Appendix 1

List of submissions

Submission no.	Organisation/Individual
1	Mr Barry Grice
2	Dr William De Maria
3	Mr William Toomer
4	Mr B W Hamilton
5	Ms Leslie Jane Killen
6	Mr Gerard Crewson and Mr Pascale Bourot
7	Whistleblowers Australia
8	Confidential
9	Mr Keith Potter
10	Minister for Defence
11	Confidential
12	Clerk of the Senate
13	Mr John Mayger
14	Mr Chiu-Hing Chan
15	Department of Transport and Regional Services
16	The Law Society of South Australia
17	Queensland Criminal Justice Commission
18	Department of Foreign Affairs and Trade
19	Department of Agriculture, Fisheries and Forestry
20	Community and Public Sector Union
21	Department of Industry, Science and Resources
22	New South Wales Ombudsman
23	Mr Howard Whitton
24	Commonwealth Ombudsman
25	Public Service and Merit Protection Commission
26	Department of Health and Aged Care
27	Ms Ann Forward
28	Mr Alan Doolan, Merit Protection Commissioner
29	Confidential
30	Department of the Parliamentary Reporting Staff and Department of the Parliamentary Library
31	Mr P J Bewley
32	Mr Alan Doolan, Merit Protection Commissioner
33	Ms Sue Streets, Lecturer in Law, Deakin University
34	Mr Andrew Podger, Public Service Commissioner
35	Mr Howard Whitton
36	Australian Federal Police

Appendix 2

Additional Information

Additional information was supplied to the inquiry by the following agencies:

- Department of the Senate
- IP Australia
- Office of Asset Sales and Commercial Support
- Australian Electoral Commission
- Department of the Prime Minister and Cabinet
- Child Support Agency
- Australian Customs Service
- Attorney-General's Department
- Australian Federal Police
- Australian Government Solicitor
- Department of Finance and Administration
- Environment Australia, Department of the Environment and Heritage
- Australian Taxation Office
- Australian Maritime Safety Authority
- Civil Aviation Safety Authority
- Department of Employment and Workplace Relations

Appendix 3

Public Hearing

The following witnesses attended a round table on the Bill held at Parliament House on Thursday 16 May 2002, 3.30pm-7.00pm.

Australian National Audit Office
Mr Ian McPhee, Deputy Auditor-General
Mr Russell Coleman, Executive Director, Corporate Management Branch

Office of the Commonwealth and Defence Force Ombudsman
Mr Ron McLeod, Commonwealth and Defence Force Ombudsman

Community and Public Sector Union
Mr Steve Ramsey, Legal Officer
Ms Mary-Anne Cooper, Legal Officer

Public Service Commissioner
Mr Andrew Podger

Acting Merit Protection Commissioner
Mr Boris Budak

Whistleblowers Australia
Mr Peter Bennett
Mr David Berthelsen

Attorney-General's Department
Mr Keith Holland, Assistant Secretary, Security, Law and Justice Branch
Ms Catherine Smith, Principal Legal Officer, Security, Law and Justice Branch

Dr William De Maria
Centre for Public Administration, University of Queensland

Mr Howard Whitton
Private capacity

Appendix 4

Tabled Documents

The following documents were tabled during the public hearing:

‘The Victorian Whistleblower Protection Act: Patting the Paws of Corruption?’ Paper given to Staff Seminar, Department of Business Law and Taxation, Monash University, 3 May 2002 by Dr William De Maria, Centre for Public Administration, The University of Queensland.

‘Common Law—Common Mistakes: The Dismal failure of Whistleblower Laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom,’ Paper presented to the Internal Whistleblowers Conference, University of Indiana, 12-13 April 2002 by Dr William De Maria, Centre for Public Administration, The University of Queensland.

