Chapter 3

The Purpose and Scope of the Bill

3.1 Senator Murray's Bill, introduced into the Senate on 27 June 2001, proposes to establish a mechanism by which a person can report improper conduct in the knowledge that the allegation will be duly investigated, and that he or she will not suffer reprisals on account of disclosing such information.

3.2 A number of witnesses applauded the overall thrust of the Bill. The Law Society of South Australia commended the proposed legislation as a positive move towards dealing with corruption within government departments and agencies and in providing adequate protection to those who wish to raise concerns about inappropriate conduct or practices within government agencies.[1] For similar reasons, the Queensland Criminal Justice Commission endorsed the proposed legislation.[2]

3.3 Nevertheless, witnesses also expressed considerable reservations about the effectiveness of aspects of the Bill and these will be discussed in the remainder of this report. In considering these criticisms of the Bill, the Committee takes account of legislation enacted in other jurisdictions and the observations of people working in the area of public interest disclosure.

3.4 This chapter considers and assesses the adequacy of the provisions relating to:

- the purpose of the Bill and whether it is adequately stated; and
- the adequacy of the scope of the Bill, including provisions governing:
  - what constitutes a public interest disclosure,
  - who can be the subject of a disclosure, and
  - who can make a disclosure.

The purpose of the Bill

3.5 The Bill is a response to an identified need to encourage people to disclose information in the public interest. Its purpose is to provide a legislative framework to facilitate and support such disclosures.

3.6 The only explanation of the Bill's purpose is contained in the title which states that it is: 'A Bill for an Act to encourage the disclosure of conduct adverse to the public interest in the public sector, and for related purposes.' The Bill does not contain any objects which would identify in greater detail its purpose.

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1 Submission no. 16. See also Mr William Toomer, submission no. 3; Ms Lesley Jane Killen, submission no. 5; and Mr Chiu-Hing Chan, submission no. 14.

2 Submission no. 17.

3.7 Research on whistleblowing legislation suggests that, for it to be effective, it must make clear that its aim is to encourage the disclosure of wrongdoing and convince potential whistleblowers that it will provide them with adequate protection. Otherwise, it is likely that potential whistleblowers will not make a disclosure.

3.8 In evidence to the inquiry, Dr William De Maria, Centre for Public Administration, University of Queensland, pointed out the narrowness of the Bill's brief statement of purpose as quoted above. He suggested that the Bill would benefit from an aspirational supplement that 'looks to societal outcomes of the successful functioning of the Act.' He mentioned purposes such as raising the ethical standards of public administration, improving the system of accountability and achieving greater transparency. He recommended that the object of the Bill should read: 'A Bill for an Act to improve ethical standards of public administration and achieve greater transparency and accountability by encouraging the disclosure of conduct by public officials that is adverse to the public interest.'[3]

3.9 Legislation dealing with public interest disclosure in other jurisdictions offers more detailed explanation of the purpose of the legislation. The South Australian, New South Wales (NSW), Victorian and Tasmanian Acts make clear that the legislation takes a three pronged approach to promote public interest by encouraging the disclosure of information in the public interest, facilitating its investigation and protecting persons making disclosures.[4]

3.10 The United Kingdom's (UK) *Public Interest Disclosure Act 1998* makes a forthright statement of principle that a 'worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'[5] The Queensland legislation makes a similarly straightforward statement of commitment to protect whistleblowers.[6]

What constitutes a public interest disclosure

3.11 While it is clear that legislation governing whistleblowing is concerned with improper conduct, problems arise when determining the nature and degree of the wrongdoing that should be disclosed. Definitions of misconduct, mismanagement or wrongdoing itself, while generally understood, are by nature broad and open to interpretation.

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3 Submission no. 2, p. 8.

4 Section 1, *Whistleblowers Protection Act 2001* (Vic.); section 3, *Whistleblowers Protection Act 1993* (SA); section 3, *Protected Disclosures Act 1994* (NSW); and *Public Interest Disclosures 2002* Act (Tas.).

5 Part IVA, section 47B(1), *Public Interest Disclosure Act 1998* (UK).

6 Section 3, *Whistleblowers Protection Act 1994* (Qld), states that its paramount object is to promote the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector; danger to public health or safety; or danger to the environment.

3.12 One difficulty encountered in determining categories of information that should be disclosed is the need to avoid subjective value judgements or terms that are too prescriptive or, conversely, too sweeping. Another is the need for a clear distinction between a personal complaint and a public interest disclosure.

