House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

5th August 2008

Submission for the Inquiry into whistleblowing protections within the Australian Government public sector

I understand the Committee will be looking at a *"preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector"* and I have read and understand the terms of reference for the Committee.

For this reason, I'd like to start by making the comment that legislation in itself ie. the making of an *"act"* or the *"failure to perform act"* unlawful and providing only for compensation to victims is not a *"protection"* in the sense that the provision of compensation to a victimised whistleblowers is not necessarily a deterrent insofar as ensuring that victimisation or retaliation will not take place in the first instance. Compensation does not come from the pockets of the perpetrators so if they personally incur no liability and/or if no sanction or penalty is imposed against them, there is no deterrent for them to continue victimising whistleblowers.

For there to be a reasonable level of *"protection"* built into any legislation, I hold a strong view that a deterrent must also be included in the legislation (such as penalties or sanctions against perpetrators) and that must be *seriously enforced.* As there is no *enforcement* of a number of other employment related legislation that currently exists, there are cynics among us who would still have doubts that legislation in itself will remain nothing but rhetoric and window-dressing.

Nonetheless, while I still support the introduction of such legislation to protect whistleblowers, providing penalties and sanctions are included and enforced, I ask the Committee to note that one of the reasons some State legislation purporting to provide protection to whistleblowers has not worked is that while it states that victimising, retaliating against and subjecting the whistleblower to injury or detriment is unlawful, there are no penalties or sanctions imposed on those who do so. *Motherhood statements and rhetoric* built into legislation (without the inclusion of penalties to those who do not comply and an assurance that they will be strictly enforced), are simply not enough and have never worked. Without penalties being included in the legislation itself, whistleblower protection legislation would be just as impotent as the *Privacy Act* is in its current form.

"Protection" implies a level of assurance or a guarantee that the whistleblower will not be victimised if they report wrong-doing, the provision of compensation on it's own, is not sufficient to encourage whistleblowers because most would rather not have their health damaged, be caused

detriment, have sanctions imposed against them and then spend years of their life caught up in legal processes to obtain compensation. To be compensated for losses, even if they were compensated for all of them, is not a *benefit* and the years of their life spend trying to obtain justice, remedy or compensation is no picnic. Not that whistleblowers set out seeking any *benefit* but compensation after years of struggle is not enough incentive to encourage whistleblowers to report significant and serious wrong-doing. Potential whistleblowers would have to have complete confidence in the system in order to take that risk and an assurance or guarantee such that in the event they are caused *any detriment whatsoever* that action will be taken quickly against senior public sector managers responsible and remedy immediately provided to the whistleblower as soon as possible, otherwise the same problems that currently exist will continue.

While it is obviously fair and reasonable to compensate a victimised whistleblower for all losses, disadvantage or damage (tangible or intangible) and the nature of these may vary on a case-by case basis, a deterrent against victimisation in the first instance, which provides the strongest form of *"protection",* cannot be achieved without penalties or sanctions also being included for breaches and an assurance that they will be strictly enforced. There are so many existing laws relevant to human resources management that are not complied with by Agencies (as my own case via the *Attachment* to this submission would demonstrate), that it would be reasonable to understand why victimised whistleblower become so cynical after having done the rounds of existing so-called external authorities that effectively do nothing and are loathe to challenge the hierarchy in Government Agencies or even the Public Service or Merit Protection Commission on such matters and usually don't from the cases I've heard of over the years since becoming a whistleblower myself.

The bureaucratic hierarchy have personally have nothing to lose by doing so and can also evade further scrutiny of their action by the Public Service Commissioner if they *terminate the employment* of that whistleblower because once they do so, the Public Service Commissioner then has no further legal obligation to investigate alleged misconduct on the part of the Agency Head involved or any of his/her delegates or any outstanding issues nor assist the then (former) APS employee even in instances where defective administration can be demonstrated. The AAT, AIRC and Federal Courts cannot impose sanctions against senior public sector manager who may have acted unlawfully in any event, so terminating the employment of a whistleblower eventually becomes an attractive option for them, for that reason. The issues are then buried in their legal representatives or insurers files, out of sight and out of mind.

The cases that are the most likely to result in victimisation and/or retaliation are of course those cases in which the issues raised are significant and serious because that in turn is perceived by the bureaucratic hierarchy as a personal risk to them. The same people are ultimately personally *responsible and accountable* for the issues raised by that whistleblower and also as they also control all internal employment-related decisions and actions, the scope for abuses and victimisation is considerable. Of course that may also be likely to depend on the personal ethics and integrity of key decision-makers or the *"culture"* of the Agency.

As all employment related decisions have been made the responsibility of Agency Heads, who in turn are *unlikely* to readily acknowledge areas of defective administration within their Agency because that in turn may reflect adversely on their own performance and competence and their *"reputation"* and worse still, may put them at risk of actually being held to account for such matters, internal processes are often inadequate for whistleblowers where the issues they raise are significant and serious.

The only external authority who can consider or review *employment related decisions* except in the case of termination of employment following cases of retaliation or victimisation against a whistleblower (as with all APS employees) is currently the Merit Protection Commission and issues of misconduct of an Agency Head can only be referred to the Public Service Commissioner. In my own case and in the case of others I am aware of, they are unlikely to make a finding against senior public sector managers or an Agency Head, because do so may in itself

"reflect badly on the reputation of that APS Agency", even if true. I support than and demonstrate it via information available in the Attachment I provided to this submission.

I would also ask the Committee to consider the need to tweak some existing laws, regulations and codes to ensure that those areas where public sector managers have managed to obtain some leverage to victimise or retaliate against APS whistleblowers (condoned by the Merit Protection Commission and Public Service Commission) are either removed or at the very least made more specific including in any areas where exemptions should be applied eg. in the case of whistleblowers.

For example, at the moment there are some elements of the APS Code of Conduct that may be in conflict with one another under circumstances are less than ideal, noting such circumstances may very well give rise to whistleblower's reports in the first instance.

Issues with the Administration of the APS Code of Conduct by Agencies and by the Merit Protection Commission and Public Service Commission:

The APS 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

A breach of the *APS Code of Conduct* used against whistleblowers and one that is applied, interpreted and administered in such a way that it is assumed to *over-ride any other obligation* under the Code, is the following:

- at all times behave in a way that upholds the APS Values and the integrity **and good reputation** of the APS [Emphasis added];

That is currently the case both where the administration of the Code of Conduct within the Agencies themselves as well as any *review of actions* by the Merit Protection Commission or the Public Service Commission. It has been a long-held view the review processes currently in place do nothing but *rubber-stamp* any action taken against any whistleblower by an Agency Head or his/her delegates. To do otherwise may reflect badly on the *"reputation"* on that Agency, the

Agency Head and his/her delegates, hence the Merit Protection Commission and the Public Service Commission are inadequate in terms of ensuring remedy is provided to whistleblowers or the risk of injury and detriment caused to them is minimised and mitigated to the greatest extent possible.

