Chapter 5

Procedures for Investigating a Public Interest Disclosure

5.1 The procedures in place to investigate a public interest disclosure must be seen to be effective and fair to all. It is important that the legislation provide simple, clear and workable procedures that will facilitate a prompt and thorough inquiry into allegations made in a public interest disclosure.

5.2 This chapter examines the adequacy of the Bill's provisions that deal with the procedures for investigating a public interest disclosure, including:

- the procedures for making and receiving a public interest disclosure;
- the powers to investigate a disclosure;
- the decision not to refer the disclosure;
- reporting obligations;
- anonymous disclosures;
- vexatious or frivolous disclosures;
- indemnity provisions for whistleblowers; and
- duty of confidence.

Procedures

5.3 Clause 10 of the Bill stipulates that an agency must establish procedures to facilitate the making of public interest disclosures and to deal with such disclosures as soon as practicable, and in any event, within 12 months after the commencement of this clause or the agency comes into existence, whichever is later.

5.4 These procedures must deal with:

(a) making public interest disclosures;

(b) assisting and providing information to a person who makes a public interest disclosure;

(c) protecting a person who makes a public interest disclosure from unlawful reprisals;

(d) acting on public interest disclosures.

5.5 A number of witnesses noted that there needs to be an instrument to set out the proper investigation procedures.[1] The Community and Public Sector Union

1 Leslie Jane Killen, submission no. 5 and CPSU, submission no. 20.

(CPSU) argued that, though the Bill proposes that the authority shall investigate a disclosure, there is no guidance or authority in the Bill as to how that investigation is to be conducted and no detail on the powers of the investigating authority.

5.6 The detail of the procedures for conducting an investigation differ little from that contained in the current Public Service Regulations.[2] Nevertheless, the Bill contains a number of provisions that promote accountability and transparency in the conduct of an investigation. Clause 10(4) requires the agency to produce a document setting out the procedures established under this legislation and make a copy available to its public officials and to the public for inspection. It must supply a copy to a person who pays for such a copy.

5.7 The Bill's reporting obligations, in particular the requirement to provide a progress report on an investigation, and its provisions dealing with confidentiality, are added safeguards that protect the integrity of an investigation. These provisions are discussed later in the chapter.

5.8 As noted previously, there are a number of interpretative difficulties in this Bill, particularly with the definition of a public interest disclosure and disclosable conduct and the use of terms such as 'reasonable'. While there can be some clarification of these definitions, a considerable amount of latitude in the interpretation of their meaning will always remain. A person considering making a public interest disclosure should be entitled to seek advice on these matters.

5.9 Clause 10(3) requires an agency to establish procedures dealing with assisting and providing information to a person who makes a public interest disclosure. It does not make reference to those who are considering making a public interest disclosure.

5.10 Research on whistleblowing has emphasised the need to ensure that whistleblowers or would be whistleblowers receive adequate advice. The Commission on Government emphasised that whistleblowers need expert counselling and assistance and saw merit in providing an avenue for a potential whistleblower to discuss their concerns prior to making a public interest disclosure.[3] According to J. Starke QC[4] and the Committee on the Office of the Ombudsman and the Police Integrity Commission[5] there should be a unit which intending whistleblowers could approach for advice.

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2 Regulation 2.4 requires the agency head to establish procedures and state that the procedures must have due regard to procedural fairness and comply with the *Privacy Act 1988.*

3 Western Australia, Commission on Government, *Report no. 2,* December 1995 chapter 5, para 5.3.4.4.

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

5 The Committee recommended the unit have the functions of monitoring the investigation of disclosures by public authorities and providing advice to public officials wishing to make disclosures; be located in the Office of the Ombudsman; and not have an investigatory function and or act as an advocate for the person contemplating making a report. Committee on the

Powers to investigate

5.11 In looking at the actual investigation, Mr Gerard Crewdson and Mr Pascale Bourot, private citizens, noted that the Bill does not define the term 'investigate' and recommended that a definition be included. They argued that:

