness of the material that is published. As Mr Peter Bartlett, an eminent Australian lawyer who has represented media interests for many years, explained:

9 Mr Bennett, *Transcript of Evidence*, 9 September 2008, p. 35.

10 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 51.

11 Mr Chadwick, *Transcript of Evidence*, 9 September 2008, p. 40.

There are whole different levels of that review. The first is the journalist. The journalist gets the call. The journalist talks to the source. The journalist looks at any documents produced by the source. If the journalist takes the view that it has no credibility or little credibility, it stops there and the story would not go any further. If the journalist takes the view that it is a story that should be published, the journalist would further research that story and produce an article. That is then looked at by editorial staff. If it is a big story, it is looked at by the editor. It then goes through the lawyers. At any one of those stages, it is reviewed and reviewed and reviewed. It would only get into the paper if it passes all of the tests and if people do not see a flaw in it.¹²

8.19 The prospect of a disclosure to the media can be an incentive for investigative bodies to efficiently manage their own procedures and report back to a whistleblower.¹³

8.20 Associate Professor David McKnight of the Media Research Centre at the University of New South Wales drew the Committee's attention to the apparent inconsistency in the treatment of public servants who leak information to the media compared to Ministers who leak:

... ministers leak, and will continue to leak, confidential material to journalists, but when a similar action is taken by a junior public servant it can result in the loss of their job, of their peace of mind and their income.¹⁴

8.21 It was suggested to the Committee that the conditions under which it is appropriate to make a disclosure to the media should be no more onerous than the conditions for attracting protections for internal disclosures or disclosures to a prescribed external integrity agency. Ms Chapman of News Limited argued that whistleblowers themselves are in the best position to determine to whom they should disclose and that their choice of recipient should not affect their protection:

As soon as the public interest test is defined, the key should then be that the matter is addressed and that it is solved. If the whistleblower feels that the best way to do it is to go internally or if they believe the best way to do it is to go externally, that is the

12 Mr Bartlett, *Transcript of Evidence*, 21 August 2008, p. 23.

13 Ms Hambly, *Transcript of Evidence*, 9 September 2008, p. 36.

14 Associate Professor McKnight, *Transcript of Evidence*, 27 October 2008, p. 52.

decision that they should take because it is probably in their best interests to know how that issue should be dealt with.¹⁵

- 8.22 If the Commonwealth does not legislate on disclosures to the media, it may be overtaken by technological advances enabling the anonymous disclosure of official information on the internet on sites such as Wikileaks. The Wikileaks website contains measures to protect the identities of its contributors and does not include any Australian filtering mechanism.¹⁶

Case study Third party disclosures: Ms Toni Hoffman AM

Background

In 2003 Ms Toni Hoffman was in charge of the Intensive Care Unit at Bundaberg Base Hospital. Ms Hoffman recalls having a degree of concern about complex surgery being done in a provincial hospital like Bundaberg because, in her view, it could lead to inadequate or unsafe health care. When she raised the matter she was told that the operations would continue. Subsequently, she identified risk factors that she believed led to complications after surgery and she spent the next two years trying to have her allegations examined. She raised her concerns with the Director of Medical Services and the district manager and other staff at Bundaberg.

After raising her concerns internally, Ms Hoffman had further discussions with her union and the district manager for Queensland Health. The response of Queensland Health was to pass the matter between various officials and it appears that no formal steps were taken towards an independent review until December 2004. Even then, the Chief Health Officer thought it 'too early and inappropriate to raise any particular concerns'.¹⁷ When he visited the hospital in February 2005, the Chief Health Officer did not seek to gain evidence on particular allegations but, rather, 'sought to "collect [the] personal impressions of issues of concern" to those who chose to meet with him'.¹⁸ Ms Hoffman felt that her allegations were being ignored and visited the office of Mr Rob Messenger MP in March 2005 and provided him with a copy of the formal allegations she had made within Queensland Health. Mr Messenger then tabled Ms Hoffman's document in the Queensland Legislative Assembly.¹⁹ At that time Queensland had a public interest disclosure law but it did not provide protection for this form of disclosure and Toni Hoffman was vulnerable to civil action for defamation and administrative censure for breach of the Code of Conduct.

Discussion

Among the important issues from this case are: the need for managers to be sensitive to the fact that a disclosure has been made, whether or not a formal procedure was followed; that there must be positive obligations on managers to act once a disclosure is made; and there is a need for protection to be retained when a person has acted in the public interest. The study also shows that, despite the existence of a disclosure system, there can be occasions where management fails to meet its obligations. Toni Hoffman considered it necessary to go to her union and to a Member of Parliament, both outside her organisation and outside of the prescribed disclosure system. Doing this came at personal risk. But, in doing so, her allegations were aired and led to a public inquiry.²⁰

15 Ms Chapman, *Transcript of Evidence*, 27 October 2008, 61.

16 Dr Harris Rimmer, *Transcript of Evidence*, 16 October 2008, p. 10.

17 Queensland Public Hospital Commission of Inquiry exhibit 225, GF12.

18 Queensland Public Hospital Commission of Inquiry report, p. 158.

19 Queensland Public Hospital Commission of Inquiry report, p. 162.

20 The allegations of Ms Hoffman were considered in the Queensland Public Hospital Commission of Inquiry but had not been, at the time of tabling this report, considered in any court proceedings.

Risks associated with unconditional disclosure to the media

8.23 A number of contributors to the inquiry argued that disclosures made to the media should not be protected in a new public interest disclosure system. Whistleblowers who disclose to the media may not have full information on the alleged misconduct, may not be aware of the potential ramifications of the disclosure, and could potentially put at risk other important aspects of the public interest such as procedural fairness in investigations.

8.24 The Attorney-General's Department submitted to the Committee that:

The difficulty with disclosing to a third party is that the whistleblower may not be aware of all the facts and circumstances, and the third party is less likely to be in a position to ascertain the entire picture compared to a person or office that has the powers to investigate whistleblower's allegations.²¹

8.25 The 2006 review of the Queensland *Whistleblowers Protection Act 1994* noted that the media has quite a different role in handling the disclosures made to it:

The media, although an integral component of the democratic process, is clearly separate from the processes of government. The commentary provided by the media on the activities of government can be influential, but it is important to distinguish this role from that of the careful collection and consideration of evidence on which governments can properly be held accountable.²²

8.26 The media may be motivated by the self interest of boosting ratings or circulation rather than the interests of the wider public or those involved with an allegation. Professor Ken McKinnon of the Australian Press Council offered a somewhat less idealised view of how the media determines what is fit for publication, arguing that sales and the threat of defamation action are primary considerations:

[A story] would not be included unless it was something that the editor thought would reach the public in some way and be interesting enough to make them want to keep buying the paper.

21 Attorney-General's Department, *Submission no. 14*, p. 4.

22 Office of the Public Service Commissioner Queensland 2006, *Review of the Whistleblowers Protection Act 1994*, p. 17.

Finally, what stops editors from publishing some things are defamation laws.²³

8.27 Another view put to the Committee was that by maintaining the focus on internal processes and improving internal procedures, the need for taking matters to the media would be minimised. As a Community and Public Sector Union witness told the Committee:

... we do not think the front pages of the tabloids of this country should be the first port of call if a public sector employee or a person performing public sector work is apprised of an instance of maladministration or corruption or illegal activity in the course of their employment. We think it is in the public interest that there should be a regime for providing internal mechanisms within the Public Service ...²⁴

8.28 The NSW Deputy Commissioner Against Corruption told the Committee that a person, having made a disclosure, sometimes wants to know how an enquiry is progressing but, because the matter is still under investigation, nothing can be disclosed. In these circumstances, people may feel compelled to go to their local Member of Parliament or to the media and may actually end up damaging any outcome that might have been achieved.²⁵

8.29 While the media has capacity to mitigate some of those risks through the 'filtering' process described by some witnesses, it should not be assumed that the filter is consistently applied. A number of witnesses noted the very broad range of activities that could be included in 'the media' from established broadsheet newspapers to the publication of web logs or 'blogs', by private individuals.

8.30 Even within the print media, standards of publication can vary and whistleblowers essentially have no control over how their information is treated once it is provided. Whistleblowers need to exercise caution in deciding which journalist to approach, as one former journalist explained:

I would be very concerned to identify the right messenger for the story. It takes diligence and dedication and precision for a story that does turn on people's lives to be properly conveyed so that people are not overly alarmed, but at the same time appreciate that this is a real problem that needs to be addressed.

23 Professor McKinnon, *Transcript of Evidence*, 27 October 2008, pp. 55, 56.

24 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 2.

25 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, p 81.

[Whistleblowers] need to be assured that that journalist has a track record for accuracy, and then the onus is on the journalist to actually make sure that the story is not beaten up, overcooked and thus loses its impact because people can see through it or you can pick holes in it from the beginning.²⁶

8.31 The consequences of disclosures to third parties relating to security, intelligence, defence and policing could be much more serious than disclosures on other types of matters such as fraud concerning grants for social services. The Inspector-General of Intelligence and Security argued strongly against protecting disclosures to the media where security and intelligence information is involved.²⁷

8.32 The Attorney-General's Department told the Committee:

... the whistleblower and the third party may not necessarily appreciate the potential damage disclosure could cause to national security, defence or inter-governmental and international relations and therefore may not give the information the protection required.²⁸

8.33 All existing state and territory public interest disclosure legislation, with the exception of New South Wales, is silent on disclosures to the media. Under those Acts, the media are not authorised as formal recipients of disclosures and, therefore, protections would not be afforded to people who disclose to the media. Indeed, if public servants did report directly to the media, they would be acting outside the relevant Act and may be liable for prosecution.

