Executive Summary

Introduction

1. Whistleblower or public interest disclosure schemes rest on the premise that individuals who make disclosures serve the public interest by assisting in the elimination of fraud, impropriety and waste. In this way, an effective whistleblowing scheme is a necessary part of maintaining a good public administration framework.

2. Over the past decade there has been growing recognition in Australia of the need for public interest disclosure legislation for the Commonwealth public sector. While the *Public Service Act 1999* provides some coverage for Commonwealth public sector whistleblowers, the Act only applies to about half of the Commonwealth public sector.

3. The objective of the proposed legislation, the Public Interest Disclosure Bill 2001 [2002], is to provide a comprehensive Commonwealth public sector whistleblowing scheme. It aims to enable a person to report improper conduct in the knowledge that the allegation will be duly investigated and that he or she will not suffer from reprisals on account of disclosing such information.

4. The Committee acknowledges that some departments, the Public Service Commissioner and the Acting Merit Protection Commissioner are satisfied with current arrangements under section 16 of the *Public Service Act 1999* and contend that any necessary adjustments to the present scheme can be achieved through changes to the Regulations.

5. However, the Committee is yet to be persuaded that section 16 of the current Public Service Act provides an adequate framework for a public interest disclosure scheme. The Committee is aware of the issues surrounding the provisions, such as the need for tighter terminology, questions about the bodies designated to receive and investigate reports of misconduct, and a lack of adequate protection from reprisals.

6. In particular, the Committee is convinced that the jurisdiction of section 16 is overly limited, as it only applies to that part of the public sector covered by the Public Service Act. The Committee believes that this aspect alone constitutes sufficient grounds for the Parliament to consider separate legislation to ensure that an effective and comprehensive public interest disclosure scheme is implemented.

7. The Committee notes that, despite assurances since 1995 that a public interest disclosure scheme has been under active consideration, as yet no comprehensive legislation has materialised.

8. The Committee supports the adoption of separate and comprehensive legislation as anticipated by all sides of politics during debate on clause 16 of the Public Service Bills of 1997 and 1999. The Committee welcomes Senator Murray's initiative as a way to generate public discussion on this matter.

Purpose and scope of the Bill

Purpose of the Bill

9. The Committee believes that any public interest disclosure scheme should make a clear statement in support of public interest disclosure and explain in simple terms the significance of the provisions of the proposed legislation. The Committee considers that unless the public and potential disclosure makers understand the import of public interest disclosure legislation, they will not have confidence in the legislation and it will not be used.

10. The Committee considers that the Bill as presently drafted does not sufficiently promote itself as a mechanism to support public interest disclosures and disclosure makers or as an effective and determined means of preventing reprisals. It believes that the Bill itself should be used to inform and educate the public about its intentions and suggests that the object of the Bill be stated in clear, definite and simple terms.

11. The Committee considers that the proposed Bill could be enhanced by making a clear statement in support of public disclosures and disclosure makers by means of a preamble, an explanatory memorandum and more clearly stated objectives. This would contribute to increasing public confidence in the legislation.

Defining public interest disclosure

12. The Committee recognises that defining 'public interest disclosure' and 'disclosable conduct' are difficult drafting matters as such definitions are required to cover a wide range of relevant behaviour while remaining sufficiently precise to provide guidance. The Committee supports the Bill's approach to this dilemma, though it is concerned that the use of the general term 'a disciplinary offence' may weaken the sense that the Bill is concerned with significant wrongdoing.

13. While the Committee supports the Bill's definition of 'disclosable conduct' in general, it is concerned that the definition stipulates that the wrongdoing 'could', if proved—rather than 'would', if proved—constitute a criminal offence or reasonable grounds for terminating services. It is also concerned that maladministration, incorporated in the New South Wales and Queensland legislation, has been omitted as a category of 'disclosable conduct'.

14. The Committee suggests that the definition of 'disclosable conduct' could be improved by:

- **substituting 'would, if proved' for 'could, if proved'; and**
- **including maladministration as a category of 'disclosable conduct'.**

15. The Committee further suggests that the Bill would be enhanced by including a reference to 'the environment' in the definition of 'public interest disclosure'.

