INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE AUSTRALIAN GOVERNMENT SECTOR

House Standing Committee on Legal and Constitutional Affairs

Submission

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September 2008

1. Introduction and Summary

1. The statutory protection of 'Whistleblowers' and individuals who make a principled 'public interest disclosure of wrongdoing' can no longer be regarded as a new or controversial idea in mainstream Australia. While this was not the case in 1988, the two decades of experience since then have served to mitigate early concerns that protecting whistleblowers was either not feasible, inappropriate, un-Australian, or not worth the cost.

2. Instead, the last decade's efforts by most States and Territories demonstrate not only that effective protection measures are feasible, but also that they have not been subject to significant abuse, and that Australians generally support such measures, and whistleblowing itself, in principle.

3. By contrast, in the Australian government sector the issue of protection of "whistleblowers' remains an open question for no apparent reason. The Australian Public Service lacks adequate statutory provisions protecting public servants, despite numerous formal inquiries, a significant number of noteworthy cases, and eventually in 1999, the provision of minimal protections in the *Public Service Act* for a very limited form of whistleblowing activity.

4. This submission is concerned less with the history of the Commonwealth's approach to this issue than the efforts of the various Australian jurisdictions which began to legislate specifically to protect 'whistleblowers' and 'public interest disclosure of wrongdoing' from 1991 onwards, commencing with the response to the 1989 report of the Commission of Inquiry into official misconduct in Queensland (The 'Fitzgerald Commission').

5. The key feature of the approach taken in Australia has been the recognition that the ultimate objective of whistleblower protection law and policy, properly understood, is not the protection of whistleblowers as such. Protection is a crucial strategy for achieving the main objective – to encourage the disclosure of wrongdoing (fraud, waste, misconduct, abuse, corruption, etc.) and imminent danger, in an appropriate way, so that something can be done about it. Practical concern about 'the public interest', rather than moralism, is the key.

6. From 1993, new whistleblower laws in South Australia, New South Wales, Queensland, and the Australian Capital Territory, generally followed the legislative model recommended by the Electoral and Administrative Review Commission

(EARC) in Queensland in 1991, whose recommended approach focused on the disclosure itself, rather than on the whistleblower. In this important respect, the EARC approach departed significantly from the model first established in the United States in the nineteenth century, and restated as long ago as 1989 in the *Whistleblowers Protection Act*, in which the principal focus was on the whistleblower, rather than the disclosure.

7. New laws to protect public interest disclosure of wrongdoing, in broadly similar terms, have also been enacted since 1994 in Canada, New Zealand, the United Kingdom, Japan, South Africa, and the United Nations Secretariat. The remaining Australian jurisdictions, with the exception of the Commonwealth (recommendations by the federal Parliamentary Committee on Public Accounts in July 1999, among others, notwithstanding), have introduced similar legislation. A new Australian Standard (AS 8004-2003) for Whistleblower Protection Programs for Entities, now sets out minimum requirements for effective programs of protection for principled disclosure of wrongdoing for all organisations, be they government, business or not-for-profit.

8. On this basis it appears safe to conclude that there is now broad acceptance in Australia of the public interest justification for effective and practical protection of responsible whistleblowers and for whistleblowing activity by public officials (and others occupying positions of trust). There appears to be no serious suggestion in any quarter that those who genuinely disclose official corruption, fraud, theft, criminal conduct, abuse of office, serious threat to public health and safety, official misconduct, maladministration, or avoidable wastage of public resources should not receive protection from retaliation by those involved. On the contrary, organisations which fail to protect genuine whistleblowers and permit, or take, reprisal action against them usually face severe censure.

9. The complexity of the policy and practice issues involved in protection of whistleblowers in the Australian States and Territories over the past two decades has been the subject of recent research in a wide ranging research project, *'Whistling While They Work'*, a three-year collaborative national research project led by Griffith University and jointly funded by the Australian Research Council, five participating universities, and fourteen industry partners including important integrity bodies and public sector management agencies.

10. The review helpfully points to a very large body of new empirical data which shows that while the 'whistleblower phenomenon' in Australia may have been misunderstood in the past, at least by the public at large, the legislation which has been enacted or proposed by the various States and Territories, except the Commonwealth, has generally been well conceived in principle, and has broad acceptance. What is lacking, as demonstrated by the project's research data, is not good laws, but effective administrative and organisational support for whistleblowers and would-be whistleblowers, and more accessible mechanisms for compensation and protection.[1]

11. This submission considers a number of pertinent factors relating to the 'public interest' justification for the protected disclosure of certain information; it also considers the major factors to be taken into account in defining the forms of principled disclosure which ought to be protected; and the possible form of an institutional base for providing such protection.

12. The submission recommends:

(a) that the Commonwealth adopt comprehensive legislation which emulates generally the main features of the legislative approach adopted by Queensland, New South Wales, South Australia, and the United Kingdom, so as to effectively protect *bona fide* whistleblowers and others from retaliation, to provide relevant and effective sanctions against retaliation directed at a *bona fide* whistleblower, and to provide accessible and effective mechanisms for obtaining compensation for such retaliation, in a 'Public Interest Disclosures Act' or law of similar title.

