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SUBMISSION by the COMMONWEALTH OMBUDSMAN

## INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE AUSTRALIAN GOVERNMENT PUBLIC SECTOR

### Introduction and summary

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*.

The Commonwealth Ombudsman supports the introduction of new legislation to protect public interest disclosures within the Australian Government public sector. Legislation of this kind exists in other Australian jurisdictions. The issue has been a topic of inquiry and discussion within the Parliament for over fifteen years. Legislative reform would be timely.

A society based on the rule of law should provide legal protection to those who uphold the public interest by reporting their knowledge or suspicion of wrongdoing occurring within government. Telling the truth should not be a costly mistake. Nor will the public interest be served if those who have inside knowledge of corruption, illegality and other wrongdoing are fearful of disclosing this information.

A public interest disclosure Act is therefore of immense practical importance in establishing clear procedures, mechanisms and protections for principled whistleblowing. The Act would be of equal symbolic importance in affirming the Parliament's commitment to integrity and accountability.

The report to be published in September 2008 by the *Whistling While they Work* project provides the Australian Parliament with an excellent opportunity to enact the world's best practice legislation.

### Background

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Ombudsman's office does not currently have a legislated role in relation to public interest disclosures by Australian Government officials. The office nevertheless plays a role in this regard, by investigating complaints (including anonymous complaints) that are received under the Ombudsman Act from people who qualify as whistleblowers.

The Commonwealth Ombudsman discharges the role of Australian Capital Territory Ombudsman, under arrangements with the ACT Government. In this capacity, the Ombudsman's office has jurisdiction to receive and investigate public interest disclosures under the *Public Interest Disclosure Act 1994 (ACT)*. That Act confers a

specific role on the Ombudsman to investigate complaints that can most appropriately be handled by the Ombudsman's office: see ss 12, 14, 22.

This submission is informed by the Ombudsman's office's direct experience in handling public interest disclosures. The office is also an Industry Partner in the Australian Research Council funded 'Whistling While They Work' research project. This submission draws directly on two outcomes from that research project:

1. A J Brown, 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation – An Issues Paper', which was co-published by the Commonwealth Ombudsman, New South Wales Ombudsman and Queensland Ombudsman in November 2006, and
2. The project's forthcoming First Report, particularly Chapter 11 'Best Practice Whistleblowing Legislation for the Public Sector: the Key Principles', of which the Commonwealth Ombudsman, Prof McMillan, is a contributing author.

A feature of the forthcoming First Report is a statement of thirteen Key Principles for best practice public interest disclosure legislation. The Key Principles, which are attached to this submission, address many of the issues that are raised in the Committee's Terms of Reference for this inquiry. The remainder of this submission will individually address each of the issues in the Terms of Reference by supplementing the discussion in the Key Principles.

## **RESPONSE TO TERMS OF REFERENCE**

1. **The categories of people who could make protected disclosures:**
  - a. **these could include:**
    - 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**

The short response to this item is to say that each of the listed categories of people should be protected under public interest disclosure legislation. Each category describes people who, by reason of the work they have undertaken in an Australian Government agency, may possess information that reveals wrongdoing within the agency. It is in the public interest that people in that position should be encouraged to report their knowledge, and should not suffer adversely as a consequence of doing so.

On a matter of detail, there is a case for defining some of those categories more broadly. For example, category (ii), applying to contractors and consultants, should be defined to include current or former employees of the contractor, as well as current or former volunteers who contributed to the contractor's performance under the contract, and those who have provided services to government under analogous grant arrangements. Furthermore, to facilitate anonymous disclosures, the scheme should extend to any person who has provided information anonymously, of a nature that reasonably suggests the person falls into one of the listed categories.

The more difficult question is to decide whether public interest disclosure legislation should be cast more widely to protect a member of the public who does not fall within

one of those listed categories. In short, should the legislation be confined to protecting agency 'insiders', or should it provide protection to 'any person' (as some State legislation does)?

As a matter of general principle, legal protection should be afforded to any person who assists the detection of crime and wrongdoing by providing information to law enforcement or other authorities. However, that principle can be advanced by means other than a single public interest disclosure statute that applies to all instances of whistleblowing or reporting.