Appendix 5

Background to Whistleblowing Legislation

1. This appendix provides a brief account of the advent of discussion surrounding whistleblowing legislation in Australia in the early 1990s. By the 1990s there was growing recognition in Australia that whistleblowing was an important tool in the fight against corruption and a valuable activity in detecting wrongdoing and bringing offenders to account. It was becoming increasingly apparent that the people well-placed to expose fraud, waste or mismanagement were hesitant to come forward with information because of fear of reprisal.[1]

The increasing awareness of the need for a whistleblowing scheme

2. In 1989, the Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct brought to light the difficulties people faced in disclosing information in the public interest and underlined the pressing need for people to be protected from recrimination, with emphasis on the need for whistleblowing legislation[2]

3. This report became a catalyst for public debate about whistleblowing and the keystone for continuing reform in Australia. By 1991, a number of prominent individuals, such as Professor Paul Finn, were calling for governments to adopt institutional arrangements which would both 'facilitate the exposure and investigation of wrong-doing in government, and protect the legitimate interests of complainants, persons against whom allegations are made, and the public.'[3]

4. Initially, a number of commissions and committees of inquiry into Commonwealth functions found that, in large measure, the detection, identification and prevention of wrongdoing such as fraud could be achieved through the assistance of agency staff. These inquiries, often examining a specific area of public sector activity, together with the findings of other investigations in the various States, gradually built up a solid body of evidence in support of legislation that would

---

1 See for example, The Commission on Government, *Report no. 2*, December 1995, chapter 2, and Gerald E. Caiden and Judith A. Truelson, 'An Update on Strengthening the Protection of Whistleblowers', *Australian Journal of Public Administration,* vol. 53, no. 4, December 1994, pp. 575–83.

2 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, p. 134.

3 Paul Finn, Whistleblowing, *Canberra Bulletin of Public Administration,* no. 66, October 1991, pp. 169. Professor Finn was at the time working at the Research School of Social Sciences, ANU. See also J. G. Starke QC, 'The Protection of Public Service Whistleblowers—Part 1, *Australian Law Journal,* vol. 65, no. 4, 1991, p. 219; and Electoral and Administrative Review Commission (EARC), *Report on Protection of Whistleblowers,* October 1991, p. 24.

encourage the disclosure of information in the public interest by protecting from retaliation those who make such disclosures.[4]

The Review Committee of Commonwealth Criminal Law

5. The Review Committee of Commonwealth Criminal Law (the Gibbs Committee) conducted one of the most significant early inquiries that touched on the important role that whistleblowers have in the detection of wrongdoing. The Gibbs Committee inquired into many aspects of the criminal law in Australia but in its final report turned its focus to the disclosure of official information.

6. In its final report in 1991, the Gibbs Committee accepted the broad principle that 'in a democratic society, the public should have access to as much information as to the workings and activities of government and its servants as is compatible with the effective functioning of that government'.[5] It noted that, in recent years, cases of official corruption and illegalities in Australia had been brought to light by the media. Nonetheless, in examining secrecy provisions in particular Acts, the Committee concluded that there are forms of official information, such as information relating to intelligence and security services, defence or foreign relations, that should be protected by the criminal law from unauthorised disclosure.

7. The Gibbs Committee addressed the specific question of whether there should be protection from retaliatory measures as well as special statutory exemption from criminal liability for persons who bring to public notice instances of illegality, corruption or maladministration in public affairs. It examined closely the body of statute law in the USA and the work of Professor Finn and the Queensland Electoral and Administrative Review Commission (EARC). It came to the view that avenues of complaint and protection similar to those contained in the US legislation should be established in law.[6]

8. Accordingly it recommended a scheme to facilitate the disclosure of information in the public interest. The scheme included allowing disclosures to be made to the Inspector-General of Intelligence and Security (IGIS) and the Ombudsman. The Committee also recommended that the person would not only be exempt from any disciplinary sanction in respect of the disclosure, but would also be given protection against discrimination or retaliatory action.[7]

Senate Standing Committee on Finance and Public Administration reports

9. At about the same time, the Senate Standing Committee on Finance and Public Administration tabled a report on the Office of the Commonwealth Ombudsman. It briefly touched on the matter of whistleblowing, acknowledging that such disclosures

---

4 Special Minister of State, *Review of Systems for Dealing with Fraud on the Commonwealth,* Canberra, March 1987, p. 51.