Defining those who can be reported

16. For clarity, the Committee believes that the legislation should make absolutely explicit who may be subject to a public interest disclosure. This coverage should be consistent with the principle that all Commonwealth government bodies should come under the Bill's jurisdiction. The Committee is convinced that the public interest disclosure scheme established under this Bill should include Commonwealth companies and Government Business Enterprises (GBEs), regardless of difficulties that may arise in stipulating the level of Commonwealth interest that determines whether an entity would fall within the legislation.

17. The Committee refers here to the *Commonwealth Ombudsman Act 1976* and the *Auditor-General Act 1997* and suggests that the proposed legislation take account of these models to help define the Commonwealth bodies that would come under the jurisdiction of the legislation. The legislation underpinning these offices has enabled them to have a relatively comprehensive and clear jurisdiction over the public sector.

18. The Committee considers that the Bill should use the terms 'agency' and 'prescribed authority' rather than the terms 'the Commonwealth' or 'Commonwealth authority' or 'agency' to refer to the Commonwealth bodies that the Bill aims to cover. The definition of 'agency' should be that contained in the *Financial Management and Accountability Act 1997*. The definition of prescribed authority should incorporate the terms 'Commonwealth authority', 'Commonwealth company' and 'GBE' as defined in the *Commonwealth Authorities and Companies Act 1997*.

19. The Committee emphasises that the above terms should be used consistently throughout the Bill, and be common to both those who can be reported and those who can receive and investigate that report.

20. As stated previously, the Committee is conscious that this legislation needs to be readily understood by the public and would expect the explanatory memorandum to expand on the meaning of 'public official' and 'prescribed authority' so that there is no doubt as to the Bill's coverage.

21. The Committee acknowledges that legislation in some state jurisdictions encroaches to varying degrees into the private sector. However, it is satisfied that the coverage of Commonwealth activities and functions as provided by the proposed Bill would be sufficiently comprehensive, assuming incorporation of the considerations discussed above.

Defining those who can make a report

22. While recognising that complications may arise when a whistleblower is not an employee of the agency, the Committee supports the enabling of all members of the public to make public interest disclosures. On balance, the Committee believes that the advantages to be derived from allowing any person with knowledge of impropriety to make a public interest disclosure outweigh the disadvantages.

23. The Committee stresses that it is the content of a disclosure that is of paramount importance and not the source of the information. This approach is in accord with the specific object of the Bill, that is, to facilitate public interest disclosures, to investigate and, if required, to rectify any wrongdoing.

Retrospectivity

24. The Committee recognises that there are those who have made public interest disclosures who may not have been adequately protected from, or recompensed for, reprisals in the past. However, it understands that the circumstances in which it is appropriate to apply legislation retrospectively are very limited and that it would not be appropriate in this instance.

Who can receive a disclosure

25. To save confusion concerning the definition of 'proper authority', the Committee suggests that the legislation put beyond doubt the extent of the Commonwealth sector covered by the Bill by using precise terms and not words such as 'agency' and 'authority' interchangeably.

26. The Committee notes that the adoption of its earlier suggestion, relating to the definitions and use of the terms 'agency' and 'prescribed authority', should create a direct connection between those who are the subject of a public interest disclosure and the body responsible for receiving and investigating that disclosure. Thus, a public interest disclosure would be made about the conduct of an employee of, or in the service of, an agency or prescribed authority. One of the designated authorities to receive and act on the disclosure would then be the head of the relevant agency or prescribed authority.

27. The Committee is satisfied that, in order to encourage accountability and openness, the agency and authority heads should retain responsibility for receiving and investigating allegations of wrongdoing which involve the operations of their agency or authority and the conduct of their employees.

28. The Committee accepts, however, that in some cases an agency or authority head may not be the appropriate body to receive a public interest disclosure and that there are a number of sound reasons for the Bill to allow a report to be made to an external and unrelated body.

29. The Committee recognises that a number of witnesses perceive the Public Service Commissioner and the Merit Protection Commissioner to be too closely linked with agency administration to provide this independent avenue. Further, it is aware that this perception poses difficulties for the effectiveness of the Public Service Commissioner and the Merit Protection Commissioner in their roles as independent adjudicators.