On balance, it is preferable that a public interest disclosure Act relating to the Australian Government public sector applies only to people who have worked inside that sector, as employees, contractors or the like. This conforms to the primary objective of public interest disclosure legislation, which is to facilitate disclosure of wrongdoing by those who have worked within an organisation (and hence the popular phrase 'blowing the whistle'). The legislation should focus on the position and needs of people in that category. There is a strong public interest justification for providing comprehensive and targeted protection for them.

Confining the legislation in that way also enables a more focussed and structured scheme to be devised. In particular, it will be simpler to define the responsibilities of government agencies if the disclosures to which the Act applies are all made by people who have some current or prior working relationship to an agency.

Members of the public who fall outside those categories should be assisted and protected in other ways. An established way of doing is to enable complaints to be made to independent agencies such as the Ombudsman, Inspector-General for Intelligence and Security (IGIS), Australian Commission for Law Enforcement Integrity (ACLEI), Privacy Commissioner and Human Rights and Equal Opportunity Commission (HREOC). The role of those offices is now well-established and recognised, and they have effective procedures for confidential receipt of complaints and protection of complainants.

An issue that the House of Representative Standing Committee may wish to address is that the statutory protection that is offered to members of the public who complain to those agencies is limited for the most part. The broadest protection is provided by the *Law Enforcement Integrity Commissioner Act 2006*, which provides protection of three kinds:

- s 220 provides that it is an offence to cause or threaten to cause detriment to a person on the ground that the person has referred a corruption issue to the Integrity Commissioner or the Minister
- s 222(5) provides that a person who has provided information or evidence to the Integrity Commissioner is not liable in a civil action for loss or injury suffered by a person arising from that action
- s 211 provides that ACLEI staff are not compellable in any proceedings to disclose information or produce documents obtained under the Act.

The protection under other legislation is not as broad. The *Ombudsman Act 1976* provides protection against civil action for those who have complained in good faith to the Ombudsman (s 37), and ensures that Ombudsman staff are not compellable to provide information or documents in any proceedings (s 35(8)). Beyond that, the Act does not make it an offence to victimise a person who has complained to the Ombudsman (though compare s 40YB of the *Australian Federal Police Act 1979* that makes it an offence to knowingly make a false complaint to the AFP). There are similar provisions in the *Inspector-General of Intelligence and Security Act 1986* ss 33, 34, the *Privacy Act 1988* s 67, and the *Human Rights and Equal Opportunity Commission Act 1986* s 48.

Amendment of those Acts to provide similar protection against victimisation as found in the Law Enforcement Integrity Commissioner Act would provide a comprehensive scheme of protection for members of the public who allege wrongdoing in Australian Government agencies. The main gap that would still exist would be where a person complains directly to an agency. That is, a person who complained to the Ombudsman about, say, Australian Customs would be protected, but a person who complained directly to Australian Customs would not be protected. In particular, a person in that instance could face defamation proceedings if alleging wrongdoing by a nominated Customs officer. The main protection for the person would be under the doctrine of qualified privilege.

That example raises an important issue, but one that may fall outside the terms of reference of this inquiry. The issue is not a new one, nor has it been a large problem. Indeed, it has been customary for government agencies to establish confidential 'hotlines' to encourage members of the public to provide confidential information to agencies. Perhaps, and as an adjunct to this inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs, there would be merit in a separate inquiry being undertaken into the effectiveness of the procedures established by agencies to provide protection to confidential informants.

**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.**

A public interest disclosure statute should apply equally to disclosures arising in or outside Australia. Australian Government agencies conduct business around the globe, and it is in the public interest that the same standards of integrity and propriety should apply to government activity wherever it is undertaken. Indeed, as a practical matter the integrity threat can be greater where activity is undertaken in a distant office that is not subject to the same intense scrutiny or oversight that usually applies in the central office of the agency.

To implement this principle, the legislation will need to have an extra-territorial operation. It will also be necessary for agencies to establish procedures for facilitating, receiving, recording and acting upon disclosures that are made in foreign as well as domestic offices of the agency. Special arrangements may be needed for investigation of disclosures about conduct occurring in foreign offices.

