

Chapter 2

Current Arrangements

2.1 Public interest disclosure is widely known in Australia and internationally as ‘whistleblowing’. The term is used extensively in the media, in the wider community and within the Australian Public Service (APS). Whistleblowing has been defined as ‘ethical informing’ or disclosing information about wrongdoing out of a sense of public or civic duty.¹ Dr William De Maria, Centre for Public Administration, University of Queensland, defines a whistleblower as:

...a concerned citizen, totally, or predominantly motivated by notions of public interest, who initiates of her or his own free will, an open disclosure about significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing.²

2.2 The current provisions governing whistleblowing in the APS are contained in section 16 of the *Public Service Act 1999*. Further details as to the procedures surrounding public interest disclosures are contained in Public Service Regulations 2.4 to 2.7.

2.3 This chapter considers the effectiveness of these arrangements as a public interest disclosure scheme for the Commonwealth public sector. In doing so, it looks at:

- the genesis of current arrangements, including:
 - discussion surrounding the whistleblowing clauses in the Public Service Bills 1997 and 1999, and
 - changes to the Public Service Regulations to accommodate a whistleblowing scheme; and
- the implementation of section 16 of the Public Service Act, including:
 - what constitutes a wrongdoing,
 - who can be reported and who can make a report,
 - who can receive and investigate a report,
 - protection from reprisals,
 - agencies’ views on current arrangements, and
 - consideration of additional whistleblowing legislation.

¹ R. D. Francis, *Business Ethics in Australia: A Practical Guide*, Law Book Co, 1994.

² William De Maria and Cyrelle Jan, *Wounded Workers*, University of Queensland, Department of Social Work and Social Policy, Queensland Whistleblower Study, October 1994.

Genesis of current arrangements

2.4 Debate about the need for a Commonwealth whistleblowing framework in Australia arose in the early 1990s. Discussion emerged in a number of fora, including:

- the Final Report of the Review Committee of Commonwealth Criminal Law, 1991 (the Gibbs Committee);
- reports by the Senate Standing Committee on Finance and Public Administration—*Review of the Office of Commonwealth Ombudsman*, 1991 and *Management and Operations of the Department of Foreign Affairs and Trade*, 1992;
- the report of the House of Representatives Standing Committee on Banking, Finance and Public Administration, *Focusing on Fraud*, 1993;
- Whistleblower Protection Bill 1991, introduced by Senator Jo Vallentine and Whistleblower Protection Bill 1993, introduced by Senator Christobel Chamarette; and
- the Senate Select Committee on Public Interest Whistleblowing (SSCPIW) report, *In the Public Interest*, 1994.

2.5 Further information about discussions of the need for whistleblowing legislation in Australia and the above reports and bills are contained in **Appendix 5**.

2.6 No legislation specifically addressing whistleblowing arose from the debate. The public interest disclosure arrangements currently in place occurred as part of the broader reforms of the Public Service brought about by the passing of the *Public Service Act 1999*. This legislation was initially introduced as the Public Service Bill 1997 and later as the Public Service Bill 1999.

2.7 In presenting the original Public Service Bill 1997 the Hon Mr Peter Reith MP, the then Minister for Industrial Relations, spoke about the matter of whistleblowing. He told the Parliament that, through the proposed legislation, the Government aimed to ensure that disclosures within the APS were satisfactorily investigated and whistleblowers protected.³

2.8 He was referring to clause 16 of the Bill—Protection for Whistleblowers—which read:

A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:

- (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or

3 *House of Representatives Hansard*, 26 June 1997, p. 6465.

- (b) an Agency Head or a person authorised for the purposes of this section by an Agency Head.⁴

2.9 Clause 16 was only one of many aspects of the lengthy Bill to receive attention during its examination. Nonetheless the issue of whistleblowing was raised by witnesses during the relevant inquiries and chamber debate.