It is the inclusion of the words *"good reputation"* that becomes troublesome. Whistleblowers are generally people who are loyal to the *"integrity"* of the Agency and not necessarily the people in it (regardless of rank), if they know them to have acted dishonestly, unethically or even unlawfully or if have *failed to act* where there may be a *duty to act.* The relevant senior public sector managers, on the other hand, see their own reputation and that of the Agencies as one and the same. So irrespective as to whether the issues relate to 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, these issues all have the potential to *reflect badly on the* ***reputation*** *of the APS (ie. the Agency as well as on the bureaucratic hierarchy within that Agency or their delegates)".*

The issues raised will generally either directly or indirectly involve an area of *responsibility and accountability* for one or more senior public sector manager. While *responsibility and accountability* may come with their salary packages, it is nonetheless, something that they avoid like the plague. That is the case whether it be accountability to the government, the parliament or the public or even via the AAT, AIRC or the Federal Courts.

For example it is not a breach of the APS Code of Conduct for senior public sector managers to mislead the Senate (even though it may be a breach of Senate rules and related legislation). If for example, an APS employee had evidence to prove this had taken place and was to provide that evidence to the Public Service Commissioner, she would dismiss the complaint as vexatious and frivolous and see no wrong-going under the Public Service Act or the APS Code for Conduct on the part of the senior public sector managers involved. You see despite the fact that according to the APS Code of Conduct, they must *"when acting in the course of APS employment, comply with all applicable Australian laws",* the Public Service Commission has no role in ensuring that they do nor in considering sanctions against those who do not. Nor do they require them to correct or retract statements that they may have made to the Senate that may be in any way misleading or provide additional information to ensure that errors are corrected. Public sector managers obligations to be truthful in the Senate can only be enforced by the Senate. Similarly, this applies to all legislation except the *Public Service Act* and the inclusion of a reference to the effect that APS employees (including senior managers or an Agency Head), must comply with *"all applicable Australian laws",* is not enforced by the Public Service Commission because they have no role in conducting investigations into or making any determination on matters involving *other legislation* even if applicable to the actions of a senior public sector manager in the course of their employment.

Presumably this is because if those senior managers had told the truth, doing so may have the effect of reflecting adversely on *"the* ***reputation*** *of the APS (ie. Agency or the bureaucratic hierarchy of that Agency or their delegates)",* therefore misleading, withholding information or omitting relevant information is therefore an acceptable practice under the APS Code of Conduct, if done for that reason so only information that is either neutral or favourable to the Agency can be disclosed. Hence their actions, in the event they have not being entirely honest or even have been dishonest, unethical or may have unlawfully, are not considered a breach of the APS Code of Conduct as long as doing so had no adverse effect on the *"reputation of the APS (ie. the Agency or the bureaucrats in the hierarchy of that Agency or their delegates)"*

I ask the Committee to please note that this element of the APS Code of Conduct therefore has the effect of over-riding any other obligations under the same Code and including the need to *comply with all applicable Australian laws.*

Senior public sector managers have a privilege against self-incrimination and no documents that supports a whistleblower's case may be released to any persons outside that Agency (not even to the Ministers or the Prime Minister apparently), without the express consent of the responsible and accountable Agency Head and not even in situations where the APS whistleblower has had their internal reports (verbal or written) ignored and may have been victimised and cause some detriment. Under such circumstances, the whistleblower may seek alternative avenues and especially where they have good reason to believe, the issues they have raised will continue to be ignored and may further compound. Allegations without supporting documentation can be easily dismissed as nonsense hence they strictly enforce issues relating to the release of supporting documentation outside the Agency. This can also prove to be problematic in ensuring the issues raised are effectively and adequately addressed, particularly when the whistleblower may need to explore external avenues.

The way the APS Code of Conduct is administered, the *interpretation placed on* the words such as *honesty, ethics and integrity* suggests the obligation to be *honest and ethical* and *act with integrity* is capped at the point at which information, even if truthful, may *"reflect badly on the reputation of the APS".* Hence no action is ever taken against public sector managers for withholding information in the event that doing so may be seen to done for the purpose of protect the *"reputation"* of the Agency. The withholding of such information is considered to be a virtue and valued skill, including by the Public Service Commissioner who would not make a finding that suppressing information or documents, under such circumstances, constituted a breach of the APS Code of Conduct.

Integrity and ethics, just like honesty has its limits in application apparently and it all revolves around whether the *reputation of the Agency and the responsible and accountable bureaucratic hierarchy,* is at stake or may be perceived by them as being at threat.

I ask the Committee to consider the need to remove the word *"reputation"* from the APS Code of Conduct and Public Service Act as outlined above and for the abovementioned reasons. It so easily conflicts with all other obligations under the Code of Conduct and is used, interpreted and administered in such a way to presume to *over-ride* any other obligations under the Code or even under laws in some cases. While neither the AAT nor the Federal Courts are likely to see the *"reputation of the APS (ie. Agency)"* as an *over-riding* consideration and certainly not one that *over-rides* other lawful obligations on the part of the Agency and they will consider a case in the context of all the circumstances of the case, all relevant legislation and/or use a *"reasonable person"* test in order to review a decision and make a fair determination or judgment, however, by that stage damage has already been done to an APS whistleblower by that Agency (often condoned and has in some cases even been facilitated by the Merit Protection Commission and the Public Service Commission).

Current arrangements for compensation, remedy or damages for APS employee and whistleblowers are limited. Re-instatement after termination of employment is unlikely in the even the *"employment relationship has broken down"* irrespective as to whether or not defective administration by the Agency is largely responsible. They simply would never *"trust"* that employee again after being *so honest and ethical* that they highlighted *defective administration* within the Agency which might have reflected badly on the "*reputation*" of that Agency and members of the bureaucratic hierarchy in that Agency, or their delegates.

I ask the Committee, how can the integrity of the Agency be maintained if issues such as those raised through whistleblowers reports which if serious enough will also inevitably, either directly or indirectly, have the potential to *reflect badly on the reputation of the APS, the Agency and the bureaucratic hierarchy* are suppressed, covered-up and ignored and the whistleblower ie. the person raising such issues, is caused a detriment or injury instead? How can the integrity of that Agency be maintained if withholding information or evidence and covering-up is considered a virtue and a highly valued skill rather than conduct which is frowned upon and penalised.

The Houdini-like ability to evade responsibility and accountability is becoming an *art-form* in some areas of the bureaucratic hierarchy. The Agency must give the *Impression* of being honest and ethical and give the *impression* that they comply with *all relevant legislation*. In the event that they do not do so, that is not as important to them as giving the *impression* that they do. It is *appearances* and *impressions* that can reflect on *"reputation"* so any information that is favourable to the Agency must be suppressed, even if true. The intrusion of reality is simply not welcome.

To ***challenge*** a senior manager may easily be interpreted by them as not *"treating them with respect and courtesy and without harassment"*. So once management have covered up or withheld information, the whistleblower may breach the APS Code of Conduct again if they persist and doing so may be interpreted as *"harassment"* and lack of *"courtesy and respect"*.