These are not new challenges for Australian Government agencies, though the added obligations imposed by public interest disclosure legislation will require that special attention be paid by agencies to this issue when the legislation commences. In particular, careful thought must be given to whether special arrangements are needed to protect people working in foreign offices against reprisal, both at the time and in their subsequent career. The risk of reprisal or disadvantage can be greater where a person is working in a small office overseas, or the person makes allegations that directly question the integrity of their supervisor in the foreign office. Protection of locally-engaged staff also raises special issues, especially where staff are appointed on short term contracts, or are less familiar with the protections offered by Australian law to those who make a public interest disclosure.

One way of addressing these challenges would be for the House of Representatives Standing Committee to recommend that each Australian Government agency that conducts business overseas should provide an initial report under the Act (for example, six months after commencement) on the steps taken by the agency to facilitate the operation of the Act in foreign offices. The annual report that each

agency should be required to provide under the Act should also report on disclosures made in or relating to foreign offices.

**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**

Principle 2 in the Key Principles proposes that public interest disclosure legislation should apply to each of the categories of activity listed in the above term of reference. All the categories – from corruption through to maladministration and fiscal wastage – undermine the integrity of Australian Government policies and administration, and they appropriately fall within the scope and objectives of public interest disclosure legislation. The comparable legislation in the Australian States and Territories generally applies to those categories of activity, and it is strongly desirable that the coverage provided in national legislation is as comprehensive.

Two subsidiary issues arise, that are largely of a practical kind. The first has to do with the precise drafting of each of the categories. Terms such as 'corruption' and 'breach of conduct' are already defined in other Commonwealth legislation, and a threshold question is whether to adopt those other definitions or to craft a new definition for the purposes of the public interest disclosure Act. Terms such as 'maladministration' are not a term of art and may need to be defined in the Act. This submission will not comment further on those drafting issues, although the Commonwealth Ombudsman's office is amenable to engaging in further discussion of those issues with the Committee.

The second issue is that there are already internal and external mechanisms in place within the framework of Australian Government to deal with allegations of those kinds. The mechanisms vary depending upon the nature of the allegation. The Australian Public Service Commission (APSC), for example, is largely responsible for dealing with Code of Conduct breaches, the Australian National Audit Office (ANAO) for dealing with fiscal probity, the Commonwealth Ombudsman for dealing with allegations of maladministration, IGIS for dealing with allegations against the security intelligence agencies, and ACLEI for dealing with corruption allegations against federal law enforcement agencies.

It is important that a public interest disclosure Act accommodates those arrangements and does not disturb them. Two things are required to ensure that happens. The first is that public interest disclosures should in the first instance, and unless there are exceptional circumstances, be dealt with internally within the agency to which the disclosure relates. The second is that an external oversight agency to which a disclosure has been made should be empowered to transfer the matter to another more appropriate agency.

**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**

This suggestion is contrary to Principle 3 in the Key Principles, and is not supported by the Commonwealth Ombudsman. Principle 3 states that the motivation or intention of the person making the disclosure should not be relevant to whether they qualify for protection under the statute, nor to whether there is a responsibility on the agency to deal with the person's disclosure in accordance with the procedures in the statute. Problems both in principle and in practice are likely to arise if an agency as a threshold requirement assesses a person's motivation in making a disclosure:

- accurately assessing a person's motivation is rarely a straightforward matter, as motivations can be mixed, ambiguous and difficult to prioritise
- it would allow an agency excessive latitude to pick and choose which disclosures to act upon
- it would be threatening to a person making a disclosure to know that an agency could filter disclosures in this manner, especially if the person loses the protection afforded by the statute when a disclosure is assessed as falling outside the statute
- it is contrary to the spirit of a public interest disclosure statute to discourage disclosures: the objective of the statute is that wrongdoing should be dealt with, regardless of the motivation of the person making the disclosure.

The appropriate way of addressing any concern about the motivation for a person's disclosure is to require that a disclosure is first made either to the agency to which it relates or to an external supervisory agency. If the disclosure is handled appropriately through those processes, the spectre of unwanted embarrassment to the government or personal gain for the individual should be slight.