> Agencies can subvert and thwart the making of disclosures by instituting in response a broad review process focused on generalities and procedures instead of investigating the particulars of the disclosure. Or they might ignore information contained in the disclosure about past conduct of an officer or officers and instead investigate their current conduct after they have been forewarned of the allegations made against them.[6]

5.12 The Bill is silent on the powers of the investigating authority. It does not explicitly refer to the extent of the powers conferred on Agency heads, the Public Service Commissioner or the Merit Protection Commissioner to conduct an investigation on a public interest disclosure. Under section 16 of the Public Service Act, the Commissioner has extensive powers to investigate a report of a breach of the code of conduct. Presumably these powers would also apply to the proposed Bill. It is unclear from the proposed legislation the extent of the investigatory powers of an agency head or of the Merit Protection Commissioner.

5.13 Mr Alan Doolan, then Merit Protection Commissioner, informed the Committee that appropriate powers should be available to those responsible for investigating whistleblower reports and that the Public Service Commissioner should have investigatory powers akin to those available to the Auditor-General.[7]

5.14 This problem would not arise in regard to the Ombudsman, the Auditor-General or the IGIS, should the Bill be amended to include them as proper authorities, as their powers of investigation are specified in their respective acts.[8]

Decisions not to refer the disclosure

5.15 The CPSU highlighted clause 18 of the Bill, which provides that a referral to another agency must not be made if, in the authority's opinion, there is a serious risk of an unlawful reprisal. The CPSU argued that this provision presents the danger that clause 18 could be used to 'stifle proper investigation of the alleged disclosable conduct'.[9]

Office of the Ombudsman and the Police Integrity Commission, *Review of the Protected Disclosure Act 1994*, September 1996. pp. 9–10, 38-39.

6 Submission no. 6, p. 1.

7 Submission no. 32, p. 6.

8 Section 9, (1) (1AA) (1A) and (2), *Ombudsman Act 1976,* Act no. 181 of 1976 as amended, compiled 24 May 2001.

9 Submission no. 20, p. 7.

5.16 While the onus is on the agency to ensure that the person making the disclosure will not suffer detriment on account of that disclosure, evidence to the inquiry noted that there appears to be a tacit acknowledgment in this clause 18 that this responsibility may be beyond the capacity of an agency. This assumption undermines the credibility of the legislation, which at its very heart is intended to protect a whistleblower from reprisal.

5.17 Clause 18 again underlines the importance of having an independent overseer of public interest disclosure legislation. Because the Australian Capital Territory (ACT) legislation in dealing with this matter allows the Ombudsman to assume responsibility in such circumstances, a legitimate public interest disclosure cannot be avoided because of the likelihood of an unlawful reprisal or because the investigation would be prejudiced. As explained by the CPSU:

> Clause 18 of the Bill is taken from the ACT legislation, but loses its force by the omission of the reference to the phrase, 'other than the Ombudsman'. The effect, as currently drafted, therefore leaves an avenue open for an agency to resist the operation of the Bill by refusing/failing to refer a matter to another agency because of a serious risk of reprisal.[10]

Reporting obligations and requirements

5.18 Clause 11 of the Bill states that an agency that is required by an Act to prepare an annual report of its activities during a year for tabling before the Parliament must include in that report details on public interest disclosures. This report must contain a description of the procedures it has maintained regarding public interest disclosures during the year and the particulars of remedial action taken by the agency in relation to public interest disclosures. These statistics are to include the number and type of public interest disclosures received by and referred to the agency, and the number of disclosures investigated by the agency. Where the agency has referred public interest disclosures to other agencies, the report is to provide information on the total number and type of disclosures referred to another agency and to identify that agency. This is to include the number of disclosures substantiated by the agency's investigation and those on which the agency declined to act.

5.19 A number of witnesses welcomed this obligation to report. Ms Lesley Jane Killen, a private citizen, asked, however, how accuracy in reporting could be ensured. She made the point that she 'disappeared' from her employers annual report by being rendered absent without leave when in reality she was on sick leave without pay.[11] She submitted that: '[t]he current practice in NSW is that employers remove disclosure making employees. They are rendered to troublesome employees and disappear from reporting mechanisms'.[12]

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10 Submission no. 21, p. 7.