(b) that consideration be given to application of the proposed law to other categories of Australian Government employees such as people currently or previously engaged under the *Members of Parliament (Staff) Act 1984* and to the Australian private sector, following generally the model established by South Australia and the United Kingdom, to protect appropriate disclosure of criminal conduct, official misconduct, or significant breach of fiduciary duty by persons occupying a position of trust.

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[1] The report is discussed in *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organisations,* at: http://epress.anu.edu.au/anzsog/whistleblowing/pdf/whole_book.pdf , especially chapter 11.)

(c) the establishment of an independent function with responsibility for administering the proposed law on Public Interest Disclosures, and for co-ordination of whistleblower disclosure protection in Commonwealth agencies. It is proposed that such a function could be appropriately established by extending the current functions and powers of the office of the Australian Ombudsman or by creating a new independent statutory body.

2. Background

13. The popular image or characterisation of the 'whistleblower' is generally a vexed one: while it may vary with the nature and the gravity of the specific issue concerned, the relatively limitless power of the Government to impose litigation or disciplinary proceedings, or to visit other more subtle forms of dissuasion on the whistleblower can see the characterisation of any given whistleblower range from 'selfish and irresponsible troublemaker' to 'self-appointed guardian of government morality' to 'heroic knight on a quest'.

14. Many media accounts and academic treatments of whistleblowing have tended to regard all whistleblowing events as belonging to a homogenous set: this is not the case. The fact that a given whistleblower has suffered severe retaliation in the United States or France or the UK does not of itself tell us anything about what might have happened if the same whistleblowing actions had occurred in Australia. Every act of whistleblowing takes place in a specific legal, organisational and cultural context, which is likely to significantly colour the expectations of the discloser, the outcomes of a given disclosure and the attitudes of anyone affected by it. For this reason, the experience of whistleblowers in the United States in the 1990s, or anywhere else, cannot be assumed to be directly relevant to the experience of Australian whistleblowers in the 1990s, much less in 2008.

15. That said, the evidence suggests that some things remain unchanged: the claim to be a whistleblower, as a basis for demanding protection for a given disclosure, may stem either from a combination of factors or from a single factor, including, but not limited to:[2]

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[2] Adapted from A J Brown, *Key Benchmarking Themes – Internal Witness Management Systems in the Australian Public Sector* (2005) Whistling While They Work Project, Griffith University <http://www.griffith.edu.au/centre/slrc/whistleblowing/symp05/sympsummary.pdf> at 21 August 2008, p 5.

- a personal grievance based on 'maladministration'
- disagreement with workplace management practice or policy
- perceived workplace or organisational malpractice
- a (desirable) form of transparency fostering 'public trust'
- in the absence of organisational integrity and ethics – the ultimate protection of 'the public interest'
- a (desirable) counter to excessive government 'confidentiality'
- a principled circuit-breaker for conflicting loyalties or responsibilities
- an alternative vehicle for mandatory or desirable reporting requirements.

16. The various possible motivations for the principled disclosure of information are not always appreciated when the term 'whistleblower' is invoked. It is noted that 'whistleblowing' can serve as the term of choice to characterise an individual's 'principled dissent' over government or organisational policy: this activity, directed as it is at 'high policy' rather than 'wrongdoing', has not been protected as whistleblowing activity in Australia, other OECD countries, or the UN Secretariat. Policy disputes are sometimes covered by separate administrative and professional arrangements, as is appropriate.

17. The media can usually be expected to encourage the disclosure of government-held information in the interests of transparency, or for other reasons: such disclosure is often referred to as whistleblowing. While such cases create material that newspaper pages, television news segments and internet websites use to generate public concern, or to create scandal, the claimed whistleblowing may also feed a constant struggle with the government of the day over the protection of confidential sources. The conflation of these related, but distinct, aspects of reliable public governance and transparent accountability has come to prominence in a recent case involving the prosecution of a Commonwealth officer,[3] and has led to the broader media community calling for reform to whistleblower protection legislation.[4]

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[3] *R v Kelly* [2006] VSCA 221 (17 October 2006) <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/221.html> at 21 August 2008; *McManus & Anor v Country Court of Victoria & Ors* [2006] VSC 293 (23 August 2006) <http://www.austlii.edu.au/au/cases/vic/VSC/2006/293.html> at 21 August 2008.

[4] I K Moss, *Report of the Independent Audit into the State of Media Freedom in Australia* (2007) <www.abc.net.au/unleashed/documents/Audit-Report-Final-31-Oct.pdf> at 21 August 2008, pp 53–88.

18. By way of clarification, it should be noted that whistleblower protection as Australians generally understand the term is not to be confused with the long-established, and fundamentally different, US system of '*Qui tam*' private-capacity legal actions originating in Civil War procurement fraud, where the modern litigant whistleblower stands to gain a percentage of the fraud proceeds if and when recovered through prosecution. Under this approach whistleblower protection is a *sword*, not a shield.

