"All it needs for evil to flourish is for people of good will to do nothing"- Edmund Burke

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

Dear Committee Secretary

Please find attached a PDF format copy of Whistleblowers Australia supplementary submission to the **'Inquiry into whistleblowing protections within the Australian Government public sector'.**

I do hope this further submission will receive the attention of the Committee. Would you please confirm that the Committee will give further consideration to this submission.

For your convenience, I have included my contact details below should you wish to contact me directly.

Yours sincerely

(signed)

Peter Bennett
National President

Supplementary Submission by Whistleblowers Australia:

House of Representatives Standing Committee on Legal and Constitutional Affairs

Inquiry into Whistleblowing in the Australian Public Service

Novemeber 2008.

This submission is submitted to address issues requiring further clarification arising from evidence given by Whistleblower Australia (WBA) members and others in the Hearing in Sydney on 27 October 2008,

1. A 'Public Interest' test'.

WBA does not support a rigid definition of either terms 'public interest' or 'in the public interest.'
There is the fear that if 'public interest' is rigidly defined in the act, there is a possibility that some 'public interest' matters may be misclassified and wrongly excluded or included as part of the definition.

An ordinary person (particularly a potential Whistleblower) must be capable of applying the public interest concept or test to any given set of circumstances. They must be able to determine whether or not those circumstances disclose matters which serve the public interest directly by providing information, including information which exposes wrongdoing. An ordinary person must also be able to use the test to distinguish between a public interest disclosure matter and a matter which is confined to a personal or industrial grievance.

This could easily be achieved by drafting a provision based on two requirements;

1. whether the conduct and circumstances as alleged and disclosed by the Whistleblower is prima facie contrary to or not in the public interest and.
2. whether the public interest disclosure (PID) is made pursuant to the act.

The latter point would rest on whether given all of the circumstances, the PID generally conformed with the requirements set out under the act.

A possible wording may be as follows:

For the purposes of this act a 'public interest disclosure' is a disclosure where:

1. the wrongdoing and circumstances alleged and disclosed by the Whistleblower are prima facie contrary to or not in the public interest and

2. where the disclosure is made pursuant to this Act.

The question of whether the whistleblower should be afforded protection under the act would depend on whether the disclosure or proposed disclosure met the above criteria.

The Disclosure and the Protection arising there from, would rest or rely on three planks: whether the PID was
(1) 'substantially' a public interest disclosure,
(2) as defined by the act and
(3) made with an honest and reasonable belief as to its truth.

The use of the word 'substantially' would admit and allow for the possibility that while a PID may contain some element of a grievance or workplace complaint, it was still 'substantially' a public interest disclosure. 'Substantially' has been specifically selected as it gives a sense of quantity or proportion when weighing things up but is also recognised as meaning something of the essence, at the heart of, or significant and important to the issue.

This approach is straightforward and uncomplicated. It simplifies the process of identifying matters of public interest that should be disclosed and which invoke protection provisions. It is based on the assumption that the general public has a common sense understanding of what would constitute conduct contrary to the public interest. We believe there is that common understanding.

However, some members hold the view that although the 'public interest' should not be specifically defined, it is necessary to have some guidelines to give weight to the intent and objects of the legislation.

'Public Interest' disclosure legislation should provide guidelines as to information which the public has a right know (see below). Similarly, such guidelines should set out examples of activities which would be contrary to the public interest (as opposed to personal or workplace grievances). The guidelines should also acknowledge a possible link in some circumstances, between a personal or workplace grievance and the development of a public interest disclosure.

These guidelines should be incorporated as part of the act, regulations or in a schedule. There are precedents for such guidelines to be authorised and incorporated under an act. (See the Safety, Rehabilitation and Compensation Act).

These guidelines should be 'read as one' with the Act to ensure that the intentions and objects of the act are applied to each section of the act. These guidelines should have the force of law and must not merely be regarded as a general 'motherhood' provision that has no effect in law (as is the case with the current s3 'Objects' of the Freedom of Information Act).

