

Introduction

- 1.1 Colloquially, 'blowing the whistle' refers to informing on a person or exposing an irregularity or a crime.¹ The most important and valuable form of whistleblowing concerns 'the public interest' or matters that affect more than just the interests of the individuals involved in an allegation.
- 1.2 Those willing to speak out against what they consider to be improper conduct in the workplace might put at risk their personal wellbeing and professional standing. Whistleblowers are sometimes branded by their managers and colleagues as disloyal troublemakers. Yet they can play a valuable role in exposing wrongdoing and promoting integrity in government administration.
- 1.3 Public interest disclosure legislation has an important role in protecting the interests of those who speak out about what they consider to be wrongdoing in the workplace, encouraging responsive action by public agencies, strengthening public integrity and accountability systems and supporting the operation of government.
- 1.4 Facilitating public interest disclosures is part of a broader public integrity framework that is considered to be an essential feature of modern accountable and transparent democracies. The broader integrity framework can be said to include enabling public access to information held by government through freedom of information law and minimising secrecy in government activity.²

1 This broad definition was adapted from the Oxford English Dictionary, 2nd Edition, Volume 16, Clarendon Press, 1989, p.258.

2 The Australian Law Reform Commission is currently undertaking a review into secrecy provisions.

- 1.5 Since the early 1990s there has been a growing recognition of the need for specific legislation to promote whistleblowing or the making of public interest disclosures in the public sector and protecting the interests of those who disclose. Despite the existence of legislation on public interest disclosures in Australia, in practice whistleblowing has been described as ‘one of the most complex, conflict-ridden areas of public policy or legislative practice’.³
- 1.6 All Australian and many comparable overseas jurisdictions have enacted specific legislation to support the making of public interest disclosures by public sector employees. However, the current Commonwealth whistleblower provisions are limited. The task of 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.
- 1.7 The formulation of public interest disclosure provisions is not straightforward. Responding to disclosures requires the consideration of a number of values including the interests of the public in exposing and addressing wrongdoing, the public’s general right to information, the government’s right to make decisions in confidence, the need to protect people who disclose and provision of natural justice for people under investigation.
- 1.8 The circumstances surrounding each disclosure are unique. New whistleblowing provisions should be flexible enough to appropriately respond to a range of scenarios, and set out clear guidelines for agencies and individuals involved with disclosures.
- 1.9 The Commonwealth Ombudsman told the Committee about relevant instances of official misconduct, underlying the need for legislation on whistleblower protection:

Over the past two decades across all levels of government in Australia we have witnessed the prosecution and at times imprisonment on corruption and fraud offences of a state premier, state government ministers, a commissioner of police, a chief magistrate, members of parliament, judges, numerous officials at all levels of government and prominent national businessmen. Royal commissions and special inquiries in Australia over the past decade have investigated allegations of corruption in political

3 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 1.

lobbying, policing, job recruitment, occupational licensing, vehicle registration, land and building development, offender management, public procurement, revenue collection, financial investment and foreign bribery, as well as within crime and anticorruption commissions themselves.⁴

- 1.10 This introduction provides an overview of the inquiry, the current legal framework for public interest whistleblowing at the Commonwealth level, the performance of those laws, other relevant legislation and inquiries on the subject and the approach of the Committee.

Referral of the inquiry

- 1.11 On 10 July 2008 the Attorney-General, the Hon Robert McClelland MP, on behalf of the Cabinet Secretary, Senator the Hon John Faulkner, asked the Committee to inquire into and report on whistleblowing protections within the Australian Government public sector.
- 1.12 The Committee agreed to undertake that inquiry and specifically examine:
- The categories of people who could make protected disclosures. This could include current and former public servants, contractors and consultants and parliamentary staff.
 - The types of disclosures that should be protected, such as allegations of illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds and so on.
 - The conditions that should apply to a person making a disclosure including whether a threshold of seriousness should be required for allegations to be protected.
 - The scope of statutory protection that should be available, which could include protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection.
 - Procedures in relation to protected disclosures, which could include how information should be disclosed for the disclosure to be protected and the obligations of public sector agencies in handling disclosures.⁵
- 1.13 The Committee sought submissions from Commonwealth and state government agencies, non-government organisations, relevant

