Submission to the Standing Committee on Legal and Constitutional Affairs

Whistleblowing Protections within the Australian Government Public Sector

Introduction.

This submission supports the introduction of wide ranging legislation and associated administrative procedures at the Commonwealth level. It aims at achieving three objectives:

1. Strengthening ethical practices in the Australian Public Sector,
2. Providing administrative support, encouragement and protection to those who wish to disclose wrongdoing in the organisations with which they are associated,
3. Ensuring that those disclosures are properly investigated and dealt with.

The submission draws on several sources: (i) a research project funded by the University of Sydney that compared legislation throughout the states of Australia, and in turn with that in the US and the UK; (ii) interviews and discussions with close to 40 actual and potential whistleblowers over the last four years, (iii) an extensive examination of relevant literature, including the NSW Ombudsman's 2004 review of the adequacy of the Protected Disclosures Act, (iv) presentations to, and extensive interaction with, the Griffith University's *Whistling while They Work* Project and (iv) an analysis of the institutional capabilities of an agency of government to bring effective management into the whistleblowing process.

The submission has been prepared by the undersigned, Dr. Peter Bowden, who has a wide background in institutional strengthening, both domestically and internationally, and who, as a Research Officer in the Department of Philosophy at the University of Sydney, currently works on ethics-related organisational issues, including the teaching of whistleblowing. His background is available through the Australian pages of Google. He has also been active in support, education and research with Whistleblowers Australia (WBA), and is on its National Committee as Education Officer and President of the NSW Branch. This submission, however, is put forward independently.

This submission endorses and supports the WBA submission. The reason behind the independent submission is that this submission urges that consideration be given to three aspects of whistleblower protection: (i) to adopt elements of the British Public Interest Disclosures Act 1998; (ii) to include private sector whistleblowing protection. It would have been, for instance, as much in the public interest to prevent the ethical failures of HIH, FAI, James Hardie, etc, as it was any public sector wrongdoing in recent years; and (iii) that the first line of disclosure be to the whistleblower's superior officer, rather than an external agency. Some submissions will argue for disclosures to go first to an external agency, as organisational superiors are the source of most of the retaliation. However, the natural tendency of a whistleblower is to approach his/her superior officers first, an assumption that has some research data to support it. But he/she must have an external agency to approach as alternative. These components of the submission are further discussed below.

The submission is set out against the Terms of Reference for the House Standing Committee. This concluding paragraph to the Introduction, however, sets out those issues which are believed to be the more important in the submission. They are

(a) The definition of whistleblowing:

Whistleblowing is the exposure, by people within or from outside an organisation, of significant information on corruption and wrongdoing that is made in the public interest, and that would not otherwise be available.

An action that is illegal or that brings harm or has the potential to bring harm, directly or indirectly to the public at large, now or in the future, is not in the public interest.

In WBA interviews, we have discovered that of the people who come to us, over half have a grievance with their supervisor or organisation, usually of bullying. They may possibly consider themselves whistleblowers but often specify little or no public interest wrongdoing. Bullying can be widespread and as such may be an issue that warrants attention, but the widespread nature needs to be proven first. The above definition rules out interpersonal grievances, such as complaints about individual bullying.

(b) The need for a Whistleblower Agency

. Whistleblowing requires a considerable amount of courage, for the possible whistleblower is about to cut him/herself off from the organisation that is their basic means of support. Whistleblowers however are just ordinary people who are risking a great deal to reveal wrongdoing. They need support and encouragement to do so. They are also often acting on suspicions and partial information yet are asked to provide court acceptable level of evidence to prove their accusation. While reasonable evidence is necessary, investigating and proving the wrongdoing should be the role of an agency of government. Whistleblower management is currently the responsibility of the employing departments of Government, with some responsibility with the Commonwealth Ombudsman. The suggestion is that an agency be created to support whistleblowers, as well as manage the whistleblowing process, and that it would be best concentrated in one dedicated unit in the Ombudsman's Office.

The reason for placing ultimate authority with the Ombudsman is that supervisors or even Heads of Departments are not impartial when they receive a whistleblower complaint, and could react adversely, or as happens many times investigate and then do nothing. For this reason, all whistleblower complaints would be forwarded to an independent body - the Ombudsman unit in this submission. To differentiate between a personal grievance and a genuine wrongdoing is sometimes difficult, requiring a personal interview. Although the first line of interviews would normally be the complainant's supervisors (or the department's ethics officer), in difficult cases this interview would be best handled by dedicated specialists, sympathetic to the benefits of whistleblowing, rather than by the departmental staff. The handling of information on wrongdoing must be the responsibility of the department's senior management, but when that a information questions the reputation and honesty of senior management or of even the department, an external and independent unit needs to manage the issue.