8.34 However, the occurrence of disclosures to the conventional media and the gradual impact of other forums such as Wikileaks, and the inevitability that there will be dissatisfaction with the result of some disclosures, suggests that, to some extent, disclosures to the media may be inevitable. As Dr Brown told the Committee:

We live in the world where the question of public exposure has to be managed rather than there being any option of saying that these things will not get into the public domain. It is a question of whether they get into the public domain in a reasonable way and whether they are properly managed in that relatively limited set of

26 Mr Thomas, *Transcript of Evidence*, 28 October 2008, p. 15 & 16.

27 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 3.

28 Attorney-General's Department, *Submission no. 14*, p. 4.

circumstances where matters are of a nature or the circumstances are such that they are more likely to get into the public domain.²⁹

Possible qualifications for protecting disclosures to the media

- 8.35 Ideally, disclosures to the media would not be necessary with the establishment of a well designed public interest disclosure system that provides ample opportunity to make disclosures internally or to an external integrity agency.
- 8.36 There may be exceptional circumstances in which authorised avenues for disclosure are unsatisfactory or too slow in providing an outcome.³⁰ Some contributors to the inquiry considered that disclosures to the media may be appropriate where there are exceptional circumstances as a last resort, where all other mechanisms for raising the matter within the government have been exhausted, and where the matter disclosed serves the public interest.³¹
- 8.37 There are a variety of ways to protect only the most serious disclosures to the media by applying conditions under which protection is appropriate. Such conditions could include:
- a) the person has reported through specified internal channels first;
 - b) the person has reported to a specified external oversight or integrity body;
 - c) the matter has not been resolved over a specified period of time;
 - d) the result of internal or authorised external investigation has been inadequate and that the person has a reasonable belief that the matter needed to be escalated to the media (subjective test);

29 Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 18.

30 For a carefully documented example of unnecessary delay in investigation following disclosure, see the judgment of Justice Gray in *Henry v British Broadcasting Corporation* [2006] EWHC 386 (QB), a successfully defended defamation action arising from disclosure of falsified hospital waiting list data: <http://www.bailii.org/ew/cases/EWHC/QB/2006/386.rtf> (accessed 19 February 2009).

31 Commonwealth Ombudsman, *Submission no. 31*, p. 11; Mr Podger, *Submission no. 55*, p. 6; Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 10; Mr Needham, *Transcript of Evidence*, 9 September 2008, p. 38.

- e) the result of internal or authorised external investigation has been inadequate and there is a genuine public interest in disclosing the matter (objective test);
- f) the substance of the disclosure is of a nature that it would not be appropriately or adequately resolved through internal or external authorised processes;
- g) the substance of the disclosure is a serious immediate risk to public health and safety; and
- h) The category of the information (for example, information concerning national security and intelligence could be exempt from disclosure).

8.38 In its submission to the Committee, the Australian Press Council outlined the circumstances in which it considered that disclosures made to the media should be protected:

- Where [whistleblowers] honestly believe, on reasonable grounds, that to make the disclosure along internal channels would be futile or could result in victimisation, OR
- Where they honestly believe, on reasonable grounds, that the disclosure is of such a serious nature that it should be brought to the immediate attention of the public, OR
- Where they honestly believe, on reasonable grounds, that there is a risk to health or safety,
- Where internal disclosure has failed to result in prompt investigation and corrective action.³²

8.39 Australia's Right to Know, a coalition of 12 major media organisations, suggested disclosures to the media should be protected where:

- (a) the employee honestly believes, on reasonable grounds, that it is in the public interest that the material be disclosed; and
- (b) the employee honestly believes, on reasonable grounds that the material is substantially true; and
- (c) the employee honestly believes on reasonable grounds either that:
 - i. to make the disclosure through internal channels is likely to be futile or result in the whistleblower [or any other person] being victimised; or

32 Australian Press Council, *Submission no. 21*, pp. 4-5 (emphasis in the original).

ii. the disclosure is of such a serious nature that it should be brought to the immediate attention of the public.³³

8.40 New South Wales is the only Australian jurisdiction to provide for disclosures to the media. Section 19 of the *Protected Disclosures Act 1994* provides the following conditions for making a protected disclosure to a journalist:

(1) A disclosure by a public official to a Member of Parliament, or to a journalist, is protected by this Act if the following subsections apply.

(2) The public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of this Part.

(3) The investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred:

- (a) must have decided not to investigate the matter, or
- (b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or
- (c) must have investigated the matter but not recommended the taking of any action in respect of the matter, or
- (d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.

(4) The public official must have reasonable grounds for believing that the disclosure is substantially true.

(5) The disclosure must be substantially true.

8.41 The NSW provisions contain elements of procedure (that it must already have been referred to an approved authority for investigation), time (where the authority had failed to notify the person after 6 months), and subjective and objective tests of truth.

33 Australia's Right to Know, *Submission no. 34*, p. 4.

- 8.42 Dr Brown criticised the NSW approach, arguing that the ‘substantially true’ requirement sets an excessively high threshold, that it is not clear who the arbiter to the test would be, and a court or tribunal, where whistleblowers would be defending themselves, is not an appropriate forum to investigate the substance of the claim.³⁴
- 8.43 In reviewing state and territory whistleblower legislation, Dr Brown suggested the following checklist to determine when disclosures to the media are reasonable:

1. Disclosures to parliamentarians or the media should only be protected if the official first made the disclosure internally to the agency, and/or to an appropriate independent agency – unless neither of these courses is reasonably open to the official. Circumstances in which official channels are not reasonably open might include a specific, reasonably held risk that they or someone else will suffer a reprisal if the matter is disclosed.

2. Disclosures to parliamentarians or the media should also only be protected if the official has reasonable grounds for believing that no appropriate action has been or will be taken on their internal disclosure(s) within a reasonable period, by either the agency or the independent agency.

Rather than imposing arbitrary timeframes, the legislation should provide for a ‘reasonable period’ to be determined having regard to the nature of the matter, the time and resources required to properly investigate, its urgency, and guidelines on the timeframes and level of communication to which investigating agencies should normally adhere depending on the circumstances. The legislation should provide for these guidelines to be published by a coordinating agency, and provided to officials who make public interest disclosures, who will be presumed to be aware of them.

3. Finally, for the further disclosure to be protected, the court, tribunal or officer determining the matter must be generally satisfied that it was in the public interest that the matter be further disclosed. For this, they should be satisfied that:

- (a) the person making the disclosure believed that appropriate action had not been and would not be taken on an issue of significant public interest as a result of previous disclosures; and

34 Brown, AJ, ‘Privacy and the public interest disclosure: when is it reasonable to protect ‘whistleblowing’ to the media?’ in *Privacy Law Bulletin*, 4 (2), p. 24.

(b) the person making the disclosure was reasonably justified in their belief that appropriate action had not been or would not be taken; and

(c) the person's primary reason for making the further disclosure, at the time of the disclosure, was a reasonably held intention that it would result in appropriate action being taken on the issue; and

(d) the further disclosure did result, should result, should have resulted, or could yet result in appropriate action being taken on the issue.³⁵

8.44 Other contributors to the inquiry were critical of the time limit imposed by the NSW legislation for protecting disclosures to the media. Cynthia Kardell, for example, argued that, in practice, time limits had been used to undermine the timely resolution of disclosures by agencies seeking to avoid account ability:

... time based restrictions have tended to operate mainly as a delaying mechanism and have failed to encourage and facilitate the timely in-house rectification of wrongdoing by the accused agency, contrary to what you might have thought might have been the result.³⁶

8.45 Rather than time elapsed from the initial disclosure, it was suggested that the seriousness of the allegation could be an appropriate requirement to protect a disclosure to the media.

8.46 The Murray Bill contained more expansive conditions by including categories for especially serious conduct and exceptional circumstances:

(2) A public official may make a public interest disclosure to a journalist if:

(a) the public official does not make the disclosure for purposes of personal gain; and

(b) under all the circumstances, it is reasonable for the public official to make the public interest disclosure; and

(c) the disclosure has already been made to a proper authority under section 8, or a senator or Member of the House of Representatives under subsection (1), but has not been acted upon,

35 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 44.

36 Ms Kardell, *Submission no. 65*, p. 16.

to the knowledge of the public official, within 6 months of the disclosure; or

(d) the disclosure has already been made to a proper authority under section 8 or a senator or Member of the House of Representatives under subsection (1), and acted upon, but it is reasonable for the public official to believe that the action was not adequate or appropriate; or

(e) the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.

8.47 The 1994 Senate Select Committee on Public Interest Whistleblowing recommended the adoption of the approach taken by the 1991 Gibbs Committee Review into Commonwealth Criminal Law, which took into account the seriousness of the allegation. It recommended that, where information concerned wrongdoing:

... was such that its disclosure without authority would not be a breach of the penal provisions proposed in [Chapter 31 of the Gibbs Report] or any special penal provision, the person would be exempted from any disciplinary sanction for publishing it to any person including the media if -

(i) he or she reasonably believed the allegation was accurate;

and

(ii) notwithstanding his or her failure to avail of the alternative procedures, the course taken was excusable in the circumstances, which would of course include the seriousness of the allegations and the existence of circumstances suggesting that use of alternative procedures would be fruitless or result in victimisation, but such a person would not be given any special protection as regards the law of defamation or any other law of general application.³⁷

8.48 Another approach to disclosures to the media would be to combine a timeframe with the seriousness of the allegation so that the most serious of allegations had no time requirement to be afforded protection, whereas less serious allegations involving no immediate threat to the public could wait up to six months prior to protecting the disclosure to the media. As Mr Maniaty suggested to the Committee:

³⁷ Senate Select Committee on Public Interest Whistleblowing 1994, *In the public interest*, p. 198. The Government rejected the proposal on 13 November 1995 on the basis that a whistleblower, lacking full information, is not in a position to assess public interest considerations.