4 Professor McMillan, *Transcript of Evidence*, 4 September 2008, p. 2.

5 The complete terms of reference for this inquiry are located at the beginning of this report.

professional associations, media bodies, unions, academics and from whistleblowers themselves. A total of 71 submissions and 16 supplementary submissions were received. A list of submissions is at Appendix A.

- 1.14 The Committee undertook 11 public hearings in Melbourne, Canberra, Sydney and Brisbane to enable people to provide oral evidence to the inquiry. Those hearings included two roundtable discussions with public administration experts, lawyers and academics held on 9 September 2008 and representatives of media related organisations held on 27 October 2008. Secretaries from two Commonwealth departments and a departmental Deputy Secretary shared their views on whistleblower protections with the Committee at a further hearing on 27 November 2008. Details of the public hearings are listed in Appendix B.
- 1.15 It is the normal practice of the Committee to conduct its activities in public and place as much of its evidence on the public record as possible. However, given the nature of the inquiry, the Committee decided to receive certain types of evidence in confidence.
- 1.16 A small selection of evidence was made confidential or partially confidential to protect the interests of submitters and witnesses who feared adverse consequences if identified. The Committee observed the sub judice convention by refraining from discussing matters that are awaiting adjudication in a court of law to avoid interfering in the course of justice.
- 1.17 The Committee received requests to investigate whistleblower cases or to make recommendations that particular investigations be reopened. The Committee could not meet these requests as it is not its role to investigate individual cases or provide legal advice. The Committee only considered individual cases to the extent that they revealed broader systemic or legislative issues within the terms of reference of the inquiry.

Current whistleblower protection laws

- 1.18 The current legislative framework for public interest disclosures in relation to Commonwealth public sector employees is set out in the *Public Service Act 1999*. Restrictions on the disclosure of official information are primarily contained in the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Privacy Act 1988* and the *Freedom of Information Act 1982*.⁶ Other sources of potential protection for whistleblowers can be found in parts of the *Workplace*

6 In its current review into secrecy laws, the Australian Law Reform Commission identified over 370 distinct secrecy provisions in 166 pieces of legislation.

Relations Act 1996, the Criminal Code Act 1995, and other specialised legislation.

- 1.19 Section 16 of the *Public Service Act 1999* provides protections against victimisation and discrimination for whistleblowers who report breaches of the Australian Public Service (APS) Code of Conduct by other APS employees. The Agency Head, Public Service Commissioner or Merit Protection Commissioner are authorised to receive whistleblower reports. Subregulation 2.4 of the Public Service Regulations requires agencies to establish procedures for dealing with whistleblower reports made under the Act.

Box 1.1 The Australian Public Service Code of Conduct

The Code of Conduct requires that an employee must:

- behave honestly and with integrity in the course of APS employment;
 - act with care and diligence in the course of APS employment;
 - when acting in the course of APS employment, treat everyone with respect and courtesy, and without harassment;
 - when acting in the course of APS employment, comply with all applicable Australian laws;
 - comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction;
 - maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff;
 - disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment;
 - use Commonwealth resources in a proper manner;
 - not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment;
 - not make improper use of:
 - a. inside information, or
 - b. the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person;
 - at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS;
 - while on duty overseas, at all times behave in a way that upholds the good reputation of Australia; and
 - comply with any other conduct requirement that is prescribed by the regulations.⁷
-

- 1.20 Section 2.5 of the Public Service Commissioner's Directions 1999 further requires that agency heads ensure that:

APS employees are aware of the procedures for dealing with whistleblowing disclosures, and are encouraged to make such disclosures in appropriate circumstances, and ... allegations of

⁷ Section 13, *Public Service Act 1999*.

misconduct are addressed in a fair, timely, systematic and effective way.