The reason for recommending the Ombudsman's Office is primarily to reduce costs (compared with a separate office, as been recommended in past inquiries), but also to gain some synergies from related activities in that office.

The following paragraphs are set out against the Terms of Reference of the Inquiry

1. Who can make disclosures?

1. a. The categories of people who could make protected disclosures would include current or former employees in the Australian Government, current and former contractors and consultants, and current and former employees of Parliament. These are as set out in the in the TOR. A later paragraph outlines a process by which revealing wrongdoing can be extended to the private sector, but at this point the submission is confined solely to the Commonwealth public sector

1. b. This submission extends these categories to include all persons connected with the department or agency in any way. This extension would primarily include clients or users of the agency's services, or staff in other agencies which interact with the one where the offence is occurring. Such people can come across a wrongdoing, but if they expose it, they could suffer in their access to a particular service that the agency may be providing, or could lose the cooperation of that agency.

2. Types of Disclosures that are protected

2. a. **The types of disclosures that should be protected** are those in the TOR: i.e. 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.

2. b.i. **Disagreements on Policy**: The TOR asked 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.

The NSW Act contains a provision that questioning of the merits of a government policy would not be protected by the Act (s.17). It is a unique condition in Australia (and world–wide). It is also a difficult and debatable issue.

On the surface, it would seem a reasonable clause. We are in a democracy, and policy decisions are a result of the democratic process. Once the decision is made, public servants should implement it and we should abide by it. Members of the public may agitate against a particular decision, but they are activists, not whistleblowers, and would not need protection under the Act. There are, however, public servants who will question a particular policy decision, sometimes indirectly, seeking media attention in the process. To give them protection may be helping some self-serving or misguided objective of that employee. Public servants are to implement policy, not subvert it.

On the other hand, public policy decisions should not be made in secret. One of the fundamental human rights that we have is to know of government decisions that may impact on us. Policy which raises safety issues on the rail system, for instance, or security questions at airports should be made known, and the employee who reveals these decisions is blowing the whistle in the public interest and should be protected.

It is suggested, therefore, that the proposed legislation does not prohibit a questioning of government policy, but that such a questioning be reviewed by the Ombudsman's office on the basis of the extent of existing public awareness and discussion on the issue, and an assessment of whether the complainant is pursuing a personal agenda. This examination is another reason why this submission suggests a specialised group within the Office of the Ombudsman be established.

If that office finds that a policy decision, or even a current government practice that a whistleblower reveals has the potential for harm, or infringes guidelines, but is not publicly known and has not been subject to debate, or to review, then the whistleblower would be protected. If the policy is public knowledge, has been adequately reviewed, and has been subject to scrutiny, then the public servant should be entitled to voice his or her disagreement, but would not have the protection of the Act.

2. b. ii: **Personal Grievances:** The TOR asked whether grievances over internal staffing matters should generally be addressed through separate mechanisms.

The answer to this question is yes. The crucial issue is public interest. The definition of public interest wrongdoing stated above precludes personal grievances. The two most serious sets of offences on which the Committee may receive submissions for inclusion are bullying and harassment (race, sex, etc.).Promotion or discipline issues are sometimes behind these complaints. This submission suggests that they be excluded on the grounds that there are other mechanisms to deal with these issues. All agencies have (or should have) internal mechanisms to deal with interpersonal conflict within their organisations. In addition, Australia wide anti-discrimination legislation exists under which perpetrators can be sued. There is no anti-bullying legislation, but it can be handled under agency provisions.

There are three exceptions to the statement that interpersonal conflicts be excluded: Serial bullying (or discrimination) for they are then of wider public interest, independent observation by an outsider (which takes away the self serving elements of some grievances), and complaints about reprisals.

Should an agency receive a complaint on a staff conflict, it would still report that complaint to the Ombudsman unit.

3. Conditions on the whistleblower

3. a. **No threshold of seriousness should be required** for allegations to be protected; mainly as such a threshold will be difficult to define. There will be at times a complaint from a whistleblower who is at loggerheads with his/her supervisor, where the wrongdoing cited is small - distorting travel claims for instance. The disclosure should still be investigated and also forwarded to the Ombudsman's Office.