11 Submission no. 5, p. 3.

12 Submission no. 5, p. 3.

5.20 The Bill also requires the investigating authority to keep the person who made the public interest disclosure informed about the progress of the report. Clause 20(1) requires that a person who makes a public interest disclosure, or a proper authority which refers a disclosure to another proper authority, may request that the proper authority to which the disclosure was made or referred to provide a progress report. Where such a request is made the proper authority shall provide a progress report to the person or authority who requested it as soon as practicable after receipt of the request. If the proper authority takes further action after providing the progress report, that authority is to provide a progress report at least once every 90 days from the date of the initial report and on completion of the action.

5.21 A progress report must, under clause 20(3), contain the following particulars:

> (a) where the authority has declined to act because the proper authority considers the disclosure to be frivolous, vexatious, trivial, misconceived, lacking in substance or that there is a more appropriate method of dealing with the disclosure or the disclosure has already been dealt with adequately—that it has declined to act and the grounds;
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> (b) where the proper authority has referred the public interest disclosure to another authority—the referral and the name of that authority;
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> (c) where the authority has accepted the public interest disclosure for investigation—the current status of the investigation;
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> (d) where the authority has accepted the public interest disclosure for investigation and the investigation is complete—its findings and any action it has taken or proposes to take as a result of its findings.

5.22 The Department of Foreign Affairs and Trade noted that the inclusion of the proposed reporting procedures would provide an additional degree of public accountability for action taken by agencies following a public interest disclosure. It argued, however, that the requirement for agencies to provide progress reports to persons who make public interest disclosures is problematic especially in regard to clause 20(3)(c) and (d) where it may be inappropriate to provide a progress report. It maintained: '[p]rogress reports may undermine the integrity of the investigation being undertaken and/or may expose the agency to a claim for breach of privacy'.[13]

5.23 The Queensland Criminal Justice Commission commended the reporting requirements. It submitted:

> The requirement that an agency must report on the status of investigations to those making disclosures or to referring agencies, and must also include information about public interest disclosures in the agency's annual reports

13 Submission no. 18, p. 2.

> are important methods by which agencies can establish openness and accountability.[14]

5.24 The Committee notes the recommendation of the Committee on the Ombudsman and the Police Integrity Commission that statutory provision should be made for regulations requiring authorities to adopt uniform standards and formats for statistical reporting on protected disclosures.[15]

Anonymous disclosures

5.25 Clause 13 of the Bill stipulates that a proper authority is not required to investigate a public interest disclosure if the person making the disclosure does not identify him or herself.

5.26 This provision is consistent with the ACT Act and the conclusion of the Senate Select Committee on Public Interest Whistleblowing (SSCPIW).[16] Anonymous disclosures are not supported because it is thought that they may encourage frivolous and vexatious allegations and, therefore, increase the potential for possible unfair damage to reputations and lead to a drain on public sector agencies.[17]

5.27 However, the lack of a requirement to investigate anonymous disclosure is at odds with legislation in Queensland, Victoria and Tasmania that specifically allow for disclosures to be made anonymously.[18] It also runs counter to the Government's response to the SSCPIW, which argued strongly in favour of accepting anonymous disclosures.[19]

5.28 Ms Killen maintained that the proposed legislation does not attempt to address the bona fide reasons why people may wish to make an anonymous disclosure, that is, their vulnerability. She emphasised that the fundamental intention of the Bill is to prevent wrongdoing and promote best practice in the public sector, something that anonymous disclosures would facilitate.[20]

5.29 The CPSU supported this view, noting that consideration should be given to whether the prohibition of anonymous disclosures has the capacity to dissuade people from making disclosures.[21] Ms Sue Streets, Lecturer in Law, Deakin University,

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14 Submission no. 17, p. 1.

15 Committee on the Office of the Ombudsman and the Police Integrity Commission, *Review of the Protected Disclosure Act 1994*, September 1996, p. 124.