5 Review of Commonwealth Criminal Law, *Final Report*, December 1991, p. 315.

6 Review of Commonwealth Criminal Law, *Final Report*, December 1991, p. 338.

7 Review of Commonwealth Criminal Law, *Final Report*, December 1991, pp. 353–4.

would 'become increasingly common in the next few years' and 'there is a public interest in some mechanism for impartial, external review of whistleblowing complaints'.[8]

10. Twelve months later, in December 1992, that same Committee reported on the management and operations in the Department of Foreign Affairs and Trade. Consistent with findings both at home and abroad, it also noted that the person best placed to report improper behaviour was frequently vulnerable to retaliation. It observed that addressing the matter of whistleblowing required the establishment of mechanisms to encourage the disclosure of improper conduct while minimising the chances that frivolous or malicious reports might be made.[9]

11. The Committee found that the system in the Australian Public Service (APS) did not measure up to this ideal. It stated succinctly that the reporting avenues and protection available to genuine whistleblowers were inadequate and that there were few mechanisms for rectifying 'systemic faults identifiable from whistleblower's reports'.[10]

Report of the House of Representatives Standing Committee on Banking, Finance and Public Administration

12. In 1993 the House of Representatives Standing Committee on Banking, Finance and Public Administration reported on its inquiry into fraud in the Commonwealth. It also found a need for the Commonwealth to implement a scheme to facilitate the disclosure of information in the public interest. Its recommendation followed closely the proposal put forward by the Gibbs Committee for the introduction of a whistleblowing scheme.[11]

13. It also recommended that a person who had made a disclosure be given protection against discrimination or retaliatory action and that serious harassment of, or discrimination towards, a person who had blown the whistle be made a criminal and disciplinary offence. The Commonwealth and Defence Ombudsman were to be responsible for overseeing the implementation and the enforcement of the protection provisions as well as providing counselling and guidance to whistleblowers.[12]

---

8 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman,* December 1991, p. 69.

9 Senate Standing Committee on Finance and Public Administration, *Management and Operations of the Department of Foreign Affairs and Trade,* December 1992, p. 31.

10 Senate Standing Committee on Finance and Public Administration, *Management and Operations of the Department of Foreign Affairs and Trade,* December 1992, p. 55.

11 House of Representatives Standing Committee on Banking, Finance and Public Administration, Focusing on Fraud, November 1993, Recommendation 14, pp. 10–11.

12 House of Representatives Standing Committee on Banking, Finance and Public Administration, *Focusing on Fraud,* November 1993.

Whistleblowers Protection Bill 1991 and 1993

14. Despite the mounting evidence in favour of whistleblowing legislation, the Commonwealth lagged behind the States in implementing a comprehensive statutory framework for public interest disclosures. The first move toward federal whistleblower legislation took place when Senator Jo Vallentine introduced the Whistleblowers Protection Bill 1991 into the Commonwealth Parliament. The Bill sought to establish a Whistleblowers Protection Agency, headed by a commissioner, which would have powers to receive and investigate claims of corruption within government or government agencies by Commonwealth employees or by any member of the public.[13] The agency established under this Bill would also protect those employees or members of the public who make such allegations.

15. In May 1993, Senator Christobel Chamarette, who filled the vacancy created by the resignation of Senator Vallentine in January 1992, tabled a revised, though in essence the same, Bill in the Senate in the form of a discussion document. A few months later, a Senate Select Committee on Public Interest Whistleblowing (SSCPIW) was established to inquire into whether the practice of whistleblowing should be the subject of Commonwealth legislation. On 27 October 1993, Senator Chamarette's bill, which had been introduced into the Senate on 5 October, was referred to that Committee for inquiry and report.[14]

16. At that time, the matter was also under consideration by the Government. On 27 June 1994, the then Attorney-General, the Hon Mr Michael Lavarch MP, replied to a question on notice concerning whether the Attorney-General or his department had reviewed the effectiveness of the whistleblower legislation currently before the Queensland and New South Wales (NSW) Parliaments. He informed the Parliament that the department had not formally reviewed the effectiveness of the whistleblower legislation under consideration in the States 'although it continues to monitor legislative developments relating to whistleblowing in all Australian jurisdictions.' He explained that the Government had been examining proposals for legislation to protect whistleblowers as part of its consideration of recommendations made by the Gibbs Committee on the disclosure of official information. He further noted the inquiry being undertaken by the SSCPIW.[15]