3. b. **An honest and reasonable belief that the allegation is correct is necessary**, with vexatious whistleblowers subject to disciplinary action. No sanctions should apply to whistleblowers who materially fail to comply with the procedures under which disclosures are to be made; except when they knowingly or recklessly make false allegations;

3. c. **The whistleblower need not necessarily act from solely altruistic reasons,** nor even appear to be acting from these reasons. This condition is an important additional factor to consider. The overriding condition must be revealing activities against the public interest, not the personal relations between two officers. This writer is closely familiar with situations where a staff member has increasingly been frustrated by the inability to stop the continuing employment of borderline ethical practices by another officer, usually senior. Tensions are then set up between the officers. Eventually one of the offending actions becomes serious enough to blow the whistle. One of the well-known whistleblowing cases at the University of NSW was initially set in motion by the bullying of a junior officer by the Head of the unit. The Head's use of doubtful research findings, described by the subsequent high level committee of inquiry, as having "stated and presented a material or significant falsehood in reckless disregard for the truth", became one motivating factor for the junior officer to blow the whistle.

One organisational response between two officers, one of whom accuses the other of wrongdoing, is to institute mediation. This action places the mediator in a difficult position. A preferred approach would be to first determine whether the accusation is correct.

4 Statutory Protections

The statutory protections that should be available would include the nine protections that are collectively available under the various state Acts (Set out below - No state provides all nine):

a. Confidentiality for whistleblower's identity.
b. Prohibition against reprisals.
c. Injunctions against reprisals under the Act.
d. Proceedings for damages.
e. Right to relocate.
f. Indemnity against civil & criminal proceedings.
g. Absolute privilege against defamation
h. Anonymous disclosures allowed.
i. Protection if released to media.

A number of these provisions need further elaboration:

a.Confidentiality, and maintaining it as long as possible are fundamental to building confidence in a whistleblower and for encouraging future whistleblowers. Should a whistleblower accuse a colleague or superior of some wrongdoing, however, natural justice demands that the accused be informed and is given the opportunity to refute the allegation. In our experience, however, as soon as the accused is informed, the issue becomes public, the cover-ups are put in place and the retributions start. It is highly desirable therefore that the investigating agency use the period when the matter is still under wraps to pursue its investigation as far as possible.

b. The prohibition against reprisals is quite heavy in most states. The Commonwealth should not be any less.

c. d. f. g. Injunctions against reprisals and the right to institute civil proceedings for damages should be included in the Act, as well as the indemnities and privileges included in

most state legislation. A section below suggests further steps in respect to these protections based on current practice in Britain.

e. Right to relocate. Should be available, to the extent possible in the organisation or the wider public sector. The public service is large, and can relocate officers more easily than can a private company.

h. Anonymous disclosures. Whilst acceptable, such disclosures face the obvious difficulty that they are often unsupported accusations, lacking in the detail necessary to investigate them. The agency should nevertheless permit them, while still emphasising confidentiality (with its limits).

i. Ability to go to the media or to a parliamentarian. This freedom is advocated by this submission and is discussed further below. It is regarded as a safeguard for whistleblowers for once their complaints are made public any negative treatment of them is also likely to become public. There are a number of examples in NSW - one being the electoral secretary who was dismissed for testifying against a minister being tried for paedophilia. She was immediately offered reinstatement plus compensation when the media announced her dismissal.

5. a. Procedures in relation to protected disclosures – responsibility for receiving and investigating the complaint

The introductory paragraphs have argued that the ultimate authority on the disposition of whistleblowing issues should be a special unit in the Office of the Commonwealth Ombudsman. It would have an oversighting role and be a second line of appeal, but not normally be the office where a whistleblower would first direct his/her disclosure (unless the whistleblower wished to do so in order to avoid the opprobrium that may be generated by whistleblowing within his/her own agency).

The inquiry may receive submissions that suggest disclosure to an external agency should be the first line of approach for a whistleblower. This submission however, believes that the natural response for somebody who discovers a wrongdoing within their organisation is to sort it out internally, usually by informing their supervisor (or the manager above that supervisor). Such action is in keeping with the intrinsically communal mindset of both the whistleblower and those who condemn him/her. This writer has posed to students now for several years the problem of a new graduate entering the workforce and discovering a wrong that they believe to be unethical. The type of organisation and the actual wrongdoing varies from year to year. They have learned of the State Act, its protection provisions and the reasons for them, and of the possibility of going to the NSW Ombudsman or the Independent Commission Against Corruption. Over 95% of students, however, now numbering over 500, still propose raising the issue internally. Some do not even consider it whistleblowing at this stage.

It is suggested, therefore, that the complainant can go internally or to the Ombudsman. If he/she goes internally, the agency must inform the Ombudsman, giving broad information– nature of the accusation, people involved, preliminary assessment, and proposed action. The Ombudsman can step in to the extent that it wishes. If the Ombudsman takes no action, it would still be informed of progress on investigation and the action taken to finalise the case.

