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Submission No. 26

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

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Mark Dreyfus QC MP
Chair – Inquiry into Whistleblowing in the Australian Government Sector
House of Representatives Standing Committee on Legal and Constitutional Affairs
PO Box 6021
Parliament House
Canberra ACT 2600.

Dear Mr Dreyfus

Thank you for providing Whistleblowers Australia with this opportunity to make a submission to your Inquiry concerning a preferred model for legislation to protect whistleblowers within the Australian Government Public Sector and related matters.

The submission is provided with this letter.

You will note our concern throughout the submission to promote transparency and accountability in relation to pubic interest matters and to provide whistleblowers with appropriate protection against reprisals.

Whistleblowers Australia is encouraged by this positive move to lift issues surrounding public interest disclosures into the public spotlight.

I have also received your formal invitation to participate in the 'roundtable' discussion on this matter on 9th September 2008. Your invitation is appreciated and accepted with thanks.

We look forward to further positive developments about whistleblowing in the future.

Yours faithfully

Peter Bennett
National President

Submission by Whistleblowers Australia

House of Representatives Standing Committee on Legal and Constitutional Affairs

Inquiry into Whistleblowing in the Australian Public Service

PART 1. PREFACE

Whistleblowers Australia (WBA) continues to advocate the establishment of a public interest disclosure Agency to manage both public interest disclosures and the implementation of effective Whistleblower protection legislation. WBA recommended this course to the 1993 Senate Select Committee on Public Interest Whistleblowing.

The Select Senate Committee in its Report recommended:

> 7.47 Public Interest Disclosures Agency -
>
> Legislation be enacted to establish an independent agency, to be known
> as the Public Interest Disclosures Agency (the Agency).
>
> The role of the Agency should be to receive public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures, to provide a national education program and to make and oversee the implementation of recommendations relating to its role.
>
> The Agency should consist of an administrative unit with the capacity to contract relevant experts as required, and an education unit.
>
> The Agency should have the following accountability mechanisms:
>
> a. Report annually to Parliament;
> b. Present special reports to Parliament on any matters relating to its functions and operations which the Agency considers need Parliamentary support or action;
> c. Maintain files, statistics and records of cases;
> d. Provide evidence of client satisfaction through surveys, the results of which will form part of the annual report……

The recommendation was not implemented. The Australian Public Service has been denied an effective public interest disclosure regime for 15 years. During this period, public interest information which would have served the public interest was not disclosed. Whistleblowers Australia looks forward to an outcome through this Committee that is significantly better than the outcome of the previous inquiry.

PART 1 Introduction.

This submission is divided into two parts. Part 1 addresses matters which fall under clause 7 of the Terms of Reference. Part 2 addresses specific matters citing the other clauses of the Terms of Reference.

Whistleblowers Australia contends that the matters addressed in Part 1 are appropriate for the Committee to consider in the context of an Australian Government approach to whistleblowing.

We contend that the matters addressed in this Part are fundamental to the public's right to disclose and access public interest information. It is our view that Australian protected public interest disclosure legislation should apply outside the Australian Public Sector to any person who has knowledge of conduct contrary to the public interest (wrongdoing).

Establishing public interest disclosure legislation applicable to the Australian Public Sector is a significant first step in that process and therefore no criticism is intended in relation to the scope of this Inquiry. However, we believe it is important that the Committee acknowledge the vital need for a national public interest disclosure regime and that addressing preliminary issues concerning the Australian Public Sector is a very limited but necessary first step in that process.

1. WBA stand on preliminary issues

i. For the purposes of this submission, the term 'Whistleblower' refers to a person making a public interest disclosure and 'Whistleblowing' refers to the making of a disclosure in the public interest.

ii. Whistleblowers must not be compelled to make disclosures. Whistleblowing must be a voluntary act.

iii. Information related to or about a public matter, policy, governance or administration is public interest information.

2. Fundamental right to public interest information.

WBA contends that a fundamental obligation of Parliament is to ensure the public's right to public interest information. At present there is no law ensuring the public's right to disclose (or access) public interest information. By using various powers and legislation, specified authorities have almost unlimited discretion as to what public interest information may be disclosed. Public interest information is not freely available. It is only made available if it is not adverse to vested interests.

This is a serious misuse of the powers vested in Parliament and the bureaucracy. The establishment of a Public Interest Disclosure Act does nothing to enforce the public's right to public interest information.

Public interest information is only made available selectively, depending on the interests of those who have the power to restrict access. Therefore information which has not been disclosed but which would serve the public interest can only be disclosed through informal channels – whistleblowing. If blowing the whistle offends those vested interests then the whistleblower invariably suffers reprisals.

From a Whistleblower's perspective, PID Acts do not ensure the public's right to public interest information. PID Acts do not require the disclosure of information which has not been disclosed. PID Acts do not reduce the need for whistleblowers or whistleblowing. The aim of

most existing PID Acts is to maintain control over the disclosure of public interest information by 'regularising and institutionalising' those informal public interest disclosure (whistleblowing) channels. The reward for whistleblowers who abandon informal disclosure channels and comply with those 'regularised and institutionalised' processes is that some formal whistleblower protection is offered

The purpose of controlling the availability of public interest information it to minimise, delay or stop its disclosure. This may be a perfectly valid purpose in instances which serve the public interest but in other instances the purpose may only serve other vested interests.

In formulating a PID Act, the Committee must consider reversing the emphasis <u>from</u> constructing restrictive procedures <u>to</u> providing access to public interest information.

Having established a regime by which public interest information is made available, it would be proper to consider circumstances where some information may be restricted in the public interest for compelling and necessary reasons. Lastly, proper protection for whistleblowers must be introduced for those instances where information is not being made available in the public interest.

3. Emphasis on laws to restrict public interest access.

It is ludicrous to think that our democratic system of representative government empowers Parliament to create laws which derogate the public's right to information which best serves the public interest. But that is what is happening.

Laws exist (Crimes Act s70, PS Regs 2.1 and others) are used to prevent the disclosure of public interest information when the public interest would be better served if the information was disclosed. Some disclosures are being prevented for reasons that serve political or public sector interest but not the public's best interests. On balance, often the reasons used to prevent disclosure are not compelling and not necessary because they do not serve the greater public interest. The power to prevent disclosure exists in law and practice. That power is often abused and information which would properly serve the public interest is not disclosed.

Laws which restrict public interest disclosures and access to public interest information have not kept pace with the development of civil and political rights. This was confirmed by Justice Finn in *Bennett v The President, Human Rights and Equal Opportunity Commission [2003] FCA 143* when he struck down the previous 87 year old regulation preventing public servants from making public comment about matters of public administration.

Similarly the International Covenant on Civil and Political Rights (Article 19) and recent European Union Human Right decisions oppose unnecessary impediments to the disclosure of public interest information. These eminent authorities hold that any restriction on imparting information must be on specified 'necessary' grounds – which does not include the protection of political or public sector interests.

The growing legal consensus is that public interest information should be disclosed (or accessed) as a public right and as a service to the public interest. Any impediment to that process must occur only if there is a compelling and necessary public interest requirement for that impediment.

In short WBA argues that the Committee should consider how best to allow and facilitate routine disclosures of public interest information by Agencies (unless there are compelling and necessary public interest reasons why the disclosure should not be made.)

4. 'Confidential' Information.

In the Terms of Reference the expression 'confidential information' is used.

To make it perfectly clear about the need for some information to be restricted from public interest access, WBA acknowledges without reservation, that the public interest can on occasions be best served if certain information is not made available to the public. But that non disclosure should only apply if it best serves the greater public interest as opposed to the other interests; eg to protect a person from embarrassment or the responsibility to account for actions, conduct or policies.

The Audit Office, the Ombudsman and courts and tribunals have often commented on the rampant misuse of security classifications on documents and information by Commonwealth agencies. For example, the Australian Customs Service made a 'blanket' direction to the effect that any information arising from or within the Australian Customs Service was prohibited from disclosure. Once the document entered a Customs area, or was in the possession of a Customs Officer it gained the status of a 'protected' document. This included Telstra phone books, wall calendars, union magazines, and if you brought your grandmother's Anzac cookie recipe to work, then it became a protected document as well.

This was a blanket 'protected 'classification of documents, many of which were already public documents. There are numerous examples of agencies abusing their power to claim that information was 'confidential' for no purpose other than to avoid embarrassment or accountability.

This sort of abuse is so rampant that nobody any longer calls it for what it is, misfeasance. This is a breach of administrative law which occurs constantly. The conduct is contrary to the Public Service Act (Code of Conduct). Yet WBA cannot find any charges being laid against any bureaucrat for such conduct. Even when courts have commented adversely about such conduct, no action has been taken against those involved.

There can be no doubt that the misclassification of agency information can only be done and maintained with the concurrence (be it explicit or implicit) of very senior agency managers. Though there may well be a valid public interest reason to classify some information as 'confidential' there is no public interest justification to classify all or most information within an agency as 'protected'. Therefore any blanket classification of agency information must be regarded as highly suspect and the motives of those responsible must be questioned.

The Committee must consider whether the agency misfeasance practice of improperly classifying information as a means to prevent the disclosure of public interest information should be treated as an offence under a PID Act. WBA suggests that the placement of this offence in the PID Act would go a long way to stopping this administrative abuse.

5. The 'Public Interest' – competing interests.

The term 'public interest' is generally accepted as applying to the 'common well-being' or the 'general welfare' of people. However the 'people' to which it applies varies. When the term is applied to the people as a whole, then the term is best described as the "widest or greater public interest."

But authorities claim there are other specifically nominated public interests; For example;

> national security , defence, Cabinet or the Executive Council or Internal working documents or documents affecting enforcement of law and protection of public safety or which affects financial or property interests of the Commonwealth, or those affecting certain operations of agencies or personal privacy and legal professional privilege and so on.

Agencies involved in such matters invariably claim that they have a public interest role and that the disclosure of any information about such matters is contrary to that public interest. But what these Agencies are actually claiming is that the public should not know what they are doing. They claim that the Agency 'public interest' must prevails over the wider public interest.

This is a conflict between an Agency's 'public interest' claim and the wider public interest. The conflict between competing public interests is complex but not really difficult to resolve.

As a general rule, the 'wider' or greater' public interest is best served by the disclosure of public interest information. Only in circumstances where there is a compelling and necessary reason (in the public interest) should the public be denied public interest information.

Therefore any claim to exempt an Agency's public interest information from disclosure must be balanced/tested against the wider public interest benefit of having the information disclosed. To prevent the disclosure of Agency information, the Agency must prove that the wider public interest would be harmed if the Agency information was disclosed.

Determining the balance between servicing the widest or greater public interest and serving the interest of a particular Agency exemption would be necessary on a case by case basis. But the over-riding criteria must be whether there was any compelling (avoidance of serious harm) and necessary (the harm is imminent and difficult to rectify) justification to deny disclosure of public interest information.

The Committee must address the issue of competing 'public interests.' It is vital to establish the criteria by which public interest matters are balanced to ensure that the widest or greatest public interest is best served.

6 New Legislation.

Legislation is not enough.

Whistleblowers Australia exists to help whistleblowers survive the process of making a public interest disclosure. There is no other organisation in Australia committed to that purpose. There is no dedicated unit or sub unit of any Australian organisation or government agency committed to and properly resourced to carry out that function.

Whistleblowers Australia was cooperatively provided an opportunity to offer constructively critical comment to the Griffith University Project, 'Whistleblowing in the Australian Public Sector', January 2008 'Draft Report'**.** This project also has the title of 'Whistling While They Work' (WWTW). Victims of reprisals who have left the Public Service were not included in the Draft Report research. It is our view that had those victims been surveyed, that data would have provided the Report with even more damning insights into the critical status of public sector whistleblowing than was discovered by the project research. Nonetheless, the report data is sufficient for our purposes. Though the statistical data covers state and federal jurisdictions, it is reasonable to assume that the figures provided may be generally applied to the Australian Public Service.

From the 'Draft Report':

- 71.4% of respondents had directly observed at least one of a wide range of nominated examples of wrongdoing in their organisation.
- 61.1% of respondents rated at least one form of wrongdoing as at least 'somewhat serious'.
- 28% of all respondents formally reported the wrongdoing.
- 20% of all respondents were estimated to have reported outside their organisational role (as whistleblowers).
- 12% of all respondents reported 'public interest' wrongdoing, such as corruption, defective administrative, or waste, as opposed to personnel and workplace grievances.
- 28.5% of all respondents who observed wrongdoing they considered 'very' or 'extremely serious' did not report it or otherwise act on it.

Clearly the above data shows a significant amount of observed and/or unreported wrongdoing and other systemic problems in public administration. Other data strongly indicates that a high proportion of this wrongdoing is against the public interest.

More importantly, the report shows that 22% of whistleblowers suffer reprisals and that most reprisals are inflicted by 'agency management'. WBA holds the view that the 22% is a very conservative assessment of those who suffer bad treatment, particularly that inflicted by agency managers. Many whistleblowers who are treated badly by managers leave the Public Service. These instances are not reflected in the 22% quoted by the Draft Report. The instance of bad treatment reprisals is more likely to be round 30% if those who have left the Public Service are taken into account.