- when acting in the course of APS employment, treat everyone with respect and courtesy, and without harassment;

It is at the discretion of Agency Heads and their delegates as to what *spin* they choose to put on an employees actions and conduct how they apply and administer the Code. Even in the event the managers involved have been dishonest, unethical or perhaps have not complied with a particular law which they are bound to comply with, these matters can easily be removed from the scope of any investigation they authorise via the *"terms of reference"* for that investigation and a finding made such that the whistleblower ie. APS employee involved has not *"treated them with respect and courtesy and without harassment"*. Even threatening to take a manager to court for alleged breaches of law which have had the effect of causing the whistleblower an injury or detriment can be considered by the Agency to constitute *"harassment"*, so that employee may find that their employment is terminated before they get the matter to court.

My comments and input with respect to other aspects of the Terms of Reference for this Inquiry:

Reference Terms of Reference 1 (a) and (b) – people who could make protected disclosures

I agree with all the categories of people included and referenced in the TOR for this Inquiry and do not believe that there should be any exceptions. The committee may also consider including employees of external providers (noting that they are not all contractors and consultants necessarily).

Reference Terms of Reference 2 (a) and (b) – types of disclosures that should be protected:

I agree that a full range of types of disclosures should be included. Some disclosures can have implications in a number of different areas and may involve a combination of the types of the disclosures referred to.

With respect to *"grievances over internal staffing matters"*. I would like to raise with the Committee the possibility that what may appear to be a *"grievance"* about an internal staffing matter, may also involve a known and the potential escalation of maladministration involving considerable sums of public monies. For example, as in my case, I referred to the *"unfair treatment of an officer"* whom I believed was being relocated and had been unfairly treated at that time, due to the fact that he had sought to address issues within the Agency about maladministration of a large contract involving overpayment of considerable sums of money that could not be properly accounted for under that contract. That makes it a *"staffing grievance"* as well as questioning the reason and motivation behind the action taken as well as expressing concerns about resulting risks with regard to continuing maladministration. While it was treated as

a *"staffing grievance"* and dismissed, the issues relating to the maladministration of that contract and overpayments continued and compounded as a result and my concerns were not unfounded. In fact the same issues re-surfaced again 2-3 years later. Even at a later stage there was a concerted effort made by management to *"cover-up"* for that issue by other officers who then sought to once again address the issues. At that stage, of course, I felt more vulnerable to further victimisation as I was perceived as a potential threat noting I had reporting it years earlier and it was ignored then, hence problems escalated and compounded and later suppressed again, rather than adequately addressed at that time.

Reference Terms of Reference 4 (a), (b) and (c) – scope of statutory protections to be available:

Disclosure of personal and sensitive information:

I believed that protection and immunity from civil law suits against whistleblower should be provided as well as any issues that may have the potential to reflect adversely on senior, responsible and accountable public sector managers. It is only in full consideration of all matters relevant to the case, that they can be properly investigated and fully considered. Confidentiality in employment related matters, personal and sensitive information about various parties involved if they related to a whistleblowers disclosures and or their subsequent victimisation as well as immunity from suit for what may be perceived as breach of confidence, should be included in the suite of protections made available to whistleblowers.

In some cases, when reporting matters regarding maladministration and waste of public monies issues of *"conflict of interest"* may again arise and may involve a personal dimension. For example, while hearsay, and with respect to the issues outlined above, a senior Agency officer with financial delegations and a strong degree of control over both payments (ie. financial delegations) as well as the controls put into place to oversight financial management aspects of that contract with the Agency was said to be in a relationship with a senior member of staff employed in firm that happened to be the external provider under that same contract. As I believed that the information provided to me was very likely to be true (as it came from what I believe to be 2 reputable sources), should I have disclosed that information as well at the time of providing a 2nd report on the matter involving the maladministration of that contract and waste of public monies ie. not properly accounted for expenditure that resulted over the last several years of the management and administration of that contract. Such things as *"relationships"* can fairly easily be denied and would possibly have left me exposed to a defamation case by the Agency officer involved, hence I was reluctant to include that information, although relevant.

There is a also a considerable amount of *nepotism* involved in working relationships generally with Agencies, especially at higher levels of the hierarchical structure. Given that careers can be either made or broken, at the discretion of those at top levels, there is significant reluctance to become involved in anything that may possibly threaten that fragile working relationship and result in losses in terms of potential further career advancement or get those ambitious people *off-side* with any members of the hierarchy. Protection the hierarchy and those decision-makers, at all cost, is usually a career advancing move for those in the Agency who are ambitious and seek career advancement. *Closing ranks against the whistleblower* irrespective of the circumstance of a case and the validity and veracity of issues raised, is a common tactic in cases that are significant and serious. Perhaps they prefer to have it seen that their loyalty is to the person who holds that senior position, rather than to the integrity of the Agency itself.

Current options with respect to remedies:

Cases before the AAT, AIRC or the Federal Courts are not limited by the scope of a *"terms of reference"* set by an Agency (unlike internal investigations or those conducted by external investigators engaged by an Agency). Of course, by the time it gets to an AAT, AIRC or Federal

Court matter, the employee (whistleblower) has suffered significant damage, sanctions and most likely, the termination of their employment and has a lengthy legal battle ahead of them at cost to themselves, while the Agency has considerable sums of taxpayers money to use on legal fees.

If that employee has been prudent enough to ensure that they have sufficient evidence, then the Agency may not want to proceed to court because then it will a matter of public record and AAT, AIRC and Federal Court transcripts are made publicly available. However, the Agency and/or their insurer is likely to drag the case on for as long as possible and then settle during the course of mediation prior to court where both sides exchange documentation (often it may involve a considerable length of time in any event). Compensation or remedy is currently limited and often inadequate to compensate for *all losses or damage* caused to the employee, in any event. The cost to the Agency or their insurer is of no consequence to the responsible bureaucratic hierarchy or their delegates as it has no adverse effect on them personally and no penalties are imposed on them regardless of the outcome of a case. Hence access to compensation is not a *"protection"* if there are no deterrent ie. penalties imposed against those who perpetrate abuses against whistleblowers, cause them injury or dishonestly or unreasonably cause them any detriment.

It should be noted that once an APS whistleblower's employment is terminated, the Public Service Commission no longer has any legal obligation to re-consider any employment related matters relating to that whistleblower post-termination of employment. It may be a moot point as to whether, despite not having any legal obligation, that they may have a have a moral or ethical obligation to do so in some cases, however, they are not bound by morals or ethics irrespective as to the circumstances of a case involving the termination of employment of that APS whistleblower. Examples of such instances may include where the case should perhaps be re-visited may be instances that involve the dishonest, unethical or unlawful conduct on the part of the managers is involved and/or where defective administration may be involved and can be identified and demonstrated. Regardless, of the information and evidence available and even if the actions of the managers involved do not stand up to scrutiny as part of a legal case, the Public Service Commission claims to have no further role. This also applies in instances where the Merit Protection Commission or Public Service Commission may have previously condoned or had facilitated any related action taken by that Agency, against that same employee. Clearly this situation is inadequate and unfair in some cases.