19. In particular, it needs to be recognised that the broad policy model adopted since 1998 by the UK, Canada, New Zealand and the UN General Assembly, and from 1993 by the various Australian States and Territories, is founded on a *preventive* approach to whistleblower protection, rather than a retributive approach. The phrase '*Whistleblower protection is a shield, not a sword*' captures this difference, and recognises that a specific regime of law and policy/procedures will likely prove to be effective only if it is actually efficient in dissuading would-be reprisal takers.

20. As noted above, current Australian laws demonstrate a major departure of policy from the traditional approach to dealing with whistleblowers under US federal law, and as represented in many research studies and media accounts. This difference is central to effective whistleblower protection: simply put, it requires that the focus of the official response to a *bona fide* principled disclosure must be on the disclosure itself and not on the whistleblower. The ultimate objective of all Australian laws in this field is not the protection of whistleblowers as such, but the encouragement of the principled disclosure of defined wrongdoing, as a kind of fiduciary duty to the whistleblower's organisation, and/or to a larger public interest.

21. Two further areas of innovation relate to classes of disclosure in which a whistleblower is in a factual sense absent: this occurs where there is in fact no protected disclosure as such, but retaliation for a presumed or suspected disclosure is threatened against an individual or is actually visited upon them. Protection may thus be required for an individual who has not in fact made a protected disclosure of information, but is suspected, mistakenly, of having done so; and, in the other case, for an individual who has been required (as part of his or her duties) either to report certain information via an internal administrative process, or to assist with an internal or external process such as an inquiry or audit. In each of these cases, where an attempt is made to warn off an individual from doing their duty

conscientiously, such threats should be treated as forms of retaliation under the protection policy.

22. In practice, any legislative scheme for the protection of disclosures of sensitive and potentially damaging information must be capable of drawing hard definitional lines between (1) non-genuine would-be disclosers, who seek to abuse the protections available in order to advantage themselves or damage the interests of other individuals or organisations, (2) those would-be whistleblowers who are genuine but ill-informed, and (3) those who are genuine but not necessarily motivated by public interest considerations. Current Australian whistleblower protection laws generally follow this approach, recognising that the motives of the whistleblower should be of no significance provided that they can satisfy the 'good faith' test of 'an honest belief held on reasonable grounds' that their disclosure is true.

23. In all these respects, the Australian Public Service is poorly served. The minimal whistleblower protection provisions of the *Public Service Act 1999*, the vesting of major responsibility for investigation of whistleblower allegations with the whistleblower's own agency head, the lack of specificity of the *APS Code of Conduct and Values* (which provides the sole permissible basis for making a protected disclosure), the lack of scope for the Public Service Commissioner to exercise an independent role in managing investigations or resolving intractable cases, and the lack of adequate information provided by the various official circulars issued by the Public Service Commissioner, all tend to suggest that whistleblowing in the APS is not, in practice, valued or encouraged.

3. International and Australian Approaches Compared.

The UN Secretariat

24. On 1 January 2006, the then Secretary–General of the United Nations (UN), Kofi Annan, acting in accordance with UN General Assembly resolution 60/248, created the UN Ethics Office, a project with which the author had a close involvement from the outset.

25. UN System concerns about the need for whistleblower protection were triggered largely by a public perception of corruption in UN agencies, and in particular by the 'Oil for Food' investigation.

The instrument establishing the UN Ethics Office described the objective of the Office as follows:[5]

> 1.2 The objective of the Ethics Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.

The specific terms of reference of the UN Ethics Office were also set out:[6]

> *3.1 The main responsibilities of the Ethics Office are as follows:*
>
> *(a) Administering the Organization's financial disclosure programme;*
>
> *(b) Undertaking the responsibilities assigned to it under the Organization's policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations;*
>
> *(c) Providing confidential advice and guidance to staff on ethical issues (e.g., conflict of interest), including administering an ethics helpline;*
>
> *(d) Developing standards, training and education on ethics issues, in coordination with the Office of Human Resources Management and other offices as appropriate, including ensuring annual ethics training for all staff;*
>
> *(e) Such other functions as the Secretary-General considers appropriate for the Office.*
>
> *3.2 The Ethics Office will not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances, with the exception of certain functions assigned to the Ethics Office under section 3.1 (b) above.*
>
> *3.3 The Ethics Office shall maintain confidential records of advice given by and reports made to it.*
>
> *3.4 In respect of its advisory functions as set out in section 3.1 (c) above, the Ethics Office shall not be compelled by any United Nations official or body to testify about concerns brought to its attention.*
>
> *3.5 The Ethics Office shall provide annual reports to the Secretary-General and, through the Secretary-General, to the General*

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5 K A Annan, Secretary–General of the United Nations, Secretary–General's bulletin, *Ethics Office —establishment and terms of reference* (30 December 2005), ST/SGB/2005/22 <http://daccessdds.un.org/doc/UNDOC/GEN/N05/668/34/PDF/N0566834.pdf> at 21 August 2008, section 1.