- 1.21 Sections 70 and 79 of the *Crimes Act 1914* (Cth) provide a general prohibition against the unauthorised disclosure of official information. The *Public Service Act 1999* further provides that employees are not to make improper use of 'inside information'. The Public Service Regulations subregulation 2.1 provides for a general duty not to disclose information.
- 1.22 The *Criminal Code Act 1995* (Cth) creates further offences for releasing certain types of official information and creates offences to protect people who are threatened with disadvantage during the normal course of their duties including making a whistleblower disclosure in accordance with the *Public Service Act 1999*.
- 1.23 Section 659(2)(e) of the *Workplace Relations Act 1996* (Cth) may provide protection against the termination of employment for employees of independent contractors on certain grounds including:
- ... the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities ...⁸
- 1.24 Section 76 of the *Occupational Health and Safety Act 1991* (Cth), similarly protects employees from detrimental action following the making of a complaint concerning a work-related health, safety or welfare matter.
- 1.25 Other portfolio or area specific legislation such as the *Aged Care Act 1997* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Clth) provides for certain categories of officers to make protected disclosures in certain circumstances. These are discussed further in Chapter 4.
- 1.26 There is a range of other bodies that may receive whistleblower type allegations, although they were not specifically set up for that purpose. These include the Commonwealth Ombudsman, the Privacy Commissioner, the Auditor-General, the Inspector-General of Intelligence and Security and the Commissioner for Law Enforcement Integrity.
- 1.27 Most other comparable liberal democracies and all Australian states and territories have whistleblower protection, public interest or protected disclosure laws. The performance of the Commonwealth laws is considered further below.
-

8 As discussed below, this protection is limited.

Whistleblowing under current law

1.28 In 2006-07, a total of 21 employees from 10 APS agencies were investigated following a whistleblower allegation under the *Public Service Act 1999*. In that year, the APS Commissioner received 21 whistleblower reports and the Merit Protection Commissioner received 20 whistleblower reports.⁹ A number of those reports were made by the same people and concerned individual grievances and personnel type matters rather than what could be considered more serious ‘public interest’ allegations.¹⁰

1.29 The Australian Public Service Commission (APSC) further indicated that from 1998 to October 2008:

... the Public Service Commissioner has received 138 reports of alleged breaches of the APS Code of Conduct. Of those, based on viewing summaries of cases, it would appear that 17 reports (or aspects of the report) could be considered to be ‘public interest’ disclosures. Of those only 5 were valid whistleblowing reports where the Public Service Commission conducted an inquiry.

During the same period the Merit Protection Commission has received 37 reports, none of which could be regarded as ‘public interest’ disclosures.¹¹

1.30 Until recently, there has been very little empirical evidence on the performance of public interest disclosure laws. The Whistle While They Work (WWTW) project, lead by Griffith University, collected and analysed survey data from 7663 public servants and 118 public agencies including 15 ‘case study’ agencies. Key findings from that project include:

- less than two percent of public interest whistleblowers receive organised support from their government agency;
- more than half of all public interest whistleblowers were estimated as suffering a stressful experience, including around a quarter reporting reprisals or mistreatment;
- seventy one per cent of respondents had directly observed at least one of a wide range of nominated examples of wrongdoing in their organisation;

9 Australian Public Service Commission, *Submission no. 44*, p. 5.

10 The Australian Public Service Commissioner, Ms Briggs, and the Merit Protection Commissioner, Ms Godwin, *Transcript of Evidence*, 25 September 2008, pp. 12-18.