Can we not build a set of circumstances over a range of time frames that are of greater public interest, and you could define them to some degree, to the point where a major security attack is about to happen? That is clearly not something we can wait six months for. But if it is the wasting of \$2 or \$3 million in a government department I think we can all wait six months to find out about that.³⁸

Alternatives to direct disclosures to the media

- 8.49 A public interest disclosure system that provided a broader scope of protection and instilled confidence that allegations would be properly tested internally or through a dedicated and independent external body, may reduce the need for people to approach the media while reducing any harm caused if people, nonetheless, decide to go to the media.³⁹
- 8.50 Another proposition put to the Committee was that in certain circumstances, it may be appropriate for an integrity agency to release the substance of a disclosure or a report to the public, where it is in the public interest to do so. For example, the Commonwealth Ombudsman, the IGIS and Integrity Commissioner of the Australian Commission for Law Enforcement Integrity, have the authority to publicise its reports.⁴⁰
- 8.51 Recent amendments to s. 22A(2) to the Victorian *Whistleblowers Protection Act 2001* enabled the Victorian Ombudsman to disclose the identity of a person against whom protected disclosures are made where it is in the public interest to do so. Procedural fairness processes are required.

Disclosures to other third parties

- 8.52 A number of contributors to the inquiry argued that conditions relating to disclosures to the media should be no different to condition relating to any other third party. For example the Attorney-General's Department submitted that disclosures to third parties, including the media should not be protected.⁴¹
- 8.53 Alternatively, while agreeing that conditions for the disclosure to all third parties should be the same, Mr Christopher Warren of the Media, Entertainment and Arts Alliance, argued and that such disclosures should

38 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 64.

39 Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 15.

40 Mr Moss, *Transcript of Evidence*, 23 October 2008, p. 6; Mr Varghese, *Transcript of Evidence*, 16 October 2008, p. 6.

41 Attorney-General's Department, *Submission no. 14*, p. 4.

be protected.⁴² Protecting disclosures to all third parties in the same way removes the problem of defining the 'media' in legislation and recognises that once a disclosure is published in the media, it is effectively disclosed to all third parties.⁴³

- 8.54 A number of submissions supported the protection of disclosures to Ministers and other parliamentarians and to advocates such as legal advisors, unions and professional associations.⁴⁴

Disclosures to Members of Parliament

- 8.55 It is not common for legislation in other jurisdictions to include parliamentarians as authorised recipients of public interest disclosures. However, some examples include:

- Section 26(1A), *Whistleblowers Protection Act 1994* (Qld), protects disclosures to a Member of the Legislative Assembly;⁴⁵
- Section 5(4), *Whistleblowers Protection Act 1993* (SA), protects disclosures to a Minister of the Crown;
- Section 19, *Protected Disclosures Act 1994*, (NSW) protects disclosures to a Member of Parliament on the same conditions as a disclosure to the media; and
- Section 3(d), *Protected Disclosures Act 2000* (New Zealand) notably excludes Members of Parliament as recipients of disclosures, while s. 10 of that Act provides additional conditions for protecting disclosures to Ministers.

- 8.56 At the Commonwealth level, disclosures made to parliamentarians may be protected, in certain circumstances, by the *Parliamentary Privileges Act 1987*. Section 16 of that Act provides certain immunities in a court or tribunal in relation to 'proceedings in Parliament'. A public interest-type disclosure could therefore attract protection if formed part of proceedings in parliament, meaning 'words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'.⁴⁶

42 Mr Warren, *Transcript of Evidence*, 27 October 2008, p. 65.

43 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 65.

44 For example, see Mr Ross, *Transcript of Evidence*, 28 October 2008, p. 23.

45 Queensland has a unicameral Parliament.

46 Section 16, *Parliamentary Privileges Act 1987*.

8.57 Even if a disclosure to a Member of Parliament did not form part of proceedings in Parliament, a House can still punish for contempt for action against a person who communicated with a Member where it is found that the action:

... amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a Member of the Member's duties as a Member.⁴⁷

8.58 Protection against adverse treatment could apply to the making of disclosures through providing evidence to a House or committee:

A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of: (a) the giving or proposed giving of any evidence; or (b) any evidence given or to be given; before a House or a committee.⁴⁸

8.59 The provisions for protection under the *Parliamentary Privileges Act 1987* are premised on Article 9 of the UK Bill of Rights 1688 concerning freedom of speech in Parliament, and the general democratic principle of open communication between Parliament and the people. Protection, where extended, can therefore apply regardless of the employment category of the person making the disclosure and the subject matter of the disclosure.

8.60 The Clerk of the Senate, Mr Harry Evans, wrote to the Committee to express his support for the approach taken in the Public Interest Disclosures Bill 2007. That Bill, proposed by the former Senator Murray, provided for disclosure to Members of Parliament on the following grounds:

A public official may make a public interest disclosure to a senator or Member of the House of Representatives if:

(a) under all the circumstances, it is reasonable for the public official to make the public interest disclosure; and

47 Section 4, *Parliamentary Privileges Act 1987*.

48 Section 12 (1), (2) *Parliamentary Privileges Act 1987*.

(b) the disclosure has already been made to a proper authority under section 8, but has not been acted upon, to the knowledge of the public official, within 6 months of the disclosure; or

(c) the disclosure has already been made to a proper authority under section 8, and acted upon, but it is reasonable for the public official to believe that the action was not adequate or appropriate; or

(d) the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.

8.61 The Murray Bill provided for the referral of public interest disclosures to a Parliamentary committee:

A public interest disclosure made to the President of the Senate or the Speaker of the House of Representatives ... may be referred by the President or the Speaker to a committee of the Senate or the House of Representatives, as the case may be, in accordance with a procedure of that House, or to the Senate or the House of Representatives, respectively.⁴⁹

8.62 The Acting Clerk of the House of Representatives supported the inclusion of Members of Parliament as authorised recipients of disclosures:

It would be respectful of Members in that it would give them a potentially important role in matters of government and it would group them with significant officers such as the Public/Parliamentary Service Commissioner, the Merit Protection Commissioner, departmental heads and the Ombudsman.⁵⁰

8.63 If parliamentarians were to be made recipients of public interest disclosures under a new scheme, both Clerks advised that new legislation should not interfere with the immunity of proceedings in Parliament under s. 49 of the Constitution and the *Parliamentary Privileges Act 1987*:

It is important that this aspect of parliamentary privilege be left to operate in conjunction with, and unaffected by, any statutory regime for public interest disclosures to Members of the Parliament. The ability of citizens to communicate with their parliamentary representatives, and the capacity of those representatives to receive information from citizens, should not be

49 Section 6(2), Public Interest Disclosure Bill 2007.

50 Mr Wright, *Submission no. 70*, p. 5.

restricted, inadvertently or otherwise, by a statutory public interest disclosure regime.⁵¹

8.64 The status of Parliament, as distinct from the executive, limits the extent to which Members of Parliament can be subject to the same public interest disclosure procedures compared to those that might apply in the public service. In 2007, the Queensland Parliament considered this issue in debating amendments to the *Whistleblowers Protection Act 1994*. A new Standing Order was adopted to guide Members of Parliament on the treatment of public interest disclosures, requiring Members to:

... exercise care to avoid saying anything inside the House about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures (“whistleblowers”), which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.⁵²

8.65 A schedule was inserted into the Queensland Standing Orders advising Members to consider withholding the substance of a disclosure from Parliament unless:

- the Member was not satisfied that the matter was being investigated or otherwise resolved; or
- the matter had been referred for inquiry but the Member had a reasonable belief that further disclosure in a parliamentary proceeding was justified to prevent harm to any person; or
- the matter had been referred for inquiry but the Member decides to bring it to the attention of a committee of the House with responsibilities in the area.⁵³

8.66 The guidelines in the Queensland Standing Orders are cautionary rather than mandatory, recognising the independence of Parliament and absolute privilege of freedom of speech in the institution.

8.67 As with any disclosures made to a third party, particularly the media, there will be uncertainty regarding how that third party treats the allegation. Disclosures to Members of Parliament could be used to further the personal interest of a Member and the political interest of a party, rather than to address the public interest aspect of the disclosure.⁵⁴ Furthermore, Members of Parliament are not in a position to conduct

51 Clerk of the Senate, *Submission no. 67*, p. 2.

52 Quoted in Mr Wright, *Submission no. 70*, p. 6.

53 Quoted in Mr Wright, *Submission no. 70*, pp. 6-7.

54 Mr Wright, *Submission no. 70*, p. 5.

investigations into the disclosures brought to them and are therefore unable to assess the risks related to public exposure.⁵⁵

Disclosures to trade unions

8.68 Australian Council of Trade Unions (ACTU) submitted that trade unions often receive public interest-type information from both members and non-members concerning the affairs of their employer. Unions typically seek to resolve those matters directly with management.⁵⁶

8.69 However, it is not always possible for unions to resolve issues on behalf of its members through discussions with management. The ACTU argued that existing law should be changed to enable unions to release the information it receives on the grounds that it is in the public interest to do so. Examples of how unions would like to release public interest information include:

- report the problem to other members at the workplace (for example, through a posting on the union noticeboard at work);
- report the problem to other members at other workplaces (for example, through an article in the union bulletin);
- discuss the problem with other unions or the ACTU;
- publish the report in the public domain, with a view to exposing the practice in question;
- convincing management to reverse or alter its decision (or to consult with unions and employees, etc).⁵⁷

8.70 In consideration of the significant liability for employees to disclose information to unions and the similar liabilities constraining the use of that information by unions, the ACTU recommended to the Committee that unions be made authorised recipients of public interest disclosures with the authority to publicly release the information it receives.⁵⁸

8.71 Mr Jeffrey Lapidus, Secretary, Australian Services Union Taxation Officers Branch, informed the Committee that he already assists members of his union when they are making a whistleblower report.⁵⁹ The Queensland Nurses Union, representing the Australian Nurses Federation gave evidence that the need to involve unions in advising nurses on public interest matters was of ongoing and practical value in many situations.