Some suggested guideline elements that may apply to the public's right to know (or disclose or receive) information is as follows;
The public has a right to know information if they
have an interest in or are affected by such matters or,
have a reasonable right to know about such matters or,
would be best served by knowledge of such matters or,
would/could be harmed if they were denied knowledge of such matters or,
wanted the information and it would not harm the public if it was disclosed or
if a person wished to disclose public sector information, and there was no objective proof that the disclosure would cause actual harm to the public.

2. Definitions:

Any new Whistleblowing legislation should define Whistleblowers as a person making or intending to make a public interest disclosure. There is no need nor would it be sensible to coin a new term or to use other labels.

We would object to new terms such as informant or internal witness being used as a label for a Whistleblower. Both of these labels have a clear use and standing in other circumstances mostly dealing with policing processes. By using the label 'Whistleblower' in respect of a public interest disclosure, the legislature would be building on the common understanding that a whistleblower makes disclosures in the public interest.

In police circles the word informant is used, often in a pejorative sense, to describe the person who is directly or otherwise involved in criminal matters, and who provides information about such matters.

Often the person provides the information to obtain lenience against charges or to garner favour with police for a purpose. This conduct is a self-interest contrivance for benefit and to mitigate other wrongful acts, and therefore it is not intended as a service to the public interest. In summary: (1) this is not whistleblowing and (2); it is not sensible to build on a term commonly used in a pejorative sense, nor would it be consistent with the objects of the proposed act.

An internal witness is a term applied to a police officer that is a potential witness for police in relation to police prosecutions arising out of 'payback' complaints. In practice internal witnesses greatly outnumber and are distinguished from whistleblowers, although internal witnesses often suffer reprisals, like whistleblowers, for disclosing the wrongdoing. Refer for example, to reports in relation to the operation of the Internal Witness Support Unit, NSW Police.

In summary it would not be advisable to label Whistleblowers as internal witnesses, given the general history and current use of the term as it's use would not facilitate the proposed objects of the act.

3. Qui tam actions under the US False Claims Act.

The Committee should give consideration to introducing Qui tam actions under any new Whistleblower legislation.

The Qui tam actions of the USA False Claims Act have established precedents in our law. They rely on a 12th century English common law action, which allowed a person to sue as a relator, that is, he sued for the Crown as much as he sued for himself. It also utilises the existing common law concepts of punitive damages in allowing a court to treble the amount that was falsely claimed against the government, as a penalty for a breach of the Act. The court can award a whistleblower between 15-20% of the judgment amount in compensation for the risk of taking the action: the balance is paid to the Government.

In short, there is no inherent obstacle to the inclusion of a qui tam or relator action in Australian law.

We envisage the proposed act being able to encourage, facilitate and allow public interest disclosures made either to an employer or a third party or (where the disclosure relates to a false claim having been made against the government) as a relator in a qui tam action filed in a court of competent jurisdiction.

4. The public interest versus time based restrictions on making disclosures.

Time based restrictions to control when information may be disclosed externally, may be used as a contrivance to protect wrongdoing and that is contrary to the public interest. That is, time based restrictions can be a dangerous concept in practice.

In our experience the existing time based restrictions have seldom served the public interest. They have tended to protect wrongdoers from accountability, to interfere with due process and to obstruct criminal investigations and/or pervert the course of justice and to provide opportunities for wrongdoers to cover their tracks and avoid accountability. Time based restrictions have tended to operate mainly as a delaying mechanism and have failed to facilitate the timely in-house rectification of wrongdoing by the accused agency.

In WBA's original submission we argue that whistleblowing laws tend to be about regulating and controlling Whistleblowers first and; about delaying the external exposure of information second, in the mistaken belief that an employer agency will generally want to fix the problem and it is best to give them that opportunity first. We say there is little or no evidence to support the theory, but plenty of examples of where the agency has failed to live up to expectations. Agencies generally target the whistleblower and then take whatever legislative and procedural opportunities there are to delay and even avoid accountability.

We also say that the public's interest lies in having public interest disclosures, particularly urgent and sensitive matters dealt with in a timely, effective and efficient way. We are sure the public would expect the federal Government to take the opportunity to correct the apparent failures of most State PID legislation, which has provided undue time and opportunity for wrongdoers to cover their tracks, remove evidence and attack Whistleblowers.