6 Ibid, section 3.

Assembly. The reports shall include an overview of the activities of the Office and any evaluations and assessments relating to such activities. The Ethics Office may also comment on rules, regulations, policies, procedures and practices that have come to its attention, and may make recommendations as appropriate.

3.6 The Ethics Office may be consulted on policy issues where its expertise, views and experience may be useful.'

Other agencies within the UN System were encouraged to adopt similar measures[7].

26. The public interest policy model for whistleblower protection adopted by the UN is similar in approach to the UK *Public Interest Disclosure law* of 1998, which has proved effective in thousands of cases in both the public sector and the private sector.[8]

27. The UN policy (ST/SGB 2005/21 – see Attachment 1) provides a strong statement of the duty of a UN official to disclose defined wrongdoing, and the right of an official to be protected when they do their duty, as the rationale for providing protection for the disclosure, as follows:

'General

1.1 It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation.

1.2 It is also the duty of staff members to cooperate with duly authorized audits and investigations. An individual who cooperates in good faith with an audit or investigation has the right to be protected against retaliation.

1.3 Retaliation against individuals who have reported misconduct or who have cooperated with audits or investigations violates the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view.

1.4 Retaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged

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7 UN News Centre, 'Ethics code for UN Secretariat staff extended to cover all funds and programmes' (Press Release, 3 December 2007) <http://www.un.org/apps/news/story.asp?NewsID=24900> at 21 August 2008.

8 See the work of the UK Charity, *Public Concern at Work*, generally, at <http://www.pcaw.org>.

in an activity protected by the present policy. When established, retaliation is by itself misconduct.

Section 2

Scope of application

2.1 Protection against retaliation applies to any staff member (regardless of the type of appointment or its duration), intern or United Nations volunteer who:

(a) Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service, including any request or instruction from any staff member to violate the above-mentioned regulations, rules or standards.…'

28. The policy also makes it clear that retaliation, which is broadly defined in terms similar to those employed in Australian legislation, constitutes misconduct, in that it is a breach of the duty of UN officials to 'regulate their conduct with the best interests of the Organization in view'; in other words, retaliation is also to be seen as founded on a conflict of interest.

UK Public Interest Disclosure law

29. The UK *Public Interest Disclosure law* itself was influenced by, and improved in some important respects upon, the policy model adopted for various Australian laws. In particular, access to compensation and to an effective compliance procedure is better handled under the UK law in most cases, in that retaliation or reprisal is treated as a matter arising in the employment relationship, rather than as a criminal offence. The resolution of cases by a relevantly empowered Tribunal has proved effective in the UK, whereas few cases of alleged retaliation have been successful in Australian courts.

Main features of Australian whistleblower protection laws

30. Most Australian public sector whistleblower protection measures, other than the Commonwealth's minimal provisions introduced in the *Public Service Act 1999*, include most if not all of the following specific features, many of which are also to be found in various combinations in other legislative schemes:

a) The *bona fide* discloser of defined wrongdoing - one who has an honest belief, held on reasonable grounds, that their disclosure of a specific instance of defined wrongdoing is true or is likely to be proved - does not

lose protection against retaliation even if their disclosure remains unproven or disproved after investigation.

b) Anonymous disclosures may be protectable, but purported 'disclosure' of an unsubstantiated rumour is not protected: making a false public interest disclosure, knowing it to be false, is regarded as abusive, and treated as a disciplinary offence.

c) A 'strategic' disclosure about wrongdoing in which the whistleblower was personally involved, in order to seek to escape the consequences, is *protected only in relation to any retaliation for making the disclosure*, not for the disclosed misconduct itself.

d) To prevent abuse and the unnecessary deployment of resources, a designated authority receiving a protected disclosure is required to *consider* the disclosure, but has the discretion not to investigate unless it decides on reasonable grounds that an investigation is objectively warranted: investigation may be refused if the same matter has already been disclosed and investigated.

e) The investigating authority must provide a reasonable level of reporting to the discloser, who is not empowered to accept or reject the outcome of an investigation, but may make the disclosure afresh to another authority.

f) A protected disclosure may be made to any appropriate authority in relevant circumstances: internal disclosure within the employee's own organisation as a first step is not necessarily required. (In the UK, initial internal dislosure is the norm, reflecting the primary focus there on whistleblowing as a matter arising in the employment relationship.)

g) The whistleblower is not required or invited to provide evidence to 'prove' that their disclosure is true: not all whistleblowers are *bona fide*, and in principle, vigilantes should not be endorsed in advance. Evidence and proof should be obtained by competent investigatory authorities, acting on the disclosure. The whistleblower *may* provide evidence where it is

available to him/her in the ordinary course of their work, but he or she must not be encouraged (nor indemnified) to act illegally or improperly in order to provide evidence, which may alert the subject of a disclosure to the fact that their conduct has come under suspicion, and enable them to destroy evidence, interfere with potential witnesses, or otherwise undermine an investigation or subsequent prosecution.

h) Disclosure to the public via the media (or the Internet) is sometimes conditionally protected as a last resort, (eg NSW *Protected Disclosures Act 1994*, UN Secretariat policy) where the matter concerns a significant and urgent danger to public health and safety, or where the whistleblower has already made the same disclosure internally but has been ignored. Disclosure to the public media should not attract financial or other rewards which would tend to introduce issues to do with conflict of interest on the part of the whistleblower. Disclosure to the media may also alert the subject to the fact that their conduct has come under suspicion, and enable them to destroy evidence, interfere with potential witnesses, or evade investigation.