30. Moreover, the Committee believes that, given that the jurisdiction of the Bill intends to go beyond the Australian Public Service (APS) and include all Commonwealth bodies, assigning the Public Service Commissioner and the Merit

Protection Commissioner roles as external authorities would breach their jurisdiction since it would require them to receive and investigate disclosures concerning non-APS agencies.

31. The Committee notes that the legislation upon which this Bill is modelled—the ACT Public Interest Disclosure Act—allows a report to be made to the Ombudsman and the Auditor-General. The Committee considers it imperative to include the Ombudsman in the proposed legislation.

32. The Committee notes the section in the ACT's legislation relating to the need for either the Ombudsman's or Auditor-General's approval of a proper authority's decision not to investigate a disclosure referred to it. This clause is missing from the Bill and thus there is no check on authorities declining to act on a report deemed by an independent body to be a public interest disclosure. The Committee considers the inclusion of such a clause would be an important safeguard to prevent a genuine public interest disclosure from not being investigated.

33. The Committee is aware of the advantages in allowing public interest disclosures also to be made to the media, particularly as a last resort. However, the Committee believes that there are more drawbacks than advantages in allowing disclosures to the media. It hopes that the additional safeguards suggested for inclusion in this legislation, such as designating the Ombudsman as a proper authority, would alleviate the need to provide for reports to be made to the media.

Procedures for investigating a public interest disclosure

Making and receiving public interest disclosures

34. The Committee suggested in Chapter Three that the terms 'agency' and 'prescribed authority' be used to designate the Bill's coverage of the Commonwealth sector. This change would also apply to the provisions governing the establishment of procedures to facilitate disclosures.

35. The Committee is satisfied that the direction given in the legislation is sufficiently prescriptive to compel agency and authority heads to investigate a public interest disclosure. Moreover, the Committee believes that the establishment of an independent agency, such as the Ombudsman, as an additional proper authority to receive and investigate a public interest disclosure provides yet another measure to ensure that a public interest disclosure will be treated appropriately.

36. Nonetheless, the Committee observes that some whistleblowing procedures need to be accessible to individuals considering making a public interest disclosure, as well as those who have made a disclosure. Specifically, those contemplating whistleblowing need to have access to assistance and information about making a disclosure.

37. The Committee suggests that procedures established under clause 10(3) of the Bill, relating to the provision of assistance and information to a

whistleblower, be extended to include persons who may be contemplating making a public interest disclosure and who seek advice from a prescribed authority.

38. The Committee accepts that under certain circumstances, a person considering making a public interest disclosure will be reluctant to approach his or her agency for expert and impartial advice. The Committee sees merit in the establishment of a central advisory unit across the public sector to provide advice and assistance on public interest disclosure.

The decision not to refer the disclosure

39. The Committee is concerned with the tenor of clause 18 of the Bill which provides that a referral to another agency must not be made if, in the authority's opinion, there is a serious risk of an unlawful reprisal. While the onus is on the agency to ensure that the person making the disclosure will not suffer detriment on account of that disclosure, there appears to be a tacit acknowledgment in this clause that this responsibility may be beyond the capacity of an agency or authority. This assumption undermines the credibility of the Bill, which, at its very heart, is intended to protect a whistleblower from reprisal.

40. The Committee suggests that this could be partially addressed by amending clause 18 to allow the Public Service Commissioner or Ombudsman to be alerted to concerns about potential reprisals and/or interference in an investigation, and so prevent the disclosure being referred to another agency.

Reporting obligations

41. The Committee believes that the reporting obligations in the Bill provide a level of transparency needed that will ensure proper authorities are subject to public scrutiny, and allow any person aware of an anomaly in a report to make known their concerns. The provision applies only to agencies that are required by an Act to prepare an annual report for tabling before the Parliament. The reporting requirements will, therefore, require all agencies and authorities covered by the Bill, as defined by the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*, to report on public interest disclosures.

42. The Committee agrees with the views of the Ombudsman and the Police Integrity Commission that that statutory provision should be made for regulations requiring authorities to adopt uniform standards and formats for statistical reporting on protected disclosures.