11 Australian Public Service Commission, *Submission no. 44a*, p. 2.

- seventy percent of the agencies surveyed had no procedures in place for assessing the risks of reprisals when officials in their agency blew the whistle; and
- three per cent of agencies surveyed were rated as having reasonably strong whistleblowing procedures assessed against the relevant Australian Standard.¹²

1.31 As noted in the Whistleblowers Australia submission to the inquiry, the WWTW research excluded the views of whistleblowers who had left the public service as a result of reprisals.¹³ Other submissions noted some concerns about the research.¹⁴ The APSC noted that the WWTW report failed 'to differentiate between serious malfeasance (e.g. fraud, corruption) and very minor misdemeanours (e.g. inadequate record keeping, failure to fully follow all selection procedures)'.¹⁵

1.32 While the WWTW project did not sample views from every government agency and so does not reflect whistleblowing across all of the public sector, it is the most comprehensive research to date. Importantly, it highlighted that whistleblowing was more common than previously thought and that it is not always the case that a whistleblower will suffer mistreatment:

On average, most public interest whistleblowers (at least 70 per cent) are treated either well or the same by management and co-workers in their organisation. While the employee survey did not sample former employees, even on an excessively pessimistic estimate of the experience of former employees, the total proportion of whistleblowers experiencing mistreatment would be unlikely to exceed 30 per cent.¹⁶

1.33 Some of the WWTW project findings complement the APSC annual survey of public servants published in the *State of the Service* reports. Findings of the 2007 *State of the Service* report includes:

12 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government. Whistleblowers Australia noted that the views of those who had left the public services due to reprisals were not included in the research. See Whistleblowers Australia, *Submission no. 26*, p. 6.

13 Whistleblowers Australia, *Submission no. 26*, p. 6.

14 For example, see Australian Public Service Commission, *Submission no. 44*, p. 6; Mr McMahon, *Submission no. 45a*, p. 11.

15 Australian Public Service Commission, *Submission no. 44*, p. 6.

16 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. xxvii.

- 92% of APS employees are familiar with the APS Values and Code of Conduct;
- 77% of APS employees consider that their manager demonstrates honesty and integrity;
- 80% of APS employees consider that people in their work group treat each other with respect;
- 74% of APS employees consider that people in their work group are honest, open and transparent in their dealings;
- 71% of APS employees consider their agency operates with a high level of integrity; and
- 669 employees breached the Code of Conduct (0.4% of total APS).¹⁷

1.34 In launching the 2007 *State of the Service* report, the Australian Public Service Commissioner, Ms Lynelle Briggs, noted that some agencies do not fully recognise the importance of maintaining high ethical standards:

... I would have to say that one or two agencies still struggle to appreciate what our ethical codes are all about, and don't understand that they sail close to the wind. More often than not, this is due to agency leadership not appreciating that the public sector is different; that protecting the public interest is fundamentally different to protecting the bottom line or promoting particular Ministers' interests; and that in the public sector we must treat our people well. Any agencies that put "the way things are done around here" above the behavioural culture and standards set out in the public service Values and Code of Conduct will eventually find themselves in deepwater. I cannot emphasise too strongly that our Values and the Code are fundamental to what keeps us sound, professional and safe.¹⁸

1.35 Data collected by the WWTW team shows that the bulk of public interest whistleblowing occurs without being recorded, monitored or reported under public interest disclosure legislation.¹⁹ This conclusion accords with the findings of the APSC's 2003 evaluation of the management of

17 The Australian Public Service Commissioner, Ms Briggs, Address the launch the *State of the service report 2007-08*.

18 The Australian Public Service Commissioner, Ms Briggs, 2008 David Hawkes Oration, Australian Institute of Public Administration, Northern Territory Chapter, at <http://www.apsc.gov.au/media/briggs101108.htm> (accessed 20 February 2009).