Inquiries into the Public Service Bill 1997

2.10 During 1997 two committee inquiries were conducted into the Public Service Bill, the first by the Joint Committee on Public Accounts (JCPA) and the second by the Senate Finance and Public Administration Legislation Committee. Both included consideration of the whistleblowing provisions of the Bill.

2.11 In its report, the JCPA recognised that the Public Service Bill endeavoured for the first time to provide protection for whistleblowers within the APS. Nevertheless, witnesses brought to the attention of the JCPA a number of serious weaknesses in clause 16, such as its limited jurisdiction; the absence of an independent authority to receive and investigate reports; and lack of provisions for dealing with non bona fides disclosures.

2.12 The JCPA believed that whistleblowing protection ought to be strengthened on a number of levels and recognised that the Bill was not the ideal framework within which to provide a comprehensive whistleblower protection scheme. Accordingly, the JCPA recommended that:

The Government consider introducing whistleblowers protection legislation along similar lines to that which already exists for the public sector in other Australian jurisdictions. Any such legislation should be the subject of scrutiny by a parliamentary committee prior to its passage through the Parliament.⁵

2.13 Similar themes emerged in the inquiry into the Bill by the Senate Finance and Public Administration Legislation Committee. The Committee found that the proposed legislation posed more questions than it answered and supported the JCPA's view that separate whistleblowing protection legislation for the public sector would be preferable.⁶

2.14 The Australian Democrats gave substantially greater attention to clause 16 in their dissenting report to the Senate Finance and Public Administration Legislation Committee's majority report. The Democrats detailed what it considered the Bill's

4 Public Service Bill 1997, p. 17.

5 Joint Committee of Public Accounts, *Report 353—An Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997*, September 1997, p. 64.

6 Senate Finance and Public Administration Legislation Committee, *Provisions of the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997*, October 1997, p. 4.

shortcomings, such as the lack of provision for a separate independent authority to receive disclosures; the confinement of reports to breaches of the Code of Conduct; and a lack of particulars on how the legislation proposed to afford whistleblowers protection.⁷

Proposed amendments to clause 16 of the Public Service Bill 1997

2.15 On 17 November 1997, after the Bill had been passed in the House of Representatives, Senator Andrew Murray presented the Senate with a set of amendments to clause 16 that comprised a detailed whistleblowers' protection scheme. The amendments were intended to establish a framework to facilitate the disclosure in the public interest by APS employees of maladministration, serious or substantial waste, or corrupt or illegal conduct in the APS.⁸

2.16 The centrepiece of Senator Murray's whistleblowing scheme was the proposed establishment of a Public Interest Disclosure Agency which would receive public interest disclosures from any APS employee, assess disclosures and refer the matter to relevant agencies for investigation or, if deemed appropriate, investigate the disclosure itself. The amendments would also establish a Whistleblowers' Protection Agency that would receive and assess allegations of detrimental action against APS employees because they had made a public interest disclosure, refer the matter to appropriate agencies for investigation or investigate the allegation itself. The amendments also covered other issues such as reporting requirements, the powers of the investigating bodies and assistance to whistleblowers.

2.17 Addressing Senator Murray's amendments, the Leader of the Opposition in the Senate, Senator the Hon John Faulkner, stated that the most appropriate vehicle to deal with whistleblowing matters was independent legislation: 'I think it would be better for separate legislation to come before this parliament and for it to be given the focus and the attention that the issues you raise deserve.'⁹

2.18 Senator the Hon Chris Ellison, then Minister for Schools, Vocational Education and Training, also opposed the amendments. However, he asserted that the Government regarded the issue of whistleblowing legislation with concern and that the matter of a whistleblowing scheme was with the Attorney-General.¹⁰

7 The Australian Democrats, Dissenting Report, in Senate Finance and Public Administration Legislation Committee, *Consideration of Legislation Referred to the Committee, Provisions of the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997*, p. 13.