Consequently, the termination of the employment of the employee perceived to be troublesome and persistent ie. the whistleblower, becomes a very attractive option for the bureaucratic hierarchy and their delegates and doing so actually benefits them in terms of further assisting them to evade any personal responsibility or accountability for their own actions under the APS Code of Conduct.

The AAT, AIRC and the Federal Courts *cannot impose a sanction* against them, hence there is no deterrent for them to cause an injury or detriment to that whistleblower or to terminate the employment of that whistleblower if he/she persist and doing so under those circumstances actually improves their ability to avoid being held accountable or to have sanctions imposed against them in the even they have been dishonest, unethical, have acted unlawfully in any respect or have been responsible for aspects of defective administration.

Is there any deterrent under the current system for public sector managers to victimise or terminate the employment of APS whistleblowers? Will the proposed legislation overcome all these existing issues or do some existing laws, regulations and codes also need to be tweaked in some areas as well?

Subordinate employees can be subjected to a detriment, a sanction and even have their health damaged and can currently seek to obtain some limited remedy or compensation via the AAT, the AIRC or the Federal Courts and that is the only real option currently available to them, however, it is time-consuming and costly. While they must bear the consequences of that on a personal level, the Agency can withhold information and documents and has considerable sums of taxpayers

money to use to defend its actions either directly or via their insurer. They can, at the very least, drag the case out for as long as possible before eventually settling out of court, in the event the whistleblower has sufficient in the way of evidence, documentation and witness statements to support his or her own case.

If that victimised whistleblower has a strong case, a settlement may be eventually reached out of court (after a year or two of taking action) but one of the disadvantages of doing so is that some decent legal precedents that could be established and used by other employees, are never established, so the current system has perpetuated without any real improvements over decades.

In addition, most Agencies would prefer a court transcript on such matters was not made available publicly as that may in itself cause the Agency embarrassment as well as result in legitimately reported adverse media for the Agency or some members of the bureaucratic hierarchy in that Agency. That said, nothing is embarrassing to Agency unless others know, nothing can impact on their *"reputation"* unless others know (especially if true), so *controlling information* is an important part of the process for them from beginning to end, while at the same time doing their outmost to set out to discredit the whistleblower, cause them detriment and/or injury and disadvantage them in any way they possibly can. In their minds, it is *"ethical"* for them to do so. How any person with a conscience could rationalise it that way is incomprehensible but Narcissistic personality types do existing in bureaucratic hierarchies and can be found in a number of highly ambitious people. Having said that there a good number of decent people in hierarchies that I have also had the good fortune and pleasure to have met and many of them and have the utmost respect for them but they are not always necessarily prepared to stand up to peers or superiors when issues become contentious enough.

Current issues with remedies for whistleblowers:

Obtaining remedy and/or compensation is problematic and channels of reporting to external Australian Government Authorities who may administer various pieces of legislation are limited and generally inadequate. Few so-called external Authorities, empowered to administer legislation, are empowered to deal with employment related matters once an employee is victimised. Even if they can, if that matter involves actions taken by bureaucratic hierarchy in an Australian Government Agency, their peers in external Australian Government Authorities are reluctant to make a finding against them and from my own experience and that I have heard of others, do not do so. Perhaps it is that if they do so it may reflect badly on the *"integrity and reputation"* of that APS Agency and a degree of protectionism exists at that level.

Yet, the public interest would clearly be better served and the integrity of that Agency better maintained, if action was taken against those in the bureaucratic hierarchy and their delegates before problems reported further escalate or compound.

Another significant problem for victimised whistleblowers is that various pieces of employment related legislation are administered by separate authorities eg. *Public Service Act* by the Public Service Commission, *The Privacy Act* by the Privacy Commissioner, Human Rights and Discrimination legislation by Human Rights and Equal Opportunity Commission, *The Occupational Health and Safety Act* and *The Safety, Rehabilitation and Compensation Act* by Comcare and *The Workplace Relations Act* by the Australian Industrial Relations Commission.

A case involving whistleblower victimisation may involve more than one piece of employment related legislation so the case cannot be adequately considered in it's entirety as one matter and therefore in context. This leaves a whistleblower in a situation where they need to attempt to separate out issues specific to each piece of employment related legislation, lodge complaints with different authorities (each responsible for only the administration of specific legislation only) and if still unresolved to the satisfaction of the whistleblower, then take each matter separately to

the AAT, AIRC or Federal Courts as separate legal cases with those Authorities as respondents to each legal case.

It not feasible or practical to expect an APS whistleblower to do so in order to progress their case and obtain a determination on all related matters ie. a case that may involve breaches of 5 different Acts and then be expected to run those cases concurrently either as complaints to the different external authorities or as separate cases before the AAT, AIRC and the Federal Court respectively. One case on it's own can extend beyond a year or up to 2 before it often resolved through a court or settled out of court, so running one case after the other, in the event the findings of one case may be relevant to another, would probably take a decade, with legal costs incurred separately for each matter.

If the victimised APS whistleblower becomes a Comcare case, or eventually becomes a Comcare case, then all the relevant information about breaches of several pieces of legislation although relevant contextually, and not complied with by that Agency, or issues relating to defective administration are highlighted, all those issues cannot be dealt with my Comcare as they have no role in making any determination on such matters and can only determine whether the persons employment materially contributed to a psychological injury and refer largely to medial history and evidence in making that determination. Comcare is only responsible for the administration of *The Occupational Health and Safety Act* and *The Safety, Rehabilitation and Compensation Act* so even if there was to be eg. breaches of the *Privacy Act* or *Discrimination legislation* as well as *denial of procedural fairness* before the taking of such action against an employee and even if in the event that all materially contributed to the psychological injury sustained by that APS employee and whistleblower, Comcare has no role in actually making a determination to that effect. Nor do they have any role in informing or training Merit Protection review officers in the event their earlier findings were not able to stand up to legal scrutiny as part of an AAT matter. Similarly, the Public Service Commission keeps no records on the number of APS employees and whistleblowers who end up becoming worker's compensation cases.

I recall that Senator Murray from the Australian Democrats asked Questions on Notice of the Public Service Commissioner on the question of how many internal whistleblowers end up becoming applicants and/or recipients of worker's compensation and the response to that QoN by the Public Service Commissioner was such that the *"Public Service Commission has no role in either monitoring or reporting on such matters".*

Commonly used methods to discredit and damage whistleblowers and those that the Merit Protection Commission and Public Service Commission refuse to recognise as a form of retaliation or victimisation against whistleblowers:

In the context of methods currently being used by discredit whistleblower and threaten their employment, I would like to draw to the attention of the Committee, to one of the most common forms of whistleblower retaliation or victimisation. Details are available via these two articles and the issue I would like to raise is that of psychiatric and fitness for continued duty assessments on whistleblowers:

Abuse of Medical Assessments to Dismiss Whistleblowers
http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/psychiatry.html

Battered Plaintiffs - injuries from hired guns and compliant courts
http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/Lennane_battered.html

Of course where forced psychiatric assessments are concerned, Agencies claim it to be a *"duty of care"* responsibility to that APS whistleblower to deny them procedural fairness, after alleging they *"may"* have a mental illness and there are no constraints on the processes that they may put into place under such circumstances, nor are there currently any guidelines on such matters

currently provided by the Public Service Commission and no Fact Sheets provided to employees who find themselves facing that situation, to assist them with understanding the process and their rights.
Processes that may be put into place may cause severe distress or anxiety for the employee (whistleblower) such as *discriminatory and bullying actions* and/or *violations of privacy and breaches of the Privacy Act* and that give rise to a psychological injury even in the event they had no mental illness *prior* to that action being taken.