There is also scope, in the drafting of the statute, to differentiate wrongdoing that is covered by the statute from other points of view. For example, the Queensland *Whistleblowers Protection Act 1994* s 17(2) contains the clarification that a disclosure about 'a substantial waste of public funds' does not extend to a disclosure 'based on a mere disagreement over policy that may properly be adopted about amounts, purposes and priorities of expenditure'. By definition, a disclosure about a 'policy that may properly be adopted' is not about wrongdoing.

There will be a need for guidelines to supplement the Act, to provide guidance to agencies and staff on which matters fall within the scope of the Act and the prudent options for dealing with workplace disagreements. It would be appropriate for guidelines to advise that any person who is thinking about making a disclosure should reflect on their purpose and motivation in doing so.

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

It is generally accepted that the purpose of public interest disclosure legislation is not to provide an alternative avenue for dealing with staff grievances, nor to supplant the existing mechanisms that deal with those issues.

On the other hand, it can be practically challenging to differentiate staff grievances from public interest disclosures. Not uncommonly, a dispute about internal wrongdoing will already have caused friction within an agency, before the time has come for registering the dispute as a public interest disclosure. Indeed, an objective of public interest disclosure legislation is to enable disputes of that kind to be handled by other officers (or agencies) who are not parties to the dispute. The essential reason for making a public interest disclosure may be that a person fears retribution from other staff and thus seeks the protection of the public interest disclosure Act. In

that setting, issues of public interest, wrongdoing and staff grievance are inextricably intertwined.

Sometimes, too, the allegation of wrongdoing may relate specifically to a staff matter. For example, an allegation that an agency has persistently flouted merit-based recruitment and/or promotion principles, or that its personnel processes are riddled with bias or favouritism, are allegations that are appropriately dealt with under public interest disclosure procedures. The person making the disclosure warrants protection, even though they may be personally affected or would benefit from corrective action being taken.

Once again, this issue underscores the importance of designing a scheme that places the emphasis on disclosures being made through appropriate channels, and being dealt with so far as possible by the agency to which the disclosure relates. There may be scope as well, either in the Act or in guidelines, for clarifying that the legislation is not meant to apply where a disclosure alleges only that a wrong was done to the person making the disclosure.

- 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))**

This issue is addressed in Principles 2 and 3 in the Key Principles.

Principle 2 states that a qualifier such as 'serious' or 'significant' should apply to some of the categories of wrongdoing – for example, 'a significant waste of public money', and 'unacceptable risk to public health'. This recognises that the scheme does not capture trivial or academic concerns. Some other of the categories of wrongdoing cannot be qualified in the same way – for example, illegality and corruption are, by definition, contrary to the public interest.

Principle 3 proposes that a disclosure should qualify for protection if it satisfies either of two tests: a subjective test (that a person holds an honest and reasonable belief that they are disclosing proscribed wrongdoing); or an objective test (that the disclosure shows or tends to show proscribed wrongdoing).

It is important that both tests are in the legislation. The subjective test is important in recognising that the person making the disclosure may not have full knowledge either of the facts of the issue, or of the legal and evidentiary requirements to establish illegality, corruption or other wrongdoing. The purpose of the scheme is to enable a person who has a genuine and conscientious concern about an issue to report it to an appropriate authority so that it can be properly investigated.

The objective test is equally important to deflect undue attention being paid to the state of mind or knowledge of the person making the disclosure. The primary focus should be upon the matters being disclosed and whether they confirm a suspicion of wrongdoing.

Together, the subjective and objective tests draw an appropriate balance as to matters that fall in and outside the scheme. The tests would deny protection to disclosures that are self-evidently baseless or that are knowingly false or made recklessly. On the other hand, the tests do extend protection where a person is mistaken but nevertheless genuine in reporting a suspicion that may warrant investigation.

The importance of this issue will be diminished if, as suggested above, the legislation is built around existing government mechanisms for dealing with allegations and grievances. Internal agency grievance mechanisms, and external oversight mechanisms such as the Ombudsman, ANAO, IGIS and ACLEI, currently deal with a range of complaints and allegations that are broader in compass than those to which a public interest disclosure Act would apply. A complaint through any of those channels would continue to be handled carefully and on its merits, even if it did not cross the threshold necessary to invoke the special procedures and protections of the public interest disclosure Act.