Some of the evidence over the last 15 or more years is compelling. Consider recent disclosures by Toni Hoffman in the 'Doctor Death' debacle and the Kessing matter respectively. Both the Hoffman and Kessing disclosures prima facie raised urgent public interest issues about public health and safety requiring immediate attention. Both obviously had a real potential for causing public embarrassment to the relevant agencies. We now know from these two incidents that embarrassment and sustained cover-up were the prime focus of the public administrators after the disclosures were made in the public interest. The apparent urgency, the health of patients, even the risk of serious security airport failures was set aside while attention was given to protecting the vested interests of people responsible for the failed administrative systems.

In both cases, the alleged circumstances were allowed to continue unchecked until the allegations were exposed in the parliament and the press and even then the agencies put their reputation and possible culpability ahead of public interest concerns of public health and safety. The lesson is that the opportunity to do the right thing, when there is a vested interest is not enough. That is, the possibility of embarrassment, of being seen to be wanting appears to drive the issue underground and into a cover-up, not timely investigation and resolution.

The past practice of agencies drawing out investigations or deferring assessments of a proposed disclosure over extended periods have completely failed to serve the public interest, whether they be exercised by employers or external agencies such as the ICAC, CMC or the Ombudsman. Delaying investigations or simply failing to assess the alleged facts of a proposed public interest disclosure is manifestly contrary to the public interest. Time based restrictions can be and are readily used to delay investigations or to defer an assessment of a proposed public interest disclosure while action is taken to cover-up the wrongdoing.

WBA submits a time based restriction or indeed any restriction on making disclosures to third parties is not warranted: not by the history and not by any misplaced notion that organisational actors will strive to rectify wrongdoing if they are given an opportunity and certainly not by the usual practice of doing nothing in the hope that the whole issue will just go away.

At a practical level, regardless of which authorised person or agency received the PID it would be imperative for a preliminary assessment to be carried out within say three days. The agency should be required to notify the Whistleblower in writing of its decision and it is intended course of action and if necessary, its reasons for wanting to delay any external exposure.

If the Whistleblower is dissatisfied with the conduct of or advice from the agency the Whistleblower or subsequently on obtaining further information decide disclosure to another third party would have been more appropriate, the whistleblower must be entitled to lodge the disclosure with another suitable third party, at any time within a two year period commencing from the date the alleged incident occurred, without losing protection under the act. For example, a disclosure may at first glance appear suitable for an agency like the ICAC in NSW, but on obtaining more information it may seem to have been more appropriate to have submitted it to the Ombudsman.

The whistleblower must also be entitled to challenge the agency's decisions and the agency would bear the onus of establishing (in court) in the full glare of the media, that its decisions about the PID were not contrary to the public interest.

The onus would lie with the relevant agency to comply with this process generally. Should the agency fail to notify its decision, the Whistleblower would be at liberty to take the public interest disclosure immediately to the media or a parliamentarian, without suffering a loss of protections under the act.

WBA holds the view that if an agency genuinely wanted to correct identified wrongdoing, then an immediate effort would be made to satisfy the Whistleblower that all proper actions were in train, and that no further public disclosure would be necessary to resolve the issue. This process puts the public interest at front and centre of any disclosure, based solely on the facts alleged by the Whistleblower.

In short; if within 3 to 5 days at a maximum, relevant agencies (internal or external) do not notify the Whistleblower as required by the act, the Whistleblower must be entitled to seek judicial review or other third party avenues for the disclosure of the information.

If the matter raised by the Whistleblower fails the 'public interest test' on an objective assessment by the agency and there are reasonable grounds to support a finding that public exposure would be likely to cause actual harm to the community, then the agency must be entitled to seek orders from the court to prevent the disclosure of the information. But only to the extent necessary to protect the community and only for the duration necessary to ensure that protection. The agency would bear the onus of establishing their claim.

Should time based restrictions be deemed necessary.