3.13 The definition of 'disclosable conduct' in clause 4 of the Bill includes:

- conduct of a person that adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of official functions by a public official or agency;
- conduct of a public official which amounts to the performance of any of his official functions dishonestly or with partiality;
- conduct of a public official, a former public official or an agency that amounts to a breach of public trust or that amounts to the misuse of information or material acquired in the course of the performance of official functions;
- a conspiracy or attempt to engage in conduct cited above; and
- conduct that could constitute:
  - a criminal offence, or
  - a disciplinary offence, or
  - reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public official who is engaged in it.

3.14 This definition embraces a wide range of activities that constitute wrongdoing —virtually any misdemeanour can be interpreted in light of dishonesty, impartiality or a breach of trust—and expressly deals with special areas of official misconduct. Some of the terms used in the definition are quite inexact. For example, the expression 'breach of trust' leaves much scope for interpretation as does the term 'honest and impartial'. While this broad brush approach ensures the widest possible inclusion of wrongdoing, the legislation goes on to convey a sense of serious wrongdoing. The definition limits the extent of wrongdoing to conduct that could constitute a criminal offence, a disciplinary offence, or reasonable grounds for dismissing or terminating the services of a public official who is engaged in it. This wording is taken from the Australian Capital Territory (ACT) legislation and is meant to convey a level of seriousness that would justify a public interest disclosure.[7]

3.15 The Victorian legislation places a similar qualification on improper conduct but requires a more rigorous application of its interpretation by replacing the word 'could' with 'would'. Thus, it stipulates that the wrongdoing would, if proved, constitute a criminal offence or reasonable grounds for terminating the services.[8]

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7 Section 4(1), *Public Interest Disclosure Act 1994, (*ACT).

8 Section 3, *Whistleblowers Protection Act 2001* (Vic.).

3.16 Furthermore, the Victorian legislation does not recognise as improper conduct the type of conduct that would, if proved, constitute a disciplinary offence. In doing so the legislation makes plain that it is concerned with serious wrongdoing.

3.17 In addition to its definition of 'disclosable conduct', clause 3 of the Bill defines public interest disclosure as a disclosure of information that the person making the disclosure believes on reasonable grounds tends to show:

> (a) that another person has engaged, is engaging, or proposes to engage in disclosable conduct;
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> (b) public wastage;[9] or
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> (c) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or
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> (d) that a public official has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public.

3.18 This definition moves outside the boundaries of official misconduct to take in a broader range of improper conduct. Again the terms used to describe the nature of disclosable conduct are general.

3.19 The Committee notes that the scope of public interest is extensive and difficult to list definitively. Defining a 'public interest disclosure' involves finding the right words to cover a wide range of relevant behaviour while remaining sufficiently precise to provide guidance for the general public and law enforcers. As the then Merit Protection Commissioner, Mr Alan Doolan, submitted:

> Care needs to be taken to ensure that provisions are drafted to minimise their use by individuals motivated by a desire to advance interests which are personal or private, albeit that those interests may have a minor element of public interest.[10]

3.20 The Commonwealth's State counterparts grappled with the same drafting difficulties. NSW, Queensland, Victoria and Tasmania use words such as 'serious' and 'substantial' to qualify conduct such as the waste of public moneys, mismanagement or risk to public health and safety.

3.21 The use of such terms as 'substantial waste' and 'substantial and specific danger' aims to set the degree of wrongdoing at a serious level and to minimise the chances of abuse, notably in the form of vexatious and frivolous reports.

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9 Section 3 defines public wastage as 'negligent, incompetent or inefficient management by a public official that results in substantial waste of public funds.'

10 Submission no. 32.

3.22 While the Bill refers to 'a substantial and specific danger to the health or safety of the public', it makes no mention of any risk to the environment. This stands in contrast with the majority of State legislation. The Queensland, South Australian Victorian and Tasmanian Acts all refer to risk to the environment.[11]

3.23 The term 'maladministration' appears in the NSW and Queensland legislation.[12] The NSW Ombudsman, Mr Bruce Barbour, noted that neither clause 3 or clause 4 refer to 'maladministration' and recommended that 'maladministration' be included as a category of 'disclosable conduct'.[13] Mr Howard Whitton, Independent Ethics Consultant, also told the Committee that he would like to see 'maladministration' built into the definition of 'disclosable conduct'.[14]

3.24 Including 'maladministration' as a category of 'disclosable conduct' would mean that the term 'maladministration' is further qualified by subclause 4(1), which stipulates that the conduct, if proven, would constitute a criminal offence, a disciplinary offence or reasonable grounds for dismissing or dispensing with the services of the public official who engaged in it.