The Public Service Act, Regulations and guidelines concerning Whistleblowing have been in place for more than a decade. Over that period the Act, Regulations and the guidelines appear to have done almost nothing to deter Public Sector conduct contrary to the public

interest. Moreover, it appears that the Act, Regulations and guidelines have been similarly ineffectual in relation to promoting or facilitating the disclosure of public interest wrongdoing or the protection of whistleblowers.

Notwithstanding, the Public Service Commission annual report or the reports of any Australian Government Agency provide no inkling of the feeble state of public sector whistleblowing. As a general rule, Australian Public Service agencies do not provide appropriate or adequate public reports about instances of public sector wrongdoing, public interest disclosures or the protection of whistleblowers. The lack of accountability and transparency associated with public interest wrongdoing is an abuse or neglect of public office and an affront to the public interest.

The lack of relevant Public Service information about the true status of public sector whistleblowing and the absence of transparency and accountability as to how whistleblowing is managed in the Public Service is **a serious issue for the Committee to consider.**

These issues provide strong justification to move the overall monitoring and management of Public Service whistleblowing to a new agency tasked with those functions.

As noted above, in the past the Public Sector generally has shown virtually no interest in the legislative provisions requiring the establishment of agency whistleblowing processes. Therefore it is difficult to see how the introduction of new public interest disclosure legislation alone will rectify the situation.

In our view the only way to give effect to an Australian Public Sector public interest disclosure regime is to create a separate and independent agency, charged with the prime responsibility of ensuring the proper functioning of whistleblowing legislation.

7. Why is legislation necessary?

It seems that the current legislation does little to prevent public sector wrongdoing and less to promote public interest disclosures of that wrongdoing or the protection of whistleblowers**.** If 61% of staff are aware of 'somewhat serious' public sector misconduct, then the Public Service has some serious untreated endemic problems.

It is evident from the WWTW Project data that public sector whistleblowers blow the whistle and disclose public interest wrongdoing. The data also suggests that some whistleblowers do not suffer reprisals and are not harmed as a result of making a public interest disclosure. WBA acknowledges that on the basis of those who took part in the research surveys this data is probably correct. For those lucky enough not to suffer reprisals these outcomes would be considered satisfactory and successful.

WBA holds the view that satisfactory and successful whistleblowing is confined (almost exclusively) to the disclosure of wrongdoing carried out by employees at the lower status levels. Such disclosures are the most numerous and are generally supported by management at all levels. With management support, it is likely that the whistleblowing event, including the disclosure will not result in any significant reprisals against the whistleblower.

The Public Sector agencies persistently claim that this outcome is a result of implementation of existing legislation and compliance to that legislation.

WBA holds a different view. Stopping misconduct and exercising a duty of care for an employee (whistleblower) are normal functions of any manager. Any reasonable manager would consider that stopping wrongdoing within an agency and caring for a whistleblowing employee is a natural part of their duties. It is also an obligation in common law, it is part of the employment contract, and it is stipulated in the Public Service Act.

Therefore in the current legislative environment it is more likely that actions to stop misconduct and to protect the whistleblower who disclosed it have little or nothing to do with the existing Whistleblower legislation and more to do with supervisors or managers doing their normal duties.

Claims by Public Sector agencies as to their adherence to current whistleblower protection legislation are easy to refute. The 22% of whistleblowers who were treated badly, mostly by managers proves there are serious failings at the management level to comply with the legislation.

Moreover, it is our view that this 22% of bad treatment more often than not, directly relates to the conduct of officers above line manager level within agencies. It is quite logical that managers at any level would be quite willing to resolve wrongdoing, promote disclosures and protect whistleblowers if they were not directly implicated in the wrongdoing or its disclosure. But when there is a chance that the wrongdoing directly or obliquely applies to their conduct, it is likely they will use their position of power and control to badly treat the whistleblower and prevent any disclosure. The more power they have in the agency hierarchy, the more they can impose bad treatment with impunity and the more readily they can cover-up wrongdoing.

Therefore, it is reasonable to assume that a substantial part of the 22% of bad treatment inflicted on whistleblowers are intentional acts on the part of more senior agency officers to avoid accountability at best or to cover up wrongdoing at worst.

In any event, if the current legislation worked there would be no need for changes. But the draft report data above clearly shows that there are significant problems in relation to both the amount of public sector wrongdoing which is not reported and the number of people who suffer unresolved reprisals. The current legislation has failed its purpose.

Similarly, the current legislation would not need to be changed if the reason rested solely on instances of satisfactory and successful whistleblowing events. But the persistent failure of the current legislation to prevent significant wrongdoing, the disclosure of wrongdoing or the protection of whistleblowers makes it imperative to introduce effective legislation. .

The Committee must ensure that any legislation takes much stronger action to provide effective protection for whistleblowers against reprisals.

A whole new approach must be taken in respect of an Australian Public Sector PID Act. The abject failure of the current system demands nothing less.

8. Scope of Public Interest Disclosure provisions.

The widest scope is the ultimate aim.

WBA commends the introduction of an Australia-wide public interest disclosure regime of which the creation of Public Sector Public Interest Disclosure (PID) legislation would be the first step.

WBA commends the eventual extension of the Public Sector PID legislation. The extension must cover publicly listed corporations and voluntary organisations as well as private enterprises particularly if they are contracted to supply a large scale quantity of goods or services to the public. The ultimate aim is that regardless of their employment or non employment status, a whistleblower must be entitled to protected public interest disclosure provisions.

In Part 2 of this submission at Standpoint 1.1; WBA argues that **any person** who discloses conduct contrary to the public interest must be entitled to whistleblower protection.

There is no reason why any person who has knowledge of malpractice or other public sector wrongdoing should not be entitled to report that information. Any person who makes a report must be protected from any harm as a consequence of making the report.

It seems totally unnecessary to limit protected disclosures of public interest wrongdoing to public sector employees or contractors working within the public sector. There is no logical reason to consciously deny protection to any person who disclosed public sector wrongdoing. People who are not public sector employees can also suffer reprisals if they disclose public sector wrongdoing.

9. Standards for an Australian PID Act.

Standards Australia has formulated an **Australian Standard AS 8004-2003**; 'Whistleblower Protection Programs for Entities.'

The 'Foreword' of the Standard is worth stating:

A whistleblower protection program is an important element in detecting corrupt, illegal or other undesirable conduct (defined later in this standard as 'reportable conduct') within an entity, and as such, is a necessary ingredient in achieving good corporate governance.

> An effective whistleblower program can result in—
> - more effective compliance with relevant laws;
> - more efficient fiscal management of the entity through, for example, the reporting of waste and improper tendering practices;
> - a healthier and safer work environment through the reporting of unsafe practices;
> - more effective management;
> - improved morale within the entity; and
> - an enhanced perception and the reality that the entity is taking its governance obligations seriously.

A significant factor of the Standard is that it applies to corporations, government agencies and not for profit entities but it only applies to employees. Another significant factor of the Standard is that it requires a clear delineation between the Whistleblower Investigations Officer and the Whistleblower Protection Officer.

There is much to commend the Standard as a template for the establishment of any whistleblowing regime. Though there are issues which have not been addressed or which could be modified for better effect, as it stands, the Standard is suitable for the intended purpose.

However it is remarkable that this Standard has been in existence since 2003 and has barely created a ripple of attention within the Australian Public Service. From the reaction of the Public Service one could believe that the Standard has never seen the light of day.

Since 2003 every Australian government agency has been obliged to comply with that Australian Standard as far as possible. Yet it is very unlikely that any government agency has fully complied with the Standard and much more likely that few agencies have complied with any of it.

As a template for the introduction of an Australian PID Act there is no reason why the AS 8004-2003 Standard should not be adopted as the base model.

10. The scope of an Australian PID Act.

The Inquiry's Terms of Reference suggest there is no intention of extending an Australian PID Act outside the confines of the Australian Public Service. If that is the intention then a splendid opportunity to provide Australians with proper access to public interest information will have been lost. Our democratic system will be all the worse for this lost opportunity.

On the other hand, it well may be that this Inquiry is simply the first step in a comprehensive approach to a national PID Act. If that is the ultimate aim then this step is to be commended**.**

A PID Act that applies to a narrow group of public employees is undoubtedly inconsistent with the general principle of public interest disclosure. An Australian PID Act should apply wherever there is a public interest which could be subjected to wrongdoing.

An Australian PID Act should apply to and be accessible by all Australians regardless of their employment or non employment status.

The disclosures to which a PID Act should apply are any matters of public interest which if disclosed, would on balance, serve the greater public interest. Disclosure protections would not extend to public interest matters which would cause actual harm to the public interest. Exemption from disclosure must only be available for valid, pertinent and compelling reasons**.**

Using the Inquiry's Terms of Reference as a pointer, it seems that any contemplated PID Act would not apply to the public offices of the legislature or the judiciary. Private citizens who witness public sector wrongdoing would be outside the Act. The Act would not apply to employees in private, corporate or voluntary organisations even if the organisations to which they belonged provided services to the public. And shareholders in corporate organisations

would be outside the Act despite the very important public interests impact that such corporations can have.

Of course each of these groups could eventually be subject to separate PID Acts, but as there are already 8 State PID Acts and about 9 federal acts dealing with whistleblowing, the creation of more acts would be farcical.

11. Different approaches.

The UK Public Interest Disclosure Act is a broad national 'disclosure and protection' act with coverage extending into most areas of public interest.

That act provides a framework of legal protection for individuals who disclose matters in the public interest. A significant function of the Act is to protect Whistleblowers from reprisals or other forms of victimisation. The aim of the act is to enable genuine concerns about crime, civil offences, malpractice, negligence or other wrongdoing to be given a protected disclosure status. The protections provided extend to unlimited financial compensation and workplace remedies.

The Act applies across the private and voluntary sectors as well as to public bodies. However it does not apply to all members of the public or to defence services personnel. .

The UK PID Act is incorporated into the Employment Legislative framework because it only covers employees. And there appears to be no organisation or structure within the UK Public Service which monitors practices or provides education about public interest disclosures. The only help readily available to whistleblowers appears to come from 'Public Concern at Work' a Charity which seeks to protect whistleblowers making public interest disclosures.

The industrial arrangements of the diverse Australian industrial jurisdictions would make an Australian employment based PID Act unworkable.

Therefore the only advantages of the UK model are its scope – covering private, volunteer and the public sectors and its unlimited financial compensation arrangements.

Using the following extracts from a 2006, Issue Paper by Dr A J Brown, 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation' it is possible to see the diversity and differences between State and Territory PID Acts.

> "Currently only three Acts (NSW, Cth, Tas) are consistent with the above definition of whistleblowing. The rest enable not just 'organisation members' but 'any person' to make disclosures as if they were a public official…
>
> ….The two public sector laws (SA, Qld) which attempt to cover certain types of private sector wrongdoing do not do so comprehensively, and would be best amended to maintain a clear public sector focus.
>
> …can be found in Tasmania. This is the only Act to specifically provide for contractor disclosures

> ….mechanisms for the investigation of wrongdoing involving some public officials, such as legislators and judges. In these situations, unsurprisingly, no mechanisms exist for officials to make protected disclosures about such persons or agencies. General best practice is to be found in South Australia, Queensland and Western Australia where the public integrity system covers every type of official, including all parliamentarians and judicial officers. However, achieving similar coverage in other jurisdictions depends on broader reform than simply recasting the relevant whistleblower protection law.
>
> ….are volunteers (in effect, unpaid contractors), such as State Emergency Service, Rural Fire Service and a variety of health care volunteers. These persons can also be subject to reprisal risks for disclosing information.
>
> ….Specific best practice is found in Western Australia, where the definition of 'public authority' is sufficient to include government-owned corporations, and the definition of 'public sector contractor' is particularly comprehensive (s.3(1))".

The options for the scope of an Australian PID Act are endless.

However the simple legislative solution for an Australian PID Act is to entitle any Australian who has information about any public interest wrongdoing to report it under the authority of a protected disclosure. Any restriction on the disclosure must be for <u>the most</u> compelling and necessary public interest benefit. Provided disclosures are made with an honest belief and reasonable knowledge, all relevant protection must be afforded to the whistleblower.

12. Disclosures should be Encouraged.

Whistleblowers very seldom blow the whistle or make public interest disclosures in the hope of gaining a benefit. Usually the Whistleblower is simply motivated by their personal ethics and values. From a WBA perspective, surviving a public interest disclosure is a good reward, surviving with restitution or compensation for harm suffered is better and surviving without harm is best. Most Whistleblowers would also be grateful for an appreciative acknowledgement of their efforts. And it would be 'nice' if those in authority offered some tangible gratitude for services rendered to the public interest.

However there seems to be some indefinable objection to the notion of a Whistleblower getting some reward for disclosing public interest wrongdoing; after all it is the duty of every citizen to disclose perceived wrongdoing.

So there is little in the way of tangible benefits to encourage a Whistleblower to make a public interest disclosure. And there is much to act as a deterrent against whistleblowing.

The <u>USA False Claims Act cannot be used by government employees</u>. But the Act provides rewards for disclosing graft, fraud and misappropriation. Under that act people are rewarded handsomely in cash (between 15 to 25 percent) for disclosing information which leads to the recovery of financial damages. The reward is clear confirmation by the

Government, that by making the disclosure, the Whistleblower was serving the public interest.