- 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.**

It would be inappropriate for public interest disclosure legislation to apply a penalty or sanction to a person who has purported to make a disclosure under the Act. The purpose of the legislation should be to facilitate genuine disclosures – not to be a new weapon available to the state to penalise dissent.

Nor is it necessary to build a deterrent of this kind into the legislation. A person who has made a malicious allegation, or who has acted outside the procedures of the Act, will not qualify for protection under the Act. In effect, the person will be exposed potentially to a civil action for publishing a defamatory statement, to a disciplinary penalty for unprofessional conduct, to a criminal penalty for unauthorised disclosure of official information, or to prosecution under s 137.1 of the *Criminal Code* for providing false or misleading information to an Australian Government agency. Those deterrents are both severe and adequate.

Other legislation that facilitates complaints about official wrongdoing (such as the Ombudsman, IGIS and ACLEI legislation) does not apply a penalty or sanction to a false complaint. It would run counter to that established feature of our accountability framework if public interest disclosure legislation was to introduce a punitive regime.

- 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**
  - b. immunity from criminal liability and from liability for civil penalties, and**
  - c. immunity from civil law suits such as defamation and breach of confidence.**

Principles 9 and 12 of the Key Principles address this term of reference. They propose that the suggested protections should all apply where a person has made a disclosure that falls within the scope of the Act. Indeed, this goes to the essence of public interest disclosure legislation, which is to provide legal and administrative protection to those who have acted in the public interest to report suspected wrongdoing within government.

- 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**

Principle 4 of the Key Principles addresses this term of reference. The thrust of Principle 4 is that a person wishing to make a disclosure should be able to choose one of a number of available mechanisms.

In the first instance, the person should have the option of reporting to their supervisor or a more senior officer in the agency. Ordinarily this would enable the disclosure to be dealt with efficiently and in a low-key manner. On the other hand, the allegation may relate to the conduct of a person's supervisor or close colleagues; or the setting in which a person works may make it difficult to guarantee confidential handling of a disclosure. In that instance, there should be a 'safe' channel in the agency to which the person can report.

The creation or designation by each agency of a special unit or person to whom any allegation can be made will have the subsidiary advantage of ensuring that expertise will develop within the agency on handling public interest disclosures. It will also enable a person to obtain confidential advice on whether and how to make a disclosure.

Those internal agency mechanisms must be supplemented by the existing oversight role of bodies such as the Ombudsman, APSC, ANAO, ACLEI and IGIS. The independence of those agencies, and their stature and credibility in and outside government, make them a logical choice for receiving public interest disclosures. Upon receiving a disclosure they would, as at present, first consider whether the allegation warranted further investigation, and whether that investigation should be undertaken by the oversight agency or be referred back to the agency to which the allegation relates.

The proposal in Principle 4 for a 'dedicated hotline' is to acknowledge that agencies sometimes contract external bodies to operate a hotline that can receive allegations both from staff and from members of the public. That step is usually taken to reassure all stakeholders that the agency is serious about preserving integrity and punishing wrongdoing. It would be sensible to accommodate those special arrangements in a public interest disclosure scheme.

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

Principles 5, 6, 8, 11 and 13 in the Key Principles address this term of reference. A key theme in a new scheme of protection should be the responsibility cast upon agencies to facilitate public interest disclosures and to secure protection for current or former employees who make a disclosure to the agency.

This responsibility needs to be spelt out both in the Act and in the administrative procedures developed by agencies to implement the Act. If agencies discharge this responsibility professionally and assiduously, it will provide them with reassurance that the public interest disclosure scheme complements rather than jeopardises their opportunity to respond internally to integrity threats.

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

Principle 7 in the Key Principles addresses this term of reference.

It is pivotal to the effectiveness of a public interest disclosure scheme that one or more external oversight agencies have a designated responsibility to discharge a mixture of functions – to receive, assess and investigate public interest disclosures; to monitor agency action under the Act; to promote the objectives of the Act, both to the public and to agencies; to publish model procedures for the administration of the legislation; and to provide training and other assistance to agencies.