5 b. The obligations of public sector agencies

Their requirements are to inform the complainant of his or her rights, as documented by the Ombudsman's Office, to pass onto the Whistleblower Unit the fact that a complaint had been made, providing the information requested by the Unit, and with the consent and cooperation of the Unit, to investigate and deal with the complaint. It would include informing the complainant of the progress of the investigation, and of its eventual outcome.

5 c. Role of the Public Disclosures Unit in the Ombudsman's Office

This office would develop an overall system which would detail the role of the agencies and the role of the Unit, as set out below:

(a) Ensure that each whistleblower knew of his/her rights in that they had the freedom to approach that office at any time, and that they had the support of the Office of the Ombudsman. This statement of rights and protections would be available widely, and given by each agency to any officer who makes a disclosure.
(b) Provide the Unit with the right to work cooperatively with any agency that had reported a disclosure, including a meeting with the whistleblower, or even to taking over the investigation if the Unit so decided.
(c) Establish and operate a public information and training arm.
(d) Gather and publish statistics on whistleblowing in the Australian Government.
(e) Undertake such research as was necessary and useful, and publish its findings.
(f) Review the operation of the legislation and propose changes as often as desired and at least every six months for the first two years of operation, and every two years after that.

The Ombudsman's Office could also develop for its own use a set of guidelines which signalled the need to step in – such as previous experience with its contact person in the department, and with the department overall, the seriousness of the alleged offence, whether it was an accusation that attacked the probity of the department, or the managerial capacity of some of its senior officers, rather than the reporting of some contravention of the departmental codes or guidelines (The former is more likely to engender a cover up or retribution than the latter).

5 d. Disclosure to a third party.

The right to disclosure to the media is unique to NSW. This submission believes that disclosures to the media are necessary - that this component in the NSW Act should extend to the Commonwealth. In NSW, some major whistleblowing incidents have surfaced, such as the accusations against the University of NSW medical research programs only because of this clause.

There are several reasons behind this suggestion. The media itself will act as a screening device, in that it will only publicise matters of importance. The fear of legal action will also ensure that the media will only broadcast accusations that are largely provable. It is therefore acting as a whistleblowing review mechanism. Another reason is that experience to date has shown that the media is very effective in bringing public attention to the disclosures of whistleblowers, and in ensuring that discrimination against them is minimised.

The clause could be further strengthened by having a delay period of three months instead of six months. Three months is enough time for an agency, in conjunction with the Ombudsman's office, to assess the complaint and decide the action to be taken. This recommendation is made if the Committee be wary of disclosure to the media. This submission, however, sees no great problem with immediate disclosure for serious matters along with internal disclosure, for it sees no other way to handle an issue which the department tries to cover up (including not informing the Ombudsman).

The above list of protections and compensatory mechanisms are sufficient should the Commonwealth wish to confine itself to bringing in legislation that is along the lines of the legislation current in the states. However, the TOR suggest that the submission address the question of "civil or equitable remedies including compensation for any breaches of this protection". This question raises the issue of Australia adopting elements of the British Public Interest Disclosures Act, which is addressed further below.

6. Relationship with existing Commonwealth laws

The Commission needs to examine the interconnectedness of its proposals with four Commonwealth laws in particular,

1. The Crimes Act, 1914. The Commission might wish to re-examine s.70 of the Act. The case against Allan Kessing and the possibility of 2 years imprisonment that faced him is directly in conflict with the objectives of a regime aiming at increasing the number of disclosures in the public interest.

2. The Freedom of Information Act 1982. In September last year, the Australian Law Reform Commission received Terms of Reference from the Attorney-General of Australia to inquire into Freedom of Information (FOI) laws and practices across Australia. In July this year, the Cabinet Secretary announced that the government intended to introduce its own reforms. FOI and Public Interest Disclosures are closely linked. The issue of the public's right to know is often a whistleblower matter. But also the whistleblower when seeking further evidence, or defending him/herself against discrimination, will need access to information.

3. The Workplace Relations Act, 1996. A Committee decision to introduce compensation for breaches of protection (see Other Matters, below), will require adjustment to this Act.

4. The Ombudsman Act, 1976 will also obviously need changing in light of the recommendations that the Committee suggests.

7. Other Matters

a. Compensation for breaches of protection (The UK Public Interest Disclosures Act)

The British Public Interest Disclosures Act, 1998, works on an entirely different basis to the State Acts in Australia. The Act applies, in concert with employment law, to all public and private employees in Britain, with the exception of certain intelligence staff or the military forces. For a disclosure to be protected, (a) the whistleblower must make the disclosure in good faith; needs to show some substantive basis for his/her belief; and on to wider public

disclosures to the media etc. - unless there is some good reason why not - the concern should have been raised internally or with a prescribed regulator first.