That tangible acknowledgment of a reward has multiple benefits. The Whistleblower has something more than a gratified 'thank you", other employees are encouraged when they see the practical benefits of doing their civic duties and the Government recoups defrauded money.

WBA is not proposing a Whistleblowers reward system. Nonetheless the Committee should note that governments and the police regularly offer rewards for information about crimes. Certainly the False Claims Act is a precedent for rewards. It is difficult to see why 'whistleblowers' should not be rewarded in relation to certain crimes if the information provided serves the public interest. WBA suggests the Committee consider the benefits that may flow from a system which properly acknowledges the personal commitment of whistleblowers who serve the public interest.

13. Emphasising the relevant players.

Most PID (type) Acts concentrate on the whistleblower as if they are the focus of the whole matter. They are not. When a whistleblower makes a disclosure their role is exhausted. They have done their duty and from that point on nothing should happen to them (good or bad). Provided they acted in an honest belief and with reasonable knowledge there is nothing more that a Whistleblower can do or should have to do. At worst the Whistleblower may have to answer question to clarify their disclosure but other than that their duties are finished.

Yet legislation is flowing from parliaments and printing presses are running hot to set out the duties, responsibilities and accountability of whistleblowers.

In any whistleblowing event there are usually four critical players:

i. the person(s) engaged in wrongdoing,
ii. the whistleblower who observed and disclosed it,
iii. the authority to whom the wrongdoing was disclosed, and who was obliged to provide protection to the whistleblower and
iv. the authority, who had responsibility to ensure that all matters relating to the event were properly dealt with according to law and fair practice.

With few exceptions, most PID Acts are silent about;

i. the person(s) engaged in wrongdoing and
iv , the 'authority', who had responsibility to ensure that all matters relating to the event were properly dealt with according to law and fair practice.

The 'authority' to whom the disclosure was made (iii.) usually have their duties and responsibilities set out but there are seldom procedures in place if those duties are not carried out. If those duties are not carried out, the Whistleblower is denied protection and suffers reprisals and probable damages. Yet no-one is made responsible or held accountable.

It makes no sense to develop PID legislation and only set out the duties, responsibilities, and accountabilities of one player (the Whistleblower) with only partial obligations applying to one other player. The legislation must address the obligations, procedures and ramifications that apply to all the players.

In particular the duties and responsibilities of (iv) 'the authority, who had responsibility to ensure that all matters relating to the event were properly dealt with according to law and fair practice', must be set out in enforceable terms. At present the legislation is completely silent on this aspect.

WBA suggests that the Committee consider the obligations and accountability of all players involved in a Whistleblowing event and construct the legislation accordingly. Particular attention should be given to legislation relevant to those authorities who have the overall responsibility to prevent wrongdoing, detect it when it occurs, facilitate disclosures if the matter is not properly resolved and to protect the whistleblower if reprisals occur.

14. Loyalty to whom?

The issue of 'loyalty' is a matter of serious concern to WBA members.

In the WWTW Draft Report 'loyalty' is defined as**; "**Promoting, protecting and defending the organisation and remaining committed under adverse conditions". Disloyalty is presumably the antonym.

Loyalty, more precisely disloyalty, is usually the code signal used by agency managers to commence reprisals against a whistleblower.

In the WWTW Report the term 'loyalty' is usually used in conjunction with levels of 'prosociality or organisational citizenship' or 'loyalty to an agency'. Generally it is used to rate various forms of reporting against organisational 'loyalty'. In any event, 'loyalty and disloyalty' are raised constantly in relation to Whistleblowers and the WWTW report follows that trend.

'Loyalty' is a term used as a tool by Agency managers when gauging an employee's unquestioning compliance to management control. The higher the loyalty, the greater is the unquestioning compliance. Loyalty is not a measure of skill, competence or ability. When used by Agency managers, it is a measure of blind and silent obedience.

Whistleblowers are constantly accused of having a "lack of loyalty" to an agency or its managers. Agency managers at upper levels are those most likely to make the accusation though quite often the accusation is not made directly to the Whistleblower. Usually it is said to those who directly manage the Whistleblower in the workplace. The usual purpose is to signal the 'deniable' authorisation to commence the reprisal process. Using 'disloyalty' as grounds for action is a usual part of the reprisal mechanism intended to denigrate and discriminate against anyone who discloses public interest wrongdoing.

It is unacceptable and offensive for agency managers to blatantly misuse the issue of 'loyalty' as an excuse for reprisals against Whistleblowers. Unfortunately many of those who abuse the term have no notion of its actual meaning.

It is the view of WBA that Public Servants owe their loyalty to the Australian public and not to an agency or its managers. Public Servants are precisely that; servants of the public. They are not servants of an agency or its managers. Public Servants are there to serve the public as their first priority. Misconduct by agencies, their managers or others should be disclosed in service of the public.

WBA strongly contends 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 <u>or</u> the agency interest.

Part 2 Submission citing 'Terms of Reference'

The Terms of Reference (ToR) are displayed in *italics*

The Committee is to consider and report on a preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector. The Committee's report should address aspects of its preferred model, covering:

WBA Standpoint:

- This Inquiry is required to consider only those matters which are relevant within the Australian Government public sector. Clause 7 of the terms of reference permit consideration of other matters as the committee considers appropriate.
- Our submission includes an 'Introduction' part, which we believe contains information relevant to any inquiry into protected public interest disclosures.
- We submit that the information provided in that 'Introduction' should be considered and reported on by the committee as relevant to the matters in question.

ToR 1. the categories of people who could make protected disclosures:

i. persons who are currently or were formerly employees in the Australian Government general government sector, whether or not employed under the Public Service Act 1999;*

ii. contractors and consultants who are currently or were formerly engaged by the Australian Government;

iii. persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants; and

****General government sector***
Institutional sector comprising all government units and non-profit institutions controlled and mainly financed by government.

WBA Standpoint 1.1:

- All person listed above should be included in the scope of those who must be entitled to make protected disclosures.

Comment:

Further categories need to be added to the above list.

There is no reason why <u>any person</u> who has knowledge of malpractice or other public service wrongdoing should not be entitled to report that information. Any person who makes a report must be protected from any harm as a consequence of making the report.

There is some opposition against extending the proposed categories of people eligible for protected disclosures to persons outside the public sector. It is argued that people who are not within the public sector cannot suffer reprisals and therefore protected disclosure provisions would not be relevant. That is not a valid argument.

Members of the public deal with the public sector constantly and from time to time, public officers may engage in corrupt practices in their dealings with members of the public. There is legislation available to report illegal acts such as solicitation for graft or other benefit or conspiracy to commit an offence, but that process does not protect the person making the report from reprisals.

Members of the public, dealing with matters in a public sector environment may simply witness public officers engaged in public sector wrongdoing which is contrary to the public interest. Because members of the public deal with matters in this environment they are potentially at risk of reprisals if they report the matter.

The opportunities for federal officers to abuse their office and engage in corrupt practices or malpractice or other misconduct is far reaching and wide. Extending that public sector wrongdoing to reprisals or retaliation is quite feasible.

For example, a customs official may approach a customs agent and seek an agreement whereby the customs officer will expedite a cargo clearance in a manner contrary to his duties provided the customs agent gives the officer some benefit. The customs agent may report the matter, and the officer could be disciplined. But in due course, the customs agent may find that the officer or his colleagues may subsequently harass or otherwise adversely deal with his future consignments. This was a public interest disclosure which resulted in a non public sector person (whistleblower), suffering reprisals.

Another example may be that a member of the public is aware that a firearm he surrendered for destruction was subsequently purchased by another acquaintance. The person may complain to police about the re-emergence of his surrendered firearm. Later he may find that he alone gets regular visits at all hours by police to check his shooter licence requirements and gun safety. This would have been a public interest disclosure which resulted in the non public service person (whistleblower), suffering reprisals.

The scope of the inquiry covers the 'general government sector' which includes all government and non-profit institutions controlled and mainly financed by government. Therefore aged nursing facilities would fall within this category. They are legislatively and operationally controlled and mainly financed by government.

A final example may be that a patient or a relative of a patient in an aged nursing facility may report conduct by staff, which amounts to serious acts of malpractice or misconduct which harms the patients. As a consequence, the particular patient and perhaps others may suffer subtle but certain reprisals as a consequence of that report.

In each example above, there appears to be a single source of corruption, malpractice or wrongdoing. But such adverse conduct even if it is restricted to a single individual, is the start of corruption or wrongdoing within the organisation. If the corruption has already spread to multiple offenders, then it is a systemic problem within the organisation. In either case, it is necessary to take action to stop the conduct before it harms the organisation or more importantly, as it is in this latter case, the health of patients and ultimately the public interest.

Stopping the rot at its earliest stage is the most cost-effective and direct way to protect the public interest and maintain the health of a public service organisation.

Organisations and agencies are helped by addressing the earliest symptoms of misconduct, corruption or other wrongdoing. The resolution of such instances helps maintain accountable standards and the transparency of public administration. It also promotes public confidence in the competence of the relevant organisation.

Therefore we can see no reason why any person should not be entitled and encouraged to report public sector misconduct or other wrongdoing which is contrary to the public interest. Any person who makes such a report must be protected against any form of reprisal which **may** arise as a consequence of making the report.

WBA Standpoint 1.2:

- the category of people entitled to make protected disclosures must include all persons who are aware of public sector wrongdoing which may harm the public interest.

b. the Committee may wish to address additional issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise;

WBA Standpoint 1.b :

- As recommended above, it is necessary that the category of people entitled to make public interest disclosures includes all persons who are aware of public sector wrongdoing, which may harm the public interest.
- If the conduct is contrary to the public interest then it is irrelevant whether that misconduct or wrongdoing of the official occurs on duty or off duty, overseas or otherwise. If the conduct is contrary to the public interest then, that conduct must be reported in the public interest**.**

ToR 2. the types of disclosures that should be protected:

a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment; and

WBA Standpoint 2. a.1:

- All the activities and forms of misconduct quoted above must be subject to public interest disclosure provisions; Additional offences could include; malpractice, malfeasance, misfeasance or 'conduct contrary to the public interest'.
- All the above examples need further legislated definition. The definition of 'maladministration' would require particular attention.

- The above examples specify particular offences. As a consequence, not all examples of public interest wrongdoing have been proposed. A broader definition of public interest wrongdoing or malpractice is required to ensure that all such conduct is caught by the legislation.

Comment:

Misconduct or wrongdoing contrary to the public interest.

Disclosures about the forms of misconduct proposed above should be protected. But these are not all the wrongful conduct or activities that should be disclosed and for which protection should be provided.

Other improper action or wrongful conduct contrary to the public interest may include matters such as, abuse of office, threatening security, breaching security, solicitation for advantage or benefit, conspiracy to harm or act against another person, misuse of information, gaining improper advantage, threats, harassment or intimidation to prevent disclosure of malpractice or misconduct, and constructive bias to give some examples.

Malpractice may cover a range of activities which are contrary to the public interest, but without further definition many adverse forms of this misconduct may not be caught by this legislation. Examples of malpractice includes maladministration, misrepresenting, falsifying or omitting necessary public sector information or failing to maintain or carrying out a particular activity or declared policy in a way that harms the public interest.

The aforementioned conduct happens. And it can seriously affect the public interest. In its formative stages it may only involve individuals, but once the precedent is set and no action taken to rectify the issue, then it increasingly becomes systemic within an organisation.

We contend that the legislation should cover the widest range of conduct or actions which are contrary to the public interest. All the misconduct referred to in the previous paragraphs and in the terms of reference could be cited as examples of conduct contrary to the public interest but that list is still not exhaustive. Some forms of corrupt conduct may be missed if the legislation it too specific.

The proposed legislation should nominate a generic offence such as ‘any misconduct contrary to the public interest, including…..’. where the proposed offences discussed above could be added. This would also serve as a guide to the offences which should be disclosed and which would attract ‘a protected disclosure’ status.

The disclosures which must be protected are disclosures which serve the public interest

We disagree that a matter must involve a ‘significant’ public interest before it attracts a protected disclosure status. As indicated above and in the ‘comments’ of Clause 1 above; it is necessary to identify corruption at its earliest stage so as to prevent it spreading and becoming both systemic and significant. Deferring action until public sector corruption becomes a significant public interest matter is an abrogation of responsibility and a dereliction of duty.

WBA Standpoint 2.a.2:

- All and any misconduct or wrongful acts which are adverse to the public interest must be the subject of protected public interest disclosure legislation**.**

b. the Committee should consider:

i. whether protection should be afforded to persons who disclose ***confidential information*** *for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit; and*

WBA Standpoint 2.b.1: re "Confidential Information"

The issue of Confidential Information requires separate consideration and argument.

'Confidential Information' is fully addressed in the above 'Introduction'.

- Restrictions on disclosures and access to public interest information are often imposed unnecessarily and in some instances, probably unlawfully. Before information is classified as 'confidential' and restricted from public interest disclosure or access there must be a compelling 'public interest' necessity to do so.
- As matters stand, most restrictions to public interest information do not benefit or serve the 'greater' public interest. Some restrictions may serve some public interest but on balance, more often than not, they do not serve the 'greater' public interest.
- Restrictions tend to favour vested public sector interests. Often those restrictions are brazenly used by bureaucrats to avoid public sector transparency and accountability.
- It must be an offence for public officers to classify information inappropriately or unnecessarily which results in restrictions to public interest disclosures or access to public interest information.