8 Senator Murray, *Senate Hansard*, 17 November 1997, p. 8918.

9 *Senate Hansard*, 17 November 1997, p. 8931.

10 *Senate Hansard*, 17 November 1997, p. 8934.

2.19 Senator Murray's amendments were defeated. The following day, Senator Murray again moved more minor amendments to clause 16 without success.¹¹ These amendments were also opposed by both the Government and the Opposition.

2.20 The Senate passed the 1997 Bill with 52 non-Government amendments on 19 November 1997 but it was laid aside by the House of Representatives. On 25 February 1998, the Government announced that, following the Senate's opposition to the Public Service Bill, it would bypass that House and implement major reforms to the APS through administrative changes and regulations.¹²

2.21 As part of this initiative, the Government amended the Public Service Regulations to include a whistleblowing scheme. Commencing on 15 March 1998, the Regulations incorporated clause 16 from the Public Service Bill 1997 as passed by the House of Representatives. This amendment set down the minimum requirements for procedures that an agency must establish for dealing with reports of breaches of the Code of Conduct.

Public Service Bill 1999 and its proposed whistleblowing scheme

2.22 Although the Government had taken steps towards APS reform through changes to the Regulations, it again introduced its Public Service Bill into Parliament on 30 March 1999. It was the same bill that the House of Representatives had passed in October 1997.

2.23 In consultation with the Opposition, the Government proposed various amendments to the Bill. An agreed amendment to clause 16 added the Merit Protection Commissioner or a person authorised by the Merit Protection Commissioner as an authorised authority to receive reports of breaches of the Code of Conduct.¹³ The Bill was passed and the *Public Service Act 1999* received the Royal Assent on 11 November 1999 and came into effect on 5 December 1999.

2.24 Apart from the above amendment the whistleblowing clause remained the same as that contained in the 1997 Bill. Hence, the important questions that were raised about the effectiveness of clause 16 of the Bill as a comprehensive whistleblowing scheme for the Commonwealth public sector by the inquiries into, and debate on, the Bill were not addressed.

2.25 The Explanatory Memorandum to the 1999 Public Service Bill stated categorically that:

11 Senator Murray sought to have the words 'intimidate' and 'harass' inserted as actions not permitted against a Public Service employee who reports a breach or alleged breach of the Code of Conduct. He also wanted to expand on the matters that could be reported by adding the terms 'public interest disclosure' and 'alleged wrongdoing'. *Senate Hansard*, 18 November 1997, p. 8999.

12 Minister for Employment, Education, Training and Youth Affairs, Press Release, 25 February 1998.

13 *Public Service Bill 1999—Supplementary Explanatory Memorandum*, p. 9.

The recommendation on the extension of whistleblower protection for APS employees (recommendation 13) has been referred to the Attorney-General's Department and will be a matter for future Government consideration.¹⁴

The effectiveness of current arrangements

2.26 As yet, no separate whistleblowing legislation has been passed and section 16 of the Public Service Act, accompanied by the relevant Regulations,¹⁵ provides the framework for current whistleblowing procedures. Section 16 applies to APS employees who report breaches of the Code of Conduct as contained in section 13 of the Act. **Appendix 6** contains the relevant sections of the Act and Regulations.

2.27 This section of the report discusses some of the broad criticisms of the current arrangements under the Public Service Act.

What constitutes a wrongdoing

2.28 Under section 16 of the Act a report of a wrongdoing is confined to breaches of the Code of Conduct. The Code of Conduct covers a wide range of activity, a quality that the Public Service Commissioner, Mr Andrew Podger, considered useful. He stated: 'the very fact that it is broad actually widens its scope rather than reduces it.'¹⁶

2.29 Despite the advantages of broad wording, commentators have noted the vagueness of the terminology of the Code of Conduct. Mr Denis Ives, Adjunct Professor, University of Canberra and a former Public Service Commissioner, pointed out that the use of words such as 'courteously' 'sensitive', 'communication', 'consultation' and 'cooperation' were likely to open up debate about the nature of specific conduct. He stated that:

The cobwebby nature of the values means that a multitude of technical breaches of the Code of Conduct may occur daily ... It would seem almost impossible for public servants to avoid some actions that technically infringe point 11 of the Code of Conduct, probably on a regular basis.

