Chapter 4

Who Can Receive and Investigate a Disclosure

4.1 In large part, the success of this legislation will depend on the public perception of the designated proper authorities and their ability and competency to receive and inquire into a public interest disclosure and to protect the person making the disclosure from reprisal. If there is a breakdown at this point in a public interest disclosure scheme, the scheme will lose credibility and the legislation may not be used.

4.2 This chapter examines the offices that clause 9 of the Bill designates as proper authorities to receive and investigate public interest disclosures. In doing so it considers:

- agency heads as proper authorities;
- the Public Service and the Merit Protection Commissioner as proper authorities;
- whether the Ombudsman should be included as a proper authority; and
- whether the Bill should provide for disclosure to the media.

4.3 The Bill identifies the agency head, the Public Service Commissioner and the Public Service Merit Protection Commissioner as proper authorities to receive a public interest disclosure concerning a government agency's conduct or the conduct of a public official in relation to the agency. The Bill also covers parliamentary agencies. In this case the proper authority to receive public interest disclosure would be the Secretary of the parliamentary agency; the Parliamentary Service Commissioner or the Parliamentary Service Merit Protection Commissioner.

4.4 Considerable doubt was expressed to the Committee as to the adequacy of the designated proper authorities. Mr Keith Potter, a private citizen, argued that the proposed Bill in its present form cannot reasonably be expected to achieve the objective of effective protection for public interest whistleblowers because it wrongly presumes the integrity of designated 'proper authorities'.[1]

Agency heads

4.5 A number of witnesses drew attention to the term 'agency' which is defined in the Bill as a government agency or parliamentary agency.[2] Clause 3 of the Bill further defines a government agency as:

- a Department of State, excluding an Executive Agency or a Statutory agency;

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1 Submission no. 9, p. 1.

2 See William Toomer, submission no. 3, p. 2.

- an Executive Agency (within the meaning of the *Public Service Act 1999*); or
- a Statutory Agency (within the meaning of the *Public Service Act 1999*).

4.6 This definition of agency confines the meaning of statutory and executive agency to that within the Public Service Act, despite the Bill's intention to encompass a broader spectrum of the Commonwealth sector than that covered by the Public Service Act. A range of Commonwealth entities fall outside this definition of agency and the heads of such bodies are not considered proper authorities to receive or investigate a public interest disclosure.

4.7 Having designated the head of an agency as a proper authority to receive and act upon a public interest disclosure, the question arises as to whether it is appropriate for such bodies to receive and investigate reports of wrongdoing within their own ranks.

4.8 A number of witnesses endorsed the Bill's facilitation of the reporting and investigation of disclosures within an agency. As the Ombudsman, Mr Ron McLeod, told the Committee, 'I do not think the legislation would be well placed if it were designed to discourage whistleblowers from in some cases taking the matter up directly with the agency itself.' He noted that in his experience of receiving and investigating complaints '[t]he agency, in by far the majority of cases, is able to reach a satisfactory accommodation with the complainant'.[3]

4.9 Nevertheless, some witnesses mentioned the possibility of agencies failing to act properly under the legislation.[4] Whistleblowers Australia stated bluntly that, based on its experience of many hundreds of cases, the chances that a government department that is the subject of a complaint would do the right thing by the whistleblower is 'almost nil'.[5] Whistleblowers Australia maintained that the position of agency head is prejudiced because of his or her vested interest in the outcome of the investigation.[6]

4.10 Indeed, research suggests that the motive to expose unethical conduct may stem not only from evidence of the actual wrongdoing but also from indications of management indifference or denial of such misconduct. Public interest disclosure then involves not only misconduct but also reveals the failings of the organisation to deal appropriately with the problem or even widespread collusion. In such cases, making an internal report may be pointless or even counterproductive.[7]

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3 *Committee Hansard*, 16 May 2002, p. 13.

4 See Mr Barry Grice, submission no. 1, p. 3; Mr William Toomer, submission no. 3, p. 1; and Mr Gerard Crewdson and Mr Pascale Bourot, submission no. 6, p. 2.

5 Submission no. 7, p. 1.

6 Mr Peter Bennett, *Committee Hansard*, 16 May 2002, p. 12.

7 See Irena Blonder, 'Whistleblowing' in *Res Publica,* University of Melbourne, vol. 9, no. 1, 2000 and Criminal Justice Commission, 'Protecting Public Sector Whistleblowers—A Statutory Responsibility', *Issues Paper Series,* vol. 2, no. 1, December 1995, p. 2.