Private sector coverage

31. Disclosures across the public sector / private sector interface need special treatment: disclosure to a relevant public organisation by a private citizen of wrongdoing by a contractor or by the organisation's own staff, such as, for example, abuse of staff or unlawful discrimination, breach of health and safety law, damage to the contracting organisation's mission or reputation, breach of contract terms, fraud or theft, should be protected as far as is feasible. A private sector contractor who is proven to have taken or threatened reprisals could be subject to administrative fines, contract cancellation, closer contract audit/supervision, debarment from future contracts and /or prosecution.

Compensation

32. As identified by the '*Whistling While They Work*' report, effective access must be available to compensation, so that a whistleblower who has suffered adverse treatment at the hands of an employer can be recompensed in some way, and the employer can be sanctioned effectively: it is clearly meaningless to have in place a compensation system which the average whistleblower cannot afford to access, or which places other barriers in the way of a fair and reasonable outcome

for the genuine whistleblower who has performed a public service. The UK model for providing compensation via an action before an employment tribunal is to be preferred.

Effective administrative process

33. Legislative provisions concerning the whistleblower and the disclosure aside, attention must also be given to the administrative process which organisations develop and implement to ensure that the legislation is effective in achieving its overall objective: once implemented, a whistleblower protection / public interest disclosure policy must be strongly supported by subject organisations to ensure that it is 100% effective, and is seen to be so.

34. Australian organisational culture must be encouraged to become more supportive of 'public interest disclosure of wrongdoing' as an act of loyalty to the organisation and to the public interest, rather than as an act of personal disloyalty. In the Australian context, such change is likely to be achieved more readily if those whistleblowers who are not dealt with properly at first instance within the organisation can be taken up by an external, independent, and expert authority which is empowered to deploy a robust process to achieve the objectives of the legislation by balancing the various conflicting interests of the parties.

The Australian Public Service

35. Australia's *Public Service Act 1999* provides very restricted protection for employees of Australian Public Service (APS) agencies who "blow the whistle" by reporting breaches (or alleged breaches) of the APS Code of Conduct: no other basis for making protected disclosures is provided.

36. The APS Code of Conduct is set out in its entirety in very broad and general terms in the *Public Service Act 1999*: it requires that APS staff -

> *1. behave honestly and with integrity in the course of their employment;*
>
> *2. act with care and diligence in the course of their employment;*
>
> *3. treat everyone with respect and courtesy, and without harassment (when acting in the course of their employment);*
>
> *4. comply with all applicable Australian laws, including federal, state and territorial statutes and instruments made under those statutes (when acting in the course of their employment);*

5. comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction;

6. maintain appropriate confidentiality about dealings that the employee has with any Minister or the Minister's staff;

7. disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their employment;

8. use Commonwealth resources in a proper manner;

9. 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 employment;

10. not make improper use of inside information or 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;

11. at all times behave in a way that upholds the APS and the integrity and good reputation of the APS;

12. on duty overseas, at all times behave in a way that upholds the good reputation of Australia; and

13. comply with any other conduct requirement that is prescribed by the regulations.[9]

37. The first feature to note is the narrowness of the scheme of obligation. This is a narrow employee code of conduct, focused on narrow compliance with selected employment obligations – see for example sub-clauses 4, 5, 7, 9 and 13. Other clauses are so unclear in their application as to be unsafe for any whistleblower to rely on – see for example sub-clauses 1, 10, 11 and 12. It is thus far removed from the type of professional ethics code which has been commonplace – and desirable - for public officials in many countries, including Australia at the State and Territory level, for decades. Such codes recognise at minimum a broader set of interests than those of the immediate employer, the reality of competing and conflicting systemic 'core values', and the ethical dilemmas created by the location of discretionary power in the hands of appointed officials.

38. One immediate and undesirable consequence of the *Public Service Act* provisions and the APS Code is that together they cast the principled disclosure of

[9] http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/BP/prb0127-e.htm - %283%29

official wrongdoing as a strictly optional activity, to be undertaken at the discretion of the individual: there is no clear duty imposed on APS officials to disclose wrongdoing of any kind, in any circumstances.

39. This is a crucial difficulty: all Australian States and Territory legislation takes as a given that the intending whistleblower should not be tasked with making the judgment that the matter which they find problematic will qualify as a protected disclosure. The scope for individual discretionary judgement as to what constitutes 'a breach of the APS Code of Conduct' must be minimised if APS whistleblowers are not to be seen as moralistic do-gooders pursuing their own moral agendas.

