Australian Government
Attorney-General's Department

Secretary

08/16543

8 August 2008

Dr Anna Dacre
Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Dr Dacre

Attorney-General's Department submission to the inquiry into whistleblowing protections within the Australian Government public sector

I refer to your letter of 14 July 2008 inviting the Department to make a submission to the Committee's inquiry on whistleblowing protections within the Australian Government public sector.

The Department's submission is enclosed. Should you require further information, the contact officer for this matter is Laura Munsie who can be contacted on (02) 6250 5689.

Yours sincerely

Robert Cornall AO

Australian Government

Attorney-General's Department

ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE AUSTRALIAN GOVERNMENT PUBLIC SECTOR

The Attorney-General's Department (AGD) is supportive of measures to encourage whistleblowing as outlined in this submission. Encouraging people to report illegal, corrupt or otherwise inappropriate conduct is an essential part of maintaining integrity and accountability in the public sector. An effective whistleblowing regime will also assist in the protection of sensitive Government information, by providing an avenue for people to raise concerns outside of their agency, rather than resorting to measures such as leaking information to the media.

2. The Committee has invited submissions addressing the terms of reference. This inquiry requires the Committee to develop a model for future legislation and the terms of reference focus upon what could or should happen under a whistleblowing regime rather than what currently is the case. Therefore, some of the comments provided in this paper necessarily touch upon matters of policy.

3. The submission is split into three sections – brief comments relating to each of the terms of reference; other matters of interest to AGD; and Australia's international obligations in relation to whistleblowing and preventing corruption.

A. Comments on the Terms of Reference

The categories of people who could make protected disclosures

4. The terms of reference identify people who could make protected disclosures as including current and former employees in the Australian Government sector, contractors and consultants engaged by the Australian Government, and persons engaged under the *Members of Parliament (Staff) Act 1984*. The terms of reference also indicate that the Committee may wish to address issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise.

5. AGD notes that there is increasingly a need for the Commonwealth Government to share information with State and Territory Governments and with the private sector. There is the potential that this increased cooperation may provide persons outside the Australian Government sector with more of an 'insider' perspective on some Government agencies as opposed to being more equivalent to a 'client'. Therefore, the Committee may also wish to consider whether it would be appropriate for persons outside the Australian Government sector to have recourse to the

whistleblower regime, or whether there are already appropriate mechanisms in place to deal with complaints or concerns raised by such persons.

The types of disclosures that should be protected

6. The terms of reference identify a number of categories of disclosures that might be protected under a whistleblowing regime. These include allegations of 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.

7. AGD notes that allegations of illegal activity are generally matters for police investigation, and would expect that such matters would be referred to police for investigation. However, it may be necessary to consider whether it would be appropriate for the relevant whistleblowing agency to be able to continue its own investigation in the event that the matter has been referred to the police for investigation. This may be relevant, for example, where a police investigation determines that there is no evidence of illegal activity, but there is evidence of impropriety that falls short of criminal conduct, but still needs to be addressed.

8. The Committee is also asked to consider whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government or personal benefit. AGD agrees that consideration could be given to ways of preventing abuse of a whistleblowing scheme by persons who seek to use it as a way to air personal grievances or debate the merits of Government policy. A whistleblowing scheme will be less effective if too many resources are devoted to pursuing frivolous or vexatious claims at the expense of those matters truly in the public interest.

9. The Committee is also asked to consider whether grievances over internal staffing matters should be addressed through separate mechanisms. Generally, internal staffing matters can be satisfactorily dealt with through internal agency processes or according to employment laws. However, grievances over staffing matters that relate to illegal, corrupt or otherwise inappropriate conduct may be appropriately dealt with under a whistleblowing regime. The draft report of the *Whistling While They Work* project[1] notes that a complaint or grievance over an internal staffing matter may indicate a broader organisational problem. It may be appropriate to strongly encourage, or in some cases require, persons with complaints that relate to internal staffing matters to use other mechanisms before seeking redress through the whistleblowing scheme.