If the Committee determines that a time based restriction against external disclosure (to the media or a parliamentarian) was necessary, then we say a 'public interest test' should be applied, to justify the restriction. That 'test' together with a mandatory process should counteract the natural tendency of agencies to become defensive or to do nothing, particularly when embarrassment threatens.

The system would require the agency to do an immediate preliminary prima facie assessment of the nature of the PID and its degree of urgency, to determine whether any delay in making an external disclosure would not be contrary to the public interest and what period would be necessary if the agency wanted an opportunity to rectify the problem. The assessment should assume (for the purpose) that the allegations were essentially correct.

The process would firstly require the agency to consider the public interest, which would include the public's right to know. If it was decided by an objective assessment, that the public interest would not be further harmed by any delay in dealing with the matter then the agency must advise the Whistleblower (in writing) of this decision. The agency would similarly notify the Whistleblower that an external disclosure should not be made for a specified period (not exceeding four months) while the matter was being addressed. If the Whistleblower simply disagreed with the assessment of the agency (particularly in relation to the risk to the public interest) then the Whistleblower must advise the agency to that effect

and allow the agency to review its assessment. If the agency does not change its assessment or fails to respond, then the Whistleblower must be entitled to make the disclosure to another relevant agency, the media or a parliamentarian.

Similarly if the Whistleblower held the view that the agency did not follow the required process, or misapplied them or otherwise wrongly applied them, then the Whistleblower would be entitled to seek a judicial review which may involve a penalty or to immediately expose the matter to the media or a parliamentarian.

However if the agency maintains the view that their assessment meets the 'public interest test' and there are reasonable grounds to support a finding that public exposure would be likely to cause actual harm to the community, then the agency must be entitled to seek orders from the court to prevent the disclosure of the information. But the restriction must only apply to the extent necessary to protect the public interest and only for the duration necessary to ensure that protection. The agency would bear the onus of establishing their claim and all costs would be born by the agency.

At the end of the 'delay' period, even if the actual investigation had not been concluded, the agency would be that much closer to rectifying the problem and in a more favourable position to deal with any media or political attention should it eventuate.

5. A separate Whistleblowing or Public Interest Disclosure Agency.

The government presently has the opportunity to build on nearly 17 years experience, mainly at the State level to protect the wider community against conduct contrary to the public interest by enacting Whistleblowing legislation and perhaps more importantly, creating a stand alone agency to administer and enforce those protections.

5A. Consolidating and or coordinating existing resources & protections.

In Australia at present, there is whistleblowing (regulatory) legislation applying to Insurance, Superannuation, Banking, Parliamentary Services, Workplace Relations, Corporations and Public Service Acts. We submit none of this legislation works as well as it could or should, because with the exception of the Public Service Act, there is no administrative or enforcement agency behind the legislation. In so far as the Public Service Act is concerned, the relevant agency appears to lack any will, competence or capacity to carry out the required duties.

In the case of the Australian Industrial Relations Commission (AIRC), the Whistleblower provisions of the Workplace Relations Act are seldom utilised (only 9 hits exist on the AIRC web site on a search for 'Whistleblowing/Whistleblower') even though there appears to be links to whistleblowing matters within a number of unlawful dismissal cases.

The Australian Securities and Investments Commission (ASIC) administers the Corporations Act, yet the 2007 - 08 and 2006 -- 07 annual reports have no reference to the words, Whistleblower or Whistleblowing. Although the 2007-08 annual report makes a reference to reports of "*crime and misconduct*" at the annual rate of *2008 - 11,436; 2007 - 10,682; 2006 - 12,075; 2005 - 10,752; 2004 - 9,970; and 2003 - 9,292.*

Clearly the Whistleblower provisions of the Corporations Act are not being utilised in relation to the vast number of cases involving corporate crime and misconduct.

The (Commonwealth) Ombudsman received in excess of 19,000 complaints about public administration last year. Research suggests that only 4600 of these complaints will actually be investigated. The balance of 14,400 cases will not be investigated, but will be returned to the complainant with the advice that no further action will be taken on the matter and for all

intents and purposes their complaint is finalised.

