
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

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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.