16 Section 16 *Public Interest Disclosure Act 1994* (ACT) and Senate Select Committee on Public Interest Whistleblowing (SSCPIW), *In the Public Interest*, 1994, p. xviii.

17 See the Commission on Government, *Report no. 2-Part 1*, December 1995, chapter 5, 5.3-5.4.

18 Section 27(1), *Whistleblowers Protection Act 1994* (Qld); section 7, *Whistleblowers Protection Act 2001* (Vic.); and section 8, *Public Interest Disclosures Act 2002* (Tas.).

19 Government Response to *In the Public Interest*, the report of the SSCPIW, 1995.

20 Submission no. 5, p. 3.

21 Submission no. 20, p. 6.

expressed similar reservations, stating further that clause 13 'could be perceived as a green light' to ignore disclosures 'even if the information provided is pertinent and of a kind that would be investigated if provided by a named individual.'[22]

5.30 The New South Wales (NSW) Ombudsman submitted that in its experience 'anonymous disclosures are often found to be substantiated—the crucial issue is whether sufficient information is provided with the disclosure to enable an effective investigation to be conducted'.[23]

5.31 The Commonwealth Ombudsman, the Auditor-General and the Public Service Commissioner told the Committee that they receive anonymous disclosures.[24] The Public Service Commissioner, Mr Andrew Podger, observed that:

> Our line would be, whether they are anonymous or not, that there is a discretion to look at them under the same criteria as mentioned: that if they are frivolous we may not do so but, if there is some substance, we will. Anonymous complaints can prove to be very valuable.[25]

5.32 Likewise the Commonwealth Ombudsman, Mr Ron McLeod, stated '[i]n the final analysis, it is really the nature of the disclosure and the substance that might appear to be in the disclosure that is the important consideration.'[26] Mr Howard Whitton, Independent Ethics Consultant, also emphasised that it is the disclosure, rather than the disclosure maker, that is important. He stated: 'the only relevant question is: is there enough information to investigate the disclosure and is it true?'[27]

Frivolous and vexatious reports

5.33 Clause 31 of the Bill stipulates that a person must not knowingly or recklessly make a false or misleading statement, orally or in writing, to a proper authority with the intention that it be acted on as a public interest disclosure. The penalty if the offender is a natural person—100 penalty units or imprisonment for 1 year or both, if the offender is a body corporate—500 penalty units.

5.34 Clause 14 of the Bill states that a proper authority may refuse to act on a public interest disclosure if it considers that the disclosure is frivolous, vexatious, misconceived, lacking substance or trivial. The authority may also decline to act if there is a more appropriate method of dealing with the matter or the disclosure has already been dealt with adequately.

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22 Submission no. 33, p. 2.

23 Submission no. 22, p. 2.

24 *Committee Hansard*, 16 May 2002, pp. 15-17.

25 *Committee Hansard*, 16 May 2002, p. 17.

26 *Committee Hansard*, 16 May 2002, p. 17.

27 *Committee Hansard*, 16 May 2002, p. 17.

5.35 However, according to the Independent Commission Against Corruption (ICAC) 'there is considerable confusion about how frivolous and vexatious reports are identified and where the line is drawn as to what is and what is not "frivolous" or "vexatious"'.[28]

5.36 Mr Harry Evans, Clerk of the Senate, believed that the clause covering frivolous and vexatious disclosures is inadequate. He argued that 'it would be very easy to generate a series of vexatious complaints without knowingly or recklessly making a false or misleading statement'. He suggested that a procedure whereby 'an impartial person or body, perhaps the Public Service Commissioner, could declare a person who has made a series of disclosures a vexatious complainant whose disclosures would not be investigated unless approval for investigation is given by the Commissioner'.[29]

5.37 Looking at this clause from a different perspective, the CPSU noted that the term 'frivolous and vexatious' is very broadly worded. Rather than being troubled that it might not prevent nuisance or mischievous disclosures, its concern was that the clause provided discretion for an agency to decline to investigate a disclosure, if it judged the report to be 'misconceived or lacking in substance'.[30]