43. The Committee expects that an agency providing a progress report will take the necessary precautions to protect the integrity of the investigation and the confidentiality of those involved in the investigation, while observing the obligation to be accountable for its actions and decisions.

Anonymous disclosures

44. The Committee recognises that allowing anonymous reporting may encourage unsubstantiated or even mischievous allegations and that such reports may be more difficult to investigate. The Committee is also aware that the accused has a right to defend themselves and that, in some cases, he or she can only do so effectively if they know where the accusations are coming from.

45. However, the Committee accepts that the overriding intention of the Bill is to facilitate public interest disclosures and that it is the substance of the report that is of primary consideration. While it expects that the safeguards put in place by the Bill would in large measure negate the need for anonymous disclosures, it recognises that a whistleblowing scheme should require all reports to be investigated.

46. The Committee suggests that the Bill would be enhanced by providing for anonymous disclosures:

- **to be received and investigated by the proper authority; and**
- **to be deemed 'protected disclosures' under the legislation in the event that the identity of the person making the report becomes known.**

Vexatious or frivolous disclosures

47. The Committee favours retaining the provisions for vexatious or frivolous disclosure as they stand, while appreciating the views that the provision will not be effective in discouraging such disclosures. The Committee accepts that there are sufficient safeguards in the Bill to satisfy those concerned that a genuine public interest disclosure cannot be dismissed simply on the whim of a proper authority.

48. The Committee believes that the legislation takes appropriate measures to enable a person making a public interest disclosure to divulge information that would otherwise be deemed to be confidential without detriment.

Indemnity provisions for whistleblowers

49. The Committee notes that the Bill offers public interest disclosure makers only qualified privilege in proceedings for defamation.

50. To strengthen confidence in the effectiveness of the legislation and to encourage public interest disclosures, the Committee suggests that in proceedings for defamation there be a defence of absolute privilege in respect of the making of a public interest disclosure. Such absolute privilege would apply to disclosures that fall under the Bill's definition of 'public interest disclosure', and thus only to disclosures based on reasonable grounds. The Bill should make explicit that absolute privilege would not apply to frivolous or vexatious disclosures.

Duty of confidence

51. The Committee is of the view that the provisions covering confidentiality allow an authority a certain amount of discretion in balancing the requirement to respect the identity of the person making the public interest disclosure with the right of the person who is the subject of the report to procedural fairness.

52. The Bill does not include a provision allowing a person impugned in a public interest disclosure report an opportunity to reply to an adverse comment. The Committee notes that the Tasmanian Act contains such a provision.

53. The Committee notes that section 16 has been taken from the ACT legislation and does not take account of the differences in the definition of a proper authority between the two pieces of legislation. A proper authority under the proposed Bill can be either the agency head or the Public Service Commissioner. The clause, which reads that 'a proper authority shall investigate a public interest disclosure received by it if the disclosure relates to its own conduct' needs redrafting to ensure that the role of the Public Service Commissioner is reflected.

Protection from unlawful reprisals

54. The Committee emphasises that the effectiveness of whistleblowing legislation is heavily dependent on individuals contemplating making a disclosure having confidence in the ability of legislation to protect them. In the event that legislation fails to protect a whistleblower, it must provide whistleblowers with reliable remedies.

55. The Committee supports the use of a general definition of 'unlawful reprisal' with reference to 'detriment', since it considers that discrimination in any form should be prevented by whistleblowing legislation. However, it also recognises that, because of the varied and subtle forms that reprisals take, there is a case for a more specific definition. The Committee believes that the suggested explanatory memorandum would address this concern and provide those contemplating whistleblowing with a better grasp as to what the legislation protects them against, as well as an objective standard against which to compare possible offences.

56. The Committee observes that there is a need to protect the individual accused of unlawful reprisal, as well as the individual who has made a public interest disclosure. To maintain procedural fairness, the Committee believes that the definition of unlawful reprisal should be amended so that a firm link between detrimental action and the public interest disclosure must be established for an offence to have occurred. The wording of the Queensland legislation maintains an appropriate balance.

