



# COMMONWEALTH OMBUDSMAN

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22 October 2001

Ms Helen Donaldson  
Secretary  
Senate Finance and Public Administration Legislation Committee  
Parliament House  
CANBERRA ACT 2600

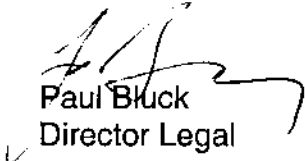
Dear Ms Donaldson

I refer to your invitation to the Ombudsman to make a submission to the Committee's inquiry into the Public Interest Disclosure Bill 2001. Thank you for permitting a short extension of time for this submission.

I have attached the Ombudsman's submission. I have sent an electronic copy to the Committee.

I would be the point of contact should the Committee wish to invite the Ombudsman or staff to discuss the submission or give oral evidence. I can be contacted on 02 6276 0155 or [paul.bluck@comb.gov.au](mailto:paul.bluck@comb.gov.au)

Yours sincerely

  
Paul Bluck  
Director Legal

**PUBLIC INTEREST  
DISCLOSURE BILL 2001**

**SUBMISSION  
TO  
SENATE FINANCE  
AND PUBLIC ADMINISTRATION  
LEGISLATION COMMITTEE**

**OFFICE OF THE  
COMMONWEALTH OMBUDSMAN**

## Summary

The Ombudsman supports the creation of arrangements by which people can make allegations of improper conduct by officials, with confidence that there will be an appropriate response and without fear of reprisal. Such frameworks foster improvement in the quality of management of public resources and the provision of public services.

The whistleblowing mechanism established under the *Public Service Act 1999* makes a valuable statement about the importance Parliament attaches to this kind of accountability. But that mechanism is not, in the Ombudsman's view, always sufficient and the present Bill represents a substantial advance in thinking.

The Bill recognises that allegations of improper conduct can come from many sources and that different kinds of protection may need to be considered where a person making a disclosure is not a public servant. The Bill provides consistent structures for dealing with allegations and the people who make them.

The Ombudsman suggests, however, some changes to the Bill to ensure that allegations can be investigated properly and impartially. He proposes that his own office, the Auditor-General and the Inspector-General of Intelligence and Security be made proper authorities to receive and investigate allegations. In particular, he argues that his own office should be considered for a central role in any public interest disclosure scheme.

### 1. Background

- 1.1 The office of Commonwealth Ombudsman is established under the *Ombudsman Act 1976*. The Ombudsman exercises powers and performs functions under that Act and under the *Complaints (Australian Federal Police) Act 1981*, the *Telecommunications (Interception) Act 1979*, and the *Freedom of Information Act 1982*. Under recent amendments to the *Crimes Act 1914*, the Ombudsman will also have a role in relation to inspecting the records of controlled operations conducted by Commonwealth law enforcement agencies.
- 1.2 Almost every Commonwealth agency is subject to the Ombudsman's jurisdiction including, under recent amendments, the National Crime Authority. The Government has been considering its response to a recommendation by the Joint Committee of Public Accounts and Audit that the Ombudsman's jurisdiction extend to the actions of Commonwealth contractors.
- 1.3 The Ombudsman can investigate following a complaint or on his own motion. He has the power to compel agencies and individuals to provide documents, information and answers to questions. He is subject to procedural fairness requirements and to strict secrecy requirements. He has the power to report on defective administration and to make

recommendations. The Ombudsman sometimes uses his own motion powers to deal with matters raised by whistleblowers. He regularly uses the same power to investigate the adequacy of agency structures and actions in areas such as complaint management.

- 1.4 Under transitional legislation and the *Ombudsman Act 1989* (ACT) the Ombudsman is also the ACT Ombudsman and has a similar range of powers to those in his Commonwealth role. The Ombudsman exercises powers and performs functions under that Act and under the other ACT legislation - the *Public Interest Disclosure Act 1994* and the *Freedom of Information Act 1989*. The Public Interest Disclosure Act was a model for the present Bill.
- 1.5 The Ombudsman's role under the ACT's Public Interest Disclosure Act is to be a "proper authority" to which a disclosure can be made. For the purpose of investigating a disclosure, the Ombudsman may exercise powers under the ACT Ombudsman Act
- 1.6 The Ombudsman has a staff of about 80, in offices in every State and Territory capital. The Ombudsman deals every year with about 20,000 complaints and about 20,000 other approaches. In about three-quarters of complaints, the Ombudsman declines to investigate, usually because a matter has not been raised with an agency or some appropriate review mechanism.