  (see 'Introduction' for further comment)

WBA Standpoint 2.b.2:

- The motivation (or dominant purpose) giving rise to any public interest disclosure is not generally relevant and should not be a factor in determining whether protection should be provided.
- Protection should be provided to disclosures which serve the public interest. Any disclosure about a government policy helps the public understand the workings of their representative Government and public administration and is in the public interest. If that knowledge is provided to the public and as a consequence it causes embarrassment to the Government then it is the policy that needs attention and justification.

- A caveat to this recommendation is necessary. Some disclosures do not serve the public interest. Therefore where a disclosure does not serve the 'greater' public interest it would not be a protected disclosure. These circumstances should be well defined and absolutely necessary to avoid harm to the public interest and then only for the time necessary to avoid that harm.
- The question of gaining personal benefit needs further clarification. Consideration should be given to instituting provisions similar to the USA False Claims Act which offers rewards for the disclosure of public sector wrongdoing related to improper financial gain.

Comment:

Motivation to disclose

The motivation (or dominant purpose) giving rise to any public interest disclosure is not generally relevant. The public is not concerned about why information has been disclosed in the public interest. It matters not whether the person making the disclosure had an altruistic purpose or they were doing it for spite. The only issue of consequence is whether the public should have had access to the information in the public interest.

Raising the question about the motivation of the whistleblower has been a long held practice, used by public service administrators as a means to detract from exposure of malpractice or other wrongdoing. No public interest is served by analysing each disclosure in an attempt to find some dominant reason why a person discloses public interest information.

The reason why a public interest disclosure is made does not alter, mitigate or detract from the exposed public sector malpractice or other wrongdoing. Protecting a person from reprisals who has made a public interest disclosure out of spite does not reward that person any more than it would if the person had made the disclosure for the most ethical and altruistic reasons.

Motivation is not a matter for consideration when determining the reasons why any person engages in malpractice or other public interest wrongdoing. Similarly it is not a relevant factor in relation to any Whistleblower disclosure.

Motivation for benefit

Questions of motivation and rights to protection may arise if the disclosure is done for personal benefit. The morality and ethics of a person may be questioned if they intend to directly benefit from making a public interest disclosure about 'confidential information.'

However if there is a public interest benefit in the disclosure of the information then the purpose of the legislation is accomplished. The fact that someone besides the public benefits from the disclosure does not detract from that public interest benefit. It is churlish to deny a person protection under the legislation simply because both they and the public benefited conjointly from the disclosure.

Motivation for reward

The prospect of a reward or benefit scheme should be considered as part of any legislation.

The USA False Claims Act provides rewards for disclosing graft, fraud and misappropriation. Under that act people are rewarded handsomely in cash for disclosing information about improper financial gains contrary to the public interest.

No matter what legislation is introduced to protect a whistleblower who has made a public interest disclosure there will always be some form of retaliation against that person. Organisations, particularly at senior and middle management levels tend to stigmatise a whistleblower who makes a public interest disclosure. The practice is to try and trivialise the disclosure and make it appear that the whistleblower who made the disclosure was reaching too far and had no just cause to make the disclosure.

However, in circumstances where a court or tribunal confirms that a disclosure about a 'false claim' was justified and a reward is paid to the whistleblower, there is a change in attitude. The reward is confirmation of proper legal conduct. It marks an appreciation by the Government. It is an acknowledgement of the whistleblower acting in the public interest. And finally it stimulates interest in others to look for other instances of malpractice or wrongdoing.

ii. whether grievances over internal staffing matters should generally be addressed through separate mechanisms;

The WBA Standpoint 2.c:

We presume that the above term of reference "grievances over internal staffing issues" does not include grievances about reprisals, bullying, victimisation, intimidation and harassment of whistleblowers who have disclosed information in the public interest. The comments below are made on that presumption.

- Personal or private interest workplace matters which have no prevailing public interest value do not meet the criteria of a protected public interest disclosure. Such matters should be dealt with by relevant [industrial/Comcare/OH&S] adjudicators.

- Matters arising under the foreshadowed legislation must have an unmistakable, if not a foremost public interest component.

- Workplace grievances/matters which involve the public interest, whether that public interest is identified immediately or subsequently, become the subject of Public Interest Disclosure legislation as soon as any public interest element is discovered.

- Workplace grievances or staffing matters which appear to have no public interest value at the outset may afterwards be found to involve public interest matters. Such matters should be retrospectively subject to Public Interest Disclosure legislation.

- Some workplace grievances or staffing matters have no public interest value at the outset. But arising from those staffing matters, subsequent events such as systemic victimisation, harassment, malpractice or other administrative

wrongdoing may occur and that conduct would have a public interest value, thus drawing in the use of the Public Interest Disclosure legislation.

Comment;

This term of reference concerning "grievance over internal staffing" is ambiguous. It may relate to employee grievances over staffing matters which may or may not have a public interest value.

To reiterate, all personal or private interest workplace matters which have no prevailing public interest value do not meet the criteria of a protected public interest disclosure. Such matters should be dealt with by relevant [industrial/Comcare/OH&S] adjudicators.

All general day to day employee interests such as staffing matters have no significant public interest value and do not warrant protected public interest disclosure status.

However those same matters may have adverse impact on services to the public. The matter then takes on a new interest – that of the public. It becomes a public interest matter and then it warrants a protected public interest disclosure status.

So regardless of whether it is a grievance, an industrial dispute or a staffing matter, only those matters which have public interest value warrant protected disclosure status.

Grievances, industrial disputes or staffing matters invariably have a public interest component if the matter affects public services. These matters tend to be industry wide issues affecting work areas rather than individuals or small groups. Disclosure of public interest information about such matters may focus political interests and public attitudes on the respective arguments and facilitate a resolution. The public interest would be served by a disclosure or access to the relevant information.

Generally, a grievance or industrial dispute or staffing issue raised by one or a few staff is unlikely to have any public interest value. The public generally would not be affected and the public interest is unlikely to be harmed by small workplace disputes. Workplace matters which have no prevailing public interest value do not meet the criteria for disclosure as a public interest matter and should be dealt with by organisations or industrial tribunals**.**

Generally, Public Interest Disclosure legislation would not apply to a person with personal or private issues, regardless of whether it involves a grievance, an industrial issue, a staffing matter, or a clash of personalities. Such matters should be dealt with by the organisation internally or through an industrial tribunal.

However important exceptions apply to the above 'generalised' principles. Below are examples of exceptions which run contrary to those generalised principles.

- a grievance or staffing issue may affect many staff and perhaps a public service which will ultimately have a public interest value, yet only one person (a whistleblower) may seek to disclose the matter in the public interest. That person should be entitled to make a protected disclosure.

- one or a number of staff may have a grievance, or dispute about a staffing matter involving corrupt practices by a senior manager. Such a matter would be subject to the Protected Interest Disclosure legislation. An appropriate disclosure about such a matter must be dealt with as a protected disclosure.

- a person (whistleblower) may complain about staffing matters within an organisation, which are subsequently resolved. However, as a consequence the whistleblower then suffered reprisals and retaliation because they lodged the original complaint. The subsequent reprisals and retaliation were reported to the organisation but were not remedied. Failure to deal with the reprisals and retaliation is a systemic problem of the organisation and therefore a public interest matter. Disclosures made about this matter should be protected under Protected Public Interest Disclosure legislation.

- a person may make a complaint about a staffing matter which they presumed was restricted to a local 'personnel' matter. Unbeknown to that person the complaint involved serious matters of public interest. As a consequence of making that complaint that person suffered reprisals and retaliation. Disclosures made about the matter must be protected under the Protected Public Interest Disclosure legislation.

- a person may lodge a complaint about a staffing matter, in which they may have a personal interest, but which also involves one or more senior officers and probable corruption or overall systemic corruption or malpractice within an organisation. Obviously, such a situation would be of public interest and any disclosure under public interest disclosure legislation should be protected.

These examples demonstrate that a very cautious approach is necessary to ensure that any matter which has a public interest value must be caught by the legislation. Only those matters which have no public interest value whatsoever, at any time, should be excluded from coverage under the legislation.

***ToR 3. the conditions that should apply to a person making a disclosure**, including:*

a. whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a)); and

WBA Standpoint 3. a:

The thresholds for a public interest disclosure are;

- that the disclosure serves the public interest and
- that the person making the disclosure has honest belief that the information disclosed is;
    - about conduct which is harmful to the public interests or
    - of a kind referred to in para 2(a) and
- that the person making the disclosure does so in with an honest belief that the disclosure will not harm the 'greater public interest.'

Comment:

The only threshold that needs to be considered is whether an alleged offender has acted contrary to the public interest. The aim of the legislation is to reduce, if not eliminate public sector wrongdoing.

If a person makes an allegation of public sector wrongdoing with an honest belief and reasonable knowledge then that person must be entitled to the full weight of protection available under the legislation regardless of the seriousness of the matter in question.

Taking an approach that attempts to identify a 'seriousness' threshold of misconduct raises three obvious problems.

The first problem is that any process aimed at establishing a level of misconduct 'seriousness' suggests that there are some matters of public sector misconduct, which are not serious. This approach implies that some matters of public sector misconduct do not warrant protected public interest disclosure provisions.

This approach would actually encourage some misconduct, as it would ensure that less serious misconduct would never be the subject of a protected public interest disclosure.

Though the aim of this approach is to determine whether a protected disclosure status should apply to less serious matters, the first requirement is the creation of two legislatively based classes of public sector wrongdoing; one which is defined as serious and another defined as less serious or not serious.

On the basis of this classification, some public interest wrongdoing would attract protected public interest disclosure provisions and other public interest wrongdoing, would not.

It is an anathema to have legislation which protects some public interest wrongdoing from protected public interest disclosure.

The second problem is that determining a 'seriousness' threshold would be an exercise in subjectivity. A judgement about particular conduct or misconduct would be necessary. The opportunities for bias towards either viewpoint are extreme. The process of determining whether a 'seriousness' threshold was met would have to be resolved before any 'protection' action could be provided. No 'protection' action could be taken against retaliation until a determination was made as to the seriousness of the alleged misconduct.

The full seriousness of the matter may not become evident, for months or even years after the original disclosure was made. This approach would leave the whistleblower who made the disclosure, vulnerable to ongoing reprisals and retaliation over the entire period.

The third problem is that before making any public interest disclosure, every prospective whistleblower would firstly have to read the legislation to ascertain whether the matter they wished to disclose met the threshold level of a protected disclosure. As part of this process, they would have to assess the seriousness of the matter, based on whatever limited information they had.

This means that a person would virtually need to investigate a suspicion of wrongdoing till they were relatively certain that the matter reached the seriousness threshold before making a disclosure to ensure they were protected in so doing.

The best way to manage the vast scope of potential public interest disclosures is to establish a structure with operational procedures, which enable those concerned to deal with matters according to the public interests.(See reference to a new structure below).

b. whether penalties and sanctions should apply to whistleblowers who:

i. in the course of making a public interest disclosure, materially fail to comply with the procedures under which disclosures are to be made; or

ii. knowingly or recklessly make false allegations;

WBA Standpoint 3.b :

- **Item i.**

  - Any public interest disclosure which serves the 'greater' public interest must not attract any penalties or sanctions and
    no law or procedure should exist, which derogates from the public's right of access to or disclosure of information which is in the 'greater' public interest.

  - Where procedures adequately and reasonably facilitate the disclosure of information which serves the 'greater' public interest, those procedures should be followed. Any breach of those procedures may incur proportionate sanctions, not for the disclosure of the public interest information but only for failing to carry out a formal procedure.

  - Procedures under which disclosures can be made must recognise that there are competing public interests. In these circumstances, the whistleblower may comply with procedures concerning the protected disclosure of a 'greater' public interest matter, while at the same time, contravening a procedure that deals with another public interest matter. If the greater public interest is served, then no penalty or sanction should apply.

  - Penalties or sanctions must be applied only for procedural breaches and must only be applied proportionately. Penalties and sanctions must not be applied because of the political or publicly critical content of those breaches.

- **Item ii.**

  - Any person knowingly or recklessly making false allegations should be subject to appropriate penalties and sanctions**.**

Comment:

Procedural compliance has a general benefit in public administration. However in relation to public interest disclosures, procedural compliance serves little purpose other than a facility by which bureaucrats can monitor and control the release of [critical] information about matters of public administration.

There is no justification for the introduction of procedures which can or do unnecessarily interfere with the public's right of access to public interest information.

Procedures are useful

Nonetheless, to ensure that a disclosure does not harm the greater public interest or any other public interest it would be best if procedures are developed, which facilitate and formalise the process of any protected public interest disclosure.

But these procedures must not unnecessarily restrict any public interest disclosure. Any procedural restriction, which unnecessarily causes delay of a public interest disclosure would not serve the public interest and should not stand.

It is also necessary to ensure that the public interest is not harmed by the unrestricted disclosure of information. Therefore, any procedures must facilitate an objective assessment and advice to the whistleblower about the proposed disclosure to avoid possible harm to both the public interest and to the whistleblower.