2.30 He posed the following questions:

When is an apparent breach of the Code (based on the values point) important enough to warrant action leading to the imposition of a sanction? What is the threshold test? Can this only be settled on a departmental case-

14 *Public Service Bill 1999—Explanatory Memorandum*, pp. 13–14.

15 Public Service Regulations 1999, clauses 2.4-2.7 outline the procedures agencies must have in place to deal with whistleblowing reports, and the functions of the Public Service Commissioner and Merit Protection Commissioner in relation to whistleblowing reports.

16 *Committee Hansard*, 16 May 2002, p. 8.

by-case basis and, if so, how is consistency to be achieved in relation to breaches related to the APS values?¹⁷

Who can make a report and who can be reported?

2.31 Section 16 of the Act only extends protection to an APS employee who reports a breach of the Code of Conduct.

2.32 As Mr Howard Whitton, Independent Ethics Consultant, told the Committee, the legislation makes no provision for a person who is not an APS employee, but has knowledge of or has witnessed a breach of the Code of Conduct, to make a report.¹⁸ Nor does section 16 enable those contracted by Public Service agencies, who are not covered by the legislation and hence not subject to the Code of Conduct, to be reported for misconduct.

2.33 However, the greatest limitation of the Public Service Act is that it does not extend to the whole Commonwealth public sector, leaving a significant portion of Commonwealth public sector employees without coverage by section 16.

2.34 The following agencies told the Committee that they are not covered by the Public Service Act and thus not covered by section 16:

- Australian Government Solicitor (AGS) employees are employed under terms and conditions determined by the CEO under the authority of the *Judiciary Act 1903* which does not include any provisions relating to whistleblower protection;¹⁹
- Australian Maritime Safety Authority (AMSA) employees are employed under terms and conditions are determined by the AMSA Board;²⁰ and
- Civil Aviation Safety Authority (CASA) employees are employed under legislation that does not include a provision for employees to report breaches of the Public Service Code of Conduct to the Public Service Commissioner or the Merit Protection Commissioner.²¹

17 Denis Ives, Adjunct Professor, University of Canberra and a former Public Service Commissioner, 'Benchmarking the Issues', *Canberra Bulletin of Public Administration*, no. 97, September 2000, p. 34.

18 Submission no. 35.

19 Australian Government Solicitor (AGS), Additional Information.

20 Australian Maritime Safety Authority (AMSA), Additional Information. AMSA is a statutory authority established under the *AMSA Act 1990*. The AMSA Board has endorsed a Code of Conduct which outlines the standards of personal and professional behaviour required of staff. AMSA has formulated a policy and guidelines addressing workplace harassment and a procedure for the resolution of grievances which intends to provide protection and remedies to whistleblowers.

21 Civil Aviation Safety Authority Australia (CASA), Additional Information. CASA explained that 'CASA's Equity and Diversity policy statements and training make it clear that harassment or victimisation of any person will not be tolerated'.

2.35 The Commonwealth authorities cited above are only a sample of bodies whose employees are not covered by the Public Service Act. Indeed, less than half of Commonwealth employees are APS employees.²² Non-APS Commonwealth employees may be employed in statutory authorities, Commonwealth-owned companies and Government Business Enterprises (GBEs).

2.36 This point was reiterated by the Public Service Commissioner, the Merit Protection Commissioner, the Commonwealth Ombudsman and the Community and Public Sector Union (CPSU).²³ The Public Service Commissioner told the Committee that:

... the Public Service Act does not cover the whole of the Commonwealth sector. ... I know a number of those agencies have internal arrangements, but they do not have the same authority that the Public Service Act provides.²⁴

Who can receive and investigate a report?