40. Further, it should be noted that because of the general and non-exhaustive terms in which the APS code is formulated, it is not clear that protection from retaliation is available to an APS employee who has, for example, assisted an official investigation, or responded in accordance with the duties of their position to a request for information, without 'making a disclosure': too much is left open to interpretation.

41. Given the evident risks attached to making a disclosure of conduct which, *in the opinion of the whistleblower*, amounts to a breach of the APS Code of Conduct, it has to be asked whether it is reasonable to expect that any reasonable person would take on such a course of action.

42. Secondly, the *Public Service Regulations 1999* require each Public Service Agency Head to establish procedures for dealing with a report made by an APS employee under section 16 of the *Public Service Act 1999* because he or she has reported breaches (or alleged breaches) of the APS Code of Conduct to the Public Service Commissioner, the Merit Protection Commissioner, an APS Agency Head, or a person authorised by any of these officials…'.

Section 16 of the Act provides minimally as follows:

> *'16. Protection for whistleblowers*
>
> *A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:*
>
> *(a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or*

(b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.

(c) an Agency Head or a person authorised for the purposes of this section by an Agency Head.'

43. It should be noted that disclosures made by private citizens (for example, clients of Australian government agencies) concerning the conduct of APS staff, are not covered by these provisions.

44. Section 15 of the Act provides in relation to breaches of the APS Code of Conduct that Agency Heads must establish procedures for assessing breaches of or failure to comply with the Code. The Regulations further provide that the procedures for inquiring into a report must have regard to procedural fairness. In a case where an APS employee makes a report alleging a breach of the Code of Conduct to the Agency Head (or a person authorized by the Agency Head to receive the report), the Agency Head (or authorized person) must, unless he or she considers the report to be frivolous or vexatious, inquire into the allegations and determine whether there is sufficient evidence to justify an investigation under the Agency Head's procedures for determining whether there has been a breach of the Code of Conduct.

45. An APS Agency Head may, in the case of an employee who is found to have breached the APS Code of Conduct, impose sanctions including termination of employment, reduction in classification or salary, re-assignment of duties, a fine or a reprimand. The Commissioner does not have the power to impose a sanction. It is possible that the Agency Head placed in such a situation may not be a wholly disinterested administrator of the protected disclosure scheme.

46. Putting aside the consideration of notions such as 'duty' in the context of APS employment, potential whistleblowers will be likely to require, not unreasonably, a degree of certainty that their disclosure *will* be covered by the available protections, not merely that it might be.

47. Unfortunately, under the current arrangements, the vagueness in terms of definitions and processes, and the lack of clear responsibility for the specific function of protection of a whistleblower, together with a complete lack of statutory provisions regulating the many problematic situations which could

foreseeably arise (examples are set out above in paragraph 30) will inevitably prove to be inimical to an effective public interest disclosure regime.

4. Administration, Policy and Legislation

48. At minimum, there is now a need, and a broadly accepted public interest justification, for the provision by the Commonwealth of a robust statutory framework for the regulation of public interest disclosure of wrongdoing by APS officials, in terms comparable to those already provided by Australian State and Territory laws.

49. There is also a need for an independent source of authoritative and indemnified advice to intending whistleblowers, if APS staff members and others are to be realistically expected to become involved in the risky business of ensuring, on behalf of their agencies, that breaches of the APS Code - and wrongdoing more generally - will be the subject of principled disclosures by staff.

50. It is submitted that a new independent statutory body could be created for this purpose or, alternatively, the Commonwealth Ombudsman could provide the appropriate level of independence, both perceived and actual, and the expertise necessary for setting whistleblower policy and practice standards, and for administering individual cases that involve APS agencies and staff, and private citizens. The Ombudsman's functions currently involve safeguarding the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action;
- fostering good public administration that is accountable, lawful, fair, transparent and responsive;
- assisting people to resolve complaints about government administrative action;
- developing policies and principles for accountability; and
- reviewing statutory compliance by agencies.

51. The Commonwealth Ombudsman's office primarily investigates complaints about Australian Government agencies and makes recommendations for resolving complaints, in order to (among other matters)[10]:

- foster good complaint handling in Australian Government agencies;

[10] *See: http://www.comb.gov.au/commonwealth/publish.nsf/Content/legislation_home*

- highlight problems in public administration through complaint handling, own motion investigations and reporting;
- contribute to public discussion on public administration;
- focus attention on the adverse impact government administration can have on individuals;
- promote open government;
- inspect the accuracy and comprehensiveness of records on selected law enforcement activities; and
- collaborate with State, Territory and Industry Ombudsmen

52. On this basis there would appear to be a good initial 'fit' with an extension of the Ombudsman's jurisdiction to include responsibility for a Commonwealth whistleblower protection regime, allowing that additional resources and powers are likely to be needed, depending on the scope of the functions to be undertaken, and the extent to which the Ombudsman would function as a policy setting and co-ordination body in collaboration with other integrity agencies (such as the Auditor General) and heads of other Commonwealth agencies.