Other procedures would be necessary to properly moderate the processing of a protected public interest disclosure. Such procedures would include matters of privacy, confidentiality, security, protection, advising relevant investigation officers and the proper recording of necessary information.

The above suggested procedures simply regularise and formalise the process of a protected public interest disclosure. If procedures of this nature were in place, then it would be reasonable to require a whistleblower to follow these procedures.

Penalties and sanctions

'Confidential information' that is justifiably restricted by legislation for the 'greatest' public interest (i.e. for a necessary relevant purpose at the time) must not be disclosed or accessed without appropriate authority. Note extensive qualifying discussion on this matter in the 'Introduction'.

To protect the public interest, some information must be restricted by a 'confidential information' classification. The intentional unauthorised disclosure of or access to properly classified 'confidential' information may be a criminal offence and would certainly be a Public Service Code of Conduct offence. Appropriate penalties and sanctions should apply in this instance.

However some public interest information is improperly (unnecessarily, unjustifiably, indefensibly, or perhaps unlawfully) classified as 'confidential information.'

Where information has been improperly classified as confidential and does not warrant confidential status, there can be no offence if the information is disclosed or accessed, particularly if the intention of the disclosure is to serve the public interest.

It is an abuse of procedural fairness to penalise a whistleblower who discloses information which has been improperly classified as 'confidential'. Yet this is another standard operating procedure in the Australian Public Service. Disclosing information that is improperly classified as confidential is considered to be a dreadful crime yet on

the other hand those who improperly classify information as confidential are never penalised.

The classification of information must not be used to selectively prevent public interest disclosures. The intentional or negligent misclassification of information must be an offence for which there are penalties and sanctions.

Failure to follow a formal procedure when making a disclosure which serves the public interest should only be treated as an administrative procedural breach regardless of the information disclosed. Remedial disciplinary action may be appropriate proportionate only to the actual procedural breach.

On the other hand, failure to follow a procedure when making a bona fide disclosure, which resulted in actual harm to the public interest, must be considered a reasonably serious offence. Sanctions for failure to follow procedure and for the unlawful disclosure of confidential information may apply.

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An observation worth noting

The terms of reference do not seek to determine what penalties, sanctions or actions should be taken against those public officers, who failed to facilitate a public interest disclosure or who actively obstruct a disclosure in the public interest. Classifying information as confidential, for no valid reason that serves the public interest is an example of conduct, which should attract appropriate penalties and sanctions.

A factor causing whistleblowers to avoid agency procedures is that some public officers actively obstruct public interest disclosures by direct overt actions or through more subtle, covert actions. The improper classification of information is one such example of officers using covert processes to prevent the legitimate disclosure of public interest information.

If penalties and sanctions were more readily available to be used against those who obstruct a proposed public interest disclosure then whistleblowers would be less likely to make disclosures outside the formal procedures.

ToR 4. the scope of statutory protection that should be available, which could include:

a. protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;

WBA Standpoint 4 a;

Protection –Scope of Application.

- **Whistleblower protection should be provided through relevant legislation exercised by a specific authority, structured and resourced for that purpose. (Further comment below and in the 'Introduction'.)**

- Protection against any form of public interest disclosure reprisal must be available on demand or as required. Reprisals include victimisation, discrimination, discipline or other employment sanctions involving overt or covert acts against a whistleblower with the intention of causing harm, distress or damage.
- Protection entitlements must apply from the time a prospective whistleblower indicates to a relevant person, that they have a genuine belief about the existence of public interest misconduct. The protection must actively continue until the matter is resolved and the whistleblower confirms that there is no longer any evidence of reprisals or retaliation. Any conduct adverse to the whistleblower, which occurs at a later time must be considered as having a probable causation arising from the earlier disclosure activity.
- Actual protection procedures must commence immediately upon notification to relevant authorities that a public interest misconduct matter has been alleged.
- Protection must be applied proactively and publicly where it is possible and appropriate.
- Protection procedures must include a power for whistleblowers, or relevant authorities to stop conduct by any person, which is detrimental to the well-being of the whistleblower. The power for whistleblowers to take such action must not be an expense borne by the whistleblower. Whistleblowers should also have legal standing to seek injunctions or orders for relief and for related matters.
- Adverse action against a person, done with the intent or purpose of stopping a public interest disclosure, must trigger the protections available under the act.
- Where a person (whistleblower) claims that reprisal action is being taken against them for a public interest disclosure or a proposed public interest disclosure, all such reprisal action should be acted upon immediately. Any indications or evidence of harm or disadvantage to the whistleblower must be stopped immediately by the most effective means. The reprisal action complained of must be investigated without delay and all relevant matters properly documented. Where the Whistleblower considers that the matter is not being dealt with fairly, they may appeal to an authority outside the agency and that agency will take over the responsibility for the relevant enquiries and may impose levels of workplace protection for the whistleblower.
- The **onus of proving that reprisals have not occurred must rest on those accused of the reprisals (reverse onus).** Where a whistleblower has been subject to involuntary workplace changes since making a formal disclosure, the benefit of the doubt about the validity of those changes should favour the whistleblower.
- Further legislative provisions are required in relation to those i) accused of acting against the public interest, ii) against the whistleblower and iii) in respect of rectifying organisational arrangements. These matters are not raised as specific items in the Terms of Reference and will be addressed in the 'Introduction'.

Remedy:

- Upon notice that a public interest disclosure has been made, the relevant organisation must immediately act to provide support and protection to the whistleblower(s) involved.
- Remedies, restitution and compensation for reprisals against a public interest disclosure must rest with the relevant agency – but the agency may reclaim against those who carried out the reprisals or who failed to comply with statutory duties.
- Compensation or restitution for harm, injury or damage caused by reprisals or retaliation for public interest disclosures should be borne by those responsible. Reprisals or retaliation does not amount to a duty of office, and therefore that conduct is a personal action for which the public sector should not be liable.
- Agencies may also be liable for a breach of a duty of care or other offences where there is evidence of abrogation of responsibilities.
- Reinstatement is an important remedy for a whistleblower who has suffered job relocation, demotion or reassignment, as a result of making a public interest disclosure. A reinstatement needs to meet the (health and safety) needs of the whistleblower.
- Civil remedies must be available to a Whistleblower if the agency fails to properly provide a remedy, restitution or compensation for damage or injury suffered. In such circumstances, the failure of the agency to prevent the reprisal and exercise a duty of care should be taken into consideration when determining compensation.
- If reprisals of a criminal nature are taken against a whistleblower, then the whistleblower should be empowered to take private criminal action against those involved.
- Disciplinary or other legal action against those who carry out reprisals and who victimise whistleblowers is an important remedy against any such future conduct.
- Thorough investigations into reprisals and victimisation of whistleblowers, with findings being publicised widely, assists the repatriation of whistleblowers back into the workforce.
- Reports by organisations about the full circumstances of any whistleblowing event helps remedy questions of agency commitment to public interest disclosures.
- Agency notices to staff about organisational changes arising from a whistleblowing event confirms that such events help remedy organisational faults**.**

Comment:

Protection of Whistleblowers is <u>of vital importance</u> but it does <u>not address the underlying problem</u>. Protecting Whistleblowers is treating a 'symptom' of the problem but it does little to prevent or stop the underlying problems.

The problems relate to those:

i) who are accused of acting against the public interest and,

ii) who have taken reprisal action against the whistleblower and

iii) who did not prevent the wrongdoing, and have duties to rectify the respective organisational problems..

These problems/matters are not raised as specific issues within the Terms of Reference. They fall within the generalised scope of Item 7 and will be addressed in the 'Introduction'.

Protection:

Whistleblower protection entitlements must be available and activated automatically when a whistleblower indicates they have information about public interest wrongdoing. Similarly entitlements must be activated, if the whistleblower complains about a perceived reprisal arising from a prospective or an actual public interest disclosure.

Any legislation must ensure that facilities are readily accessible to enable whistleblowers to seek advice and counsel in relation to a whistleblowing matter.

Activation of Provisions

The legislation must ensure that, at the first instance, protection applies to a person who indicates knowledge of or concern about public interest wrongdoing. When a prospective whistleblower raises the question of public interest wrongdoing with another employee or another person capable of taking action in respect of public interest wrongdoing, then the matter becomes a live, actionable whistleblowing matter.

From that point, the whistleblower should be entitled to relevant protection under the act. When the whistleblower advises a designated person that they have an honest belief and a reasonable cause to suspect public interest wrongdoing, the whistleblower must be entitled to the full protection available under the act.

Adverse action against a person done with the intent or purpose of stopping a public interest disclosure must activate the protections available under the act. From the instigation of the adverse action, the full protection available under the act must apply.

Individuals who are engaged in wrongdoing sometimes detect or are warned that a whistleblower is about to make a disclosure concerning their conduct. Similarly agencies are sometimes made aware that a whistleblower is about to make a disclosure about misconduct within the organisation. In either case, action is taken against the whistleblower to stop or attempt to stop the public interest disclosure.

The legislation must make it an offence for any person or officers of an organisation to stop or attempt to stop a whistleblower from making a public interest disclosure. Any action to stop or attempt to stop a public interest disclosure must trigger the whistleblower protections available under the act.

Enforcement of Protection

Protection available to Whistleblowers under most (State and Territory) Public Interest Disclosure (PID) Acts is at the discretion of the Agency. If the Whistleblower is not

satisfied with that protection, most legislation allows the Whistleblower to take some form of legal action such as injunctions or orders for relief. There is no such provision within the Australian Public Sector.

Therefore it will be necessary to create new legislation for all Australian Public Sector Whistleblower protection requirements. This will include not only the legislation but the administrative and organisational arrangements under which the legislation must work.

[**NOTE**: WBA contends that any new whistleblower protection requirements must include an independent regime by which whistleblowing disclosures and protection are properly managed. Arguments supporting that standpoint are in the 'Introduction'.

However there are existing Public Service arrangements in place. The following comments (below) assume that the existing structure will be retained in some form or other.]

The relevant legislation must require the establishment of a whistleblower protection regime within the Australian Public Sector. As a template, the Standards Australia AS 8004- 2003 Report on Whistleblower Protection, provides elements which are considered appropriate and necessary to meet good governance standards in respect of whistleblower protection. The development of any whistleblower regime must give considerable weight to that standard. In particular, the standard requiring separate whistleblowing 'investigation' and 'protection' functions are absolutely necessary.

A standard for an appropriate regime must be set and Agencies must be obliged to comply. Failure to comply must be considered an abuse of office for those responsible and appropriate disciplinary action should ensue.

The legislation must direct Agencies to implement appropriate protection procedures. Those procedures must give effect to the legislative intent of protecting whistleblowers involved in public interest disclosures. Procedures must come into force immediately a public interest disclosure matter is identified, regardless of the formal requirements of the process. Full support and assistance must be provided to the Whistleblower. Every effort must be made to protect the whistleblower against overt or covert reprisals.

Where an agency fails to carry out proper protection for a whistleblower, legislation must ensure that the whistleblower may (have standing to) take remedial legal action against the agency and those who are engaging in reprisals.

Existing state PID Acts usually provide some facility to take legal action against those carrying out reprisals but not against agencies for failing to prevent the reprisal. Even where legal action such as injunctions is available, the cost of that action is invariably borne by the whistleblower.

The legislation must provide for legal action (injunctions or relief orders) to be taken by the whistleblower against the agency and/or those who were are engaging in reprisals. Any cost for that action must be borne by the agency.

Protections in Practice

All Whistleblowers claims of reprisal action being taken against them for a public interest disclosure or a proposed public interest disclosure should be acted upon immediately by the relevant agency. Those accused of reprisal action must be obliged to account for any action involving the Whistleblower.

To ensure fairness to all concerned, all matters must be formally documented and provided to all parties as matters progress. The investigation of any reprisal activity should be investigated as publicly and as quickly as possible. But in respect of the evidence collected from witnesses, that evidence should be collected in confidence.

Where indications or evidence of harm or disadvantage to the whistleblower are identified, that conduct must be stopped immediately by the most effective means. Monitoring of the complaint should occur to ensure that such misconduct is not repeated or set anew.

Where reprisals are confirmed, those involved must be removed from contact with the Whistleblower and monitored as a preliminary disciplinary proceeding. Appropriate disciplinary or legal action should immediately commence against those involved.

Where the Whistleblower considers that the matter is not being dealt with fairly, they may appeal to an authority outside the agency and that agency will take over the responsibility for the relevant enquiries and may impose levels of workplace protection for the whistleblower.

The **onus of proving that the reprisals have not occurred must rest on those accused of the reprisals (reverse onus).** Where a whistleblower has been subject to involuntary workplace changes since making a formal disclosure, the benefit of the doubt about the validity of those changes should favour the whistleblower.

Providing help and support.

The first element of protection under the act must be to ensure that the work status and conditions of the Whistleblower are identified as benchmarks against any future 'coincidental' losses or damage visited upon the Whistleblower. As part of the protections necessary it is desirable a whistleblower to have a voluntary benchmark medical examination so that the health of the whistleblower may be monitored over a period.