55 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 20.

56 Australian Council of Trade Unions, *Submission no. 64*, p. 1.

57 Australian Council of Trade Unions, *Submission no. 64*, p. 2.

58 Australian Council of Trade Unions, *Submission no. 64*, pp. 3-4.

59 Mr Lapidus, *Transcript of Evidence*, 21 August 2008, p. 48.

The Union informed the Committee of a number of recent incidents of significant concern:

For example, last week a non-Member called our call centre to report that unlicensed staff were checking the dangerous drugs before providing them to residents and that these staff were also in possession of the keys to the dangerous drugs cupboard. At law, this work is required to be undertaken by a licensed registered nurse. The practices are dangerous and potentially fatal. The caller declined to say where she worked. We have also had calls from Members concerned about directions from their employer with respect to altering documentation. We have had calls from Members regarding being directed to work outside their scope of practice. In the past we have had calls from Members concerned about the purposes for which funding was being spent.⁶⁰

View of the Committee

- 8.72 The issue of protecting public interest disclosures made outside the public sector challenges some of the key values discussed throughout this report such as privacy, confidentiality, procedural fairness and the importance for people to make disclosures internally. However, experience has shown that internal processes can sometimes fail and people will seek alternative avenues to make their disclosure.
- 8.73 There are cases, including cases with implications of utmost seriousness, when disclosure through third parties has been initially necessary and consequentially beneficial. Examples include the prelude to the Fitzgerald Inquiry in Queensland and the Shipman case in the UK. A public interest disclosure scheme that does not provide a means for such matters to be brought to light will lack credibility. Over time, to the extent such matters do arise and harm is shown to have been compounded through delayed disclosure, a scheme that did not facilitate quicker disclosure will be seen to have failed in its fundamental public interest objective. Several potential third party recipients of disclosures have legitimate check-and-balance roles in any system of democratic governance, including Members of Parliament, unions, professional associations, legal advisors and the media.

60 Mr Ross, *Transcript of Evidence*, 28 October 2008, pp. 22, 23.

- 8.74 In determining the appropriateness of protecting disclosures made to the media, the primary consideration must be how such disclosures could serve the public interest. If disclosure to a third party cannot promote accountability and integrity in public administration, or otherwise serve the public interest, then the disclosure does not warrant protection. In this context, the interests of the individual whistleblower and the interests of the media are not the primary concern.
- 8.75 Protecting disclosures to the media on the same basis as disclosures made internally is not in the public interest. There are major differences between the consequences of disclosures made internally or within the public sector and those made outside the sector. Among these differences, the media lacks a structured and rigorous system of investigating and assessing the risks of publishing a disclosure.
- 8.76 Disclosure to the media in the first instance poses a number of risks that are unacceptable. It is not in the public interest that internal investigations are undermined, that workplace confidentiality is breached, that whistleblowers and their colleagues are publicly scrutinised and that natural justice is denied to people against whom untested allegations are made. Disclosures to the media concerning unsettled policy issues, national security, intelligence and defence could interfere with the proper processes of government and in extreme circumstances could put lives at risk.
- 8.77 The risks associated with third party disclosures highlight the need to favour the importance of internal disclosures. However, despite the comprehensive multi-layered public interest disclosure system proposed in this report, it should not be assumed that the framework would adequately cater for every possible scenario. Each case of whistleblowing raises its own unique set of issues. It may be possible that in some cases, for example, where an agency has not fulfilled its obligations to a whistleblower, the disclosure framework within the public sector may not adequately handle an issue and that a subsequent disclosure to the media could serve the public interest.
- 8.78 Enabling protection for disclosures made to the media in certain circumstances could potentially act as a 'safety valve' where particularly serious matters have been disclosed and have not been resolved in a reasonable time, having regard to the nature of the matter. In these situations, protecting disclosures to the media would enhance the system by adding another check and balance as an additional layer of accountability.

- 8.79 Such a qualification places emphasis on the role of agencies, and the oversight integrity agency, to ensure that all aspects of the disclosure scheme are in place and that there is sufficient awareness of the disclosure system within the public sector.
- 8.80 Protecting disclosures to the media where the matter concerns immediate serious harm to public health and safety could be qualified on the belief of the whistleblower, on reasonable grounds, that it is necessary to make the disclosure and the requirement that the whistleblower had already made the disclosure internally and externally. Further qualifications, such as imposing an arbitrary timeline, would only serve to unduly complicate procedure and may not serve the public interest.
- 8.81 Protecting disclosures to the media in the limited circumstances described above is not likely to result in a flood of new disclosures. Most people appear to be reluctant to place themselves in the public eye by making a disclosure to the media. Whistleblowers themselves may be aware of the risks and unintended consequences of that avenue of disclosure.
- 8.82 Research indicates that disclosing to the media is not a preferred option for whistleblowers. On average, journalists are the ninth most likely recipients of public interest disclosures in the reporting process, behind supervisors and managers (first), unions and human resources units (second), government watchdog agencies (third) and Members of parliament (fifth).⁶¹
- 8.83 Consequently, it is the Committee's view that disclosures to the media, in limited circumstances, provide an important check on procedure and a 'safety valve' for the system.

Recommendation 21

- 8.84 **The Committee recommends that the Public Interest Disclosure Bill protect disclosures made to the media where the matter has been disclosed internally and externally, and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety.**

61 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 88.

- 8.85 The privilege of freedom of speech in Parliament and the protection of communications between citizens and Members of Parliament is a fundamental feature of Parliamentary democracy in Australia and is enshrined to some extent in the *Parliamentary Privileges Act 1987*. It is not the intention of the Committee that public interest disclosure legislation interfere with this important democratic feature.
- 8.86 In certain circumstances, parliamentary privilege may protect people who choose to make a disclosure to a Member of Parliament, particularly where the disclosure is used in parliamentary proceedings. Given the existence of such protections, the critical role of Members of Parliament in our democratic system and the broader improvements to the public interest disclosure system proposed in this report, the Committee considers that Members of Parliament should be authorised recipients of public interest disclosures.
- 8.87 As noted in the context of disclosures to the media, disclosures made to a Member of Parliament may give rise to unintended consequences for both individuals and the broader interests of public administration. The Committee therefore considers that the Standing Orders of the House of Representatives and the Senate should be amended to provide guidance on matters to be considered when receiving a disclosure. With this guidance in place and the protections already available in relation to disclosures to Members of Parliament, it is appropriate that there are no additional qualifications for disclosures to receive protection where they are made to a Member of Parliament.

Recommendation 22

- 8.88 **The Committee recommends that the Public Interest Disclosure Bill include Commonwealth Members of Parliament as a category of alternative authorised recipients of public interest disclosures.**

Recommendation 23

- 8.89 **The Committee recommends that, if Commonwealth Members of Parliament become authorised recipients of public interest disclosures, the Australian Government propose amendments to the Standing Orders of the House of Representatives and the Senate, advising Members and Senators to exercise care to avoid saying anything in Parliament about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures, which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.**

Recommendation 24

- 8.90 **The Committee recommends that the Public Interest Disclosure Bill provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*.**
- 8.91 The Committee received little evidence on disclosures made to professional associations or legal advisors. In any regard, the Committee considers issues in relation to those third parties analogous to disclosures to unions. While legal advisors, professional associations and unions perform different roles, one of their key commonalities is the provision of confidential advice.
- 8.92 The Committee considers that disclosures made to legal advisors, professional associations and unions should attract public interest disclosure protection where those disclosures are made for the purpose of seeking advice or assistance. This measure would provide yet another avenue for people to informally discuss workplace matters of concern to them and receive assistance with advocating their concerns.

Recommendation 25

- 8.93 **The Committee recommends that the Public Interest Disclosure Bill protect disclosures made to third parties such as legal advisors, professional associations and unions where the disclosure is made for the purpose of seeking advice or assistance.**
- 8.94 The Committee has recommended that public interest disclosure legislation provide more than one avenue for making a disclosure. If people are not comfortable disclosing internally, they can approach a range of other external integrity agencies or the central oversight integrity agency, the Commonwealth Ombudsman.
- 8.95 In order to reduce the need for people to go outside the system, the Committee has recommended that legislation provide clear guidance on the circumstances in which protection could be provided, and that decision makers have some flexibility to exercise discretion where procedures may not have been followed but people are shown to have acted in good faith in the spirit of the legislation.
- 8.96 The Committee wants to strengthen the new system of public interest disclosure by providing a role for the Commonwealth Ombudsman to conduct awareness campaigns in the public sector. This would assist in driving a change in bureaucratic culture to value and support those who speak out and promote an ethic of disclosure.
- 8.97 It is within the general powers of the Ombudsman to publish reports on its investigations.⁶² This power should be available to the Ombudsman in relation to public interest disclosures issues, so that the Ombudsman may report to the public on matters disclosed to agencies.

Recommendation 26

- 8.98 **The Committee recommends that the Public Interest Disclosure Bill provide authority for the Commonwealth Ombudsman to publish reports of investigations or other information relating to disclosures (including the identity of persons against whom allegations are made) where the Ombudsman considers it is in the public interest to do so.**

62 *Ombudsman Act 1976*, Section 35A.

Other matters raised during the inquiry

Introduction

- 9.1 As noted earlier in the report, while legislation is important it is insufficient in itself to bring about the level of change required to promote accountability and integrity in public administration through a new public interest disclosure system. For example, it has been noted that cultural change in the public sector will be required to support the objectives of the legislation.
- 9.2 This chapter covers a number of areas that are not directly referred to in the terms of reference but have nonetheless been recurring themes in evidence to the Committee. These other matters include disclosures concerning wrongdoing in the private sector, the need to change workplace culture, and the role of support services. This chapter includes a brief discussion of the relationship between the Committee's preferred model of public interest disclosure provisions and existing Commonwealth laws.