53. The Ombudsman would also be well placed to co-ordinate the development of coherent policy on whistleblower protection with other State, Territory, and Industry Ombudsman offices and to direct public attention to procedures for seeking to make protected disclosure about corruption or maladministration.

54. It is important that any legislative measure adopted to provide for the protection of public interest disclosures is expressed in clear and unambiguous language, enhanced by modern drafting conventions.

55. The APS Code and Values also need to be reconsidered and re-expressed, or further supplemented, in terms which provide significantly greater certainty as to what disclosure of wrongdoing will attract available protection.

56. Explanatory provisions should be included in prospective whistleblowing protection legislation so as to aid public servants, lawyers, judges, politicians, journalists and the greater public to develop a good understanding of the rights and responsibilities which arise with respect to public interest disclosure of wrongdoing, and the related protection measures. Importantly, the legislation must clearly define the types of matters which, when disclosed in accordance with the law, will attract protection on the ground that the disclosure is in the public interest, and how – in practice – responsible Commonwealth agencies are to provide that protection.

5. Conclusion and Recommendations

57. With the recognition of the need for implementation of legislative measures to protect public interest disclosures, effective steps can and should be taken to enable and encourage prospective whistleblowers to do what should be characterised as their legal and professional duty; that is, to report misconduct and corruption to a proper authority.

58. Once enacted, whistleblowing legislation must be strongly supported in administrative practice by Ministers, Agency Heads and the Senior Executive Service to ensure that it is effective in achieving its objectives. The regime must also be subject to regular parliamentary and administrative review, and mandatory annual agency reports, in order to maintain relevance, and to focus agency heads on the task of fostering an organisational culture which properly depicts appropriate public interest disclosure of defined wrongdoing as being an act of loyalty to the Australian public.

59. Recommendations:

1. **That, as a matter of urgency, new specific legislative measures for the protection of public interest disclosures of defined wrongdoing, or 'whistleblower protection', be developed having regard to the laws and administrative arrangements developed by Australian States and Territories, the United Kingdom, and the UN Secretariat, and bearing in mind the desirability of having broadly consistent policy and practice in the approach to the protection of whistleblowers and whistleblowing at State and Federal level in Australia, in consultation with the Commonwealth Ombudsman, Public Service Commissioner, Agency Heads, unions, and other integrity offices.**

2. **That such measures for the protection of public interest disclosures of defined wrongdoing include provision for compensation to the whistleblower and effective sanctions against the wrongdoer.**

3. **That a new independent statutory body or the Commonwealth Ombudsman be given responsibility for administering the proposed**

new legislative measures, together with the necessary resources to undertake the functions involved.

4. **That the proposed Commonwealth whistleblower protection legislation contain explanatory provisions describing the rights and responsibilities of prospective whistleblowers under the Act, in addition to specific requirements binding heads of Commonwealth agencies to develop and implement relevant administrative processes for the handling of disclosures and protecting whistleblowers in accordance with the objectives of the Act, the provisions of the APS Code of Conduct, the operational imperative to ensure integrity in the agency's operations, and the public interest.**

5. **That the proposed protection regime also be subject to regular parliamentary and administrative review, and mandatory annual agency reports, in order to maintain relevance, and to focus agency heads on the task of fostering an organisational culture which properly depicts appropriate public interest disclosure of defined wrongdoing as being an act of loyalty to the Australian public.**

6. **That the APS Commissioner reconsider, and provide specific guidance on the interpretation and application of, the** *APS Code of Conduct and Values* **as the basis for making a protected disclosure of wrongdoing.**

7. **That consideration be given to the application of the proposed protection regime to other categories of Australian Government employees such as people currently or previously engaged under the** *Members of Parliament (Staff) Act 1984* **and,** *mutatis mutandis***, to the Australian private sector, following generally the model established by South Australia and the United Kingdom, to protect appropriate disclosure of criminal conduct, official misconduct, or significant breach of fiduciary duty by persons occupying a position of trust.**

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Federal Member for Fremantle

* Acknowledgement: The author wishes to thank Howard Whitton for his invaluable advice and assistance in the preparation of this submission.

Attachment 1

United Nations

ST/SGB/2005/21
Secretariat
19 December 2005
05-65155 (E) 191205
0565155

Secretary-General's Bulletin

Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations

The Secretary-General, for the purpose of ensuring that the Organization functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorized audits or investigations, and in accordance with paragraph 161 (d) of General Assembly resolution 60/1, promulgates the following:

Section 1
General

1.1 It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation.

1.2 It is also the duty of staff members to cooperate with duly authorized audits and investigations. An individual who cooperates in good faith with an audit or investigation has the right to be protected against retaliation.

1.3 Retaliation against individuals who have reported misconduct or who have cooperated with audits or investigations violates the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view.