The need for an independent authority

4.11 A number of witnesses, while strongly endorsing the internal reporting procedures, told the Committee that the safeguard of an external, independent authority to receive and investigate disclosures was needed. The Commonwealth Ombudsman told the Committee that 'if for any reason they [whistleblowers] feel lacking in confidence that the matter will be investigated thoroughly and objectively, they should have the opportunity to lodge it with an external investigator.'[8]

4.12 The Community and Public Sector Union (CPSU) told the Committee that 'if you have someone external to the organisation independently viewing and investigating the allegations, then there is that extra pressure brought to bear on the agency itself that may well resolve the issue'.[9] Similarly, the Public Service Commissioner, Mr Andrew Podger, stated '[t]he very existence of a capacity for an external review does discipline the mind of an agency head in applying it.'[10]

4.13 The view that a disinterested and impartial body to receive and investigate public interest disclosures is needed for a whistleblowing scheme to be effective arose repeatedly during the inquiry. Mr Gerald Crewdson and Mr Pascale Bourot warned that one of the chief dangers of the Bill was that:

> … it does not seem to allow a person to go beyond the designated proper authorities to any higher or external authority if the proper authority fails to deal properly with disclosure. There appears to be a single process of dealing with the disclosure with no review or appeal mechanism available.[11]

4.14 Some witnesses argued that an independent agency should be established to provide an independent avenue for reporting disclosures. Mr Barry Grice, a private citizen, stated that:

> … there is a need for a new independent body, with an investigative focus, staffed not by legal practitioners, but directed by personnel specialists, who have the right experience, with those powers necessary for dealing with the tasks at hand, with in-house legal expertise, adequate human and other resources, answering only to the Prime Minister.[12]

4.15 Dr William De Maria, Centre for Public Administration, University of Queensland, also argued that the most appropriate way to operate a disclosure program is to have an independent authority. He referred to evidence that, he believed, showed that internal procedures 'are geared more to cover-up at worst and damage control at best'. He maintained that hierarchical inertia was the most common form of

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8 Mr Ron McLeod, *Committee Hansard*, 16 May 2002, p. 13.

9 Ms Mary-Ann Cooper, *Committee Hansard*, 16 May 2002, p. 12.

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

11 Submission no. 6, p. 2.

12 Submission no. 1, p. 3.

obstruction.[13] He further argued that the establishment of an independent public interest disclosure agency would achieve consistency in whistleblowing procedures between agencies.[14]

4.16 Mr Potter submitted that 'the only effective solution is for public interest disclosures to be lodged with an independent outside body empowered to investigate and report directly to Parliament'. He went further than most commentators in suggesting that the members should be selected by an independent outside body comprising 'non-legalistic representatives of a wide spectrum of the community. Preferably, the selectors and selectees would have no prior or foreseeable future connection with any Parliamentary person or party, or with any Commonwealth or State agency'.[15]

4.17 Not all advocates of an independent reporting avenue believed that the establishment of a new agency was required. The CPSU stated that 'an independent body, able to report directly to Parliament, is an essential mechanism to ensure the efficacy and credibility of any legal framework established to protect whistleblowers and the public interest.' It maintained that the legislation should not be enacted until there was adequate provision for the creation of, or referral to, an independent agency such as the Commonwealth Ombudsman, which would report directly to Parliament.[16]

4.18 Similarly, Mr Howard Whitton, Independent Ethics Consultant, saw advantages in including the Ombudsman, the Auditor-General, the Inspector-General of Intelligence and Security (IGIS) and even 'a relevant Parliamentary Committee' among the list of proper authorities.

4.19 Support for an independent avenue for reporting and investigation has also arisen in other work and debates on the issue of whistleblowing. The Committee notes that the Australian Institute of Criminology acknowledged that internal reporting might be inappropriate in more serious cases of fraud.[17]

4.20 The Fitzgerald Report,[18] the Democrat amendments to the Public Service Bill 1997[19] and the report of the Senate Select Committee on Public Interest

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13 See also, Criminal Justice Commission, 'Protecting Public Sector Whistleblowers—A Statutory Responsibility', *Issues Paper Series,* no. 1, December 1995.