It is vitally important that any medical examination is **voluntary** and seen to be supportive of the Whistleblower. There is a 10 or more year history in the Australian Public Service of (most) whistleblowers being compulsorily sent for unnecessary and prejudicial medical examinations. This practice is now widely recognised as a 'standard operating procedure' by agencies, the medical profession and unions. These examinations are often primed by adverse (and often secret) reports from agencies. These reports (when they can be accessed by the Whistleblower-) invariably imply or assert that the activities of whistleblowing are atypical, non-conforming, non-compliant and an obvious symptom of a psychiatric illness.

Australian Public Service agencies seem to have a list of "psychiatric" medical professionals that are referred to by some in the legal profession as "Hired Guns". The selective use of particular medical professionals is highly questionable and is consistently part of this hostile attitude towards whistleblowers.

Clearly the aim of this process is to discredit the whistleblower at least, or set the whistleblower up for redundancy or retirement on medical grounds. The object is to remove anyone who may bring agency bureaucrats to account.

Those engaged in this practice, are fully aware that their conduct is not consistent with the Public Service, Code of Conduct. The practice is not fair; it is prejudicial and subjective. More often than not the information provided by the agency is untrue either by act or omission. Regardless of whether the allegation made by the whistleblower is true or false, upon making a disclosure, agencies seek to gain a benefit, by removing a person who brings the administration of an agency into question. The priority of the

agency is to get rid of any person who is 'reckless' enough to make a public interest disclosure. The goal is to make sure that such conduct is widely recognised as an affront to the agency culture and one which will bring down serious retaliation by the management structure.

Similarly, there is a standard practice by most agencies to redeploy or reallocate a whistleblower immediately after a disclosure is made. Standard practice is to claim that their services were required elsewhere. Usually the job to which they are allocated has less status, less job satisfaction and less supervisory functions. The usual claim is that "there is no one better for that job" and that the redeployment was "coincidental" with the public interest disclosure.

The real reason for the redeployment is to allow the agency to cover its tracks. With the whistleblower removed, evidence of the wrongdoing can be obliterated. With the evidence gone, and the whistleblower left without access to events in the area, any disclosure becomes seriously weakened.

When a whistleblowing disclosure occurs, there must be an immediate audit of workplace matters related to the whistleblower. All records related to the whistleblower must be produced and full copies provided to the whistleblower. In particular, any adverse comments or recommendations for action for or against the whistleblower must be identified. Any adverse changes in status, immediately following the disclosure or in connection to the disclosure must be considered as probable reprisals and dealt with accordingly.

Benchmarked employment and medical statuses are invaluable in providing protection to whistleblowers. Proactive monitoring of both statuses generally ensures good levels of protection.

Protection is ongoing

Protection must actively continue throughout the process, and specifically, while there is any chance of reprisals or adverse activity. Protection must be available after the matter is resolved as a bulwark against recurring reprisals. When the matter is resolved, the whistleblower must be repatriated to a status at least equal to or better than the position the whistleblower was in prior to making the public interest disclosure.

Whistleblowers sometimes suffer unnecessary or improper adverse actions well after a public interest disclosure matter has been resolved. Often this adverse action is undertaken by associates or peers of the person who had been engaged in public interest wrongdoing. Therefore whistleblowers who have been involved in a public interest disclosure who subsequently complain that they are suffering unnecessary or improper adverse actions against them, must be entitled to have their complaint considered as part of their previous public interest disclosure.

Collective adverse conduct towards a whistleblower, before, after or during a public interest disclosure event is usually indicative of a systemic culture within an agency, aimed at protecting wrongdoers from any accountability. This collective misconduct is, in fact, a matter which should be reportable under appropriate public interest disclosure legislation.

Ongoing protection for whistleblowers, carried out publicly with the clear and obvious support of the relevant agency and its senior officers, is probably one of the most effective ways of deterring public interest misconduct. It is also an encouragement to others to look for instances of wrongdoing and to disclose them to the relevant authorities.

Remedies:

Remedies to help the Whistleblower;

Legislation must impose a legal obligation on agencies and their staff to protect whistleblowers from reprisals.

Where reprisals occur, the agencies must have a duty of care to act against those carrying out the reprisals and to ensure full restitution and compensation to the whistleblower for harm or damage suffered.

There are already common-law and statutory provisions, which oblige agencies to protect whistleblowers. There has been a universal failure of these provisions to protect whistleblowers. More often than not, those charged with the responsibility of protecting whistleblowers are actually responsible, either by act or omission for those reprisals.

Therefore, the legislation must impose duties on agencies and relevant persons to protect whistleblowers and where they neglect or fail to maintain those duties, that conduct must render them liable for damages and disciplinary action.

Where an agency fails or neglects to maintain obligations to provide whistleblower protection, and as a consequence, the whistleblower suffers reprisals, then the agency must be rendered liable to a claim to damages by the whistleblower.

If harm, injury or damage is caused to a whistleblower who made a public interest disclosure, then those individuals responsible must be liable for the damages. Evidence of disadvantage, harm or damages to the whistleblower should be sufficient grounds to prove liability. The onus of proof against that liability must personally rest of those accused. [Fabricating evidence of any harm, injury or damage by the whistleblower must be legally actionable by those accused].

Though individuals may be made personally liable for damages inflicted on a whistleblower, the agency must have overall responsibility for all remedies, restitution and compensation. Agencies must ensure that the remedies are provided to the whistleblower as required and without delay. However if individuals were found to be liable for portions of the damage, the agency should be empowered to take action against those individuals to recover compensation paid to the whistleblower.

If the agency fails to properly recompense or compensate the whistleblower for damages, then the legislation must provide legal entitlements for the whistleblower to bring damages claims against the agency.

In all circumstances where a whistleblower is entitled to sue for damages as a result of conduct by an agency or employees of an agency, then the costs of that legal action must be borne by the agency.

An agency must give full financial and legal assistance to a whistleblower who suffers reprisals of a criminal nature, (assault, battery, bodily harm), to take private criminal action against those concerned.

If the agency properly supports the Whistleblower in this action, then the agency should be exempt from related legal action by the whistleblower (such a breach of duty of care, negligence etc).

One of the most significant remedies for a whistleblower is reinstatement to their position (or to a better position) after suffering reprisals. As stated previously, agencies use a standard procedure against whistleblowers who make a public interest disclosure. The

Whistleblower is invariably reassigned or relocated to less compatible duties immediately following a public interest disclosure.

This is one of the Agency's most offensive acts against a whistleblower. It immediately casts dispersions of wrongdoing against the whistleblower. The redeployment is publicly seen as correcting a fault caused by the whistleblower.

By reinstating a whistleblower to a previous position in a very public and open fashion, which is also supported by statements from senior officers, much of the harm done by a wrongful reassignment can be overcome. The more open, public and supportive is the reinstatement, the better effect it has on the Whistleblower.

Any helpful or supportive reassignment or relocation of a whistleblower must be done in full consultation with the whistleblower. In some cases it may be necessary to also seek advice from the whistleblower's doctor or a workplace consultant. But any decisions must be taken in full consultation with and having full regard for the views of the whistleblower. Where a whistleblower considers that actions being taken against him/her are a further extension of reprisals, then that whistleblower may make a claim of ongoing reprisals in relation to the matter.

The ultimate remedy is an apology. Where a whistleblower suffers a reprisal for a public interest disclosure, the most valued restitution and remedy is a genuine heartfelt apology for any harm suffered, from the most senior person in a position to give such an apology.

Extensive experience in the Australian Public Sector shows that it is easier to get financial compensation from agencies, than it is to get a genuine apology. The usual tactic of Australian Public Sector Agencies is to offer a 'conditional' apology provided the whistleblower meet some condition specified by the agency. Usually, the agency wants the whistleblower to be silent about the matter for ever and a day.

Such apologies are not genuine. In fact they are not apologies. They are bargaining chips, and there is no honesty or integrity about such apologies. Agencies which bargain about an apology do more harm than good in respect of any remedy to which a whistleblower is entitled.

Remedies to rectify organisational issues.

Where reprisals have been confirmed, regardless of any legal action taken by the whistleblower, the agency must take full appropriate action against those concerned. This is necessary to ensure that all staff are aware of the agency commitment to stomping out reprisals against public interest disclosures.

As much information as possible must be publicly disclosed as soon as is practical after any public interest disclosure matters are resolved. The more detail that is disclosed, the better it is for the health of the organisation as a whole and for the confidence of staff and for the whistleblower. In particular, the remedies provided to the whistleblower must be emphasised to prove that the whistleblower was not at fault and that harm caused to the whistleblower has been fully rectified.

Finally, agencies must take remedial action to prevent opportunities for similar wrongdoing recurring in the future. Having taken that remedial action, the agency should ensure that the issues arising from the whole whistleblowing matter are freely provided throughout the Australian Public Sector. A summarised report of the matter should be included in the agency's annual report.

The PSC should properly report on the efficacy of Australian Public Service Whistleblowing procedures in the Commission's annual report. The report must include feedback survey statistics from Whistleblowers about the worth of the Whistleblowing scheme as well as statistics about comparative rates of Public Sector disclosures going to 'external' agencies or third parties rather than to the PSC.

b. immunity from criminal liability and from liability for civil penalties; and

WBA Standpoint 4 b;

- It is necessary to amend relevant legislation to ensure that a registered Public Interest Disclosure is an absolute defence against prosecution in criminal matters (including national security) and against liability from civil penalties [eg defamation, breaches of confidence] - (subject to the conditions hereunder).
- A person who instigated, initiated or was constructively involved in a criminal act should not receive immunity from criminal liability or civil penalties regardless of a subsequent Public Interest Disclosure.
- However a person playing a lesser or accessory role in public interest wrongdoing may be granted some immunity against such conduct if they make an unsolicited and completely voluntary public interest disclosure.
- Under such circumstances, the 'greatest' public interest would be served by the disclosure of the information. The small public interest loss caused by granting immunity to a remorseful minor offender is well offset by the disclosure of evidence of more serious public interest wrongdoing.
- Regardless of a public interest disclosure and declared remorse, a person who has engaged in public interest wrongdoing, cannot be rewarded and they must suffer some level of appropriate punishment. Appropriate measures should also be taken to avoid opportunities for further wrongdoing without further punishing the person concerned.
- Immunity against criminal or civil action should extend to actions (within a prescribed time frame) involving the collection of evidence in relation to a prospective public interest disclosure.

Comment:

A registered Public Interest Disclosure must be an absolute defence against prosecution from criminal liability or from liability from civil action (provided that the Whistleblower making the disclosure was not significantly instrumental in carrying out the criminal activity).

Whistleblowers should not be given immunity from criminal liability, if they initiate, instigate or play a constructive role in the criminal activity which they later disclose in the public interest.

An exception may apply, if the original criminal undertaking was superseded by additional activity, which was organised by another person. If a person involved in the original matter were to disclose full details of all the activities, then their culpability may be limited, and some immunity may be warranted.

Where a person is not directly responsible for criminal activity, consideration should be given to provide some immunity in respect of a public interest disclosure.

It is acknowledged that there are competing public interests. Where a disclosure of information serves the ' greater' public interest, such as stopping criminal activity against the public interest, the compromise to grant immunity in a 'lesser' public interest matter is warranted**.**

There is a developing precedent where 'plea bargaining' serves the 'greater' public interest in relation to criminal matters. Though it is not a formal part of the judicial process, there is sufficient practical application to indicate that immunity in some circumstances is justifiable in the public interest.

Nonetheless, where immunity is provided in criminal liability matters it must be conditional against any further involvement in such conduct.

Where a person who is not acting in a capacity of a law enforcement officer, seeks or obtains evidence about a public interest wrongdoing involving criminal offences, that person must not be liable for criminal prosecution. Provided that the evidence obtained is passed to a relevant authority within a reasonable time, no criminality should be attached to that activity.

Similarly, if a person seeks to obtain evidence about public interest wrongdoing involving civil offences, that person must not be liable for civil action. Provided that the evidence obtained is passed to a relevant authority within a reasonable time, no civil liability should be attached to that activity.

c. immunity from civil law suits such as defamation and breach of confidence;

WBA Standpoint 4 c;

- Any person making a protected public interest disclosure made with an honest belief and to their best knowledge, must have absolute immunity against civil law action such as defamation or damages arising from the disclosure. This is a fundamental element of any protection offered.
- However, the immunity provided should be constrained by the necessity to only disclose information about those known to be or suspected of being involved in matters contrary to the public interest.
- Any person making a protected public interest disclosure must have absolute immunity against any breach of confidence or other restriction which has the effect of unnecessarily hindering the disclosure of relevant public interest information.

- The immunity provided should only cover matters about, and related to the specific public interest wrongdoing in question.

Comment:

In the absence of immunity against civil action, such as libel, slander, defamation or breaches of confidence, it would be impossible for whistleblowers to make a public interest disclosure. Provided that a whistleblower makes a public interest disclosure with honest belief and to the best of their knowledge, then they must be granted full and absolute immunity against civil law action.

Any disclosure must be restricted to the information necessary to prove the existence of public interest misconduct. Extraneous matters critical of individuals must not be accepted as part of any public interest disclosure and the whistleblower must be advised that such information may not be protected under the relevant legislation.

The function of warning a whistleblower as to the pertinence and relevance of information must rest with relevant authorised agency officers, charged with the responsibility of providing assistance to the whistleblower.