The mere fact that any employee is denied procedural fairness, means the actions taken by that Agency would not stand up to scrutiny in the AAT but regardless of this, the presumption on the part of Agencies as well as the Merit Protection and Public Service Commission, is that once it is *alleged* the employee and whistleblower *may* have a mental illness, that procedural fairness need not be provided to that employee before any decision is made to compel them to undergo a psychiatric or fitness for continued duty assessment.

In addition, the most likely relevant pieces of employment related legislation to apply in such cases are *The Disability Discrimination Act* (which applies to *alleged* or *imputed* disabilities such as mental illness as well as *actual*) and *The Privacy Act* which has some controls insofar as the handling of personal, sensitive and health information is concerned.

Despite this, when the Public Service Commissioner Ms Lynelle Briggs gave her presentation to a Whistleblowing Symposium in 2005, which included a number of slides, one contained a list of *"legislative protections"* for APS whistleblowers. In that slide and that presentation, she deliberately omitted the *Disability Discrimination Act* and *The Privacy Act* as a legislative protection for APS whistleblowers and yet these two are the most relevant legislation in cases where forced psychiatric or fitness continued duty assessments are imposed on APS whistleblowers, at the direction of an Agency Head or his/her delegates. I ask the Committee to note the presentation slides available from the link referenced below:

Ms Lynelle Brigg's presentation to a Whistleblowing Symposium and
http://www.griffith.edu.au/centre/slrc/whistleblowing/symp05/4LynelleBriggs.ppt#267,8,Legislative Protections

Note: the relevant slide reads:

Legislative Protections
- **Public Service Act**
  - **Section 16**
  - **Code of Conduct**
- **Workplace Relation Act (s. 170CK(2)(e), s. 298(k) & s. 298 (l))**
- **Occupational Health and Safety (Commonwealth Employees) Act (s.50, s.62, s.76)**
- **Racial Discrimination Act (s. 27)**
- **Sex Discrimination Act (s. 94)**
- **Human Rights and Equal Opportunity Commission Act (s. 26)**
- **Age Discrimination Act (s. 51)**

The slide omits altogether any reference to legislative protection under the *Disability Discrimination Act* or the *Privacy Act* and that would of course apply even in the event a whistleblower is the subjected to allegations that they may have a mental illness after they have made disclosures and then compelled to undergo psychiatric or fitness for continued duty assessments.

Perhaps it was an unwritten policy of the Howard Government, to exclude *"legislative protection"* under these two relevant pieces of legislation where forced psychiatric or fitness for continued duty assessments on APS whistleblowers are concerned?

Ms Briggs may care to explain to the Committee eg. who authorised the *exclusion* of these two pieces of legislation as a legislative protection for APS whistleblowers and why it is that the Merit Protection Commission fails to identify and act on breaches of the *Disability Discrimination Act* or the *Privacy Act* by APS managers and delegates of an Agency Heads? Are Merit Protection Commission review officers competently training in areas of legislation relating to human resources legislation? Are they empowered to make determinations that may relate to possible breaches of these two pieces of legislation? If not, why do they not make that clear on the reports that they produce following a review of actions?

Clearly those who are denied procedural fairness and are then subjected to *bullying and discriminatory actions* or *violations of privacy, mishandling of personal and sensitive or health* information as part of the process of being compelled to undergo a psychiatric or fitness for continued duty assessment are highly likely to *react* with severe distress and anxiety and are also therefore highly likely to incur a psychological injury as a direct result of the *processes put into place*, even in the event that they did not have a mental illness, *prior* to the taking of that action.

Actions taken by management such that may be in breach of the *Disability Discrimination Act* (which applies to alleged or imputed disabilities such as mental illness, as well as actual) may be sufficient to cause a psychological injury, yet management claim that denying that employee procedural fairness and using any method to compel the employee to undergo an assessment is their *"duty of care"* responsibility to that APS employee and whistleblower. As long as they label their actions a *"duty of care responsibility"* anything goes apparently, even if inconsistent with their obligations other employment related legislation such as the *Disability Discrimination Act* and *Privacy Act* and are consistent instead with actions generally recognised as constituting *bullying*, known to cause injury.

Perhaps the Merit Protection Commission and Public Service Commission feel that the matter of any psychological injuries sustained during the course of the compelling a whistleblower to undergo a psychiatric or fitness for continued duty assessment (even if the employee did not have a mental illness in the first instance), is a matter for Comcare and the MPC and PSC have no role in ensuring processes put into place *do not* cause any injury to the whistleblowers nor do they have any role in ensuring the risk of injury to the employee through the processes used is mitigated in any way as a result of any *review of actions* that may subsequently be conducted by the Merit Protection Commission.

While employees and whistleblowers do have access to worker's compensation through Comcare, if they have sufficient evidence through documentation, information and witness statements (because employers do not support a whistleblower's worker's compensation claim and will deny any wrong-doing), I'm sure that most would rather not have their health damaged bearing in mind that damage to their health has long-term ramifications and consequences in many aspects of their lives and not just the workplace itself or their ability to work. Much of this is not compensated including through Comcare as there are only specific things they can be compensated for. General damages to compensate for any other losses incurred are not payable by Comcare.

Anxiety and/or depression is reasonably likely to result as a consequence of being subjected to *bullying and discriminatory actions* as well as *violations of privacy and/or personal, sensitive and health information.* Medication does not undo the damage that may result due to diminished health status and that may impact adversely on many areas of that whistleblower's life as a consequence. Nor can medical practitioners resolve workplace issues and conflicts that result as a consequence either.

Other aspects of processes put into place by management may also involve instances where opinions provided verbally by psychiatrists or psychologists are obtained without the whistleblowers knowledge and given without even having met or spoke to that whistleblower.