14 Submission no. 2.

15 Submission no. 9, p. 4.

16 Submission no. 20, p. 3.

17 Peter N. Grabosky, Australian Institute of Criminology, 'Controlling Fraud, Waste and Abuse in the Public Sector', http://www.aic.gov.au/publications/fraud/detection.html p. 2 of 4 (18 August 2001).

18 G. E. Fitzgerald, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry Pursuant to Orders in Council,* July 1989.

19 Australian Democrats, Dissenting Report, 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*, October 1997.

Whistleblowing (SSCPIW) all recommended the establishment of an independent body to deal with disclosures.

4.21 Other work done by the Gibbs Committee and the House of Representatives Standing Committee on Banking, Finance and Public Administration advocated the establishment of independent avenues through the Ombudsman and the IGIS.[20]

4.22 Given such support for an external and independent authority that could receive and investigate disclosures, the question arises whether the Public Service Commissioner and the Merit Protection Commissioner are able to fulfil this role.

The Public Service Commissioner and the Merit Protection Commissioner

4.23 In addition to agency heads, the Bill designates the Public Service Commissioner and the Merit Protection Commissioner as proper authorities able to receive a public interest disclosure. For a number of witnesses, this provision was a major weakness because the Public Service Commissioner and the Public Service Merit Protection Commissioner were perceived to be too closely linked with the administration.

4.24 The CPSU submitted that the proper authorities are all part of the Public Service and that, consequently, their capacity to investigate complaints impartially and independently could be open to question. The CPSU maintained that this would undermine the credibility of the framework.[21]

4.25 The Committee notes that the Public Service Commissioner or the Merit Protection Commissioner do not have the appropriate authority to handle a public interest disclosure from an officer of, or concerning, a Commonwealth authority, such as CASA, Australian Maritime Safety Authority (AMSA) or Australian Prudential Regulation Authority (APRA), that are not covered by the Public Service Act.

4.26 As the Public Service Commissioner told the Committee, 'I feel very uncomfortable about being the external authority in a much wider scheme … my role ought to be restricted to the Australian Public Service.'[22] This view was echoed by the Acting Merit Protection Commissioner, Mr Boris Budak.[23]

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20 Review of Commonwealth Criminal Law, *Final Report*, December 1991, pp. 353–4 and House of Representatives Standing Committee on Banking, Finance and Public Administration, *Focusing on Fraud*, 1993, pp. 10–11.

21 Submission no. 20, p. 3. See also Senate Select Committee on Unresolved Whistleblower Cases, Mr Greg McMahon, *Committee Hansard*, 16 March 1995, p. 452.

22 Mr Andrew Podger, *Committee Hansard*, 16 May 2002, p. 14.

23 *Committee Hansard*, 16 May 2002, pp. 7 and 28.

The Ombudsman

4.27 As early as 1991, recognition was being given to the role of the Ombudsman in dealing with whistleblowing. The Senate Standing Committee on Finance and Public Administration inquiring into the Office of the Ombudsman concluded:

> … the Ombudsman should be responsible at least for filtering such complaints and directing them if appropriate to some other agency. The Committee also considers it inevitable that in some such cases the Ombudsman will be the appropriate agency to conduct a full investigation.[24]

4.28 As noted above, the Gibbs Committee and the House of Representatives Standing Committee on Banking, Finance and Public Administration recommended that the Ombudsman and the IGIS be designated proper authorities to receive disclosures.

4.29 In 1995, while rejecting the SSCPIW recommendation to establish an independent agency, the then Government expressed its conviction as to the value of including the Commonwealth Ombudsman and the IGIS as proper authorities to receive and investigate a public interest disclosure:

> The Government believes that existing agencies—that is, the Ombudsman, IGIS and the MPRA—are the appropriate independent organisations upon which the Government's proposed whistleblowing scheme should be based.
> …
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> The Ombudsman will be the principal external review body, and will also be responsible for reporting on the operation of the proposed scheme.[25]

4.30 Division 2 of the Australian Capital Territory (ACT) public interest disclosure legislation, upon which this Bill is based, includes the Ombudsman and the Auditor-General, as proper authorities. The view that an Ombudsman has an important place in a whistleblowing scheme is recognised in a number of other state statutes including in Victoria, South Australia, Tasmania and New South Wales (NSW).[26]

4.31 While concerns have been raised that the proposed Bill does not provide arrangements in the areas of intelligence and security,[27] of greater concern is the

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24 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman,* December 1991, p. 69. See also, Paul Finn, 'Whistleblowing', *Canberra Bulletin of Public Administration,* no. 66, October 1991, pp. 169–170.