The conditions that should apply to a person making a disclosure

10. The Committee has been asked to consider whether there should be any threshold of seriousness or similar qualification for a person to make a protected disclosure to the whistleblowing agency. As noted above, there is a need to achieve a balance between deterring vexatious persons from abusing a whistleblowing scheme, and ensuring that people with legitimate public interest disclosures are not discouraged from coming forward out of fear that they will not meet the threshold test. Basing the threshold test upon a subjective matter, such as a person's

[1] *Whistleblowing in the Australian Public Sector*, Australian Research Council Linkage Project: 'Whistling While They Work': Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations, Draft Report, October 2007 <available at http://www.griffith.edu.au/centre/slrc/whistleblowing/>

reasonable belief in the nature of their complaint, might assist in achieving an appropriate balance between these competing objectives.

11. The Committee is also asked to consider whether penalties or sanctions should apply to whistleblowers who materially fail to comply with the procedures under which disclosures are to be made or who knowingly or recklessly make false allegations. The inclusion of penalties might assist in preventing abuse of a whistleblowing scheme, and would therefore improve the scheme's effectiveness and ability to deal with matters that are legitimately in the public interest.

12. AGD also submits that the protection of classified and security sensitive information should be a consideration in the development of a whistleblowing regime, and measures should be put in place to ensure that such information is not disclosed more broadly than necessary. The provisions of the *Protective Security Manual* and the *National Security Information (Criminal and Civil Proceedings) Act 2004* may provide a starting point for consideration of how to deal with such information in a whistleblowing scheme. AGD would support the inclusion of penalties for failure to comply with any requirements for the protection of classified and security sensitive information due to the serious consequences that inappropriate disclosure could have to matters such as national security, law enforcement, intelligence or defence operations, and Australia's international relations.

The scope of statutory protection that should be available

13. Protection against victimisation, discrimination, discipline or employment sanction is an important part of an effective whistleblowing regime. It may also be appropriate for information provided by the whistleblower to the relevant body to be privileged from disclosure against the person in subsequent court proceedings. It might also be appropriate for a defence of public interest disclosure to be available to a whistleblower who is subsequently subject to criminal or civil liability. The fact that a defence is available to the person would be a matter that the Director of Public Prosecutions would take into account in weighing up the prospects of success when deciding whether to prosecute in the particular case. However, conferring immunity on whistleblowers from criminal liability and liability for civil penalties in all cases might go too far. It is difficult to predict every scenario that might arise, and it is possible that there may be cases where it would be appropriate and in the public interest for a whistleblower to face criminal penalties. It would not be in the public interest for criminals to use the whistleblowing scheme to avoid responsibility for their conduct.

Procedures in relation to protected disclosures

14. Avenues for whistleblowing should exist both internally within Government organisations, as well as through external bodies, and protections should be available for disclosures that are made through either avenue. While it is appropriate to encourage the use of internal complaints handling procedures in the first instance, it may not always be appropriate to require whistleblowers to rely upon internal procedures before they can make a complaint to an external body.

15. Public sector agencies handling disclosures should be required to keep the whistleblower's identity confidential (except where the person consents to their identity being disclosed). It is also important that persons or bodies handling disclosures take the process seriously, and be seen to take the process seriously. This would include keeping the whistleblower informed of how the matter is being progressed and providing them with reasons for any findings and any decisions to take or not take action. It is important that if a claim is investigated and the relevant person or body finds no

reason to believe there has been any improper conduct or no reason to take any action, that the whistleblower is provided with an assurance that their claim has not simply been ignored. Keeping the whistleblower informed in this way will help to minimise dissatisfaction with the whistleblowing process and hopefully minimise the risk of inappropriate disclosure of information.

16. The Committee is asked to consider whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted. This is a difficult issue. An effective whistleblowing regime should negate the need for aggrieved persons to disclose information to a third party. However, it is likely that there will be occasions where whistleblowers feel their concerns have not adequately been addressed through all available mechanisms, and such persons may choose to disclose to a third party. The difficulty with disclosing to a third party is that the whistleblower may not know all the relevant facts and circumstances, and the third party is less likely to be in a position to ascertain the entire picture compared to a person or office that has the powers to investigate whistleblower's allegations. Additionally, both the whistleblower and the third party may not necessarily appreciate the potential damage disclosure could cause to national security, defence or inter-governmental and international relations and therefore may not give the information the protection required. Disclosing information to third parties has the potential to cause serious damage to Government affairs. Therefore, it may be appropriate for offences to apply to persons who disclose protected information outside of the whistleblowing regimes.