Who can be the subject of a disclosure

3.25 Those persons whose behaviour can be disclosed under the Bill is determined by the definitions of disclosable conduct and public interest disclosure. These definitions are centrally concerned with the conduct of public officials. They also make reference to the conduct of persons in general that adversely affects the conduct of a public official, and to persons engaging in unlawful reprisal.

3.26 Evidence to the inquiry suggested that it must be unambiguous as to whose behaviour may and may not be disclosed under the Bill. For example, the Community and Public Sector Union (CPSU) told the Committee: 'it should be as clear as day who is covered.'[15]

Public official

3.27 The Bill defines 'public official' to mean an employee of an agency, a person employed by or on behalf of the Commonwealth or in the service of a Commonwealth authority, or a person otherwise authorised to perform functions on behalf of the Commonwealth or a Commonwealth authority.

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11 See section 18, *Whistleblowers Protection Act 1994* (Qld); section 4, *Whistleblowers Protection Act 1993* (SA); section 3, *Whistleblowers Protection Act 2001* (Vic.); and section 3, *Public Interest Disclosures Act* 2002 (Tas.).

12 Section 16, *Whistleblowers Protection Act 1994* (Qld) and section 11, *Protected Disclosures Act 1994* (NSW).

13 Submission no. 22.

14 *Committee Hansard*, 16 May 2002, p. 29.

15 Mr Steve Ramsey, *Committee Hansard*, 16 May 2002, p. 28.

3.28 According to the Commonwealth Ombudsman, the definition would include most kinds of government contractors, though not the employees of such contractors.[16]

3.29 Although it does not provide a definition of 'Commonwealth authority', the Bill appears to remedy the loophole in section 16 of the Public Service Act that excludes a number of Commonwealth authorities such as the Australian Government Solicitor (AGS), the Australian Maritime Safety Authority (AMSA) and the Civil Aviation Safety Authority (CASA).

3.30 Some witnesses were unsure of the exact meaning of the term 'public official'. For example, the Department of Transport and Regional Services (DTRS) questioned this term, indicating that it took the definition to include Administrators. DTRS noted that, if this were the case, other arrangements in the Bill would be inappropriate given that Administrators hold commissions from the Governor-General and are not appointed in the context of the Public Service Act.[17]

3.31 The CPSU believed that the definition of 'public official' was too narrow and should be broadened to include statutory office holders, who often have responsibilities relating to expenditure of public monies and the conduct of Commonwealth business.[18]

3.32 Witnesses supported the coverage of persons who are under a contract to provide services. Although unsure as to the best means by which to ensure that contracted service providers are accountable, the Public Service Commissioner, Mr Andrew Podger recognised the importance of this issue, stating: 'we have got many more companies providing services through outsourcing arrangements and so on. The issue is a concern to ensure that we can be confident of the expenditure of public moneys.'[19] The CPSU maintained that organisations contracted by government to provide services 'should fall fairly and squarely on the side of the line that is within the legislation.'[20]

Government Business Enterprises and Commonwealth companies

3.33 The definition of government agency in clause 3 is such that the employees of Government Business Enterprises (GBEs) and Commonwealth companies would not be considered 'public officials' covered by the Bill.

3.34 GBEs and Commonwealth companies can be wholly or partly owned by the Commonwealth. Boundaries between the public and private sector are further blurred because GBEs and Commonwealth companies are free to establish partly owned

16 Submission no. 24.

17 Submission no. 15.

18 Submission no. 20, p. 5.

19 *Committee Hansard*. 16 May 2002, p. 26.

20 Mr Steve Ramsey, *Committee Hansard*, 16 May 2002, p. 27.

subsidiaries, purchase a controlling interest in other companies or enter joint venture arrangements.[21]

3.35 Despite these complexities, GBEs and Commonwealth companies have been effectively defined in a number of contexts. A 1995 report of the Administrative Review Council (ARC) held that GBEs are distinguishable from privately-owned business enterprises by government control. It defined a controlling interest as the ability to: control the composition of the board of directors of the body corporate or company; cast more than one-half of the maximum number of votes that might be cast at a general meeting; or control more than one-half of the issued share capital of the body.[22]

3.36 Section 3 of the Tasmanian Act covers GBEs and State-owned companies, the latter defined as companies that are controlled by the Crown, a GBE, a statutory authority, or another company so controlled. Section 3 of the Victorian Act covers government companies defined as 'a company all the shares or a majority of the shares in which are held by the State or another public body.'