In the UK, wider disclosure to the media, MPs or consumer bodies must meet one of four preconditions to trigger protection. These are that either (a) the whistleblower reasonably believed he/she would be victimised if he had raised the matter internally or with a prescribed regulator; or (b) there was no prescribed regulator and he/she reasonably believed the evidence was likely to be concealed or destroyed; or (c) the concern had already been raised with the employer or a prescribed regulator; or (d) the concern was of an exceptionally serious nature.

Whistleblowers that experience discrimination are heard by a series of Employment Tribunals throughout the country, and are awarded damages, as appropriate.

PIDA 1998 is claimed by its supporters to have reduced illegal and unethical conduct by British companies and the public sector. The possibility that a cover-up or discrimination against a person revealing wrongdoing by the organisation may end in a public case, with damages awarded against it has caused employers to actively institute internal whistleblowing reporting and protection systems.

Australia could include similar clauses in its Act. Such clauses open the pathway for civil compensation in the Federal Industrial Commission, or for the states, through the existing courts and tribunals, thus making it easier for a victimised whistleblower to pursue redress. Currently, under most State Acts, the whistleblower can only pursue criminal action. Such action to date has been unsuccessful.

This submission suggests therefore that the Committee investigate the British system, and recommend that similar approaches be adopted in this country. The extension of this possibility to the private sector is recommended by this submission. It would require a separate inquiry, which this Committee could recommend.

If the Committee should give this proposal further consideration, it needs be noted that further investigation of UK practices is warranted. Specifically,

1. What are the ways that the person who wants to stop the wrongdoing can stop it earlier, and avoid the reprisals, i.e. by confidential information to a supervising agency or appropriate Ombudsman, or by injunction, or by exposure to the media?
2. Is there evidence that the UK PIDA has reduced wrongdoing?
3. Is stopping of the wrongdoing and punishment of the wrongdoer (of the original action) the responsibility of the Regulatory Agency?
4. Personal grievances such as sexual harassment and bullying appear to get compensation awards. These are often not public interest issues.
5. Any studies undertaken on the percentage of people who suffer reprisals?

b. Rewards for reporting a theft of public funds or assets

The Committee should consider in its deliberations a series of clauses which pay a percentage of the savings to a whistleblower who reports a corrupt activity that costs the Commonwealth money. Some who are committed to the belief that all whistleblowers should

act from pure and impersonal motives will decry such a payment. Yet rewards of a percent of savings are the process used under the US False Claims Act, an Act is regarded by many as the most effective whistleblower legislation in existence.

c. Percentage whistleblowers who suffer retribution

The Committee will likely receive a submission from the Whistle While They Work project at Griffith University. Among the many useful findings and recommendations that the project will likely make may possibly be the statement that only 22% of whistleblowers will suffer retribution.

This submission believes that that even at this apparently low level, the percentage who suffer retribution is still too high. However, it urges caution in interpretation of the WWTW figure. People who report theft or damage of assets to the benefit of the parent organisation, or suggestions that correct a badly managed function (safety issues for instance) may consider themselves whistleblowers in the study's questionnaires, but they would not be punished. Some are even rewarded, through suggestion boxes for instance.

The study's definition of whistleblowing also includes interpersonal conflicts (which this submission rejects as, with exceptions, they are not in the public interest), which again will distort the retribution percentage. This writer's experience is that if the whistleblowing is damaging to the organisation or to the reputation of its middle to senior managers, the organisation will go to extraordinary lengths to cover up, and to silence (or ignore) those who try to bring it into the open.

d. Whistleblower support is an administrative function

This submission concludes by emphasising that the role of a separate whistleblower unit is primarily administrative; that it needs staff with institutional people-to-people skills as much as legal expertise. Most whistleblowers are acting contrary to long ingrained behavioural patterns in that they are rejecting the organisation that employs and pays them. Even for those who have come to suspect the motives or intentions of a senior officer, exposing that wrongdoing is still a very large step. It comes often as a complete surprise that the organisation turns on them. Whistleblower after whistleblower has testified that they expected support, even reward, but have experienced the opposite. The whistleblower support unit has to work within this environment, with these sorts of problems, and with people who often quite distraught by the situation in which they find themselves.

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The author's websites, in conjunction with his colleague, Vanya Smythe, are
http://www.whistleblowingethics.info and
http://www.ethicsnetwork.net/