Those verbal opinions can also be easily altered by management and disclosed to other managers and staff *prior* to an assessment even taking place. Although it is not possible for any medical practitioner to confirm the presence of mental illness in any person without a proper assessment, verbal opinions obtained in this way can easily be altered by management, then disclosed to other staff regardless. The Public Service Commissioner may also care to explain to the Committee why in instances where such disclosures have resulted, under such circumstances, there is no obligation on the part of management to retract or correct any statement those managers may have made to other staff, on receipt of a medical report clearing the employee and whistleblower of having a mental illness and seeing to it that the whistleblower is not left with the damaging stigma of having a mental illness. The stigma of having a mental illness is actually deliberately used to compound damage to the whistleblower even if they did not have one:

> **Stigma - A fact sheet produced by the Mental Health Information Service**
> http://www.mentalhealth.asn.au/resources/stigma.htm
> *Extract:*
> *Whether you have, or have had a mental illness or not stigma can affect you. Considering that 1 in 5 people are affected by a mental illness at some stage in their lives, then if it hasn't affected you directly, then it surely has had an impact on someone you know. The word "Stigma" means a sign of shame or disgrace. A stigma is a mark placed upon you that can affect people's view of you, and even your view of yourself, for the rest of your life. There is a stigma associated with mental illness....There is a real history of prejudice, misunderstanding, confusion and mystery surrounding mental illness. It is a kind of prejudice which often begins with the application of a label, that distinguishes 'normal' or 'well' people from 'sick' or 'abnormal' people.*
> *.....Stigma is shown by the view that people with a mental illness are violent, brain damaged, intellectually disabled, unimportant, untrustworthy or worthless.*

Subjecting an employee to this is not a form of *"reasonable disciplinary action"*.

In the event the employee and whistleblower was caused any distress and anxiety through the processes put into place, and if in the event that is not mitigated, it increases the risk of that injury becoming a chronic condition.

In order to attempt to dismiss such issues as being trivial, the Merit Protection Commission review officers currently apportion the blame to the whistleblower for *reacting* to the *bullying and discriminatory* actions that they were subjected to suggesting that by *reacting,* they therefore contributed, so therefore *"no action need be taken against the managers involved".* Frankly the only person who could be *reasonably* expected *not* to react to *bullying and discriminatory actions* after being *denied procedural fairness* would be someone who was brain-dead.

Clearly the APS whistleblower has no control over the processes put into place, management do. Such a finding as made by the review officer from the Merit Protection Commission would never stand up to later scrutiny by the AAT and certainly did not in my case. Residual issues relating to that incident then compounded over several years and eventually resulted in the termination of my employment using a *"hired gun"* external investigator and a terms of reference for that investigation that precluded any investigation into, comment on or judgment of the related conduct of the managers involved.

Even when whistleblowers lodge a Comcare claim, the Agency will not be supportive.

I recently had my claim accepted some 18 months after first lodging with Comcare and at the 1st conference held in the AAT. This took place after the same Agency had *withheld documents* (they themselves had created and signed) relating to the original incident, claiming in doing so that there was insufficient information and documentation to support my claim, indicating that *they were disadvantaged* as a consequence, and recommended the insurer not pay my claim as a result. I then tabled the documents that the Agency had withheld (having obtained them from the Agency's own files some years ago and had thankfully kept) together with other documents relating to later related incidents and Comcare accepted liability. I had demonstrated by way of

documented evidence that I was telling the truth but certainly my word against theirs without supporting documentation and evidence would not have been sufficient, despite the fact that it is supposedly a "no fault scheme".

I also note that according to Comcare's website, their definition of fraud includes *"dishonestly trying to evade a liability"* but you can be certain no action will be taken against the managers who withheld those documents in an attempt to *dishonestly evade liability* because there is no penalty under the APS Code of Conduct for doing so and there is therefore no deterrent when it comes to committing such frauds. There is also no legal requirement for the Merit Protection who condoned and facilitated the original incident by the fact that they provided no remedy at that time as part of their *review of actions* to be held to account for that. While the Public Service Commission and Merit Protection Commission will turn a blind eye to such matters, even if their findings do not stand up to legal scrutiny.

In my case, the Public Service Commissioner then later permitted the vicariously liable Agency Head to empower the *"hired gun"* external investigator engaged by the vicariously liable Agency to impose a sanction against me *after* issuing him a terms of reference for his investigation such that precluded any investigation into earlier related incidents, precluded him from making any comment on or judgment of the conduct of the relevant managers involved and any other issues I had raised etc.

However, powers are often conferred on the basis that they will be exercised only after *all relevant considerations have been taken into account* and if the administrator *fails to take all relevant considerations into account*, it means the administrator has erred in the making of that decision. I refer to the termination of my employment and the omissions in the investigation that led to the termination of my employment. Having now resolved the matter of the first incident (a process that took almost 2 years following the termination of my employment), I am unable to have the matter of the termination of my employment heard by the AIRC as such matters can only be lodged for up to 21 days following the termination of an APS employees employment. The Public Service Commissioner who facilitated it, by permitting the Agency Head to empower the external investigator to impose a sanction against me under such circumstances will also say she has no legal responsibility to me to facilitate my re-deployment and return to work following the termination of my employment despite these circumstances. I am uncertain as to whether Comcare would either as part of their current obligations to worker's compensation claimants if their employment was terminated, again irrespective of the circumstances of a case.

Details of my case are available to Committee members only via an Attachment to this submission as it is lengthy and complex with a number of outstanding matters I would like to bring to their attention as problems with the current system in place. I do so to outline some of the issues I had dealt with as a whistleblower and the methods used by the Agency to cause me an injury while at the same time dismissing the issues I had raised which co-incidentally later compounded as a result. I do so also to highlight the inadequacy of the Merit Protection Commission and Public Service Commission in their handling of such matters, which reinforces the need for an Integrity or Whistleblower Agency.

Proposed new Integrity or Whistleblower Agency – a possible role for oversight, investigation into and consideration of compensation due to defective administration involved in APS whistleblower cases:

Reference: 5 (a) of the Terms of Reference – how information should be disclosed for the disclosure to be protected: options include avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two.

If the proposed new Integrity or Whistleblower Agency eventuates, then the Committee may consider making a recommendation to empower that Agency to be able to consider and make

determinations on *all relevant Australian laws* applicable in a whistleblower's cases and in the context of the circumstances of a case. There are several pieces of employment related legislation involved, and a coordinated response in consultation with other external Authorities would be more suitable than expecting the whistleblower to separate out the issues and refer them as separate complaints. Sometimes there is a relationship between some elements of different pieces of legislation and only in considering them concurrently and in context could a fair determination be made.

Whistleblowers should be able to access the Integrity or Whistleblower Agency at any stage of the process whether they are current or former employees, contractors or consultants. The whistleblower may turn to them because internal reports have been ignored or if in the event they have been victimised after reporting within the Agency or within Government. As I can demonstrate in my case there was a *"conflict of interest"* in terms of using the normal channels ie. in reporting the matter to the Public Service Commissioner in the first instance (which would have been fairly obvious to the senior managers in the Agency at the time when my letters were referred back to the Department (presumably for response) noting that this is the point at which I when then subjected to victimisation after being denied procedural fairness. Despite the fact I did not expressly state that *"conflict of interest"* existed in the letters in which I had made disclosures and expressed various concerns, it would have been known to the senior managers in the Agency where I worked at that time eg. it was not obvious to them as to why I had done so they could simply have asked, but I doubt that they would not have been aware. With any standard reporting channels there may always be time when a *"conflict of interest"* may have a bearing on the suitability of reporting channels.