The Australian Public Service Commission (including the Merit Review Protection Commissioner) claims to have received 42 whistleblowing matters in the last year. Of these, 37 were found not to warrant investigation by the Commission and were either returned to the agency from which the complaint arose or were rejected as not conforming to the requirements of the Act. Of the five that were 'investigated', three were found to have no substance and two were not resolved. These statistics are fairly consistent on a year by year basis and prove that generally, public servants have no confidence whatsoever in the Public Service Commission in respect of whistleblowing matters.

On our assessment and experience, no existing agency could take on the role of administering and enforcing Whistleblower protections without suffering considerable detriment to its existing functions. If existing organisations were given more staff to carry out additional whistleblowing functions, it is likely that those whistleblowing resources would be directed towards meeting the shortfall in the existing functions.

However, resources and positions appear to have been budgeted into the 100 government agencies and the Public Service Commission to carry out functions in relation to whistleblowing. On a conservative estimate, one must assume that at least 30 positions are budgeted for across the 100 government agencies and the least four or five positions must be budgeted for within the Commission. Therefore there should be about 35 positions budgeted for in the Australian Public Service, which could be transferred to permit the establishment of a whistleblowing agency on a cost neutral basis.

The existence of the various whistleblowing legislation cited above is in effect a Government acknowledgement of the need for whistleblowing facilities in all of the respective areas, including banking, workplace relations and in corporations. The mistake governments have made in relation to existing whistleblowing legislation is a failure to establish an appropriate agency capable of administering and enforcing the legislation.

It is increasingly evident that the solution to corruption and malpractice harming the public interest can only be resolved by effective whistleblowing legislation supported by an appropriate administrative and enforcement agency. By consolidating or even coordinating all the existing whistleblowing protections within a single Commonwealth act, it becomes easier and more efficient for a single agency to deal with those protection issues.

The scope of whistleblowing laws would not be dramatically increased as the existing laws already cover such vital areas as banking, the public service, workplace relations and corporations. The only significant change should be that rather than restrictively defining those who can report wrongdoing, the new legislation should ensure that anybody in the private and public sector with knowledge of conduct contrary to the public interest should be entitled to disclose that information and receive appropriate and proportionate protection.

WBA submits that public interest disclosures should cover any type of wrongdoing, malpractice, misfeasance, mismanagement, substantial waste or corruption in any sphere of government and society. The consolidation and rationalisation of resources into a single whistleblowing or Public Interest Disclosure Act with a properly resourced agency would actually reduce costs and increase effectiveness. The existing piecemeal approach is neither effective nor efficient.

5B. Existing Regulatory Agencies different interests.

A significant problem we have identified with most of the current legislation is that it limits the type of protection a regulatory body can provide. Basically it limits protection to ensuring the personal safety of the whistleblower as a witness (for the regulator) so as to ensure that they turn up on the day to give evidence.

The Workplace Ombudsman under the Workplace Relations Act (WPA) does take this approach one step further. It can apply to have the court direct a corporation to rectify the statutory breach disclosed by an individual's complaint, which may as a consequence rectify the complainant's problem. But that assistance is at the will of the regulator. The informant is not a party to the proceedings and so can't move the court for orders to enforce the original orders / judgement if the employer ignores or avoids the issue or the Workplace Ombudsman is not disposed to be more helpful.

It is worth noting that the majority of prosecutions brought by the Workplace Ombudsman under the WPA, which misleadingly describes the available protections as whistleblower protections arise out of personal workplace complaints (grievances), not whistleblowing. This blurring of complainants with whistleblowers, workplace grievances with public interest disclosures has spread like a cancer in most jurisdictions to the detriment of whistleblowers, because the Workplace Ombudsman's function requires him to treat complainants as witnesses.

We understand the regulator's main interest is to protect the complainant's evidence and to that extent only, protect the complainant so as to achieve a desired outcome at a hearing, but generally speaking that is as good as 'no protection' for a whistleblower.

That this is so, may have other roots. It is evident that generally a regulator, while trying to protect the Whistleblower to the extent that he can, may come to the view that there is a real potential for prospective defendants to claim the Whistleblower's evidence was compromised (in some fashion) if he were to afford anything other than the barest of protections and (to the extent that it is possible) it would be better if he avoided it even becoming an issue. That is, when push comes to shove, the regulator just will not pursue protection issues. From his perspective that may be sensible, given that his protection is always conditional on his professional and legal priorities being met first.