2.37 Section 16 of the Act stipulates that a report is made to the Public Service Commissioner or a person authorised for the purposes of this section by the Public Service Commissioner; or the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner; or an Agency Head or a person authorised for the purposes of this section by an Agency Head. There is no mention of the role of the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security (IGIS).

2.38 Critics of this section raise the need for an independent body that could receive and investigate a report, and an independent body that could investigate an alleged reprisal against someone who has made a report. Some express doubt that the authorities designated with these responsibilities under section 16 have the requisite degree of independence or detachment from the matters likely to come before them. This issue is examined more closely in Chapter Four.

Protection from reprisals

2.39 A number of witnesses have observed that current arrangements under section 16 are ineffective in protecting whistleblowers from reprisals.

2.40 Section 16 of the Act only prohibits those who perform functions in or for an agency from taking reprisals. While this includes contractors, it does not take account of the possibility of retaliation against a whistleblower by a person not connected with a Commonwealth agency.

22 According to statistics in Public Service and Merit Protection Commission, *State of the Service 1997–98*, p. 7.

23 *Committee Hansard*, 16 May 2002, pp. 2, 5, 7, 9, 28.

24 Mr Andrew Podger, *Committee Hansard*, 16 May 2002, pp. 9.

2.41 With regard to the protections afforded a person who makes a public interest disclosure, the Regulations under the Act clarify some matters and clearly place an obligation on the authorised person to investigate the claim. But apart from stipulating that the authorised person provide information about the protection available under section 16, the Regulations provide no guidance on how or who will protect the whistleblower from reprisal and there is no mention of compensation for the victim of reprisal. It does not set out the penalties for those engaging in reprisals, though the Public Service Commissioner told the Committee that ‘an employee who victimises a person who has made a whistleblowing disclosure would be subject to misconduct procedures, which may result in a range of sanctions, from a reprimand to termination of employment’.²⁵

2.42 The CPSU told the Committee that it finds ‘the act incredibly weak when it comes to protections for whistleblowers’. It elaborated further:

... if you look at the content of the legislation as it currently stands, there is no means to enforce those provisions ... The act makes the statement that a person shall not be victimised or discriminated against but, if that victimisation or that discrimination happens, where can they go?²⁶

2.43 The CPSU also asserted in its submission that the provisions of the Public Service Act do ‘not offer any effective remedy to Whistleblowers’.²⁷

2.44 Mr Howard Whitton submitted that that reprisals are ‘as likely as not to be undertaken by a relative or friend of an APS employee or service provider who is affected adversely by a disclosure. In either case no clear remedy is available.’²⁸

Agencies’ views on section 16 the Public Service Act

2.45 Despite criticism of section 16 of the Act, some government departments are fully satisfied with the current provisions for whistleblowing and see no need for separate legislation.

2.46 The Department of Defence has had an administratively based whistleblower scheme in place since July 1997 for both APS employees and Australian Defence Force members. Defence saw no need for additional legislation, maintaining that its scheme serves the public interest by ensuring the fair and independent examination of allegations made by whistleblowers, as well as by the efficient and effective use of resources.²⁹

25 Submission no. 34.

26 Ms Mary-Ann Cooper, *Committee Hansard*, 16 May 2002, p. 5.

27 Community and Public Sector Union, submission no. 20, p. 2.

28 Submission no. 35.

29 Submission no. 10.

2.47 The Department of Agriculture, Fisheries and Forestry concurred. It has also put in place procedures for dealing with whistleblower reports as required under Regulation 2.4 and is satisfied with the disclosure mechanism provided under the Public Service Act.³⁰

2.48 The submission of the Department of the Parliamentary Reporting Staff and the Department of the Parliamentary Library expressed similar satisfaction with the *Parliamentary Service Act 1999*. Although the Secretary of the departments, Mr J. W. Templeton, acknowledged that he had not considered the draft Bill in detail, he offered the following observation: ‘While the proposed Bill contains more detail than the Act, it is questionable whether the Bill would achieve more than the provisions already established under the Act.’³¹