Disclosures concerning the private sector

- 9.3 In some instances, wrongdoing within the private sector can be just as important to the public interest as wrongdoing in the public sector. Therefore it was argued, legislation should be focused on employment, such as the UK *Public Interest Disclosure Act 1998*, rather than focus on the public sector.¹

1 Dr Peter Bowden, *Transcript of Evidence*, 27 October 2008, p 25.

9.4 Another argument for including misconduct in the private sector raised with the Committee was based on the principle that anyone should be able to receive protection for any public interest matter. As Whistleblowers Australia told the Committee:

... we can see no reason why any person should not be entitled and encouraged to report public sector misconduct or other wrongdoing which is contrary to the public interest. Any person who makes such a report must be protected against any form of reprisal which may arise as a consequence of making the report.²

9.5 Similarly, Associate Professor Faunce argued:

... if you are trying to develop a comprehensive and effective system of whistleblowing protections it is quite an artificial distinction to be simply looking at the public sector service employees as if they operate in isolation from the private sector.³

9.6 In a 2005 report on Australia's National Integrity Systems, Transparency International Australia recommended a consistent legislative basis to facilitate whistleblowing across the public, private and civil society sectors for current and former employees based on the Australian Standard 8004-2003.⁴

9.7 While unable to provide data on the take up rate of Australian Standard 8004-2003, *Whistleblower protection programs for entities*, Standards Australia advised the Committee of anecdotal evidence that the Standard was being used in the private sector:

... I know for a fact that it was pushed under the [Corporate Law Economic Reform Program 9] initiatives, and I know, for example, that NAB and a few other big organisations like that have used AS 8004 as their model. I just recently did some work for the Brisbane Airport Corporation, and they have adopted AS 8004 as their model. So AS 8004 certainly does have a profile out in the marketplace.⁵

9.8 The 1994 Senate Select Committee Report on Public Interest Whistleblowing noted possible constitutional limitations for Commonwealth legislation to cover disclosures concerning private sector entities. It nonetheless recommended that, to the extent of its legislative

2 Whistleblowers Australia, *Submission no. 26*, p. 18.

3 Associate Professor Faunce, *Transcript of Evidence*, 18 September 2008, p. 13.

4 Transparency International Australia, *Submission no. 22*, p. 3.

5 Mr Dee, *Transcript of Evidence*, 27 October 2008, p. 12.

competence, Commonwealth whistleblower provisions include the public and private sector, particularly in the education, health care and banking industries.⁶

- 9.9 Ms Kardell submitted that since the 1994 Senate report, public sector outsourcing, privatisation, and major corporate scandals such as HIH, OneTel and AWB there has been a change of attitude towards private sector misconduct:

The public thinking has changed as we have come to fully appreciate just how much an ethical, accountable and properly run public and private sector is in the public interest.⁷

- 9.10 However, since that Senate report, a number of private sector whistleblower protection instruments have been developed in a variety of regulatory regimes including:

- The Australian Standard on Whistleblower Protection Programs for Entities (AS 8004-2003);
- The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* which amended the *Corporations Act 2001* (Cth) providing protection for whistleblowers; and
- Other legislative provisions in relation to financial services, unions and employer associations.⁸

The need to change workplace culture

Issues with current workplace culture

- 9.11 The need to change workplace culture to support a pro-disclosure or 'if in doubt, report' ethos was a strong theme in evidence to the Committee. A pro-disclosure culture would support the making of public interest disclosures, encourage management to be responsive to the disclosures made and reduce the risk of adverse action against people who have made

6 Senate Select Committee on Public Interest Whistleblowing, 1994, *In the public interest*, pp. 152-153.

7 Ms Kardell, *Submission no. 65*, p. 7.

8 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 14; Some witnesses raised concerns about whistleblowing in other sectors such as the corporate and financial services sector. For example see, Mr Leonard, *Transcript of Evidence*, 21 August 2008, p. 60. It is recognised that a number of industry sector regulators and Ombudsmen have now been established for oversight of private sector activities particularly where the activity was previously undertaken by government.

disclosures. The Public Service Commissioner noted that change towards a pro-disclosure culture required leadership in the public sector:

Any new system would also need managers and agencies to do more to promote the notion of an employee's duty to report, within a climate of pro-disclosure. This goes to the heart of the issue of cultural change within agencies.⁹

9.12 A number of contributors to the inquiry asserted that current bureaucratic culture is not sufficiently supportive of those who speak out. The CPSU submission noted that the topic of whistleblowing is 'somewhat "taboo", poorly understood by employees and managers alike' in the public service.¹⁰

9.13 The Chief Executive Officer of the Post Office Agents Association Ltd noted a lack of awareness about whistleblowing among his members:

In researching our submission, I contacted many of our members, both licensed post office operators and mail contractors. None of them knew about the policy. One of them eventually recalled something that he had received a couple of years ago. So I think it would be fair to say that it is not front of mind.¹¹

9.14 Ms Dawn Phillips wrote to the Committee to express concerns that there are limited opportunities for people to access legislation, understand it, and apply it in a practical day-to-day setting. She expressed the view that the inability of non-specialists to adequately represent their own best interests is a matter of concern.¹²

9.15 Mr Peter Ellis drew the Committee's attention to what he perceives as a lack of ethical standards owing to a failure of senior management to model ethical behaviour, respond to issues and adequately deal with allegations of misconduct.¹³

9 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 4.

10 Community and Public Sector Union, *Submission no. 8a*, p. 8.

11 Mr Kerr, *Transcript of Evidence*, 21 August 2008, p. 27.

12 Ms Phillips, *Submission no. 28*, p. 1.

13 Mr Ellis, *Submission no. 33*, p. 3.

Case study Culture and processes: Ms Vivian Alvarez

Background

On 17 July 2001, Vivian Alvarez was listed as a missing person. Three days later, she was unlawfully removed to the Philippines by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). Her family knew nothing of her whereabouts until May 2005. On 14 July 2003, DIMIA officers, responding to a missing persons request, found evidence that tended to identify Vivian as an Australian citizen. These officers advised their supervisor of their discovery but the police missing persons branch was not told.

On 20 August 2003, Vivian was featured on a television show about missing persons. A DIMIA officer saw the program and investigated further. The investigation identified with certainty that Vivian had been illegally removed from Australia. DIMIA then informed the police but did nothing else about the matter, either to rectify the mistake or inform senior management or the Minister's office.

Meanwhile, Ms Alvarez was physically and mentally unwell, languishing in a missionary hospice in the Philippines. Her former husband had been told by the police that Vivian had been illegally removed and it was his persistence that finally stirred DIMIA into action.

Discussion

Failure by a public officer to correct an error may be an offence and it would more than likely be a breach of the public service Code of Conduct. All of Vivian's circumstances should have been reported to senior management when they first came to light, and action could then have been taken to establish the facts.

DIMIA lacked systems, and a culture, for reporting middle management's failure to act. Supervisors are a logical first point of reference when an employee identifies a problem. In this case the junior staff did the right thing. But, an individual must have scope to escalate a disclosure when it appears that a problem is not being addressed by a supervisor.

Any disclosure scheme should include a standard against which a person can evaluate whether a matter should be escalated within an agency, or referred to an oversight or integrity agency, when it seems that remedial action has not been taken.

Suggestions for improving workplace culture

- 9.16 Some optimism was expressed about the prospect of transforming the traditional closed bureaucratic culture to one that is more receptive to those who speak out. One witness related the process of cultural change in the public sector to the process of changing community attitudes about drink driving. The key to the successful drink driving strategy, it was argued, was that it involved redefining the behaviour as unacceptable and actively enforcing to law:

Thirty years ago many of my friends would brag that they were so drunk the night before they could not remember driving home. This was a source of pride. Of course there were laws against drink driving, but nobody took them seriously. Now, 30 years later, drink drivers are condemned, and I frequently hear comments like: 'I can only have two drinks because I have to drive home.' This is an amazing turnaround which demonstrates how social values and human behaviours can be changed.¹⁴

14 Dr Ahern, *Transcript of Evidence*, 28 October 2008, p. 28.

- 9.17 The Community and Public Sector Union National Secretary suggested that new legislation should be accompanied by seminars and training for public servants on their role in the new public interest disclosure system.¹⁵
- 9.18 The Confidant Network of the Australian Federal Police (AFP) was suggested to the Committee as an example of a system designed to ‘build a culture of accountability that is “pro-disclosure” and which seeks to extinguish any stigma associated with reporting’.¹⁶ The Confidant Network aims to provide secure and confidential advice and support to AFP members through experienced colleagues trained in handling ethical dilemmas.¹⁷
- 9.19 The AFP noted several factors contributing to the success of the Confidant Network including:
- the use of the independent database. Employees have more trust in the confidentiality of the program;
 - continued support from the Senior Executive of the AFP, a number of which are Confidants. The Commissioner is a Confidant and regularly refers to the functional capability and purpose of the Confidant network in staff messages;
 - the Confidants themselves and their commitment to the role and the independence of the Confidant Network external to the Professional Standards Portfolio; and
 - the reporting by the Coordinator of the Confidant Network directly to the National Manager, Human Resources.¹⁸
- 9.20 The WWTW project findings suggest that promoting awareness of legislation and procedure can have the effect of reinforcing a positive culture in relation to the making of disclosures:
- ... higher levels of reporting can and do appear to flow logically from a greater willingness by employees to speak up, based on a more positive culture in the organisation, encouraged by direct awareness raising. The reverse, however, also appears true: specific factors can be identified that correlate with reduced reporting rates and higher inaction rates.¹⁹

15 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 7.