17. The Committee may also wish to consider whether there will be any avenues for seeking review of a decision by a whistleblowing body through the courts or tribunals – either as a matter of law or as a matter of policy. We note that State or Territory whistleblower protection schemes do not provide for review of decisions by tribunals or courts. While it is important for there to be forums for whistleblowers to raise issues of concern, and potentially dispute an initial finding by a whistleblowing body, if a whistleblowing scheme is adequately equipped to investigate concerns thoroughly it may be unnecessary to provide any specific avenues of appeal to courts or tribunals. Doing so could unnecessarily prolong the finalisation of matters.

The relationship between the Committee's preferred model and existing Commonwealth laws

18. While there is currently no single whistleblowing or integrity office with jurisdiction to investigate all claims of misconduct in relation to the Australian government sector, various bodies perform this function in relation to certain areas of government. These include the Australian Public Service Commission, the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity, and various internal complaints handling procedures within agencies. The Committee may wish to consider the possibility of establishing a central 'whistleblowing office' (possibly the Commonwealth Ombudsman) that would have the power to handle complaints in its own right or to refer matters to existing bodies that have the requisite expertise and experience to inquire into the particular matter. In this respect, we note the IGIS's role as an important accountability mechanism for Australia's security and intelligence agencies. The IGIS is independent of Government and has extensive oversight powers in relation to these agencies, often dealing with highly classified and sensitive information. We would support the continuation of the IGIS in dealing with allegations of impropriety in relation to the security and intelligence agencies.

B. Other Matters

Secrecy laws

19. AGD has policy responsibility for Commonwealth secrecy policy, and would like to draw the Committee's attention to the myriad of secrecy provisions in various pieces of Commonwealth legislation. These include sections 70 and 79 of the *Crimes Act 1914*, regulation 2.1 of the *Public Service Regulations 1999*, and numerous specific secrecy provisions in other Commonwealth legislation. A whistleblowing regime would need to provide an appropriate exception to these secrecy offences to ensure whistleblowers could not be prosecuted under secrecy laws for making a public interest disclosure in accordance with the law. Consideration should be given to the appropriateness of overriding specific secrecy provisions. For example, provisions in the *Intelligence Services Act 2001* and the *Australian Security Intelligence Organisation Act 1979* prohibit the disclosure of the identity of staff of security and intelligence agencies. It may be appropriate to maintain these types of secrecy provisions to ensure that highly sensitive information remains protected from unnecessary and unauthorised disclosure.

20. The Committee may wish to note that the ALRC is reviewing Commonwealth secrecy laws with a view to modernising them. The Terms of Reference for this review are at **Attachment A.**

Journalist shield laws

21. AGD also has responsibility for the Commonwealth laws of evidence. The *Evidence Act 1995* was amended in 2007 to include a professional confidential relationship privilege for journalists. Section 126B of the Act allows a court the discretion to direct that evidence not be adduced in the context of a journalist and their source where it would involve the disclosure of a protected confidence. Under section 126D of the Act, the privilege is lost if the confidential communication was made in furtherance of an offence.

22. Under existing law, nearly all instances of Commonwealth public sector disclosures to journalists would be illegal and privilege will not apply. In these circumstances, a journalist's refusal to disclose their source may lead to contempt of court proceedings against them. The circumstances in which disclosure to third parties is considered appropriate, as part of any whistleblower reforms, will have implications for the existing privilege for journalists.

23. Strengthening journalist shield laws was an election commitment of the Government. The Committee may wish to monitor any developments in this area.

C. Australia's International Obligations

24. Australia is a signatory to two international treaties relevant to whistleblower protection: the United Nations Convention against Corruption (UNCAC) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention).

United Nations Convention against Corruption

25. UNCAC is the first binding global instrument to deal generally with corruption. The UN General Assembly adopted the UNCAC by resolution 58/4 in October 2003, and it entered into force on 14 December 2005. UNCAC requires Parties to develop anti-corruption policies, establish

bodies to prevent corruption, regulate the recruitment and conduct of public servants, and promote accountability and transparency in public finance. Parties must also take steps to prevent corruption in the private sector. UNCAC establishes detailed mechanisms for prevention and criminalisation of corruption (including supply-side corruption), as well as international cooperation and asset recovery.