1.4 Retaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct.

Section 2
Scope of application

2.1 Protection against retaliation applies to any staff member (regardless of the type of appointment or its duration), intern or United Nations volunteer who:

(a) Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service, including any request or instruction from any staff member to violate the above-mentioned regulations, rules or standards. In order to receive protection, the report should be made as soon as possible and not later than six years after the individual becomes aware of the misconduct. The individual must make the report in good faith and must submit information or evidence to support a reasonable belief that misconduct has occurred; or

(b) Cooperates in good faith with a duly authorized investigation or audit.

2.2 The present bulletin is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance, non-extension or termination of appointment. However,

the burden of proof shall rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity referred to in section 2.1 above.
2.3 The transmission or dissemination of unsubstantiated rumours is not a protected activity. Making a report or providing information that is intentionally false or misleading constitutes misconduct and may result in disciplinary or other appropriate action.

Section 3
Reporting misconduct through established internal mechanisms
Except as provided in section 4 below, reports of misconduct should be made through the established internal mechanisms: to the Office of Internal Oversight Services (OIOS), the Assistant Secretary-General for Human Resources Management, the head of department or office concerned or the focal point appointed to receive reports of sexual exploitation and abuse. It is the duty of the Administration to protect the confidentiality of the individual's identity and all communications through those channels to the maximum extent possible.

Section 4
Reporting misconduct through external mechanisms
Notwithstanding Staff Rule 101.2 (q), protection against retaliation will be extended to an individual who reports misconduct to an entity or individual outside of the established internal mechanisms, where the criteria set out in subparagraphs (a), (b) and (c) below are satisfied:
(a) Such reporting is necessary to avoid:
(i) A significant threat to public health and safety; or
(ii) Substantive damage to the Organization's operations; or
(iii) Violations of national or international law; and
(b) The use of internal mechanisms is not possible because:
(i) At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or
(ii) It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanisms; or
(iii) The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such a report; and
(c) The individual does not accept payment or any other benefit from any party for such report.

Section 5
Reporting retaliation to the Ethics Office
5.1 Individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible. Complaints may be made in person, by regular mail or by e-mail, by fax or through the Ethics Office helpline.
5.2 The functions of the Ethics Office with respect to protection against retaliation for reporting misconduct or cooperating with a duly authorized audit or investigation are as follows:
(a) To receive complaints of retaliation or threats of retaliation;
(b) To keep a confidential record of all complaints received;
(c) To conduct a preliminary review of the complaint to determine if (i) the complainant engaged in a protected activity; and (ii) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.
5.3 The Ethics Office will seek to complete its preliminary review within 45 days

of receiving the complaint of retaliation.
5.4 All offices and staff members shall cooperate with the Ethics Office and provide access to all records and documents requested by the Ethics Office, except for medical records that are not available without the express consent of the staff member concerned and OIOS records that are subject to confidentiality requirements. Reports of the Joint Appeals Boards shall be routinely sent to the Ethics Office unless the appellant objects.
5.5 If the Ethics Office finds that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days.
5.6 Pending the completion of the investigation, the Ethics Office may recommend that the Secretary-General take appropriate measures to safeguard the interests of the complainant, including but not limited to temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant within or outside the complainant's office or placement of the complainant on special leave with full pay.
5.7 Once the Ethics Office has received the investigation report, it will inform in writing the complainant of the outcome of the investigation and make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management. Those recommendations may include disciplinary actions to be taken against the retaliator.
5.8 If the Ethics Office finds that there is no credible case of retaliation or threat of retaliation but finds that there is an interpersonal problem within a particular office, it will advise the complainant of the existence of the Office of the Ombudsman and the other informal mechanisms of conflict resolution in the Organization.
5.9 If the Ethics Office finds that there is a managerial problem based on the preliminary review of the complaint or the record of complaints relating to a particular department or office, it will advise the head of department or office concerned and, if it considers it necessary, the Management Performance Board.
5.10 Where, in the opinion of the Ethics Office, there may be a conflict of interest in OIOS conducting the investigation as referred to in section 5.5 above, the Ethics Office may recommend to the Secretary-General that the complaint be referred to an alternative investigating mechanism.

Section 6
Protection of the person who suffered retaliation
6.1 If retaliation against an individual is established, the Ethics Office may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the individual who has suffered retaliation, recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action. Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation.
6.2 Should the Ethics Office not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the Secretary-General. The Secretary-General will provide a written response on the recommendations of the Ethics Office to the Ethics Office and the department or office concerned within a reasonable period of time.
6.3 The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding.

Section 7
Action against the person who engaged in retaliation

Retaliation against an individual because that person has reported misconduct on the part of one or more United Nations officials or cooperated with a duly authorized audit or investigation of the Organization constitutes misconduct which, if established, will lead to disciplinary action and/or transfer to other functions in the same or a different office.

Section 8

Prohibition of retaliation against outside parties

Any retaliatory measures against a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the United Nations because such person has reported misconduct by United Nations staff members will be considered misconduct that, if established, will lead to disciplinary or other appropriate action.

Section 9

Entry into force

The present bulletin shall enter into force on 1 January 2006.

(*Signed*) Kofi A. **Annan**

Secretary-General