2.49 A number of departments, while satisfied with the current arrangements for public interest disclosures, accept that some aspects could be improved. Even so, they showed no enthusiasm for separate disclosure legislation, with some suggesting that any proposed changes could be implemented through the Regulations. Although sympathetic with the aims of the proposed Bill, the Department of Health and Aged Care submitted that:

... the introduction of a separate piece of legislation, that will need to be read in conjunction with the Public Service Act 1999 and its associated Regulations and Commissioner’s Directions is not supported.³²

2.50 Both the Public Service Commissioner and the Acting Merit Protection Commissioner told the Committee that they believe that arrangements under section 16 function well and provide adequate protection to whistleblowers.³³ The Public Service Commissioner pointed out that effort has been made to clarify matters through the Public Service Regulations.

2.51 Nonetheless, both the Public Service Commissioner and the Merit Protection Commissioner recognised that the Public Service Act does not cover a significant number of Commonwealth employees.³⁴

2.52 Witnesses also noted the importance of having a single, adequate whistleblowing scheme rather than a scheme that would operate in parallel with section 16 of the Public Service Act. Mr Alan Doolan, the then Merit Protection Commissioner, submitted that ‘It is essential that there should be one coherent,

30 Submission no. 19.

31 Submission no. 30, p. 2.

32 Submission no. 26. See also Department of Agriculture, Fisheries and Forestry, submission no. 19.

33 Mr Andrew Podger, *Committee Hansard*, 16 May 2002, pp. 4-5 and Mr Boris Budak, *Committee Hansard*, 16 May 2002, p. 28.

34 Mr Andrew Podger, *Committee Hansard*, 16 May 2002, p. 5 and Mr Boris Budak, *Committee Hansard*, 16 May 2002, p. 7.

effective and credible whistleblowing scheme if such a scheme is to exist.³⁵ The Acting Merit Protection Commissioner, Mr Boris Budak, told the Committee that ‘if the bill is to go ahead, the two schemes could not operate well in parallel and we would have to look at some consequential amendments to other legislation—the Public Service Act and regulations, in particular.’³⁶

Consideration of additional whistleblowing legislation

2.53 As late as 5 April 2001, in answer to a question on notice from Senator Murray, Senator the Hon Chris Ellison stated that the *Public Service Act 1999* introduced a whistleblowing scheme for the Commonwealth public sector. He further advised that ‘the Government’s more comprehensive whistleblowing policy’ was still under consideration.³⁷

2.54 At the public hearing into the Bill on 16 May 2002, Mr Keith Holland, Assistant Secretary in the Attorney-General’s Department, told the Committee that at the time of passing the Public Service Act ‘the government thought that there would be some merit in looking at other proposals outside of that that might go a bit broader. Consideration has certainly been given to that. That is ongoing and has not been concluded at this stage.’³⁸

2.55 It is not clear why separate whistleblowing legislation has not been introduced by the Government. As the Commonwealth Ombudsman, Mr Ron McLeod, told the Committee:

... when the 1999 amendment to the Public Service Act was being debated there were indications from both sides of politics that this was perhaps a precursor to a later situation where there would be more general legislation. Given that there was support in the parliament for a whistleblower scheme in relation to the Public Service proper, it seems illogical that a significant area of Commonwealth employment or activity appears not to be covered by similar legislation.³⁹

Committee view

2.56 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.

35 Submission no. 32.

36 *Committee Hansard*, 16 May 2002, p. 28.

37 *Senate Hansard*, 5 April 2001, p. 23915.

38 *Committee Hansard*, 16 May 2002, p. 8.

39 Mr Ron McLeod, *Committee Hansard*, 16 May 2002, p. 28.

2.57 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.

2.58 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.

2.59 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.

2.60 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.