16 Australian Commission for Law Enforcement Integrity, *Submission no. 13*, p. 5.

17 Australian Federal Police, *Submission no. 38*, p. 9.

18 Australian Federal Police, *Submission no. 38*, p. 11.

19 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 50.

- 9.21 The Secretary to the Department of Immigration and Citizenship considered that legislation or 'hard law' can drive values and behaviour or what he calls 'soft law'. For example, legislative obligations for agencies to report on the use of public interest disclosure provisions would strengthen perceptions about the importance of the system:

If departments were obliged to report about those arrangements to some external body, there would be some ability for confidence that each of the numerous agencies has proper arrangements in place. That, to me, would seem to be a substantial embedding of this as a key cultural issue, the so-called 'soft law': 'This is the way we do things around here. You never cover up.' You do raise issues and you are supported when you raise issues as opposed to a perception of the opposite.²⁰

The role of support services

- 9.22 Research undertaken by the WWTW study showed that systems for supporting whistleblowers were not well established:

... about 1.3 per cent of all public interest whistleblowers in our agencies had received organised internal witness support of some kind, but that was actually 6.5 per cent of all those public interest whistleblowers who said they had been treated badly ...²¹

- 9.23 Professor Sampford pointed to the need to have a facility where potential whistleblowers could access confidential advice:

... the whole point is to engage them in advice like this: 'Here is your dilemma; I understand it. If you do this you are in the clear.'
... there can be genuine uncertainty in these matters and people of goodwill, even whistleblowers, might say 'Should I do it?' or 'Shouldn't I do it?' It is very valuable to have that advice, and very valuable then when they go along the process to know their rights and what things they have to be careful of – for example, 'If you are lying about these ... matters then do not expect protection.'²²

- 9.24 The Executive Director (Public Sector Practice) of the Office of Public Sector Standards Commission WA emphasised the importance of recognising the need for support of not only whistleblowers, but those against whom allegations have been made:

20 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 7.

21 Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 16.

22 Professor Sampford, *Transcript of Evidence*, 28 October 2008, p. 7.

There is quite an array of things in there that require sensitive management. Behind all of that is appropriate support for the person who is making the disclosure and appropriate support for the person or group of people that the disclosure is being made against, as well as the whole workplace itself. So they are complex matters in terms of trying to tease out what the best systems are that support the ultimate goal of ensuring that there is a culture within an organisation that says 'If in doubt, report,' because reporting any suspected wrongdoing is the best way of getting things out in the open and dealt with and improvements made.²³

9.25 Ms Deborah Ralston of the Queensland Council of Unions commented that, often, support for whistleblowers will be available under other legislation of more general application. She observed to the Committee that:

Perhaps how we view the legislation is that other assistance is provided in additional pieces of legislation which enable the whistleblower protection legislation to operate more robustly. So, in gauging its success, we also have to draw our attention to those other areas and say that, intrinsically, they all mould in together.²⁴

9.26 In the Commonwealth setting, s. 16(2)(d) of the *Occupational Health and Safety Act 1991* states that the employer must take all reasonably practicable steps to:

- develop, in consultation with any involved unions, a policy relating to health and safety that will:
 - ⇒ enable effective cooperation between the employer and the employees in promoting and developing measures to ensure the employees' health, safety and welfare at work; and
 - ⇒ provide adequate mechanisms for reviewing the effectiveness of the measures.

9.27 Some contributors to the inquiry called for greater support for whistleblowers including counselling through workplace schemes such as Employee Assistance Programs.²⁵ The implementation of Employee Assistance Programs is a response to the requirements of the *Occupational Health and Safety Act 1991*.

23 Ms Bird, *Transcript of Evidence*, 9 September 2008, p. 5.

24 Ms Ralston, *Transcript of Evidence*, 28 October 2008, p. 26.

25 Australian Lawyers for Human Rights, *Submission no. 9*, p. 7; Mr Ellis, *Submission no. 33*, p. 4.

- 9.28 Other support mechanisms through family, friends, unions and organisations such as Whistleblowers Australia provide valuable forms of assistance and advice.

Relationships with existing laws

- 9.29 The Committee was asked to consider the relationship between the Committee's preferred model of public interest disclosure legislation and existing Commonwealth laws. Appendix E provides an overview of some of the specific legislation that may have some bearing on the provisions proposed by the Committee. Some of the more notable legislative relationships are discussed below.
- Existing whistleblower protection provisions for public servants under s. 16 of the *Public Service Act 1999* and for parliamentary officers under s. 16 of the *Parliamentary Service Act 1999* are to be repealed.
 - The legislation should note that its provisions have no effect on the immunity of proceedings in Parliament under s. 49 of the Constitution and the *Parliamentary Privileges Act 1987*.
 - The offence for the unauthorised disclosure of information by Commonwealth officers under s. 70 *Crimes Act 1914* is unaffected. The Australian Law Reform Commission is currently undertaking a review of secrecy provisions and any possible changes to this provision will be handled through that process.
 - There is no effect on current freedom of information laws. The Government has announced that there will be reform of the *Freedom of Information Act 1982*.
 - Protection under new public interest disclosure legislation will be available when the disclosure meets the threshold test set out in this Report. To ensure that public interest disclosure legislation adds to, and does not detract from, existing complaint, investigative and oversight arrangements, the following general principles on the relationship between public interest disclosure legislation and other Acts should apply:
 - Where there are powers under another Act to investigate or deal with a matter reported as a public interest disclosure, the matter should be dealt with using those powers notwithstanding that the disclosure may not have been expressly made under that Act.
 - Where there are powers or requirements to take action under another Act in relation to the investigation of any matter

contained in a public interest disclosure, the provisions of the public interest disclosure legislation are to be taken as also applying to the investigation of the disclosure unless there is an inconsistency, in which case the provisions of the other Act will prevail.

- Where it is decided not to investigate, or discontinue the investigation of a matter under public interest disclosure legislation, nothing in the public interest disclosure legislation prevents an investigation of the same matter under any other Act.²⁶

View of the Committee

9.30 Australian legislation on protection for disclosures concerning misconduct within the private sector appears piecemeal. In view of the concerns raised on the issue during the course of this inquiry, the Committee considers that protections for the disclosure of wrongdoing within the private sector could usefully be reviewed in the future.

9.31 The Committee accepts that existing workplace culture, in addition to the lack of protection currently available, is a major disincentive for people to speak out about suspected wrong doing. The development of a culture that is more accepting and responsive to people who raise concerns will be an important factor in the success of new public interest disclosure legislation.

9.32 Ideally, people should feel free to raise their concerns through both informal and formal channels, about a range of matters regardless of their ability to substantiate an issue. It should be considered part of normal business activity to speak up when in doubt. As discussed in Chapter 7, appropriate support mechanisms should be available to whistleblowers.

9.33 Some of the recommendations made by the Committee are made with the intention to help drive cultural change from the top down by, for example, imposing an obligation on agencies to ensure disclosures are investigated in accordance with the legislation and notify those who make disclosures of the outcome and the reasons for any decisions taken.

9.34 However, driving cultural change from the top down is only part of the challenge. Public sector leaders need to model the values of transparency and accountability and initiate a dialogue with staff about the importance of open communication within organisations.

26 See clause 16. Public Interest Disclosure Bill 2007.

- 9.35 It is intended that part of the extended role of the Commonwealth Ombudsman will be to conduct education and awareness raising activities in the sector and establish confidential and anonymous avenues for people to seek advice or make a disclosure.

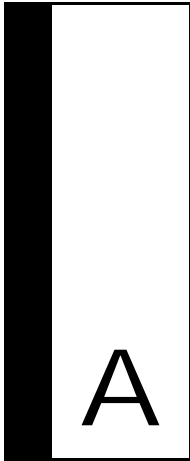
Conclusions

- 9.36 The Committee has made recommendations on what it considers to be priorities for model provisions for public interest disclosure legislation for the Australian Government public sector. The overarching purpose of the legislation is to promote accountability and integrity in public administration. The recommendations are guided by the following principles:
- it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
 - people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
 - people have a responsibility to raise those concerns in good faith;
 - governments have a right to consider policy in private; and
 - government and the public sector have a responsibility to be receptive to concerns which are raised.
- 9.37 Evidence to the inquiry from integrity bodies, whistleblowers, academics and other public sector agencies indicates that Commonwealth public interest disclosure legislation should address four main features: comprehensive coverage; clear guidance for participants; flexibility; and workplace culture issues.
- 9.38 The recommendations in this report provide for a comprehensive public interest disclosure system that includes not only current Australian Public Service employees, but current and former members of the broader public service including agencies under the *Commonwealth Authorities and Companies Act 1997*, contractors, consultants and the employees, persons overseas and Parliamentary staff. The scope of statutory protection available has been expanded to include protection against detrimental action, immunity from criminal liability and from liability for civil penalties, and immunity from civil actions such as defamation and breach of confidence.

- 9.39 Clear guidance for participants in public interest disclosures is provided for in recommendations that, in plain language, describe the range of matters that can attract protection and the circumstances in which protection would still apply where a disclosure is reported publicly or to third parties.
- 9.40 The recommendations outline a public interest disclosure system that is appropriately flexible by providing discretion for decision makers in accepting a disclosure where procedures are not strictly adhered to, prescribing more than one pathway for making a disclosure, enabling the range of disclosable conduct to be reported to a variety of authorised external recipients without penalty, and establishing processes for finalising disclosures
- 9.41 Finally, the report recognises the limits of legislation in achieving the desired outcome of accountability and integrity in public administration. Some of the recommendations note where procedures and obligations can assist in shaping organisational culture. The report acknowledges the role of policy, the administration and leadership within the public sector to facilitate and support those who speak out and ensure appropriate action is taken on disclosures. This requires fostering a culture of disclosure where people feel comfortable to speak out about their doubts.