Public interest disclosure legislation will apply across the landscape of Australian Government, to more than 150 departments, statutory and executive agencies, and government corporations. The success of the legislation will hinge on whether the requirements of the Act are understood throughout government and applied consistently and professionally. That is unlikely to occur unless there is a central agency (or agencies) that is responsible for monitoring and promoting the operation of the Act.

It is equally important that staff in government agencies who are entitled to make a disclosure under the Act can have confidence in the scheme, and can rely on the protections that it offers. That confidence is unlikely to develop unless an independent oversight agency plays a central role in the administration of the scheme. People wishing to make a disclosure under the Act will, at times, be fearful of suffering disadvantage as a consequence of doing so. Their main fear will be reprisal occurring from within the agency to which the disclosure is made. To alleviate this concern, and to facilitate public interest disclosures, it is important for people to know that an independent agency can both receive disclosures and monitor the conduct of agencies in dealing with disclosures. It is also important that a person has the option of approaching an external agency for advice and guidance on making a disclosure.

An external agency can make an essential practical contribution in other ways as well. The agency can act as a clearinghouse for dealing initially with public interest disclosures. This is especially needed where, for example, the disclosure is being made by a former employee or contractor who is unfamiliar with internal agency arrangements. Similarly, where a disclosure relates to more than one agency a person may feel more comfortable initially in approaching an external agency.

A person should be able to turn to an external agency where they are dissatisfied with the way that a disclosure has been handled by their own agency. Equally, if a person wishes to make an allegation against the senior officers of an agency, they may feel imperilled unless they can initially approach an external agency with that allegation.

The further question is which external agency should be designated with a role under the scheme. Principle 7 notes that this could be one of a number of existing agencies, such as an ombudsman, auditor-general, corruption commission, or public sector standards commission. Currently, Australian Government agencies of that description all play a role in investigating complaints and allegations of the kind that can be received under a public interest disclosure Act. It is desirable to preserve their existing roles, expertise and public profile.

A point flowing from that observation is that the Act should provide that a person can make a disclosure under the Act to any one of a number of nominated agencies, such as the Ombudsman, APSC, ANAO, ACLEI or IGIS. (The *Auditor-General Act 1997* does not specifically provide for complaints to be made to the ANAO, and further thought will need to be given to whether it is appropriate for public interest disclosure legislation to extend the role of the ANAO in this respect. Two other oversight agencies that currently receive public complaints are the HREOC and the

Privacy Commissioner. However, their primary focus is not upon the quality of administration generally, and it is doubtful – given the role of the Commonwealth Ombudsman – whether they need to be nominated as receiving agencies. The same issue perhaps arises in relation to ACLEI and IGIS, whose jurisdiction extends to only a few Australian Government agencies.)

An external oversight agency, upon receiving and assessing a disclosure, should decide how the disclosure is to be handled: by itself investigating the disclosure; by referring it to another external oversight agency; by referring it to the agency to which the disclosure relates (together with any comments or directions about how the matter is to be handled); or by notifying the person making the disclosure that it does not fall within the scope of the Act.

That scheme would be adequate in itself to ensure that disclosures are properly recorded and handled. There would nevertheless be advantage in giving a more central and coordinating role to one or perhaps two agencies, such as the Commonwealth Ombudsman or the APSC. The additional functions of a central agency would include being notified by agencies of all disclosures under the Act (see Principle 7), preparing an annual report to Parliament on the administration of the Act, and coordinating training, educational and promotional activities.

The Commonwealth Ombudsman would be an appropriate agency to discharge this central role. The office has a high profile in government and the community. The respected independence and powers of the office mean that people are confident to approach it with complaints against government. The office deals with allegations of a kind that are likely to be made under a public interest disclosure Act. The office also has excellent working relationships with all agencies in government, and is accustomed to referring matters to other agencies for investigation when appropriate. The stature of the office in administering the Act would be enhanced by the statutory creation of a new position in the office of Deputy Commonwealth Ombudsman (Public Interest Disclosures).