5.38 Mr Crewdson and Mr Bourot were also concerned that the provision is open to this type of abuse. They acknowledged that the category was necessary, but thought that it could be used as a mechanism for an agency reluctant to deal with a genuine public interest disclosure to improperly decline receiving it. They believed the Bill should incorporate a review or appeal mechanism against such decisions.[31] Similarly, Mr Grice, a private citizen, referred specifically to clause 14(1) as a major weakness in the Bill because it allows a proper authority to 'opt out of acting on a disclosure if it so desires'.[32] Put bluntly by Ms Streets, 'this section provides too many opportunities not to investigate'.[33]

5.39 The CPSU drew attention to the Bill's omission of section 17(3) of the ACT's legislation. This section, which relates to declining to act on frivolous and vexatious disclosures reads:

> If a public interest disclosure was referred to the proper authority by the Ombudsman or the Auditor-General, the proper authority shall not decline to act on the disclosure under this section unless the Ombudsman or the

28 Independent Commission Against Corruption, *Monitoring the Impact of the NSW Protected Disclosures Act, 1994,* November 1997, p. 37.

29 Submission no. 12, p. 3.

30 Submission no. 20, p. 6.

31 Submission no. 6, p. 2 .

32 Submission no. 1, p. 2.

33 Submission no. 33, p. 2.

> Auditor-General is satisfied that the proper authority has adequate grounds under this section to make that decision.[34]

5.40 The CPSU observed that this provision acts as a check to ensure that authorities do not decline to act on a report deemed by an independent body to be a public interest disclosure.[35]

5.41 The Committee noted that despite the absence of this important clause, the Bill contains a number of provisions that render the agency accountable for any decision to decline to act on a public interest disclosure. Under clause 20(3)(a) of the reporting obligations, a proper authority, on the request of a person who has made a public interest disclosure, is required to provide a progress report which, if it has declined to proceed with an investigation, must contain the particulars on its refusal to act and the grounds for this decision.

5.42 Further, clause 19 of the Bill outlines the actions to be performed by a proper authority after the investigation of a disclosure and provides another safeguard should a proper authority decline to act on a disclosure.

5.43 If, after investigation, a proper authority is of the opinion that a public interest disclosure has revealed that a person has engaged, is engaging, or proposes to engage in improper conduct, as defined in the legislation, the proper authority must take action as is necessary and reasonable to prevent the conduct from continuing or occurring and to discipline any person responsible for such conduct. Where the Public Service Commissioner or Parliamentary Service Commissioner have made recommendations regarding any such conduct, the proper authority to which the disclosure relates must, having regard to the recommendations, take action that is necessary and reasonable to stop or prevent the conduct and to discipline any person responsible for that conduct.

Indemnity for whistleblowers

5.44 Mr John Mayger, a private citizen, noted that some Commonwealth laws make 'it difficult or illegal to fully identify and define a problem prior to reporting that problem'. According to Mr Mayger, disclosures legislation should take precedence over specific privacy legislation where the disclosure is in the public interest.

5.45 Clause 32 of the Bill to some degree addresses these matters by stipulating that a person is not subject to any liability for making a public interest disclosure or providing any further information in relation to the disclosure to a proper authority investigating it, and no action, claim or demand may be taken or made of or against the person for making the disclosure or providing the further information.

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34 Section 17(3), *Public Interest Disclosure Act 1994* (ACT).

35 Submission no. 20, p. 6.

5.46 Further, without limiting this provision, a person who has made a public interest disclosure to a proper authority concerning a matter governed by legislated confidentiality provisions is not considered to have committed an offence under the relevant legislation, and does not breach an obligation requiring him or her to maintain confidentiality with respect to that matter.

5.47 In proceedings for defamation, clause 32 of the Bill provides a defence of qualified privilege in respect of the making of a public interest disclosure, or the provision of further information in relation to a public interest disclosure, to a proper authority.