19 Brown, AJ(ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 265.

suspected breaches of the Code of Conduct which found that 'many reports of suspected misconduct from APS employees are not correctly identified and treated as whistleblower reports'.²⁰

- 1.36 The misidentification of whistleblower reports has the following consequences:
- employees may not be aware that they are entitled to protection for making a whistleblower report;
 - agencies may not investigate allegations as they are required to do under Division 2.2 of the public service regulations;
 - agencies may not report back to whistleblowers to advise of the outcome of any investigations; and
 - employees may not be aware of their ability to request that allegations are further considered by the Public Service or Merit Protection Commissioner.²¹
- 1.37 A further evaluation of managing breaches of the code undertaken in 2005 appears to support the earlier findings that there is 'confusion among agencies' in regard to the implementation of whistleblowing procedures and protections.²²

Problems with the current arrangements

- 1.38 Across submissions and hearings, a strong message to the Committee was that the current legal framework for whistleblower protection at the Commonwealth level was inadequate and more specific and comprehensive legislation is required. In summary, the existing whistleblower laws include only limited categories of public servants, provide a limited range of protections and there is little or no standardisation and oversight.
- 1.39 Only two-thirds of the 232,000 employees in the Australian Government sector are covered by the whistleblower protections under the *Public Service Act 1999*. Employees of agencies under the *Commonwealth Authorities and Companies Act 1997* are not covered. Others who may have access to information that may form the basis of a public interest

20 Australian Public Service Commission, *State of the service report 2003-04*, p. 112.

21 Australian Public Service Commission, *State of the service report 2003-04*, pp. 112-3.

22 Australian Public Service Commission, *State of the service report 2007-08*, p. 170.

disclosure are excluded, such as former public servants, contractors and consultants.²³

- 1.40 Within the APS, procedures for handling whistleblower disclosures are varied. There is no requirement for agencies to have standard procedures in place and no requirement for agencies to publicly report on the use of those procedures. Ten years after the enactment of the *Public Service Act 1999*, ten per cent of APS agencies are yet to put in place procedures for dealing with whistleblower reports.²⁴
- 1.41 Whistleblowers under the current arrangements remain exposed to the criminal law, and civil actions such as defamation and breach of confidence. There are currently no provisions to protect whistleblowers who make disclosures to law enforcement authorities. There is no public interest defence in statute for disclosing official information contrary to s. 70 of the *Crimes Act 1914*.
- 1.42 Protections against unlawful termination in the *Workplace Relations Act 1996* are limited to allegations made to bodies with the 'right capacity' such as courts, tribunals or 'competent administrative authorities'. The range of competent administrative authorities is not settled and disclosures to the wrong bodies will not qualify for protection.²⁵
- 1.43 There is some confusion in the public service as to what types of reported misconduct should be protected. The Australian Public Service Commissioner told the Committee that 'what is considered whistleblowing in one agency may be viewed differently in another'.²⁶
- 1.44 There are no provisions for public servants to make authorised and protected disclosures to third parties, which could include their professional association, trade union, legal advisor, Member of Parliament or the media.
- 1.45 The same process is used for quite different types of misconduct such as workplace grievances, personnel-type issues and genuine matters of public interest that, if not addressed, would result in a significant harm to the community.

23 Australian Public Service Commission, *Submission no. 44*, p. 6.

24 Australian Public Service Commission, *State of the service report 2007-08*, p. 169.

25 The Fair Work Bill 2008, currently before the Senate, contains broader provisions in relation to workplace rights and adverse action, however, these provisions were not designed to facilitate and protect public interest disclosures. See, Workplace Ombudsman, *Submission no. 69*, pp. 4-5.

26 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 2.

- 1.46 Common law principles that could potentially affect whistleblowers in administrative or legal action tend to favour the obligations of employees to their employers rather than supporting the release of information in the public interest.²⁷
- 1.47 Overall, the current Commonwealth public sector whistleblower protection provisions were described in many submissions as the most limited and problematic of all legislative approaches across Australian jurisdictions.
- 1.48 Whistleblowers Australia, the national representative and advocacy body for people who have blown the whistle across a range of matters expressed its view to the Committee on the 'standard' treatment of whistleblowers. Their perspective is reproduced in Box 1.2 below.