## **2. Whistleblowing at present**

- 2.1 The current whistleblowing regime is found in the *Public Service Act 1999*. Section 16 provides that agency staff must not victimise or discriminate against a public servant because the public servant has reported breaches of the Code of Conduct to the Public Service Commissioner, the Merit Protection Commissioner or an agency head. Sections 41 and 50 give the Commissioners the function of inquiring into reports made to them. Section 43 gives the Public Service Commissioner powers equivalent to those held by the Auditor-General – broadly, these are powers to require the giving of information notwithstanding the potential for self-incrimination.
- 2.2 The Public Service Regulations 1999 set out more of the detail, including the obligation of agency heads to establish procedures to deal with allegations.
- 2.3 The current scheme can deal effectively with many allegations and investigations. However, it has no obvious application to agencies which operate outside the Public Service Act and it does not provide any degree of protection for whistleblowers who are not employed under the Public Service Act.
- 2.4 In any year, the Ombudsman receives a small number of complaints which amount to whistleblowing allegations. The complaints fall across

many kinds of agency and may be made by officials, contractors and members of the public. The actions mentioned in these complaints are investigated in the usual way or the information provided is used to form the basis of an own motion investigation. The Ombudsman will do what is possible to protect the identity of a person who has made an allegation if there is any risk to the person's career or welfare.

- 2.5 While there are no specific whistleblower provisions in the legislation administered by the Ombudsman, whistleblowers who act in good faith are entitled to the protection from civil action provided by section 37 of the Ombudsman Act and corresponding provisions in other legislation administered by the Ombudsman.
- 2.6 The Ombudsman would normally seek to protect the identity of a whistleblower but the procedural requirements of the current legislation may impose some inflexibilities which would best be addressed by specific whistleblower legislation. The Ombudsman could investigate and report on adverse action taken against a presumed whistleblower or bring any evidence of official misconduct to the attention of the relevant agency head.

### **3. Current proposal**

- 3.1 In the Ombudsman's view, there are several reasons for legislative underpinning of the structures for disclosures in the public interest. The public and the Parliament are entitled to be sure that public resources are not wasted or abused; legislation helps to ensure that officials cannot evade responsibility. People making allegations about misconduct in good faith should not have to risk reprisals in doing so and legislation can provide them with clear rights and protections. Confidentiality in investigation ensures that the making of an allegation does not damage reputation until it has been established that the allegation has substance. A legislated scheme reduces the attraction of making public statements before the facts are established.
- 3.2 The character of whistleblowers was considered favourably by the former Senate Select Committee on Public Interest Whistleblowing. Some are people of high integrity and great courage, driven to moral outrage by waste or wrongdoing. Some are people who seek revenge or vindication for some action that has happened previously or that they fear may happen in future. Some are motivated by a combination of more or less worthy causes. It can be difficult to be sure of motivation (which is, in any case, usually irrelevant) and the role of any inquirer must be to focus on the substance of the disclosure, not on speculation about the character or motives of the discloser.
- 3.3 The scheme created by the Bill operates by defining a class of disclosable conduct, nominating proper authorities to which disclosures can be made,

requiring agencies to establish procedures to facilitate and deal with disclosures and requiring a report of disclosure issues. Any person may make a disclosure and can do so anonymously. Agencies may decline to investigate some matters and may refer disclosures to another agency but must act on disclosures substantiated by investigation. It is an offence and a basis for a civil remedy if a person is subject to an unlawful reprisal. There is a requirement of confidentiality.

- 3.4 The issues that have been identified by the Committee for consideration are, firstly, credibility (instilling confidence in users), secondly, procedures to facilitate correction of identified errors and thirdly, public accountability reporting. This submission will return to those issues later.