In our experience, when a whistleblower (as opposed to a witness) realises no one appears to be responsible for his protection other than doing what it takes to safeguard his evidence, he becomes increasingly agitated, perhaps even sick, with the knowledge that the risks are all his. What comes out of this overview for WBA is that a regulator's role, both as an investigator or prosecutor, is fundamentally incompatible with the role and function of a whistleblower protection agency.

WBA holds the view that these issues cannot be resolved in agencies where whistleblowing investigation and protection are little more than an incidental function and not the primary purpose of the agency. The only effective solution is to set up a separate and independent agency with specific whistleblowing reprisal inspired investigation only and the related protection purposes and functions.

Furthermore, regulators may legitimately put the function, funding or other needs of their organisation above their obligation to investigate a particular public interest matter. An example of such circumstances is the ASIC's decision to lower their priorities, to delay the investigation of HIH, which unfortunately facilitated the HIH debacle.

It does raise a question about whether a regulator's role and function should generally be tempered by having to take account of the public interest in its decisions, because where an agency has multiple functions, such as the Ombudsman, ASIC, the AIRC and the Public Service Commission, the public interest may frequently be compromised by priorities related to other functions of the respective agencies. That is, WBA submits the proposed legislation should recognise and provide for the fact that the protection of the Whistleblower is being compromised by the present arrangements and provide for whistleblower protection as a priority over others.

5C. A Whistleblowing Agency need only be progressively introduced.

The establishment of a new whistleblowing agency OUTSIDE the AUSTRLIAN PUBLIC SERVICE does not necessarily require the immediate consolidation of all existing legislation or the purging of all whistleblowing functions or responsibilities from all existing agencies.

WBA acknowledges that the process could be staged, with the first stage being the introduction of whistleblowing legislation applicable only to the Australian Public Service and other Government organisations. This legislation would be administered and enforced by a new whistleblowing agency (PIDA or Commission), perhaps staffed by positions transferred from existing government agencies. This does not necessarily mean that personnel from existing government agencies would occupy positions in the new agency.

However it is vital that:

1. the new Whistleblowing agency be separate from and independent of the Australian Public Service (This would also ensure that the agency can later expand to include NON Public Service matters) and

2. the new agency must have distinctly separate Protection/Registration and Investigation/Prosecution units for the investigation of reprisals.

Over time, the existing Whistleblower legislation could be absorbed into the new Whistleblowing legislation and the responsibilities of existing administration be moved to the new Whistleblowing agency.

5D. PIDs from the private sector and other 'persons' is in the public interest..

If the Labor government had moved on its own recommendations in about 1993 and drafted whistleblower legislation then, it could have been forgiven for not appreciating that the public interest extended much more widely than government spending and accountability, but not now. Not after watching the enormous public havoc and harm caused by the HIH, OneTel, AWB, Pan Pharmaceuticals, the equine flu and now, the sub prime mortgage scandals. The public thinking has changed: we have come to fully appreciate just how much an ethical, accountable and properly run private sector is *in the public interest*; and just how inappropriate and inadequate the existing state whistleblower legislation with its outdated ideas, is in our current environment.

WBA believes the terms of reference are sufficiently broad and the circumstances so dire, to allow the Committee to recommend that the Government consider extending the application of the proposed legislation to include any person, from the public or the private sector.

The term 'person' is broad enough to capture all corporate and other employees, contractors and agents, whether *in* or *dealing with* the federal sector. We acknowledge Federal legislation cannot interfere with the functions of State Governments, but nonetheless, where people have obligations to or derive benefits from the Commonwealth, it seems perfectly proper for the Commonwealth to be able to monitor and audit matters associated with those obligations or benefits. That is, Commonwealth whistleblowing legislation should be able to apply to matters affecting the public interest of the Commonwealth.