Similarly, any person making a public interest disclosure which involves the release of information in breach of confidence or of other restrictions, must have immunity to make the disclosure. A greater good is served by the disclosure of public interest wrongdoing than would be served by maintaining a confidence or other restriction.

5. procedures in relation to protected disclosures, which could include:

a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two;

WBA Standpoint 5.a :

The possible structural options by which disclosures could be made are extensive. Below are 2 options which differ in structure and detail. Either option is undoubtedly better than persisting with the existing Australian Public Service Whistleblower Protection arrangements.

However if it is decided to retain the existing (failed) Public Service Whistleblowing system and simply introduce new legislation, then nothing will change. During the last 10 years or more the Australian Public Service has steadfastly obstructed or ignored the existing legislation. The Guidelines from the Public Service Commission have been ignored and requirements for Whistleblowing arrangements have never materialised. More to the point, over recent years Public Service agencies under insular cultures imposed by senior bureaucrats has persistently obstructed public interest information disclosures (or access). In short the existing legislation has simply been ignored or given lip service for more than a decade and the agencies have never been held to account.

New legislation without the development of an appropriately resourced structure will serve no purpose.

It is important to note: There are no established federal agencies with the charter or resources to investigate all matters of public interest wrongdoing. There are a number of existing agencies with the potential to carry out limited investigations in narrow fields of jurisdiction.

- The Australian Federal Police have a charter to deal with criminal matters.
- The Australian Crime Commission only deals with national significant crime.
- The Australian Law Enforcement Integrity Commission deals only with matters within specific organisations.
- The Public Service Commission has no capacity or commitment to investigate any public interest disclosure matter.
- The Ombudsman has a charter to resolve administrative matters.
- The Industrial Commissions have a charter to deal with workplace matters.
- The Australian Securities and Investments Commission enforces company and financial regulations.
- The ACCC deals with Trade Practices issues, and other regulatory bodies have other functions and different charters.

> None of these existing agencies are equipped to deal with public interest disclosure matters which may involve any or all acts of public interest wrongdoing.

If an Australian Crime and Misconduct Commission were created it would be likely that such an agency would have a charter including the investigation of public interest wrongdoing. But in the absence of such an organisation there is no focussed process by which public interest disclosures can be investigated.

As matters stand, each Public Service agency gets to deal with public interest wrongdoing as they see fit. The process is completely discretionary. The problem is that public interest wrongdoing within an agency reflects badly on that organisation and particularly on senior management.

Therefore there is a strong motivation for agencies to use their discretion to close the disclosure matter down to ensure that the relevant public interest information is not made available to the public or to political interests.

The most effective way to 'close the matter down' is to retaliate against the Whistleblower and force a cloak of silence over any attempt to make a public interest disclosure.

Therefore it is imperative that a determination be made as to the structure by which public interest disclosures are to be investigated before any action about legislation or procedures are made.

As discussed above, the current system of dealing with Australian Public Service public interest disclosures is an undisciplined mishmash of ineffective, subjective, discretionary processes. The introduction of new legislation without addressing the need for a structure to administer the legislation would be a waste of time and energy.

For sake of convenience the proposed new legislation is hereunder referred to as the Public Interest Disclosure Act or PID Act.

The options offered below are deliberately constructed differently to emphasise the scope of the protected public interest disclosure structures which could apply.

Notwithstanding, there are aspects of the structures, functions or operations which could be utilised by either option. In particular some operational and functional aspects outlined in the Option 2 below may well be applied (at least in part) to the functions of the PPID Commission referred to in the following Option 1.

Option 1 - A New Structure:

- **A new [Protected Public Interest Disclosure (PPID)] Commission should be created.**
- **The new commission would consist of 2 independent but interacting units – an Investigatory and Prosecution Office and a Whistleblower Protection Office.**

    - The investigation unit would investigate disclosures to determine prima facie evidence of public interest wrongdoing**.**
    - If wrongdoing was identified then the unit would carry out a thorough investigation into the matter – but if wrongdoing extended to functions of external agencies that wrongdoing could be referred, by agreement to those agencies – or officers from that agency could be co-opted to assist the investigation unit.
    - When the wrongdoing was finalised by due process, either the prosecution sub-unit or the external agency could prosecute.
    - The Whistleblower Protection unit would register a public interests disclosure, maintain statistics, advise the investigation unit of relevant information and offer appropriate assistance to the whistleblower.
    - Upon any report of a reprisal, the Protection unit would investigate the matter and if the complaint was sustained take immediate action to protect the whistleblower.
    - The Protection unit would refer any evidence of reprisals to the Prosecution unit to progress legal and or disciplinary action against the perpetrators.

- This agency could be part of a greater **Public Information Office** as could the Government's foreshadowed FOI Commission. Having both the FOI Commission and the PPID Commission in the Public Information Office could have considerable cost benefit advantages. **This proposal could be cost neutra**l and result in a consolidated professional unit dealing with the public right to public interest information.
- The Public Information Office would facilitate public interest access through the FOI Commission and facilitate public interest disclosures through a Public Interest Disclosure Commission (using the Public Interest Disclosure Act).

- Ultimately, a national (federated) Public Information Office (PIO) should be established, which would have collective jurisdiction throughout Australia. A national PIO could facilitate standardisation of legislation and systems for dealing with Australia wide access to and disclosure of public information.

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Option 2; An alternate New Structure;

- **A new Public Interest Disclosure Agency (PIDA) could be established.**
- **The PIDA would have responsibility to;**
  - Administer and monitor the application of a new PID Act.
  - Register disclosures, maintain statistics, make relevant formal reports, conduct education programs and carry out applicable research.
  - Determine whether each Disclosure served the Public Interest.
  - Pass relevant information about the Disclosure and the wrongdoing to an appropriate external agency for further investigation.
  - Monitor and press the progress of the matter being investigated by the external agency. Report investigation findings to the relevant agency.
  - Where complains of reprisals occur, carry out investigation into that complaint –using reverse onus provisions of the PID Act.
  - Take action to stop reprisals including disciplinary or legal action.
  - Provide assistance, counselling and mentors as appropriate or requested by the Whistleblower.
  - The PID Act should specify the relevant criteria by which each disclosure is referred to external agencies for further investigation.
  - The PID Act must specify procedures that must be followed by external agencies in dealing with any referred public interest disclosure.
  - Protections available under the PID Act must be extended to include those persons (police, auditors) who are subject to mandatory disclosures under other legislation.
  - Where an external agency finds evidence of reprisals against any person, that agency must pass that information to those responsible for protections under the PID Act.
  - The new PID Act would enable the PIDA to take action against those engaged in public interest wrongdoing and to facilitate compensatory action on behalf of the Whistleblower. Amendments to employment laws should facilitate compensatory action and other relevant preventive and protective procedures.

Changes to relevant external agency legislation would be necessary to facilitate the full functioning of the PID Act. This would be absolutely necessary if existing agencies were to carry out investigations of public interest disclosures.

Any legislative changes which impose new functions or responsibilities on existing agencies would require funding, training and resources.

Other options.

The above options are only examples of different structures that could be used to administer and apply a new PID Act.

It has been suggested that a broader more comprehensive agency be established dealing with the Rights of Citizens. This Agency would have a Whistleblower Protection Unit and a Public Interest Disclosure Unit, and a unit dealing with media shield laws and perhaps even Human Rights issues such as Freedom of Expression.

In short, there are endless options as to the nature of any structure, which has responsibility for a PID act. In that context, the efficacy of any new PID Act will depend on the structure of the organisation charged with the responsibility of applying it.

General Operation of disclosure process.

- **A Whistleblower, an agency officer or any other responsible person must notify and register a disclosure to a specified registry office.**
    - The registration should be carried out by the Whistleblower but failing that, an agency officer should register an interim disclosure with whatever first hand information is available.
- **PID Legislation must not compel public interest disclosures.**

General standpoint;

- All public interest disclosures which serve the greater public interest and cause no actual harm to the public interest should be protected regardless of the avenue used to disclose the information.
- There is no logical reason why bona fide public interest disclosures which serve the greater public interest should be denied protection simply because a procedure was not followed. Retrospective compliance to procedures should be available.
- Whistleblower protection procedures cannot be limited or quashed simply as a means to achieve a level of administrative or political control over public interest disclosures.
- The disclosure of public interest information is the critical issue. Avenues for disclosure should only exist to facilitate the processing of the disclosure.

General Comment:

The following comments attempt to address issues relevant to the various structural options suggested above. One option suggests an 'Information Agency' jointly dealing

with both FOI (access) and PID (disclosure) matters. Therefore the references to 'access' below are relevant to FOI matters.

A new public interest (information) agency needs to be created to ensure the most efficient and effective way of disclosing (and accessing) public interest information. The establishment of a well considered agency could have considerable cost benefits and significantly improve the effectiveness of information disclosure (and access) procedures.

As suggested above, agencies of this type would oversight the disclosure (and accessing) of public interest information throughout the public sector.

However elsewhere in this submission WBA recommends the eventual extension of PID legislation to cover the public sector, publicly listed corporations and voluntary organisations. It would also be appropriate to include private enterprises particularly if they are contracted to supply a large scale quantity of goods or services to the public.

The UK Public Interest Disclosure Act sets a clear precedent for this type of a national 'disclosure and protection' act with coverage extending into most areas of public interest.

Until a final determination has been made as to the persons and organisations who will be the subject of any Public Interest Disclosure legislation, it is difficult to propose an appropriate structure.

Creating a new bureaucracy will not be an attractive proposition to any Government, particularly as it would most likely be at an additional expense.

However we hold the view that the process could possibly be cost neutral depending on the structure adopted.

In general terms a larger 'new' agency could have economies of scale and produce a better output than would be available if the proposal was simply to impose new legislation on an existing inefficient and ineffective system.

At present there are significant Public Sector losses caused by actual waste, maladministration, duplication or neglect. Other losses arise from corruption, theft, graft or misappropriation. Those direct losses exist because there is no effective mechanism to prevent, detect or stop them. The intention of the existing Whistleblower system was to provide some means to identify and report on such matters.

Unfortunately the Whistleblower system never materialised. Agency masters allow the system to wallow, serviced by minimal resources and a total lack of management support. Nonetheless all agencies had been given some staff allocation for their Whistleblowing (and FOI) system. There is no evidence that the allocation was ever used for that purpose.

A few public servants do actually carry out some public interest information access functions. Their common complaint is that their functions are constantly directly managed by senior bureaucrats who attempt to limit any access to public interest information.

New staff from old

A new agency could draft in staff currently allocated by agencies to functions involving whistleblowing (and freedom of information) schemes. By utilising staff from agencies there would be virtually no additional staff required to create the new agency. But the significant advantage would be that these staff would become trained professionals,

specialising in the functions of the disclosure (and accessing) of public interest information. The better trained officers of a new agency would be capable of a greater throughput than exists in agencies, where there is a high turnover of staff in the functions. After training, some staff could be out posted back to agencies but under the direction and control of the new agency. Some of those staff could also be used for training purposes, across all agencies.

The lines of control, communication and accountability over public interest disclosures would be vastly simplified if a single agency was responsible for the process.

Our general position.

- It is acknowledged that formal procedures could help facilitate a public interest disclosure and should provide necessary advice and assistance to obtain the maximum protection necessary in making a disclosure.
- Whistleblowers must have options as to how and when a disclosure may be made. No single avenue is acceptable. Protection must be provided regardless of the optional avenue selected.
- Whistleblowers must have the option of changing avenues for disclosure, if they are concerned that the matter is not being properly dealt with or is suffering undue delays.
- Disclosures should be assisted by authorised persons properly trained for that purpose**.**

b. the obligations of public sector agencies in handling disclosures;

WBA Standpoint 5.b:

- The prime obligation of public sector agencies (in handling disclosures) must be to provide immediate protection, advice and assistance to the whistleblower who has indicated a desire to make a public interest disclosure.
- Protection of the whistleblower should be demonstratively proactive and as public as possible from the earliest opportunity.
- Monitoring of each disclosure must be done as a matter of course and advice about the progress of the matter should be provided to the whistleblower throughout proceedings.
- Staff generally must be properly trained about respective procedures relating to any Whistleblowing event. Staff generally must be able to witness the process and practices applied in the processing of a Whistleblowing event.
- In the absence of an external new public interest information agency, agencies must have a Whistleblowing regime established, consisting of independent officers, capable of and authorised to assist the whistleblower and facilitate the disclosure.

- In the absence of an external new public interest information agency, all agencies must have an independent investigatory unit with appropriately trained staff and adequate resources, committed to conducting preliminary investigations of any allegation concerning public sector wrongdoing.
- That unit must not be subject to internal influence by the agency. The unit should not report to the agency until the investigation is completed unless the delay in reporting would cause further actual harm to the agency,
- That unit must have clear and unobstructed lines of access to external agencies which must have the legislative authority and responsibility to investigate public interest wrongdoing.
- An external agency must not refer a matter back for investigation to the agency from which the complaint arose without the voluntary consent of the whistleblower.
- Regardless of which agency handles the public interest disclosure it is essential that:
    - A commencement date be established, from which the timing of all matters are measured.
    - Timelines must be set for the investigation of the matter.
    - Legislation must require that progress reports are sent to the Agency (and/or its Investigation Unit) and to the Whistleblower. The legislation must require that final reports are also provided to the Public Service Commission as part of a comprehensive annual Whistleblowing report to Parliament.