In summary, there is no need to create a new agency to administer a public interest disclosure Act. At most, thought could be given to creating a coordinating committee constituted by statutory officers such as the Ombudsman, Public Service Commissioner, Auditor-General, Integrity Commissioner and Inspector-General of Intelligence and Security (or nominees). The Committee could meet three or four times a year to review the operation of the Act, to provide guidance to agencies, and to make recommendations to government. A variation of that proposal would be a committee with a larger membership, including appointees from outside government. Secretarial support could be provided by the coordinating 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.**

Principle 10 of the Key Principles addresses this term of reference. In a well designed system, it would be rare that a person who has already approached an external oversight agency would be justified in publicly disclosing to the media an allegation of impropriety of a kind that would attract a civil remedy or criminal penalty. Nevertheless, the legislation should provide for those exceptional circumstances in which it is reasonable for a person to make a disclosure to a third party because all available mechanisms for raising the matter within government have been exhausted.

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

Two points arise from the foregoing discussion. The first is that the existing legislative framework for public interest disclosures (which is anchored in s 16 of the *Public Service Act 1999*) is inadequate. A more comprehensive scheme is required, embodied in a new Public Interest Disclosure Act. The second is that the new scheme should accommodate and not supplant the legislation that confers an oversight role on independent agencies such as the Ombudsman, APSC, ANAO, ACLEI and IGIS.

## Public Interest Disclosure Legislation – Key Principles

1. **Objectives and title:** The stated objectives of public interest disclosure legislation should be:
  - to support public interest whistleblowing by facilitating disclosure of wrongdoing
  - to ensure that public interest disclosures are properly assessed, and where necessary investigated and actioned
  - to ensure that a person making a public interest disclosure is protected against detriment and reprisal.

These objectives should be captured in the short and long title to the legislation. *Public Interest Disclosure Act* is a preferred title to 'Whistleblower Protection Act' or 'Protected Disclosures Act'.

2. **Subject matter of disclosure:** Legislation should specify the topics, or types of proscribed wrongdoing, about which a public interest disclosure can be made. The topics should cover all significant wrongdoing or inaction within government that is contrary to the public interest. The topics should include:

- an alleged crime or breach of the law
- official corruption, including abuse of power, breach of trust, and conflict of interest
- official misconduct, and
- defective administration, including:
  - negligence or incompetence
  - improper financial management that constitutes a significant waste of public money or time, and
  - any failure to perform a duty that could result in injury to the public, such as an unacceptable risk to public health, public safety or the environment.

3. **Person making disclosure:** A disclosure should qualify as a 'public interest disclosure' if either of two tests is satisfied:
  - (a) the person making the disclosure holds an honest and reasonable belief that the disclosure shows proscribed wrongdoing (the subjective test); or
  - (b) the disclosure does show, or tends to show, proscribed wrongdoing, irrespective of the person's belief (the objective test).

The motivation or intention of the person making the disclosure should not be relevant. Nor should a person be required to use a special form or declare that it is a public interest disclosure.

4. **Receipt of disclosure:** Legislation should allow a public interest disclosure to be made to a variety of different people or agencies, including:
  - the immediate or any higher supervisor of the person making the disclosure
  - the chief executive officer of the agency
  - any designated unit or person in an agency
  - any dedicated hotline, including external hotlines contracted by an agency, or

- any external agency with jurisdiction over the matter (eg, ombudsman, corruption commission, auditor-general, or public sector standards commissioner).
5. **Recording and reporting:** All public interest disclosures to an organisation should be formally recorded, noting the time of receipt, general subject matter, and how the disclosure was handled. Recording systems, including required levels of detail, will vary according to agencies' circumstances, but should be consistent with minimum standards across the public sector (see principle 7).
  6. **Acting on a disclosure:** An agency receiving a disclosure should be obliged:
    - to assess that disclosure and take prompt and appropriate action, which may include investigating the disclosure or referring it to an external agency
    - to the extent practicable and reasonable, to keep the person who made the disclosure informed of action proposed to be taken, the progress of any action, and the outcomes of any action, and
    - to include in its annual report a summary of the numbers of public interest disclosures received, and the action taken.
  7. **Oversight agency:** One of the external agencies with responsibility for public interest disclosures should be designated as the oversight agency for the administration of the legislation. The responsibilities of the oversight agency should include:
    - being notified by agencies of all disclosures, and recording those disclosures and how they were dealt with and resolved
    - having the option to decide, upon being notified of a disclosure, to provide advice or direction to an agency on how the disclosure should be handled, to manage the investigation of the disclosure by the agency, or to take over the investigation of the disclosure
    - providing advice or direction to agencies on the steps that should be taken to protect people who have made disclosures, or to provide remedial action for a person who has suffered detriment as a result of making a disclosure
    - promoting the objects of the legislation, both within government and publicly, and conducting training and public education
    - publishing model procedures for the administration of the legislation, with which agencies' internal procedures must be consistent; and
    - conducting a public review at least once every five years of the operation of the legislation.
  8. **Confidentiality:** Disclosures should be received and investigated in private, so as to safeguard the identity of a person making a disclosure to the maximum extent possible within the agency's control. Avenues should be available for disclosures to be made confidentially, and where practical, individual disclosures should be dealt with in ways that do not disclose the identity of the person making the disclosure, and preferably even that a disclosure has in fact been made. This principle is subject to the need to disclose a person's identity to other parties – for example, where this is absolutely necessary to facilitate the effective investigation of a disclosure, provide procedural fairness, protect a person who has made a disclosure, or make a public report on how a disclosure was dealt with.