3.37 Commonwealth legislation governing the jurisdiction of the Auditor-General and the Ombudsman also addresses this issue. Section 3 of the *Ombudsman Act 1976* enables the Ombudsman to investigate Commonwealth controlled companies. Section 3(1) of the Ombudsman Act gives the same meaning to a Commonwealth-controlled company as the ARC.

3.38 The Auditor-General is able to conduct audit statements on both GBEs and Commonwealth companies and performance audits on Commonwealth companies. Mr Ian McPhee, Deputy-Auditor-General, told the Committee that, while the Auditor-General cannot conduct performance audits of GBEs, 'the JCPAA, the responsible minister or the finance minister may request the Auditor-General to do an audit of a GBE. Further, the Auditor-General can suggest to those parties that a performance audit be done'.[23] Section 5 of the *Auditor-General Act 1997* defines GBEs and Commonwealth Companies as having the same meaning as they do under the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

3.39 Section 5 of the CAC Act defines a GBE as 'a Commonwealth authority or Commonwealth company that is prescribed by the regulations for the purpose of this definition.' Section 34 defines a Commonwealth company as 'a company in which the Commonwealth has a controlling interest. However, it does not include a company in

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21 See http://www.finance.gov.au/budgetgroup/Other_Guidance_Notes/government_business… (22 November 2001).

22 Administrative Review Council (ARC), *Government Business Enterprises and Commonwealth Administrative Law,* Report to the Minister for Justice, Report No. 38, Commonwealth of Australia, 1995, p. 9. In its response to the *In the Public Interest* the Government stated that it would consider the inclusion of GBEs in a whistleblowing scheme once it had responded to the ARC report. However, the Government never responded to that report.

23 *Committee Hansard*, 16 May 2002, p. 3. See section 17 *Auditor-General Act 1997*.

which the Commonwealth has a controlling interest through one or more interposed Commonwealth authorities or Commonwealth companies.'

Public funded institutions and institutions with public interest concerns

3.40 The Bill in its current form does not appear to provide coverage for publicly funded institutions and institutions with strong public interest concerns.

3.41 The Western Australian Commission on Government recommended a broad definition of the public sector. It proposed the inclusion of bodies such as the Governor and the Executive Council, the Parliament and all its committees, ministers and their immediate offices as well as quasi-autonomous non-government organisations receiving money from the Consolidated Fund.[24]

3.42 The Senate Select Committee on Public Interest Whistleblowing (SSCPIW) recommended that Commonwealth public interest disclosure legislation extend to academic institutions, and the health care and banking industries.[25] The Government rejected this recommendation, maintaining that the extension of whistleblower protection to academic institutions and the health care industry was a matter for the relevant institutions to consider.

3.43 Dr De Maria supported extending the scope of the Bill to include private corporations that accept public money for a public purpose. He recommended that 'the definition of "agency" and "employee" be extended to include the private sector or to include organisations, which receive more than 10% of their annual income from government sources to carry out public purposes'.[26] He identified three particular types of private corporations, those, such as Catholic hospitals, that receive government money to carry on public services; those offering government services through outsourcing partnerships; and corporatised government entities.

3.44 Section 3 of the Victorian legislation takes a broad approach on this matter and uses the term 'public body' and not agency. The definition of public body not only includes government companies as noted above, but also includes 'a body, whether corporate or unincorporate that is supported directly or indirectly by government funds or other assistance; or over which the State is in a position to exercise control'. A public body also includes a university, a public hospital and a State funded residential care service.

The private sector

3.45 Some participants in the inquiry wanted the proposed legislation to be extended to include the private sector. Whistleblowers Australia considered the lack of coverage of the private sector to be a major weakness of the Bill. It stated further that,

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24 Western Australia, Commission on Government, *Report no. 2*, Chapters 3 and 5.

25 Senate Select Committee on Public Interest Whistleblowing (SSCPIW), *In the Public Interest*, pp. xvi-xvii.

26 Submission no. 2, pp. 9 and 13 and *Committee Hansard*, 16 May 2002, p. 26.

because so many previously public functions are now contracted out, the division between private and public is increasingly blurred, and thus 'it would be seriously contradictory, confusing, and incongruous to exclude the private sector'.[27]

3.46 In 1995, the then Government rejected the recommendation of the Senate Select Committee on Public Interest Whistleblowing that legislation should have the widest coverage constitutionally possible in both the public and private sector. The Government stated:

> There are considerable practical differences between the public and private sectors, while accountability concerns would be better addressed through means other than reliance upon the useful, but random disclosures of whistleblowers.
>
> In addition, the Government would face constitutional problems if it attempted to extend whistleblower legislation into the private sector.[28]