26. Australia ratified UNCAC on 7 December 2005. Since then Australia has implemented the mandatory requirements, and some non-mandatory requirements, prescribed in the provisions of UNCAC.

27. Australia meets its obligations through a combination of:

- Commonwealth legislation (eg the *Public Service Act 1999, Commonwealth Electoral Act 1918, Financial Management and Accountability Act 1997, Freedom of Information Act 1982, Corporations Act 2001, Proceeds of Crime Act 2002, Mutual Assistance in Criminal Matters Act 1987*)
- Government bodies (the Australian Federal Police, the Australian Crime Commission, Australian Securities and Investment Commission, Australian Public Service Commission, Australian Transaction Reports and Analysis Centre)
- procedural safeguards (auditing government agencies by the Australian National Audit Office and public budget statements)
- self-regulation (eg Australian Stock Exchange (ASX) Voluntary Corporate Governance Guidelines), and
- cooperation with regional and international authorities.

28. Articles 32 and 33 of UNCAC relate to whistleblowing and disclosure. Article 32 requires State Parties to provide effective legal protection from retaliation or intimidation for witnesses and experts who give testimony concerning corruption offences relevant to the Convention, including protection for their families and people close to them. Article 33 recommends that State Parties also provide protection for people who report 'in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention'.

29. Implementing Article 32, the *Witness Protection Act 1994* established a National Witness Protection Program to provide protection to eligible witnesses and people close to them. The *Australian Crime Commission Act 2002* also provides protection for witnesses involved in examinations being conducted by the Australian Crime Commission.

30. Australia has implemented Article 33 through the *Public Service Act 1999* and the *Workplace Relations Act 1996*. Section 16 of the *Public Service Act 1999* prohibits victimisation and discrimination against APS employees who report, to the relevant authorities, breaches (or alleged breaches) of the APS Code of Conduct.

31. Within the private sector, the *Workplace Relations Act 1996* provides that an employee must not be terminated for reasons of 'the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities' (section 170CK(2)(e)).

Anti-Bribery Convention

32. Whereas UNCAC focuses on corruption generally, the Anti-Bribery Convention focuses on bribery of public officials in international business transactions. The Anti-Bribery Convention requires signatories to criminalise bribery of public officials in foreign countries and establish effective mechanisms for deterring and prosecuting bribery. Application of the Convention is monitored by the Working Group on Bribery in International Business Transactions.

33. In January 2006, the Working Group published the Phase 2 Report on Australia's implementation of the Anti-Bribery Convention. One aspect of anti-bribery systems the Working Group commonly focuses on when examining implementation of the Convention is mechanisms for reporting corruption in public and private sectors – whistleblower protection.

34. The Working Group reported that Australia had 'a low level of whistleblower protection in the public sector'. The Phase 2 Report mentioned section 16 of the *Public Services Act 1999* but highlighted that this legislation provides protection only for disclosures to the Public Service Commissioner and Agency Heads, not for disclosures to law enforcement agencies.

35. The Report also touched on 'deficiencies' in Australia's whistleblower protection scheme identified by the Parliamentary Committee on Finance and Public Administration[2], insofar as:

- it applies only to half of the federal public sector
- it does not cover disclosures by members of the public, and
- reports can only be received by a limited number of authorities, the APS Commissioner having no power to take remedial action

Commonwealth Secretariat – Commonwealth Law Ministers Meeting

36. The Commonwealth Law Ministers Meeting in July 2008 addressed model legislative provisions in relation to whistleblowing, drafted by the Commonwealth Secretariat.

37. The model legislative provisions were prepared by the Secretariat in a response to a request from Botswana and a draft was first considered by Senior Officials of Commonwealth Law Ministries (SOLM) at the meeting in October 2007. The provisions (**Attachment B**) sought to provide a framework of protection for persons who report in good faith and on reasonable grounds, corruption and other related wrong doing. The United Nations Office on Drugs and Crime were consulted in developing these provisions. Australia considers these provisions are a useful guide, able to be tailored to the specific needs of individual countries.

[2] Page 32, Phase 2 Report