Mark Dreyfus QC MP

February 2009.



Appendix A: List of submissions

- | | |
|----|--|
| 1 | Mr Nathan Rogers |
| 2 | Mr Leon Arundell |
| 3 | Inspector-General of Intelligence and Security |
| 4 | Dr Thomas Faunce |
| 5 | CONFIDENTIAL |
| | Attachment A |
| 5a | Name Withheld |
| 5b | Name Withheld |
| 5c | Name Withheld |
| 6 | CONFIDENTIAL |
| 7 | Mr Andrew Murray |
| 8 | Community and Public Sector Union |
| 8a | Community and Public Sector Union |
| | SUPPLEMENTARY (to Submission No. 8) |

- 9 Australian Lawyers for Human Rights
- 9a Australian Lawyers for Human Rights
SUPPLEMENTARY (to Submission No. 9)
- 10 Australian Services Union

Attachment A

Attachment B
- 11 United Church in Australia - Synod of Victoria and
Tasmania
- 12 Mr Kevin Lindeberg
- 13 Australian Commission for Law Enforcement Integrity
- 13a Australian Commission for Law Enforcement Integrity
- 14 Attorney-General's Department

Attachment A

Attachment B
- 15 Post Office Association Limited
- 16 Standards Australia

Attachment A
- 17 New South Wales Council for Civil Liberties
- 17a New South Wales Council for Civil Liberties
SUPPLEMENTARY (to Submission No. 17)
- 18 Dr Peter Bowden
- 19 Department of the Prime Minister and Cabinet

-
- 20 Australian Institute of Professional Investigators
- 21 Australian Press Council
- 22 Transparency International Australia
- 23 Professor Ronald Francis
Attachment A
- 23a Professor Ronald Francis
SUPPLEMENTARY (to Submission No. 23)
- 24 Australian Taxation Office
Attachment A
- 25 STOPline Pty Ltd
Attachment A
Attachment B
- 26 Whistleblowers Australia
- 26a Whistleblowers Australia
SUPPLEMENTARY (to Submission No. 26)
- 27 CONFIDENTIAL
- 28 Mrs Dawn Phillips
Attachment A
- 29 Dr Jann Karp
- 30 Media, Entertainment and the Arts Alliance
- 31 The Commonwealth Ombudsman
- 32 Ms Merrilyn Bulder

- 33 Mr Peter Ellis
- 34 Australia's Right to Know
- 35 Law Institute of Victoria
- 36 Queensland Council of Unions
- 37 Office of National Assessments
- 38 Australian Federal Police
- 39 Office of the Public Sector Standards Commissioner
- 40 Mr John Wilson
- 41 Victorian Department of Justice
- 42 Mr Peter Smythe
- 43 Mr Keith Potter
- Attachment A
- 43a Mr Keith Potter
- SUPPLEMENTARY (to Submission No. 43)
- Attachment A
- Attachment B
- 44 Australian Public Service Commission
- 44a Australian Public Service Commission
- SUPPLEMENTARY (to Submission No. 44)
- 45 Mr Greg McMahon
- Attachment A
- 45a Mr Greg McMahon

	SUPPLEMENTARY (to Submission No. 45)
46	Name Withheld
46a	CONFIDENTIAL
47	Queensland Public Service Commission
48	Department of Defence
49	Australian Nursing Federation
50	Dr Andrew Stewart
51	Ms Melissa Parke MP
52	CONFIDENTIAL
53	CONFIDENTIAL
54	Mr Ivon Hardham
55	Mr Andrew Podger
56	Dr Kathy Ahern
57	Dr Kim Sawyer
57a	Dr Kim Sawyer
	SUPPLEMENTARY (to Submission No. 57)
	Attachment A
58	Anonymous
59	Mr Neil Winzer
59a	Mr Neil Winzer
	SUPPLEMENTARY (to Submission No. 59)
59b	Mr Neil Winzer

SUPPLEMENTARY (to Submission No. 59)

59c

Mr Neil Winzer

SUPPLEMENTARY (to Submission No. 59)

60

CONFIDENTIAL

61

Department of Immigration and Citizenship

62

Mr E M Fowler

63

National Tertiary Education Industry Union

Attachment A

Attachment B

64

Australian Council of Trade Unions

65

Ms Cynthia Kardell

66

Department of Education, Employment and Workplace
Relations

67

Clerk of the Senate

68

Dr A.J Brown

69

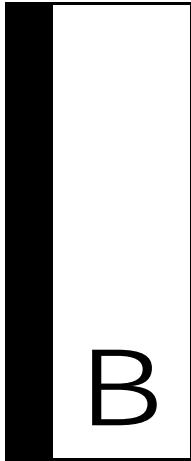
Workplace Ombudsman

70

Acting Clerk of the House of Representatives

71

Commonwealth Scientific and Industrial Research
Organisation



Appendix B: List of witnesses

Thursday, 21 August 2008 - Melbourne

Individuals

Mr Peter Bartlett

Professor Ronald Francis

Australian Institute of Professional Investigators

Mr Dean Newlan, President

Australian Services Union Taxation Officers Branch

Mr Jeff Lavidos, Secretary, Taxation Officers' Branch

Mr Richard McPhee, Industrial Officer

CSIRO Staff Association

Dr Michael Borgas, President

Mr Sam Popovski, Research Officer

Post Office Agents Association Limited

Mr Ian Kerr, Chief Executive Officer

Transparency International Australia

Mr Grahame Leonard AM, Director

Uniting Church in Australia - Synod of Victoria and Tasmania

Mr Anthony McMullen, Social Justice Officer

Dr Mark Zirnsak, Director, Justice and International Mission Unit

Thursday, 28 August 2008 - Canberra

Community and Public Sector Union

Ms Melissa Donnelly, Senior Legal Officer

Mr Stephen Jones, National Secretary

Ms Alison Rahill, Parliamentary Liaison Officer

Thursday, 4 September 2008 - Canberra

Office of the Commonwealth Ombudsman

Mr Ron Brent, Deputy Ombudsman

Professor John McMillan, Commonwealth Ombudsman

Tuesday, 9 September 2008 - Canberra

Individuals

Professor Paul Latimer

Australian Broadcasting Corporation

Mr Paul Chadwick, Director Editorial Policies

Charles Stuart University

Mr Peter Roberts, Senior Lecturer

Community and Public Sector Union

Mr Stephen Jones, National Secretary

Crime and Misconduct Commission, Queensland

Mr Robert Needham, Chairperson

Fairfax Media Limited

Ms Gail Hambly, Group General Counsel & Company Secretary

New South Wales Ombudsman's Office

Mr Christopher Wheeler, Deputy Ombudsman

News Limited

Ms Creina Chapman, Manager, Corporate Affairs

Office of Public Sector Standards Commissioner, Western Australia

Ms Penny Bird, Executive Director, Public Sector Practice

Office of the Commonwealth Ombudsman

Professor John McMillan, Commonwealth Ombudsman

Whistleblowers Australia

Mr Peter Bennett, National President

Whistle While They Work Team

Dr AJ Brown, Project Leader

Professor Richard Wortley, Member

Thursday, 18 September 2008 - Canberra**Australian National University**

Dr Thomas Faunce, Associate Professor, College of Medicine and Health Sciences and College of Law

Thursday, 25 September 2008 - Canberra**Australian Public Service Commission**

Ms Lynelle Briggs, Australian Public Service Commissioner

Ms Annwyn Godwin, Merit Protection Commissioner

Ms Lynne Tacy, Deputy Public Service Commissioner

Thursday, 16 October 2008 - Canberra

Australian Lawyers for Human Rights

Miss Jessica Casben, Co-convenor, ACT Branch, National Committee Member

Ms Rebecca Minty, Co-convenor, ACT Branch, National Committee Member

Dr Susan Harris Rimmer, President

Inspector-General of Intelligence and Security

Mr Ian Carnell, Inspector-General

Office of National Assessments

Mr Peter Varghese, Director General

Thursday, 23 October 2008 - Canberra

Australian Commission for Law Enforcement Integrity

Mr Peter Bache, Executive Director

Mr Philip Moss, Integrity Commissioner

Mr Nicholas Sellars, Manager, Policy and Research

Australian Federal Police

Mr Tony Negus, Deputy Commissioner, Operations

Commander Mark Walters, Manager, Professional Standards

Mr Peter Whowell, Manager, AFP Legislation Program

Monday, 27 October 2008 - Sydney

Individuals

Dr Peter Bowden

Ms Cynthia Kardell

Dr Jean Lennane

Dr Kim Sawyer

**Australian Centre for Independent Journalism - University of Technology,
Sydney**

Mr Anthony Maniaty, Director

Australian Press Council

Mr Jack Herman, Executive Secretary

Professor Kenneth McKinnon, Chairman

Independent Commission Against Corruption, New South Wales

Ms Theresa Hamilton, Deputy Commissioner

Journalism & Media Research Centre - University of New South Wales

Associate Professor David McKnight, Senior Research Fellow

Media, Entertainment and the Arts Alliance

Mr Jonathan Este, Director, Communications

Mr Christopher Warren, Federal Secretary

New South Wales Council for Civil Liberties

Dr Martin Bibby, Convenor, Civil and Indigenous Rights
Subcommittee

Dr Lesley Lynch, Assistant Secretary

News Limited

Ms Creina Chapman, Manager, Corporate Affairs

Police Integrity Commission, New South Wales

Mr Allan Kearney, Director, Prevention & Information

Mr John Pritchard, Commissioner

Standards Australia

Mr William Dee, Committee Member

Mr James Thomson, Relationship Manager

Whistleblowers Australia

Mr Peter Bennett, National President

Tuesday, 28 October 2008 - Brisbane

Individuals

Dr Kathy Ahern

Australian Nursing Federation

Mr Steven Ross, Industrial Officer, Queensland Nurses Union

Institute for Ethics, Governance and Law

Professor Charles Sampford, Director

Queensland Council of Unions

Ms Deborah Ralston, Industrial Officer

Whistle While They Work Team

Dr Geoffrey Airo-Farulla, Member

Dr AJ Brown, Project Leader

Professor Richard Johnstone, Member

Mr Peter Roberts, Member

Professor Richard Wortley, Member

Thursday, 27 November 2008 - Canberra

Attorney-General's Department

Mr Geoff McDonald, First Assistant Secretary, Security and Critical Infrastructure Division,