Box 1.2 Standard operating practice: A perspective from Whistleblowers Australia

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 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.

Source Whistleblowers Australia, Submission no. 26, p. 46-47.

- 1.49 The costs of not having an appropriate legislative framework to facilitate the making of public interest disclosures are difficult to quantify but would include:
- the costs to agencies of undertaking formal investigations of frivolous, vexatious and unsubstantiated allegations and appeals that could otherwise have been addressed through more informal or streamlined processes;
-

²⁷ Dr Bibby, *Transcript of Evidence*, 27 October 2008, p. 4.

- the personal and financial costs to individual whistleblowers and their families where protected or (currently) unprotected disclosures have been made and their cases have been mishandled;
- the possible continuation of improper, unethical and illegal practices leading to increased costs to Australian taxpayers, lower quality service delivery, sub-optimal policy outcomes, or risks to public health and safety – because potential whistleblowers may have felt that they would not be adequately protected if they spoke out; and
- less efficient and effective public administration and lower public confidence in the integrity of governance and administration systems.

Legislation in other jurisdictions

- 1.50 Since the early 1990s all Australian states and territories have enacted legislation to facilitate and protect whistleblower or public interest disclosures:
- *Whistleblowers Protection Act 1993*, South Australia;
 - *Whistleblowers Protection Act 1994*, Queensland (Reviewed in 2006);
 - *Protected Disclosures Act 1994*, New South Wales (Currently under review);
 - *Whistleblowers Protection Act 2001*, Victoria (Currently under review);
 - *Public Interest Disclosures Act 2002*, Tasmania (Currently under review);
 - *Public Interest Disclosure Act 2003*, Western Australia;
 - *Public Interest Disclosure Act 1994*, Australian Capital Territory; and
 - *Public Interest Disclosure Act 2008*, Northern Territory.
- 1.51 There is no consistency across whistleblower laws in state and territory legislation. Each contains different provisions on who can make protected disclosures, matters subject to disclosure, the scope of protection afforded and the procedures for making a disclosure.
- 1.52 AJ Brown's comparative analysis of state and territory legislation has shown that no single jurisdiction offers best practice provisions on whistleblower protection. According to Brown, 'every jurisdiction has

managed to enact at least some elements of best practice, but all have problems – sometimes unique, sometimes general or common problems’.²⁸

- 1.53 A number of contributors to the inquiry called for national consistency on whistleblower legislation in order to address the possible confusion arising from the different schemes.²⁹ According to Dr Brown, uniformity across the nine federal, state and territory public sectors is important because:

... the key issues are fundamentally common, and public integrity and standards would benefit nationally from a clearer legislative consensus ...³⁰

- 1.54 Whistleblower laws continue to evolve. Queensland reviewed its legislation in 2006. The New South Wales legislation is currently under review by the state parliamentary Committee on the Independent Commission Against Corruption. The Victorian legislation is being reviewed by an inter-departmental committee. Both those reviews are to be finalised later this year.

- 1.55 This inquiry has taken into account relevant whistleblower legislation in several overseas jurisdictions including:

- *Protected Disclosures Act 2000* New Zealand;
- *Public Interest Disclosure Act 1998* United Kingdom;
- *Public Servants Disclosure Protection Act 2005* Canada; and
- *Whistleblower Protection Act 1989* United States.

- 1.56 Australia has international obligations with respect to the protection of whistleblowers as a signatory to the United Nations Convention Against Corruption (UNCAC) and the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention. Notably, Article 33 of the UNCAC requires:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts

28 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. i.

29 Law Institute of Victoria, *Submission no. 35*, p. 4; Mr Newlan, *Transcript of Evidence*, 21 August 2008, p. 8; Mr Leonard AM, *Transcript of Evidence*, 21 August 2008, p. 64; Ms Bulder, *Submission no. 32*, p. 7.