Senate Select Committee on Public Interest Whistleblowing report

17. In August 1994, the SSCPIW tabled its report. It added weight to the findings of the numerous state and federal inquiries that had gone before and recommended that 'the practice of whistleblowing should be the subject of Commonwealth

13 See Jo Vallentine, 'A Bill for Protection', in *Insight Bookmagazine,* no. 4, 1992, pp. 23–26.

14 Senator Chamarette, *Senate Hansard*, 5 October 1993, p. 1654.

15 Michael Lavarch, *House of Representatives Hansard,* 27 June 1994, p. 2022.

legislation to facilitate the making of disclosures in the public interest and to ensure protection for those who choose so to do.'[16]

18. Under legislation proposed by the SSCPIW, an independent agency, to be known as the Public Interest Disclosures Agency, would receive public interest disclosures and arrange for their investigation by an appropriate authority. The agency would also ensure the protection of people making a public interest disclosure, provide a national education program and oversee the implementation of recommendations relating to its role.

19. In October 1995, the Government responded to the SSCPIW's findings. It gave 'in principle' approval to the development of whistleblower legislation that would 'strengthen the position of public spirited citizens within our modern managerial framework'. It rejected, however, the Committee's recommendation to establish an independent agency, the Public Interest Disclosures Agency.

20. The Government preferred a whistleblowing scheme that would be overseen by the Commonwealth Ombudsman. It believed that the existing agencies—the Ombudsman, the IGIS, and the Merit Protection Review Agency (MPRA)—were the appropriate independent organisations upon which the Government's proposed whistleblowing scheme should be based.

21. The Government also rejected the recommendation that the provisions of whistleblowing legislation 'be given the widest coverage constitutionally possible in both public and private sector'. Instead it proposed a scheme that would be limited to Commonwealth officers and contractors and not include academic institutions, or the health care and the banking industries. In making plain that it was seriously contemplating implementing a public interest disclosure scheme, the Government stated that the scheme would enable both disclosures within a department or agency and disclosures to an independent agency. The legislation would use the existing independent reporting agencies of the Commonwealth Ombudsman and the IGIS.[17]

22. The Opposition criticised the Government's response to the SSCPIW's findings for being 'quite limited'. The Opposition accepted the Government's proposed whistleblowing scheme as a positive move forward but believed that there was much room for improvement. The Opposition, while supporting the SSCPIW's proposed whistleblowing scheme, did not make any commitment toward implementing such a scheme were it to gain power. It did, however, state that it would be giving further consideration to these matters.[18]

---

16 Senate Select Committee on Public Interest Whistleblowing (SSCPIW), *In the Public Interest*, August 1994, p. 39.

17 Mr Kerr, Ministerial Statements, *House of Representatives Hansard*, 26 October 1995, p. 3068 and see also Ministerial Statement, SSCPIW, *Senate Hansard*, 13 November 1995, p. 2752.

18 Mr Ruddock, *House of Representatives Hansard*, 26 October 1995, p. 3070.

23. Despite repeated assurances about the possibility of implementing a Commonwealth whistleblowing scheme, the proposal remained in abeyance. It was not until mid-1997 with the introduction of the new Public Service Bill that a whistleblowing scheme again came under active consideration by the Commonwealth Parliament.

24. While no Commonwealth whistleblowing legislation materialised, all States passed whistleblowing legislation with the exception of the Northern Territory. South Australia passed the first whistleblower protection legislation in Australia in April 1993, followed by the ACT, Queensland and NSW which enacted whistleblower legislation in 1994. Recently, Victoria and Tasmania passed public interest disclosure acts and Western Australia has a bill currently being considered by Parliament.