25 Government Response to the Senate Select Committee on Public Interest Whistleblowing (SSCPIW), *In the Public Interest*, 1995. The Government also explained that its proposed whistleblowing scheme would be overseen by the Ombudsman who would be able to make special reports to the Prime Minister and Parliament on whistleblowing matters where appropriate.

26 Section 6, *Whistleblowers Protection Act 2001* (Vic.); section 13, *Public Interest Disclosures Act 1994* (ACT); section 5, *Whistleblowers Protection Act 1993* (SA); section 7, *Public Interest Disclosure Act 2002* (Tas.); and section 11, *Protected Disclosures Act 1994* (NSW).

27 Dr William De Maria, *Committee Hansard*, 16 May 2002, p. 28.

omission of the Ombudsman from the Bill. Witnesses argued forcefully for the Ombudsman to be designated a proper authority. The NSW Ombudsman remarked simply that it was not apparent why the Commonwealth Ombudsman and the Commonwealth Auditor-General had not been included in the list of proper authorities.[28] Dr De Maria, the CPSU and the Merit Protection Commissioner all told the Committee that the Ombudsman should be included in the Bill.[29]

4.32 The Public Service Commissioner told the Committee:

> I think there is strong case, if there is something wider, for the Ombudsman to play more of a role rather than adding too much more to my responsibilities ... Public concerns out there about administration of programs and so on are, for the most part, better handled by the Ombudsman.[30]

4.33 The Commonwealth Ombudsman stated that, to ensure that allegations were investigated properly and impartially, the Ombudsman, the Auditor-General and the IGIS should be made proper authorities to receive and investigate allegations. He argued strongly that his own office should be considered for a central role in any public interest disclosure scheme.[31] He further pointed out that, under current arrangements, his office was prepared to investigate a public interest disclosure as a matter of maladministration, but that there were limitations to this approach, such as the inability to protect the whistleblower, a lack of determinative powers and the inability to deal with employment related matters.[32]

4.34 In contrast to the Ombudsman, the Auditor-General was not in favour of becoming a designated proper authority. The Deputy Auditor-General, Mr Ian McPhee, pointed out that to make the Auditor-General a proper authority would be a significant change to his existing mandate. He told the Committee:

> In terms of the office's perspective on this matter, we are really not in favour of becoming a proper authority, but we would see merit in proper authorities being able to request the Auditor-General to do work in particular areas where there may be signs of systemic or significant issues arising.[33]

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28 Mr Bruce Barbour, submission no. 22, p. 2.

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

30 Mr Andrew Podger, *Committee Hansard*, 16 May 2002, p. 14.

31 Commonwealth Ombudsman, submission no. 24, p. 2.

32 Mr Ron McLeod, *Committee Hansard*, 16 May 2002, pp. 2-3.

33 *Committee Hansard*, 16 May 2002, p. 3.

Disclosure to the media

4.35 The Bill in its present form does not provide for disclosures to the media. The question of whether disclosures to the media should be provided for by whistleblowing legislation has long been a source of debate.

4.36 Dr De Maria maintained that the true test of the bona fides of lawmakers, with respect to disclosure laws, can be easily gauged by their willingness to protect those who report wrongdoing to the media. He strongly urged the Committee to incorporate protected disclosures to the media into the Bill under the following conditions:

- If they are made more than a month after the disclosures were communicated to PIDA [Public Interest Disclosure Agency].
- Upon a (lower) court non-appealable court declaration that a media disclosure may be in the public interest.
- If the whistleblower has reasonable ground for believing the allegations to be true.[34]

4.37 Ms Sue Streets, Lecturer in Law, Deakin University, also saw the media as having a role in ensuring that an investigation into a public interest disclosure was not deferred or sidestepped. She stated:

> Disclosure of the information to an MP or the media where a reported matter has not been investigated, an investigation has not been completed within a specified suitable time frame, or where there has been a recommendation that no action/inappropriate action be taken despite a substantiated complaint should be subject to the same protection as that afforded to the initial disclosure to the authority.[35]

4.38 The Professional Standards Council argued that disclosures to the media should not warrant protection unless all recognised channels had failed. It noted that not only do the interests of whistleblowers need to be protected, but so do those of third parties and the agency. For the Council, the challenge was to 'establish sufficient avenues for disclosure or complaint so as not to justify disclosure elsewhere.'[36]

4.39 The NSW legislation provides for a public interest disclosure to a journalist under certain conditions, including that the disclosure had already been made to an investigating authority which had not completed the investigation or had recommended that no action be taken.