Finally we would suggest that actually defining 'a person' to include particular categories may prove counter productive as it would in all probability promote delay, and litigation as to whether or not a particular person is a 'person' for the purposes of the act. In other words the act needs to be as broad in its application as it can be, otherwise it could become a brake on the public's interest in getting a public interest disclosure looked at and sorted in a timely way.

5E. Separating the handling of personal grievances from PIDs.

Most complaints handling systems were set up before the advent of Public Interest Disclosures (PIDs). When PIDs were introduced they were virtually tacked onto the existing complaints handling system without ensuring that PIDs were handled separately and differently from workplace complaints (grievances). More importantly those using the system were not apprised of the significance of the 'public interest' in making these disclosures. The result has been that both the PID and personal grievance streams have suffered at the hands of people who were untrained, ill-informed or indifferent to the distinction between both streams.

Employers, agency managers and the Public Service Commission in particular, should have ensured that employees and other affected people were educated and encouraged to develop whistleblowing awareness. Unfortunately there has been little awareness training about whistleblowing and the appalling consequences are evident.

In the absence of a Whistleblowing Agency dedicated to and capable of promoting Whistleblower awareness and application, it is likely that the sad state of whistleblowing at the Commonwealth level will continue to languish as an afterthought in public administration. This is an urgent issue across both state and federal jurisdictions and we urge the Committee to take the opportunity it has to get it right the first time.

6. Loyalty.

At pages 14 and 15 of the WBA submission, the issue of loyalty is discussed in the course of which, the *"WBA strongly contend(ed) that the Committee must unequivocally direct where employee loyalties should lie when there is a conflict between the public interest and the interests of an agency. The Committee must determine which should prevail; the public interest or the agency interest."*

That is, any federal Whistleblowing law must indicate *where* a person's loyalties should (properly) lie if he or she becomes aware of conduct or wrongdoing that appears to be contrary to the public interest in having the agency operate consistently with its objects and ideals; such that continued loyalty to an individual organisational actor in those circumstances is likely to be misplaced loyalty.

The new laws need to speak in terms of where the public interest properly lies, so that allegations of disloyalty by individual actors can be seen for what they usually are: a ruse to control or even eliminate their opposition. As the process of public administration presently stands, suspected or actual maladministration, misconduct, misfeasance or plain corruption is frequently protected from disclosure by the misuse of obligations of fidelity and loyalty claimed by a government agency.

There is no (whistleblowing) law presently that puts these common law obligations of fidelity and loyalty in a public interest context and until there is, Whistleblowers will continue to be punished for being disloyal, when they put the public interest in the organization as a whole ahead of individual loyalties, which they have come to realise have been misplaced.

The misuse or abuse of loyalty obligations should be seen as part of the victimisation of the whistleblower. It should be recognised as an additional misconduct offence.

This whole area of loyalty or disloyalty is fraught with unsupported accusation and counter accusation all fundamentally based on biased conceptions about where one's loyalties lie. The issue of loyalty is at best a version of the 'motivation' issue and it should not be able to be used as a means to dissuade an organisation from pursuing a public interest disclosure. WBA wants to see a system set up to handle public interest disclosures, that consistently

raises the question of whether or not the actions being considered will, if taken, be in the public interest; because if it does that, it will be reliably efficient and cost effective, all in the public's interest.

Finally we refer the Committee to the matter of *Bennett v President of HREOC [2003] FCA 1433,* in which the issue of loyalty to a government agency was a strong issue of contention. The government, through the AGS, held a strong view that if Bennett only held a single obligation of loyalty to the customs service, then he would not be entitled to make public comment about misconduct, maladministration and other wrongdoing by the agency. The protections offered by obligations of loyalty and fidelity would be such that a public servant could not disclose wrongdoing. Bennett was saved from this obligation, because he had a dual loyalty obligation as an industrial officer.

But what is very clear from this case is that the obligation of loyalty can be a significant impediment to the public's interest in encouraging and facilitating public interest disclosures about misconduct, maladministration and other wrongdoing by the agency if loyalty to an agency can continue to be used either as a means to prevent a public interest disclosure or as grounds to victimise or harm a whistleblower.

Whistleblowers Australia