Appendix 6

Relevant Sections of the *Public Service Act 1999* and the Public Service Regulations

Section 13, Public Service Act 1999—The APS Code of Conduct

(1) An APS employee must behave honestly and with integrity in the course of APS employment.

(2) An APS employee must act with care and diligence in the course of APS employment.

(3) An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.

(4) An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:

(a) any Act (including this Act), or any instrument made under an Act; or

(b) any law of a State or Territory, including any instrument made under such a law.

(5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.

(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

(7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.

(8) An APS employee must use Commonwealth resources in a proper manner.

(9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.

(10) An APS employee must not make improper use of:

(a) inside information; or

(b) the employee's duties, status, power or authority;

in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

(11) An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

(12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.

(13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

Section 16, *Public Service Act 1999*—Protection for whistleblowers

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

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

(b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.

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

Public Service Regulation 2.4—Procedures for dealing with whistleblowers reports

(1) An Agency Head must establish procedures for dealing with a report made by an APS employee under section 16 of the Act.

(2) The procedures must:

> (a) have due regard to procedural fairness and comply with the Privacy Act 1988 ; and
>
> (b) provide that an APS employee in the Agency may report breaches (or alleged breaches) of the Code of Conduct to the Agency Head, or a person authorised by the Agency Head; and
>
> (c) provide that if the Commissioner or the Merit Protection Commissioner agrees that a report relates to an issue that would be inappropriate to report to the Agency Head, the APS employee may make the report to:
>
> > (i) the Commissioner, or a person authorised by the Commissioner; or
> >
> > (ii) the Merit Protection Commissioner, or a person authorised by the Merit Protection Commissioner; and

(d) ensure that if a report is made to the Agency Head, the Agency Head will, unless he or she considers the report to be frivolous or vexatious:

(i) investigate it; or

(ii) authorise another person to investigate it; and

(e) ensure that if a report is made to a person authorised by the Agency Head, the person will investigate the report, unless the person considers it to be frivolous or vexatious; and

(f) provide information about the protection available under section 16 of the Act to persons making reports; and

(g) enable an APS employee who has made a report, and who is not satisfied with the outcome of the investigation of the report, to refer the report to:

(i) the Commissioner, or a person authorised by the Commissioner; or

(ii) the Merit Protection Commissioner, or a person authorised by the Merit Protection Commissioner; and

(h) ensure that the findings of an investigation are dealt with as soon as practicable.

Public Service Regulation 2.5—Commissioner's functions relating to whistleblowers reports

(1) For the purposes of paragraphs 41 (1) (c) and (l) of the Act, if:

(a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and

(b) a report is made, in accordance with the procedures, to the Commissioner;

the Commissioner's functions include the functions set out in subregulation (2).

(2) The Commissioner must, unless he or she considers the report to be frivolous or vexatious:

(a) investigate it; or

(b) authorise another person to investigate it.

Public Service Regulation 2.6— Merit Protection Commissioner's functions relating to whistleblowers reports

(1) For the purposes of paragraphs 50 (1) (a) and (e) of the Act, if:

(a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and

(b) a report is made, in accordance with the procedures, to the Merit Protection Commissioner;

the Merit Protection Commissioner's functions include the functions set out in subregulation (2).

(2) The Merit Protection Commissioner must, unless he or she considers the report to be frivolous or vexatious:

(a) investigate it; or

(b) authorise another person to investigate it.

Regulation 2.7—Other functions relating to whistleblowers reports

(1)Subregulation (2) applies if:

(a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and

(b) a report is made, in accordance with the procedures, to a person authorised by the Commissioner or the Merit Protection Commissioner.

Note See para 2.4 (2) (c).

(2) The person must investigate the report, unless the person considers it to be frivolous or vexatious.

(3) Subregulation (4) applies if:

(a) an Agency Head establishes procedures for dealing with a report made by an APS employee under section 16 of the Act; and

(b) a report is made, in accordance with the procedures, to the Commissioner or the Merit Protection Commissioner; and

(c) the Commissioner or the Merit Protection Commissioner authorises a person to investigate the report.

Note See para 2.5 (2) (b) and 2.6 (2) (b).

(4) The person must investigate the report.