Mr Roger Wilkins AO, Secretary

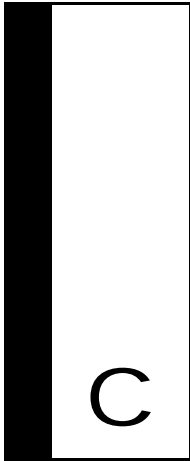
Department of Immigration and Citizenship

Mr Andrew Metcalfe, Secretary

Department of the Prime Minister and Cabinet

Ms Barbara Belcher, First Assistant Secretary, Government Division

Mr Mike Mrdak, Deputy Secretary



Appendix C: Exhibits

- 1 Post Office Agents Association Limited
Whistleblower Policy for Licensees and Agents
(Related to Submission No. 15)

- 2 United Church in Australia - Synod of Victoria and Tasmania
From Corruption to Good Governance
(Related to Submission No. 11)

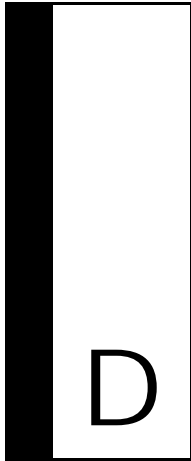
- 3 The Commonwealth Ombudsman
Information relating to 'administrative deficiency'
(Related to Submission No. 31)

- 4 Post Office Agents Association Limited
Code of Ethics
(Related to Submission No. 15)

- 5 Dr Thomas Faunce
Invited Commentary: The whistleblower act (qui tam)
(Related to Submission No. 4)

- 6 Dr Thomas Faunce
States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts
(Related to Submission No. 4)
- 7 Dr Thomas Faunce
Whistleblower-Initiated Enforcement Actions against Health Care Fraud and Abuse in the United States 1996-2005
(Related to Submission No. 4)
- 8 CONFIDENTIAL
- 9 CONFIDENTIAL
- 10 CONFIDENTIAL
- 11 Mr Tony Grosser
Various Correspondence and Excerpts from "The Whistle" Issue 47, July 2006
- 12 Dr John Wright
Putting a surgeon under: a personal story of hospital politics
- 13 Dr AJ Brown
Whistleblowing in the Australian Public Sector
(Related to Submission No. 68)

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- 14 Department of the Prime Minister and Cabinet
Protection for Whistleblowers - Personnel Guide 1.3 - November 2001
(Related to Submission No. 19)
- 15 Attorney-General's Department
Employee Relations Advice - Whistleblowing - No. 21/2008
(Related to Submission No. 14)
- 16 Department of Immigration and Citizenship
Whistleblower Policy and Procedures
(Related to Submission No. 61)
- 17 Whistleblowers Australia
The Whistle (No 56. October 2008)
(Related to Submission No. 26)



Appendix D: The Fair Work Bill 2008

This Appendix provides a synopsis of the workplace protective provisions contained in recently introduced workplace legislation, the Fair Work Bill 2008.

Protection

The Fair Work Bill sets out a range of workplace protections for fairness and representation at the workplace, a right to freedom of association and provisions related to preventing discrimination and other unfair treatment.

Chapter 3 of the Bill sets out rights and responsibilities of employees, employers, organisations. The Bill creates workplace rights (cl. 341) and defines adverse treatment (cl. 342) (see the extract below). A range of other safeguards in the workplace include protection (cl. 340) and prohibitions on coercion and undue influence (cl. 343, 344).

The definition of adverse action limits the action that will give rise to liability in relation to workplace rights to specified action taken by specified persons against other specified persons. What is adverse action in any particular case depends on the nature of the relationship between the relevant persons.

The scope of the conduct captured by the concept of adverse action is based on conduct that is prohibited by the freedom of association, unlawful termination and other provisions in the *Workplace Relations Act 1996* that have been incorporated into the protections.

An important concept in the public interest disclosure legislation proposed in this report is that making a public interest disclosure be a workplace right. As

well, the provision in the public interest disclosure legislation that creates the right would be a workplace law for the purposes of the Fair Work Bill.

Extract from Clause 342 of the Fair Work Bill 2008

342 Meaning of *adverse action*

(1) The following table sets out circumstances in which a person takes *adverse action* against another person.

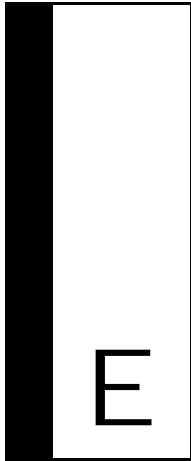
Meaning of <i>adverse action</i>		
Item	Column 1	Column 2
	<i>Adverse action</i> is taken by ...	if ...
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the <i>principal</i>) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make

Source Fair Work Bill 2008, Clause 342

Regulation

The Bill establishes a statutory authority, the Fair Work Authority, with powers including dealing with unfair dismissal claims and settling workplace disputes.

The position of Fair Work Ombudsman (FWO) has the roles of promoting harmonious and cooperative workplace relations and compliance with the law through education, assistance and advice and, where necessary, undertaking enforcement activities, such as investigation, issuing compliance notices and initiating court proceedings. The FWO is to visit workplaces to offer assistance and resolve issues quickly and informally. The FWO replaces the Workplace Ombudsman, a statutory agency responsible for promoting and monitoring compliance with, and investigating suspected contraventions of, federal workplace relations laws, awards and agreements.



Appendix E: Relationships with existing Commonwealth legislation

The recommendations contained in this report have little effect on existing legislation. The Committee recognises that there are many existing mechanisms through various agencies and statutory office-holders whereby people in the public sector can raise concerns. Public interest disclosure legislation should add to, and not detract from, existing complaint, investigative and oversight arrangements.

The principal impact of legislation that flows from this inquiry will be twofold. The legislation will place obligations on government agencies to take action on public interest matters of concern to people in the public sector and it will provide protective measures where, previously, there were none.

The provisions of the public interest disclosure legislation, in particular the protective measures, are to be taken as also applying to the investigation of a matter that, while meeting the threshold test of a public interest disclosure, is investigated using powers under another Act.

Impact on other Commonwealth legislation

Legislation	Impact
<i>Inspector-General of Intelligence and Security Act 1986</i>	The Inspector-General requested that whatever protections are made available under public interest disclosure legislation also be made available under the Inspector-General of Intelligence and Security Act (Mr Carnell, <i>Transcript of Evidence</i> , 16 October 2008, p. 4.)
<i>Parliamentary Service Act 1999</i>	Repeal s. 16 of the Parliamentary Service Act required as protections will be provided in new legislation.
<i>Public Service Act 1999</i>	Repeal s. 16 of the Public Service Act required as protections will be provided in new legislation.
<p>Acts generally, including for example:</p> <p><i>Administrative Appeals Tribunal Act 1975</i></p> <p><i>Aged Care Act 1997</i></p> <p><i>Auditor-General Act 1997</i></p> <p><i>Australian Federal Police Act 1979</i></p> <p><i>Australian Security Intelligence Organisation Act 1979</i></p> <p><i>Complaints (Australian Federal Police) Act</i></p>	<p>Where there are powers under another Act to investigate or deal with a matter reported as a public interest disclosure, the matter should be dealt with using those powers notwithstanding that the disclosure may not have been expressly made under that Act.</p> <p>Where there are powers or requirements to take action under another Act in relation to the investigation of any matter contained in a public interest disclosure, the provisions of the public interest disclosure legislation are to be taken as also applying to the investigation of the disclosure unless there is an inconsistency, in which case the provisions of the other Act will prevail.</p> <p>Where it is decided not to investigate, or discontinue the investigation of a matter under public interest disclosure legislation, nothing in the public interest disclosure legislation prevents an investigation of the same matter under any other Act.</p>

1981

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Crimes Act 1914

Criminal Code Act 1995

Defamation Act 2005 (NSW)

Defamation Act 2005 (Qld)

Defamation Act 2005 (SA)

Defamation Act 2005 (Tas)

Defamation Act 2005 (Vic)

Defamation Act 2005 (WA)

Defamation Act 2006 (NT)

Civil Law (Wrongs) Act 2002 (ACT)

Defence Act 1903

Fair Work Act (when enacted)

Financial Management and Accountability Act 1997

Freedom of Information Act 1982

<p><i>Human Rights and Equal Opportunity Commission Act 1986</i></p> <p><i>Inspector of Transport Security Act 2006</i></p> <p><i>Inspector of Transport Security Act 2006</i></p> <p><i>Inspector-General of Taxation Act 2003</i></p> <p><i>Intelligence Services Act 2001</i></p> <p><i>Law Enforcement Integrity Commissioner Act 2006</i></p> <p><i>Members of Parliament (Staff) Act 1984</i></p> <p><i>Occupational Health and Safety Act 1991</i></p> <p><i>Ombudsman Act 1976</i></p> <p><i>Parliamentary Privileges Act 1987</i></p> <p><i>Privacy Act 1988</i></p> <p><i>Workplace Relations Act 1996</i></p>	
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