57. The Committee is aware of the difficulties that have been experienced in prosecuting for unlawful reprisals in other jurisdictions. It observes that the inclusion of a defence provision for those accused of unlawful reprisal in the Bill—a provision that no other State legislation apart from that of the ACT includes—makes the already difficult task of prosecuting unlawful reprisals even more so.

58. For this reason the Committee considers that the defence provisions for those accused of unlawful reprisal should be removed from the Bill.

59. The Committee notes that the terms according to which the agency must provide counselling to a whistleblower could be made more specific and that this would provide less scope for abuse.

60. The Committee emphasises that relocation should only be considered when all other avenues of protection have been exhausted, and believes that the clauses requiring the whistleblower's consent should ensure that misuse of the relocation provisions does not occur. The Committee believes that the cost of relocation should not fall to the whistleblower and that the Bill should stipulate that the position to which he or she is relocated is equivalent, or as close as possible, to his or her current position.

61. The Committee suggests that the Bill be amended so that agencies are required to cover all costs of relocation and that the position to which he or she is relocated is equivalent, or as close as possible, to his or her current position.

62. The Committee welcomes the inclusion of provisions that allow victims of unlawful reprisals to sue for damages. It is aware that there may be advantages in making an agency liable for failing to adequately protect a disclosure maker from unlawful reprisals when it could have done so.

63. The explanatory memorandum suggested by the Committee would include guidelines as to the scope of damage that can be sued for, and address concerns that the provision allowing whistleblowers to sue for damages may be interpreted overly narrowly.

64. Although the precise outcome of the ability to apply for injunctions and orders is not yet known, the Committee welcomes the inclusion of such provisions and believes that they will provide an avenue of protection and remedy for whistleblowers.

65. The Committee is concerned that the Bill does not make clear what constitutes 'a court of competent jurisdiction' for the purposes of applying for an injunction or order. The Committee is also aware that the Bill does not provide for applications for injunctions to be made confidentially. Both these matters require further consideration. The Committee notes that the Queensland legislation addresses both these issues.

66. The Committee emphasises that, while the ability to protect the whistleblower through court action is necessary, agencies must be able and willing to protect whistleblowers and prevent such action being required. The Committee is concerned that clauses 10 and 19 provide little detail as to essential elements of agency frameworks for protecting whistleblowers, or about the form and extent of disciplinary action. The Bill also does not establish a requirement for scrutiny of proposed frameworks to determine if they are sincere and effective.

67. The Committee believes that a provision ensuring that agency frameworks are of a certain standard should be included. This could occur by setting out details of their nature in legislation, as occurs with the Information Privacy Principles to be adhered to by the Commonwealth public sector. Alternatively, the Bill could state that an authority, such as the Ombudsman, will examine whistleblower frameworks to ensure they are of an adequate standard, an approach similar to arrangements surrounding privacy frameworks in the private sector whereby the Privacy Commissioner is required to approve the privacy codes of industry bodies.

68. The Committee also sees a clear need to have provisions in the Bill that allow a person to report an unlawful reprisal to a separate and independent authority that would have the power to investigate the allegation and direct the responsible agency to remedy the situation. In Chapter Four the Committee recommended that the Ombudsman be included as a proper authority for receiving a public interest disclosure. Extending the role of the Ombudsman to include the ability to receive complaints of unlawful reprisals, regardless of whom the initial public interest disclosure was made to, would provide a means by which unlawful reprisals could be independently investigated.

69. The Committee believes that the Ombudsman's office should be assigned responsibility for overseeing agency schemes for the prevention and cessation of unlawful reprisals and disciplinary procedures for officials who engage in them.

70. The Committee further believes that the Bill should allow for the Ombudsman to be designated a proper authority to receive reports of unlawful reprisals regardless of whom the initial public interest disclosure was made to.

General conclusion and recommendation

71. The Committee recognises the need for separate legislation addressing the matter of whistleblowing and welcomes the contribution of Senator Murray's Bill to debate on this important matter. The Committee supports the general intent of the Bill. However, the Bill contains deficiencies in some of its provisions, the remedy of which will require further consideration and redrafting.

72. The Committee therefore recommends that the Public Interest Disclosure Bill 2001 [2002] not proceed in its current form.