Exceptions to standard reporting channels:

Inflexibility in the system can sometimes be problematic and *exceptions* should be made acceptable in the event that a *"conflict of interest"* may exist with the normal reporting channels. Without procedural fairness being afforded to the whistleblower in the first instance (irrespective as to the circumstances), that may not be able to be established and documented at the time – perhaps that is the very reason I was denied procedural fairness in the first instance prior to being subjected to victimisation (among other reasons). Exceptions should be considered by the Committee regardless of what new reporting channels might be eventually put in to place. Canberra being such a small place and with movement of senior managers between Agencies or later appointments to Commissions, Statutory Authorities and Portfolio Entities a possibility of a *"conflicts of interest"* is reasonably likely to arise from time to time, so without exceptions under such circumstances, there will always be situations where the pre-determined set of options on reporting channels, may not always be suitable.

Role of the new Integrity or Whistleblower Agency:

The Committee may also give consideration to empowering the new Integrity or Whistleblower Agency with the capacity to act as a watch-dog over all other Government Agencies eg. the Public Service Commission, Merit Protection Commission, the Privacy Commission and the Human Rights and Equal Opportunity Commission as well as others eg. the AFP (for matters involving allegations of breaches of law such as *"Abuse of Public Office" ie dishonestly causing a person (ie. the whistleblower) a detriment*).

The proposed new Integrity or Whistleblower may also be able consider cases that may involve elements of possible breaches of any number of pieces of legislation that are all currently administered by separate Authorities (in liaison with them if need be so the matters can be considered in context) and could do so at any stage in the process whether it be from the outset if they are the first port of call for the whistleblower or at any stage during the process if they have used internal reporting channels within the Agency. This flexibility may also prevent matters from escalating and if eg. they do previous records on that whistleblower case would be maintained by that Integrity or Whistleblower Agency. Sometimes things are inadequately addressed by that

Agency in the first instance, the problems escalate and that is a point at which the whistleblower once again becomes a vulnerable target particularly if earlier reports had been ignored and the Agency can no longer conceal compounding issues that resulted in the event that they had inadequately addressed the issues in the first instance.

As previously stated. a significant problem for victimised whistleblowers is the fact that various pieces of legislation relating to human resources management are administered by separate authorities eg. *Public Service Act* by the Public Service Commission, *The Privacy Act* by the Privacy Commissioner, Human Rights and Discrimination legislation by Human Rights and Equal Opportunity Commission, *The Occupational Health and Safety Act* and *The Safety, Rehabilitation and Compensation Act* by Comcare and *The Workplace Relations Act* by the Australian Industrial Relations Commission.

A case involving whistleblower victimisation may involve more than one piece of employment related legislation so the case cannot be adequately considered in it's entirety as one matter and therefore in context. This leaves a whistleblower in a situation where they need to attempt to separate out issues specific to each piece of employment related legislation, lodge complaints with different authorities (each responsible for only the administration of specific legislation only) and if still unresolved to the satisfaction of the whistleblower, then take each matter separately to the AAT, AIRC or Federal Courts as separate legal cases with those Authorities as respondents to each legal case.

It not feasible or practical to expect an APS whistleblower to do so in order to progress their case and obtain a determination on all related matters ie. a case that may involve breaches of 5 different Acts and run those cases concurrently either as complaints to the different external authorities or as separate cases before the AAT, AIRC and the Federal Court respectively. One case on it's own can extend beyond a year or up to 2 before it often resolved through a court or settled out of court, so running one case after the other, in the event the findings of one case may be relevant to another, would probably take a decade, with legal costs incurred separately for each matter.

The establishment of an Integrity or Whistleblower Agency may alleviate some of those problems if eg. they could liaise with an co-ordinate responses to complaints with those external Authorities on behalf of the whistleblower which would also better facilitate their ability to consider the issues in context as well as the compounding adverse effect on the whistleblower resulting from a combination of potential breaches of different types of legislation relating to human resources legislation as well as possibly inform improvements in better practice guides as well as training by that Integrity or Whistleblower Agency to the Agencies involved on what might constitute better practice such that could improve their handling of such matters in the future. It would also given them the ability to better understand of the adverse effects of being on the *receiving end* of sometimes harsh, unnecessary, discriminatory and effectively bullying-type actions taken or authorised by management as well as perhaps unreasonable sanctions imposed in consideration of all the circumstances of a case. Bearing in mind that if not handled reasonably, workplace conflicts will inevitably result, compound and escalate. It is human beings that they are dealing with and that should be remembered and factored into their thinking and the processes and actions that they may put into place in future. No doubt this would be welcomed by insurers who essentially seek to minimise the cost of compensation claims. It would be better to make improvements to the system to avoid sometimes costly compensation claims and prevent injuries in the first place, rather than simply to try to evade liability in the event psychological injuries result.

Reporting to the Integrity or Whistleblower Agency on a range of issues ie. the whistleblower disclosures themselves, together with providing insight of the context, possible longer-term developments and the adverse effects on the whistleblower from a psychological perspective could be valued input provided by both current and former employees and contractors.

The Annual Report of the Integrity or Whistleblower Agency could *"name and shame"* Agencies who have either victimised internal whistleblower, mishandled cases and including where matters of compensation arise either immediately or in the longer term for those making whistleblower disclosures within Government. Details of course would not need to be published but an incentive to reduce the number of cases and avoid the Agency being *"named and shamed"*, may also be a good incentive to improve on current practices.

Access to the proposed new Integrity or Whistleblower Agency:

Prior to any case involving whistleblower victimisation going forward to the AAT, AIRC or Federal Courts there should also be an option for both current and former employees, contractors or consultants. regardless of their circumstances to approach the Integrity or Whistleblower Agency in the first place to attempt to seek a resolution, remedy or obtain some assistance and advice with regard to matters regarding compensation as well as possibly obtain compensation via a *"defective administration"* scheme operated by them. for whistleblower victimisation cases.

Certainly the option should remain open for any dissatisfied and victimised whistleblower to take their matter to the AAT, AIRC or Federal Courts regardless but many cases may be resolved more readily without incurring legal costs if the was an Integrity or Whistleblower Agency to provide them some assistance if required and that may very well be able to facilitate resolution through mediation rather than legal action.

Also following any out of court settlement or court matter if that was to result, there may be further lessons to be learned eg. if an Agencies actions did not stand up to legal scrutiny and in such cases they or their insurers are likely to settle out of court with no useful *legal precedent* set such that may be useful to other whistleblowers if pursuing action themselves at a later date. Some useful information and case examples are probably buried in insurer's files and never used to better inform Agency practices on managing whistleblower cases as that is not the role of the insurer and they may not be in a position to enforce all matters relating to improvements to practices across Agencies. Some things insurers such as Comcare can deal with and other issues they cannot because they are not empowered to but liaison with them by an Integrity or Whistleblower Agency on whistleblower worker-compensation case may provide a range of insights that should be useful for the Integrity or Whistleblower Agency and help them to deliver on better outcomes and better practice models.