30 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 4.

concerning offences established in accordance with this Convention.³¹

- 1.57 In January 2006 the OECD Directorate for Financial and Enterprise Affairs reported on Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials. That report noted the 'low level of whistleblower protection' in the Australian public sector.³²

The movement towards Commonwealth legislation

- 1.58 This inquiry forms part of a long history of previous reviews, inquiries and efforts at the Commonwealth level to develop legislation on whistleblower or public interest disclosure protection including:
- Review of Commonwealth Criminal Law (The Gibbs Committee), 1991 *Final Report*;
 - Whistleblowers Protection Bill 1991 (introduced by Senator Vallentine);
 - Report on Protection of Whistleblowers, Electoral and Administrative Review Commission, October 1991;
 - Whistleblowers Protection Bill 1993 (introduced by Senator Chamarette);
 - Senate Select Committee on Public Interest Whistleblowing Report 1994, *In the Public Interest*;
 - Senate Select Committee on Public Interest Whistleblowing Report, 1995, *The Public Interest Revisited*;
 - Public Interest Disclosure Bill 2001 (introduced by Senator Murray);
 - Senate Finance and Public Administration Committee Report, Public Interest Disclosure Bill 2001 [2002];
 - Public Interest Disclosure (Protection of Whistleblowers) Bill 2002, (introduced by Senator Murray); and
 - Public Interest Disclosure Bill 2007 (introduced by Senator Murray) (the Murray Bill).

31 The Attorney-General's Department submitted that s. 16 of the *Public Service Act 1999* and s. 170CK(2)(e) of the *Workplace Relations Act 1996* implement Article 33 of UNCAC in Australian law. See *Submission no. 14*, p. 6.

32 *Australia - Phase 2: Report on implementation of the OECD anti-bribery convention* 16 January 2006, OECD, Paris, p. 31.

- 1.59 Each of the previous Commonwealth reviews and bills on public interest disclosures has recognised the role of whistleblowers in supporting the integrity of public administration and have put forward a range of possible provisions on key issues such as who can make a protected disclosures, the types of disclosures that should be protected and the scope of statutory protection that should be available.

The approach of the Committee

- 1.60 Some aspects of whistleblowing are inherently stressful, unpredictable and cannot be covered by legislative provisions and procedures. Each case of whistleblowing will invariably involve a unique mix of circumstances, historical context and personalities.
- 1.61 Legislation on whistleblowing can only meet part of the challenge of facilitating and protecting public interest disclosures. A successful disclosure scheme requires changes to workplace culture to support a pro-disclosure ethic, appropriate procedures in the workplace and leadership at all levels of the public service.
- 1.62 The Committee nonetheless considers that the current Commonwealth provisions on whistleblower protection are inadequate and that specific legislation on public interest disclosures is required for the Australian Government public sector.
- 1.63 The Committee anticipates that the sum of the recommendations presented here will provide the basis for drafting instructions for new Commonwealth whistleblower protection legislation for the Australian Government public sector. The legislation, based on these recommendations, may provide a model for the future revision of state and territory legislation.
- 1.64 The balance of this report comprises eight further chapters elaborating on model provisions for new public interest disclosure legislation. Chapter 2 deals with the objectives and principles of new public interest disclosure legislation and preferred definitions of key terms to be used in new legislation including the contested definition of public interest. Chapters 3-8 then consider the issues raised on each of the main terms of reference in turn.
- 1.65 Finally, Chapter 9 discusses other relevant issues raised beyond the terms of reference including public sector culture in relation to whistleblowing and public interest disclosures in the private sector. Chapter 9 discusses the relationship between the Committee's preferred model and existing Commonwealth laws.

- 1.66 Dispersed through the report are a number of case studies describing recent cases of whistleblowing or disclosures, and drawing observations in relation to the inquiry. It is not the intention of the Committee to inquire into or make comment on any current or past whistleblowing disclosures. However these case studies serve as a reminder of the possible consequences, personal costs and ramifications for individuals and organisations when public disclosures are made.