9. **Protection of person making disclosure:** A person who has made a disclosure to which the legislation applies should be protected against criminal or civil liability, or other detriment, for making the disclosure. For example, the person:
- should not be liable to prosecution for breach of a statutory secrecy provision
  - should not incur civil liability for, for example, defamation or breach of confidence
  - should not be subject to discipline or other workplace sanction, such as reduction in salary or position, or termination of employment, and
  - should be entitled to legal redress if they suffer detriment as a result of making the disclosure.
10. **Disclosure outside an agency:** A disclosure made to a person or body that is not designated by the legislation to receive disclosures (e.g., the media) should be protected in exceptional circumstances as defined in the legislation. The protection should only apply if it is reasonable in all the circumstances for the disclosure to be made to some other person or body to ensure that it is effectively investigated. As a general guide, the protection should apply where a person has first made the disclosure to a designated person or body and there has been a failure by that person or body to take reasonable and timely action.
11. **Agency responsibility to ensure protection:** The responsibilities of an agency under the legislation should include:
- establishing proper internal procedures in the agency for receiving, recording and investigating disclosures, for protecting persons who make disclosures, and for safeguarding the privacy of those who make disclosures
  - ensuring that staff of the agency are made aware of their responsibilities under the legislation, including the responsibility to support and protect any person making a disclosure
  - upon receipt of a disclosure, assessing whether the person who made the disclosure – or any other person – faces any risk of detriment or requires special protection as a result
  - where necessary, taking all reasonable measures to protect a person who has made a disclosure against direct or indirect detriment, actual or foreseeable, and
  - taking remedial action in the event that a person suffers detriment as a result of making a disclosure.

It should be the duty of the senior executives of an agency to ensure that these responsibilities are met by the agency.

12. **Remedial action:** Where detriment is suffered by a person as a result of a disclosure having been made, remedial action of the following kind should be taken by the agency, or failing that the oversight agency, to the extent necessary to prevent or remedy the detriment:
- stopping the detrimental action and preventing its recurrence, including by way of injunction
  - placing the person in the situation they would have been in but for the detrimental action, including if necessary the transfer of the person (with their informed consent) to another equivalent position

- an apology
- compensation (pecuniary and/or non-pecuniary) for the detriment suffered, if the detriment could have been prevented, avoided or minimised, and
- disciplinary or criminal action against any person responsible for the detriment.

Jurisdiction to deal with compensation applications should be conferred upon a low-cost tribunal with expertise in determining the rights and responsibilities of employers and employees. Consideration should also be given to reducing or reversing the onus of proof in cases of detrimental action, so that where a public interest disclosure has been made and detriment is suffered, it falls to those allegedly responsible to explain why the detriment did *not* result from the making of the disclosure.

13. ***Ongoing assessment and protection:*** To the extent practicable, an assessment should be undertaken into the impact upon a person of having made a disclosure under the legislation. This assessment should be undertaken at an appropriate time or times (e.g., at intervals of two, five or ten years). This assessment may be conducted by the agency to which the disclosure was made, or by the oversight agency.