5.48 Dr De Maria, Centre for Public Administration, University of Queensland, argued that the protection of qualified privilege against defamation action following a disclosure is too weak and will not instil confidence. He suggested that the protection of absolute privilege be included.[36] Likewise the CPSU stated '[i]f the purpose of the bill is to encourage public interest disclosures, you are not going to achieve that if the privilege is not absolute'.[37] The NSW Ombudsman also supported the inclusion of a defence of absolute privilege in respect of a public interest disclosure to a proper authority.[38]

5.49 The Queensland, NSW and Victorian legislation all provide for absolute privilege.[39] Mr Howard Whitton, while supporting the inclusion of absolute privilege as used in the Queensland Act, noted that the Act includes an additional test to the disclosure—that the person believes on 'honest and reasonable grounds' that the information they are disclosing shows misconduct or danger.[40]

Confidentiality

5.50 Clause 30 of the Bill stipulates that a public official must not, without reasonable excuse, make a record of, or wilfully disclose to another person, confidential information gained through the public official's involvement in the administration of this Act. The penalty for such an offence is 50 penalty units.

5.51 According to clause 30 confidential information means:

> (a) information about the identity, occupation or whereabouts of a person who has made a public interest disclosure or against whom a public interest disclosure has been made; or
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> (b) information contained in a public interest disclosure; or

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36 Submission no. 2, p. 34.

37 Ms Mary-Ann Cooper, *Committee Hansard*, 16 May 2002, p. 23. See also submission no. 20, p. 10.

38 See submission no. 22, p. 2.

39 See section 16, *Whistleblowers Protection Act 2001* (Vic.); section 21, *Protected Disclosures Act 1994* (NSW); and section 39, *Whistleblowers Protection Act 1994* (Qld).

40 *Committee Hansard*, 16 May 2002, p. 23.

(c) information concerning an individual's personal affairs; or

(d) information that, if disclosed, may cause detriment to a person.

5.52 The CPSU noted that disclosure of the whistleblower's identity is not prevented where there is a 'reasonable excuse' and described these provisions as 'alarmingly weak especially when compared with other jurisdictions'. It pointed out that the NSW and ACT legislation provides that disclosure can only be made where it is essential and where the whistleblower consents. The Victorian legislation has a blanket prohibition on disclosure of identity of the whistleblower.[41]

5.53 In his work on whistleblowing, Professor Paul Finn concluded that 'any report, whether or not anonymously, should be treated as confidential and appropriate steps should be taken to maintain the confidentiality of the identity of the reporter and, so far as is practicable, of any person impugned in the report'.[42]

5.54 Legislation must also guard the rights of the person impugned in the disclosure to be informed about accusations being made against him or her. Consequently, there is friction between the need to protect the confidentiality of the person making the disclosure and the right of the accused person to be informed about such allegations.

5.55 The Professional Standards Council was aware of this tension. It stated:

> There is an inherent and possibly irreconcilable conflict between providing protection to the whistleblower by way of maintaining confidentiality of the whistleblower's identity and providing procedural fairness to the person against whom the whistleblower has made an allegation. There is potentially a further complicating factor of balancing the desirability of transparency in handling complaints and discipline matters.

5.56 Section 55 of the Tasmanian Act states that that the Ombudsman is not to make a report that contains adverse comment about a public body or any person unless that person has been given an opportunity of being heard in the matter and their defence is fairly set out in the report.

Committee view

Making and receiving public interest disclosures

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

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41 Submission no. 20, p. 9.

42 Professor Paul Finn, 'Whistleblowing' *Canberra Bulletin of Public Administration*, no. 66, October 1991, p. 170.

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

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

5.60 The Committee suggests that procedures established under clause 10(3) of the Bill, relating to the provision of assistance and information to a whistleblower, be extended to include persons who may be contemplating making a public interest disclosure and who seek advice from a prescribed authority.

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

The decision not to refer the disclosure

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

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

Reporting obligations

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

Financial Management and Accountability Act 1997 and the *Commonwealth Authorities and Companies Act 1997*, to report on public interest disclosures.

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

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

Anonymous disclosures

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

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

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

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

Vexatious or frivolous disclosures

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

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

Indemnity provisions for whistleblowers

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

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

Duty of confidence

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

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

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