It should be noted that eg. if the Merit Protection Commission or Public Service Commission has been involved in any stages of the case eg. through a review of actions for any employment related decisions and actions affecting the whistleblower, there would clearly be a *"conflict of interest"* in their making any determination at a later date with respect to defective administration including for the purposes of any compensation payable to that whistleblower as well as making recommendations on action that should be taken on the managers involved as they are unlikely to go against their original findings even if their findings eg. did not stand up to legal scrutiny or scrutiny via the AAT, AIRC or Federal Courts.

The Committee may also consider the possibility that all compensation payable for an APS whistleblower (regardless of the type of compensation payable incl any payments that may result from *"defective administration"* on the part of the Agency involved in addition to worker's compensation in such cases is paid for directly and in full by that Agency rather than their insurer. That may take the burden away from the insurer who cannot hope to cope with and adequately deal with all issues involving a whistleblower case. It may also be further incentive for Agencies to ensure that whistleblowers in their Agency are not victimised, retaliated against or caused any injury or detriment through process put into place by that Agency and perhaps in knowing that the Agency will be *"named and shamed"* in the Integrity and Whistleblower Agency's Annual Report (without disclosing all the details of a case of course or the names of the individuals involved). This would be preferable to current arrangements where such matters are simply remain buried in

their legal representatives or insurer's files together with the initial disclosures as well as information and documentation relating to any later related developments.

By permitting whistleblowers to lodge complaints or claims for compensation via a new Integrity or Whistleblower at any stage in the process, including any insights from their perspective, it would also ensure that in addition to any issues relating to compensation or payments for defective administration, the issues originally raised by that whistleblower ie. issues regarding maladministration, unlawful conduct etc, waste of public monies etc can also be brought to the attention of the Integrity or Whistleblower Agency as well as any later developments if inadequately addressed by that Agency in the first instance by way of a cover-up. It can also help to bring those issues back to the fore and have them addressed at any stage of the process should problems re-surface or escalate. The Integrity or Whistleblower Agency could also take responsibility to ensure that all issues are dealt with appropriately, the relevant Ministers informed and relevant public sector managers adequately dealt through the imposition of penalties or sanctions to be imposed against them in instances where damage or injury has been caused to the APS whistleblower and the catalyst for that action was their whistleblowing.

The Integrity or Whistleblower should also be able to oversee the work of the Public Service Commission (PSC) and Merit Protection Commission (MPC) on whistleblower cases if they are review any employment related actions to ensure that they do not continue to function as a *rubber-stamp* for all employment related actions taken by an Agency Head or their delegates against whistleblowers in the event any matters are referred to MPC or PSC for review. Interaction between the Merit Protection and Public Service Commission would also help to inform their better practice guidelines or assist them in creating guidelines in areas where none currently exist. Bearing in mind that review officer employed by them are administrative officers without necessarily a high level of understanding of legal matters or the implications of some things they do on the psychological well-being of APS employees and whistleblowers.

It may be that all those functions relating to whistleblower matters and claims of subsequent victimisation are taken away from the Merit Protection Commission and Public Service Commission altogether once an Integrity and Whistleblower Agency is established. A matter for consideration by the Committee as areas of potential overlap would need to be considered and resolved to avoid confusion.

External Investigators employed by Agencies:

Another matter that Committee may consider with respect to the role and responsibility of the Integrity or Whistleblower Agency is concerned is that they may also perhaps be empowered to review decisions made by external investigators engaged by the Agency in which the whistleblower and employee is or was employed. This could act as a safeguard to also oversight and evaluate the rationale and decisions made by external investigators used by Agencies noting that there are currently no licensing requirements for external investigators engaged by an Australian Government Agency nor any Code of Ethics to which they are bound. Their contracts with Agencies are no doubt *"commercial-in-confidence"* so even if they act unethically or unconscionably in any regard, they are currently not held personally responsible or accountable for decisions or recommendation they make or actions they take if empowered to do so.

In the event they recommend or take action that is harsh, unreasonable or unlawful, their rationale and methodology is flawed in any way or the investigation failed to consider *all the relevant circumstances of a case,* these are matters also that could be referred to the Integrity and Whistleblower Agency by an aggrieved whistleblower. Despite these possible scenarios, external consultants, often referred to by whistleblowers as *"hired guns",* can make considerable sums of money for the provision of their services with no external scrutiny (excepting currently via the AIRC in the case of terminations of employment only) and even then if their investigation was found to be flawed, their rationale unreasonable or the determination harsh, unjust and

unreasonable, there is no avenue to address such issues directly with the external investigator and liability rests with the Agency that engaged them.

Information management and risks of involving external investigators in cases involving whistleblowers:

Engaging external investigators on employment related matters relating to APS whistleblowers can potentially put at risk highly sensitive information which the Australian Government then no longer has any control over.

In my own case, under such circumstances, I refused to disclose that information to that external investigator and commercial entity for those reasons and did so from the outset, even though it was relevant to my case and supported my case. However, other whistleblowers may not be prudent enough to realise the potential risk of the mishandling of that information at a later date and scope for possible misuse of that sensitive information then held by that commercial entity, on their own premises and no longer under the control of the Australian Government. It would seem natural to hand everything over when put in a position such that you are required to defend yourself and your own actions. I was certainly in a quandary about that at the time of the investigation I was subject to where an external investigator had been engaged by the Agency. There would actually have been nothing to prevent me from doing so. Even if ignored by that investigator, there may have been a chance it would be considered as mitigating circumstances although I doubted it from the outset in any event and viewed him as a *"hired gun"* and nothing else, given the circumstances of my own case and the *modus operandii* of the Agency involved.

I ask the Committee to consider making a recommendation that employment related investigations and decisions relating to APS whistleblower cases should not be handled by external investigators at all, given the potential for the release of sensitive information albeit as a defence in an investigation process on a whistleblower against whom a sanction is being threatened and resulting risk that if sensitive information is provided to that external investigator and commercial entity, there is a risk that it may later misused or disclosed to others outside the Agency and Government by them. A contract with that external investigator and commercial entity is no guarantee that related information would not be disclosed to others at a later date. I can provide some evidence of that as well in the Attachment I provide with this submission.

It should also be noted that there is no complaint mechanism in place for external investigators. As it is only the external investigators findings that are given to the Agency, and as there is obviously considerably more information and material exchanged during the course of the investigation and in the case of whistleblowers generally, there is a reasonable chance that sensitive material and information may be given to an external investigator at that time as a natural self-defence mechanism to validate the veracity of their own claims, the involvement of external commercial entities in such cases is a matter for consideration by the Committee as it relates to information management of potentially sensitive information ie. whistleblower disclosures.

In Conclusion:

I thank the Committee for the opportunity of contributing to this important Inquiry through this submission, the opportunity of express my views on the subject and provide information and insights to support the issues I have raised.

For those whistleblowers like myself who are concerned not only with obtaining remedy and compensation for myself but concerned also with ensuring improvements to current arrangements and processes are put into place so that others are not caused injury or damage in similar ways, this Inquiry has been long awaited.

NAME WITHHELD