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34 Submission no. 4. See also William De Maria, *Deadly Disclosures*: *Whistleblowing and the ethical meltdown of Australia,* Wakefield Press, South Australia, 1999, pp. 224–5.

35 Submission no. 33, p. 3.

36 Professional Standards Council, *Report—Whistleblowers in the Professions—Disclosure to whom? Protection to whom?* http://www.lawlink.nsw.gov.au/psc.nsf/pages/rep_whistle_whom (14 August 2001).

4.40 Clearly those suggesting that disclosure to the media be protected under the Bill saw this measure as insurance that a genuine public interest disclosure could not be passed over. They recognised that the media can be called on as a last resort to rescue a report of wrongdoing from bureaucratic incompetence or neglect.

4.41 The Committee, however, was alerted to the problems that can arise from reporting wrongdoing to the media, in particular, the scope for distortions in reporting and the unnecessary or unwarranted exposure of those involved in the alleged wrongdoing. For example, the Department of Defence argued that the disclosure of information to the media or to any other person who may be involved in any subsequent investigation may impair an inquiry into the allegation. It maintained:

> This could also lead to the reputations of innocent people being seriously damaged. Indeed, experience suggests that, in some instances, public disclosure has the potential to jeopardise ongoing investigations to such an extent that they cannot be continued or may not be concluded with a successful prosecution.[37]

4.42 Likewise, Mr Howard Whitton told the Committee:

> … whistleblowers are not always right, even if they are bona fide, and innocent reputations can suffer. There is no effective way of withdrawing or correcting a story, once it has been published in the media.[38]

4.43 The Commonwealth Ombudsman noted that whistleblowers who go to the media generally do so because of frustration and a lack of confidence in public interest disclosure arrangements. He observed that disclosure to the media is not necessarily conducive to the most effective investigation of a disclosure:

> There is no question, in my view, that once a whistleblower allegation becomes a matter of media interest it can have the impact of antagonising and polarising the parties, and I think sometimes it can act against our being able to conduct an objective investigation process, simply because of the way in which parties react to media exposure.[39]

4.44 The 1991 Queensland Electoral and Administrative Review Commission (EARC) report took the view that investigation by the media 'is rarely an adequate substitute for investigation by expert investigative authorities, and the media's role on those occasions when allegations of illegal or improper conduct are made public is usually confined to calling for, and monitoring, investigation and follow-up action by the appropriate authorities'.[40]

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37 Submission no. 10, p. 3.

38 *Committee Hansard,* 16 May 2002, p. 21.

39 Mr Ron McLeod, *Committee Hansard*, 16 May 2002, p. 22.

40 The Electoral and Administrative Review Commission (EARC), *Report on Protection of Whistleblowers,* October 1991, p. 140.

4.45 While it recommended that, in cases of serious, specific and imminent risk to the health or safety of the public, disclosures should be able to be made to anyone,[41] including the media, the Western Australian Commission on Government concluded:

> … in our view, it should be the intent of a whistleblowing scheme to encourage the proper investigation and rectification of wrongdoing, in the public interest. We do not consider that disclosing information to the media will, in most instances, achieve this goal. We do propose however, that the current common law rights which a person has to go to the media and to defend any defamation action on the grounds of disclosure in the public interest should be retained.[42]

Committee view

4.46 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.

4.47 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.

4.48 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.

4.49 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.

4.50 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

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41 Western Australia, Commission on Government, *Report no. 2,* December 1995, chapter 5, para 5.3.2.5.

42 Western Australia, Commission on Government, *Report no. 2,* December 1995, chapter 5, para 5.3.2.4.

Commissioner and the Merit Protection Commissioner in their roles as independent adjudicators.

4.51 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.

4.52 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.

4.53 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.

4.54 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.