Comment:

Whistleblowing – the Standard Operating Practice.

When a Whistleblower discloses or seeks to disclose (allegations) of public interest wrongdoing the usual consequences are as follows**:**

The whistleblower receives no advice or assistance in making the disclosure i.e. preparing a statement or providing evidence.

The immediate focus of the matter is the Whistleblower rather than the alleged wrongdoing. It seems the most important issue to an Agency is the credibility of the Whistleblower rather than the validity of the allegations.

Invariably agencies do not provide any proactive protection. Usually the Whistleblower is faced with accusations that they have breached their employment contract or other restrictions and may/will be subject to disciplinary or other adverse action. The open resentment (if not hostility) of management towards the Whistleblower is an open invitation for reprisals to start. The situation is like a pack attack on a wounded animal. There are no rules, no protection and the Whistleblower becomes fair game.

Some peers and even some supervisors will see the injustice of this situation and will offer help. But within a short time it will become evident that supporting a Whistleblower will not be tolerated. The supporter is warned of companion reprisals. Individual survival becomes paramount. Support generally evaporates very quickly.

The accusations, the hostility and management's subtle declaration of an 'open season' for reprisals a is crushing blow to a Whistleblower. The Whistleblower who had thought they were acting ethically in the public interest suddenly finds that they are alone and are subjected to an unrestricted 'pack attack' permitted or even orchestrated by agency managers.

There are statutory obligations (duties) under the Public Service Code of Conduct as well as ethical and moral obligations on the Public Sector to properly deal with whistleblowing matters and Whistleblowers in particular. With regular monotony it is found that neither obligation has been properly fulfilled by those who bear those actual responsibilities.

The following comments are made in that context.

The prime obligation of public sector agencies is to provide immediate protection of a person who indicates that they have information relevant to a public interest disclosure.

Agencies should have a properly resourced regime established, staffed by independent officers, capable of and authorised to assist the whistleblower and facilitate any disclosure.

At present, when Whistleblowers report disclosures to any existing external agency or a parliamentarian, it is the standard practice for those agencies or that parliamentarian (through the relevant Minister) to refer the matter directly back to the agency from which the allegation arose.

It doesn't matter which existing agency receives the disclosure, whether it be the Ombudsman, the Public Service Commission, the AFP or any other agency. Immediately they invariably refer information about the public interest disclosure, including information about the Whistleblower directly back to the agency from which it originated. There is no consultation with the whistleblower about this action. There is no warning that such action has been taken.

In part this action is not the fault of those agencies. No federal agency is structured or resourced to carry out public interest disclosure investigations and therefore referring the disclosure back to the relevant agency is a logical reaction. Nonetheless there is sufficient latitude within their respective legislation allowing discretion to refer the matter where it may be properly investigated. However that never happens. Invariably the disclosure and the details of the Whistleblower are sent to the subject agency.

Consequently, the whistleblower becomes immediately accountable to the same agency about which the complaint is being made.

Therefore it is vital that any external agency receiving a disclosure must not refer the matter back to the agency from which the complaint arose without the voluntary consent of the whistleblower. If returning a disclosure to the originating agency is the only action to be taken, then the whistleblower must have the opportunity to withdraw the disclosure.

Most agencies do not have properly trained public interest investigation units. Therefore the usual practice is to get a whistleblower to make a written statement of the allegations at the outset. More often than not, this statement is prepared without help, or assistance as to the relevant information necessary to sustain a public interest disclosure. Without regard to the efficacy and pertinence of the statement this document then becomes the

sole basis of the public interest disclosure. Most whistleblowers do not have the experience, skill or training necessary to construct a statement of the kind necessary.

As a rule, agencies do not actually investigate the allegations in a whistleblower's statement. Usually the aim is to find inconsistencies or irregularities, which can discredit the statement and/or the Whistleblower.

An independent external agency with a charter to investigate public interest disclosures would not have a vested interest in the outcome of a public interest disclosure. Therefore that agency would most likely undertake an objective investigation without focussing on the whistleblower.

As for other obligations in dealing with a public interest disclosure, agencies must ensure accurate recording of events and times from the outset. At regular intervals throughout the investigation, the whistleblower should be advised about its progress where possible. At the conclusion of the investigation, the whistleblower should be provided with a final report and be given an opportunity to respond accordingly.

c. the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education); and

WBA Standpoint 5.c;

- A protected public interest disclosure scheme, which does not establish a proactive, independent, oversight and monitoring system will not work.
- An independent external (PID) agency with no vested interest in the outcome of an investigation is best able to serve the public interest. A PID agency would monitor and report on all matters relating to a public interest disclosure and on the respective whistleblower protection.
- A PID agency would greatly reduce workloads on agencies in general as the PID trained specialist staff would facilitate and administer the process to a high degree of efficiency and effectiveness.
- Agencies would benefit as they would not require internal investigation and monitoring units. Agencies could also call on the PID to assist Whistleblowers with advice and counsel. The PID Agency would assume responsibility of disclosures and protection training.
- As the effectiveness and efficiency and more importantly, the credibility of a PID Agency increased, staff would regain some confidence in the public interest disclosure and whistleblowing functions of the Public Service.

Comment:

The existing federal Whistleblowing scheme is under the oversight and currently monitored by the Public Service Commission (PSC). The PSC has done nothing to facilitate public interest disclosures and less to protect whistleblowers in the workplace. The current system has no value whatsoever in respect of protected public interest disclosures.

Considerable benefit and efficiencies would be achieved by moving staff numbers from the PSC to a new public interest information (PID) agency.

For years, each federal public sector agency has been charged with the responsibility of dealing with public sector whistleblowing. The system has failed miserably. Research from the Griffith University, 'Whistle While They Work' project, shows that public interest wrongdoing is rife in the public sector. Yet despite years of complaint about the Whistleblowing system, it continues to fail.

However, given the failure of the PSC to oversight and monitor public sector whistleblowing and disclosures, it is necessary to look for alternatives. As stated previously, the Commonwealth does not have an integrity commission of the type necessary to investigate public sector wrongdoing. Referring a public interest disclosure to the AC for LEI, the AFP, the ACC, ASIC ACCC, or the Audit office is a fruitless exercise. They are not appropriate agencies (as a general rule) to investigate matters of public interest wrongdoing. Involving such agencies before a significant prima facie case is established would simply mean that matters of public interest misconduct would most likely be dropped off the priority list and would never be addressed.

Regrettably, it must be said that the Ombudsman's office is similarly incapable of conducting inquiries into the physical activities of public sector wrongdoing. The Ombudsman's office is designed to assess matters of public administration in dealing with matters of justice and equity. This is more of an administrative process rather than one which has to deal with physical conduct and real-life activities.

However of all the options available to avoid creating a new PID agency, the creation of a sub unit of the Ombudsman's Office seems feasible. But this sub unit would still need the resources necessary to conduct investigations that may involve criminal matters. This function is outside the existing charter of the Ombudsman and having a sub unit with greater powers and functions than the primary organisation is not a wise organisational arrangement.

Therefore the most logical solution is the establishment of a new and independent (PID) agency. This agency must be provided with appropriate legislation, a charter broad enough to oversight all public interest wrongdoing, a practical structure and adequate staff and resources.

Regardless of whether the agency stands alone or is part of another organisation, the critical features must be the agency's independence, and the agency's charter/legislation to address all public interest wrongdoing. The agency's functions must be to pursue public interest wrongdoing and most importantly to provide protection to whistleblowers.

Those functions would extend to include;

registering disclosures, carrying out preliminary investigations, referring the matter as necessary to external agencies, monitoring the progress of matters by external agencies, providing advice and counsel to whistleblowers, assisting with construction of statements and compiling of evidence, investigating allegations of reprisals, taking action to protect whistleblowers from reprisals, supporting the whistleblower in taking action against persons carrying out reprisals, taking action against those who carry out reprisals, compiling reports of whistleblowing events and the training of staff generally about whistleblowing and public interest disclosures.

As the Government has already foreshadowed the establishment of an FoI Commission, which in part deals with public interest information it seems a logical step to embed a PID agency as part of a public interest information agency.

d. whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted

WBA Standpoint 5.d :

- **A whistleblower should have the option of making a public interest disclosure to a responsible third-party such as the media or a parliamentarian <u>at any time</u>. The PID Act must place the <u>onus</u> of responsibility for any further disclosure on that third party.**

- **A disclosure made through this process should not diminish the whistleblower's right to protection against reprisals or reduce their immunity against criminal or civil action or liability.**

- **Further disclosure of that information by that third party would only entitle that third-party to those protections available through legislation related to their profession.**

- **In the absence of a Public Interest Information Agency or an integrity commission, a whistleblower must be entitled to disclose information to the media or a parliamentarian if the whistleblower has a genuine belief that;**
  - **making a disclosure by any other means may bring harm to the whistleblower or**
  - **the agency has not dealt with or will not properly deal with the disclosure.**

Comment:

There is no need to force a whistleblower to exhaust all other avenues of disclosure before they would be entitled to make a protected public interest disclosure to a third-party such as the media or a parliamentarian.

Whistleblowers must be able to disclose a public interest matter to the media or a parliamentarian as an option for disclosure.

The balance against further unbridled disclosure of that information should rest on legislative provisions, which place the onus and ramifications of further disclosures squarely on the media or the parliamentarian. Only if those third-parties are reasonably sure that further disclosures will not harm their interests will they make further disclosures.

There are advantages and disadvantages associated with making disclosures to the media or to a parliamentarian.

The advantages are that the media or a parliamentarian is sufficiently removed from the matters to allow some anonymity for the whistleblower if anonymity is what the whistleblower was seeking.

The disadvantage is that any claim of reprisals (arising from an 'anonymous' media or parliamentarian disclosure) would be difficult to prove. Without the identity of the Whistleblower being published it would be difficult to prove that any adverse action against the whistleblower was a reprisal.

The whistleblower would also be disadvantaged if they permitted their identity to be publicised by the media or the parliamentarian. The Whistleblower would not have access to advice and counsel about the best process and necessary information appropriate to a disclosure. It would also take some time for those responsible for providing protection to activate appropriate protection measures. In any event the matter would still have to be investigated by the relevant authority to ensure that the disclosure was both in the public interest and factually sustainable before protections would apply.

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

WBA Standpoint 6:

- The committee's terms of reference provides options for the preferred model. There is no relationship between the options suggested in those terms of reference and the current Commonwealth legislation dealing with whistleblowers.

- The committee's preferred model considers the range of people, the types of disclosure, the conditions for disclosure, the scope of protection and procedures for protection. The preferred model canvasses broad issues aimed at protecting a whistleblower who makes a proper public interest disclosure.

- The existing Australian Public Service whistleblower legislation has little to do with public interest disclosures and emphatically provides no Whistleblower protection whatsoever.

- The existing Australian whistleblower provisions are spread across nine Acts including the Corporations Act, the Public Service Act, the Workplace Relations Act and the Parliamentary Services Act. References to a Whistleblower Protection Act (Vic) are also made in one other Act.

- None of these Acts are dedicated to protected public interest disclosures. With the exception of the Public Service Act, each of these Acts relates only to a narrow band of people in particular circumstances, dealing with narrowly defined issues.

- The Corporations Act and the Workplace Relations Act deal with matters within the private sector although the latter may also deal with public sector issues. The Public Service Act applies broadly across all Commonwealth public sector areas.

- As the act which applies to the greatest volume of Federal employees, the Public Service Act (s16 Whistleblower Protection) is so utterly useless that over a five-year period the section has virtually been dormant. The few matters that have been referred to the PSC have been uniformly unsuccessful. This is during the same period when the Federal Ombudsman has received thousands of complaints about public service conduct. Public Service Officers have absolutely no faith in the PSC's willingness or capacity to properly deal with s16 Whistleblowing complaints.

Comment:

There is no relationship between Commonwealth's existing fragmented, piecemeal, half-hearted, ineffectual, lip service whistleblowing legislation and the stated intention of the committee's terms of reference, which seeks to develop protected public interest disclosure legislation**.**

The aims, intent and purpose of the existing Commonwealth whistleblowing provisions have no relevance whatsoever, in practical terms, with any proposed legislation dealing with protected public interest disclosures.
As stated elsewhere in this Submission, it is our view that a national, unified, consolidated Protected Public Interest Disclosure Act should be the ultimate aim of all Governments in Australia.

The introduction of such an Act, for and on behalf of the Federal Government is a good first step in a long but necessary process.

7. such other matters as the Committee considers appropriate.

WBA Standpoint 7;

- WBA contends that the development of Protected Public Interest Disclosure legislation is necessary in the public interest.

- We also contend that it is appropriate for the Committee to consider, as part of this Inquiry, a number of fundamental issues about the public's right to disclose and access public interest information.

- Similarly, the scope of any new Australian protected public interest disclosure legislation should be considered to determine whether the legislation should extend to parts of society, outside the Australian Public Sector.

- The 'Introduction' part of this submission raises concerns about the public's right to disclose and access public interest information and about the scope of any public interest disclosure legislation.

It is our contention that these subjects fall within the Inquiry's Terms of Reference.