Parliamentarians

3.47 Some witnesses suggested that parliamentarians be included as a category that can be the subject of a public interest disclosure.[29] The South Australian, Victorian and Tasmanian acts allow protected disclosures on alleged parliamentary wrongdoing.[30] Dr De Maria stated that the community would not find the Bill credible unless such a measure were included.[31]

Who can make a public interest disclosure

3.48 Clause 12 of the Bill follows Queensland, the ACT and Victoria's lead and makes it clear that 'any person' may make a public interest disclosure to a proper authority. A number of witnesses endorsed this provision.[32]

3.49 This is in contrast with legislation in NSW, section 8 of which states that a disclosure must be made by a public official, and section 6 of the Tasmanian Act, which states that a public officer or government contractor may make a disclosure. In Queensland certain types of public interest disclosures may be disclosed by a 'public officer', while anybody may disclose information regarding substantial and specific danger to the health or safety of a person with a disability.

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27 Submission no. 7 and Mr David Berthelsen, *Committee Hansard*, 16 May 2002, p. 27.

28 Government response to SSCPIW, *In the Public Interest*.

29 Dr William De Maria, submission no. 2, p. 26; and CPSU, submission no. 20, p. 5.

30 Section 4, *Whistleblowers Protection Act 1993 (SA)*; section 3, *Whistleblowers Protection Act 2001* (Vic.); and section 3, *Public Interest Disclosures Act* 2002 (Tas.).

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

32 See Mr Gerard Crewdson and Mr Pascale Bourot, submission no. 6, p. 1; Commonwealth Ombudsman, submission no. 24, p. 2; and Mr Alan Doolan, submission no. 32, p. 4.

3.50 The Department of Foreign Affairs and Trade observed that allowing members of the public to make disclosures may cause practical and legal difficulties. In particular, it thought there was a lack of clarity as to what extent agencies would be able to provide protection to members of the public rather than employees of an agency. The matter of protection from unlawful reprisals is discussed further in Chapter Six.[33]

3.51 The definition of public interest disclosure in clause 3 also requires all disclosure makers to believe on 'reasonable grounds' that conduct defined as public interest disclosure has or will take place. The term 'reasonable' introduces an element of subjective judgement.

3.52 Ms Sue Streets, Lecturer in Law, Deakin University, submitted that there is no guidance as to what 'reasonable grounds' means and 'there would certainly be room for disagreement as to what would and would not constitute such grounds in any given case'. She argued that this requirement may cause a potential whistleblower to refrain from disclosing information concerning improper conduct 'because he or she is unsure if this statutory requirement has been met and thus whether or not they are protected.' In her opinion it should be sufficient that a person has a 'genuine' belief that there has been or will be disclosable conduct.[34]

3.53 However, research on whistleblowing generally recognises that the term 'reasonable belief' is an appropriate expression to be used in whistleblowing legislation.[35]

Retrospectivity

3.54 Mr Clive Hamilton, a private citizen, submitted to the Committee that the Bill lacked retrospectivity and would provide no avenue of remedy and/or protection for those who made a disclosure and/or suffered a reprisal prior to the Bill becoming legislation. Mr Keith Potter, a private citizen, also submitted that '[p]rospective whistleblowers are more likely to respect a protection Bill that provides unlimited retrospectivity.'[36]

3.55 Amongst others, the Senate Scrutiny of Bills Committee generally recognises that the circumstances in which it is appropriate to pass retrospective legislation are very limited.[37] Prior to the enactment of legislation, the framework by which to determine whether disclosures are legitimate or not is not existent. Further, the

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33 Submission no. 18, p. 2.

34 Ms Sue Streets, submission no. 33, p. 1.

35 See J. G. Starke, 'The protection of Public Service Whistleblowers—Part II', *Australian Law Journal,* vol. 65, no. 5, May 1991, p. 261.

36 Submission no. 9, p. 4.

37 See www.aph.gov.au/senate/committee/scrutiny/work38/CHAPTER2.HTM (10 July 2002) for a list of the circumstances in which the Senate Scrutiny of Bills Committee considers retrospective legislation appropriate.

proposed Bill outlines criminal offences, and the International Covenant on Civil and Political Rights states that criminal offences should not be made retrospective.[38]

Committee view

Purpose of the Bill

3.56 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.

3.57 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.

3.58 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

3.59 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.

3.60 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'.

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

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38 http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (10 July 2002).

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

3.62 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

3.63 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.

3.64 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.

3.65 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*.

3.66 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.

3.67 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.

3.68 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

3.69 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.

3.70 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

3.71 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.