## **5. The Bill's Coverage**

- 5.1 The Bill covers conduct by, or related to, "public officials". That term is defined so as to include most kinds of Commonwealth contractor and that inclusion is welcome at a time when an increasing range of government activities are performed through outsourcing arrangements. On the other hand, it is less clear that the Bill would cover the employees of contractors.
- 5.2 While covering most people employed in the broad Commonwealth sector, the Bill does not appear to comprehend persons employed under the *Members of Parliament (Staff) Act 1984*. There seems no appreciable reason why these officers should not have the protection of the Bill.
- 5.3 The standard of behaviour dealt with by the Bill is that which would constitute a criminal offence or which would constitute grounds for disciplinary action under the Public Service Act. The latter standard may or may not be applicable to, for example, persons employed by the Commonwealth other than under the Act and Commonwealth contractors.

## **6. Proper authorities**

- 6.1 The proper authorities listed are agency heads, the Public Service Commissioner, the Merit Protection Commissioner and their Parliamentary service equivalents.
- 6.2 Agency heads will usually be in the best position to assess the truth or otherwise of an allegation and to rectify any problems in management. They have extensive employment and management powers which can be used to ensure that improper reprisals do not occur. Any system involving external agencies will have to allow for matters to be transferred to the appropriate agency head as not every allegation will warrant inquiry by an external body.
- 6.3 On the other hand, agency heads do not have coercive powers (although they may be able to direct their staff to cooperate with an investigation)

and the intrusive nature of those powers is such that they probably should not be spread too widely. Agency staff may see greater protection and independence if they make a disclosure to a separate agency which can protect their identity, thus minimising the risk of reprisals.

- 6.3 The Commissioners are central to the scheme proposed in the Bill. Each has a limited role and their public profile is similarly limited. They are the regulators of conduct and actions related to employment within the parts of the public sector for which they are responsible. Their jurisdiction does not, however, include all people not employed under the enactments which create their offices. Also, they may not have the resources or the specialist skills to investigate the detail of an administrative or commercial process engaged in by an agency and they may, to that extent, be reliant on the agency being investigated. Moreover, their role in relation to the actions of a Commonwealth contractor is likely to be very limited indeed.
- 6.4 The Commissioners would, however, be well-placed to investigate allegations about employment practices in relevant agencies. They would be able to facilitate the protection from reprisal of people employed in those agencies. Coupled with their existing powers under the Public Service Act and Regulations, this would place them in a strong position.
- 6.5 There are other agencies which could also carry out the role of proper authority and which could be included as proper authorities. The Ombudsman has an Australia-wide network of offices, extensive investigation powers which could be harnessed to an investigation and the capacity to deal with the actions of a wider range of agencies than the Commissioners. The Auditor-General has access to specialist skills and powers needed for investigation and reporting on a range of matters. The Inspector-General of Intelligence and Security has special expertise, access and profile in relation to the operations of the security agencies.
- 6.6 Accordingly, noting the special roles of the Commissioners and the other officers mentioned, and in addition to the referral provisions in clauses 15 and 17, the Ombudsman considers it would be useful if Secretaries and equivalents were enabled by the Bill to refer matters to another proper authority where they thought that authority would be more appropriate.
- 6.7 Expanding the class of proper authorities and providing an additional basis for referral would lower the barriers to making a disclosure and would facilitate comprehensive investigations by the agency best placed to conduct them.

## **7. Procedures and Reports**

- 7.1 The Bill requires the establishment and publication of procedures, in a way which mirrors Part 2 of the Public Service Regulations 1999. There is no requirement for procedures to be approved externally or for them to be endorsed by the relevant Minister.

- 7.2 The Bill would require reporting in an agency's annual report about procedures and disclosures. In the interests of natural justice, agencies should be required, before reporting on a matter, to permit any person or entity subject to criticism to make submissions. Criticism of an identifiable person following a disclosure may be very damaging.

## **8. Making and dealing with disclosures**

- 8.1 The obstacles to making a disclosure should be low, encouraging disclosures to be made.
- 8.2 The bar on disclosing information subject to legal professional privilege (clause 8) may operate as a barrier to disclosure. Officials and others (for example contractor employees) may not be aware of the detailed requirement for privilege and how they relate to particular information. An option might be to provide that a disclosure of privileged information to a proper authority does not affect its protection from production in litigation.
- 8.3 The grounds for declining to act on a disclosure in subclause 14(1) seem appropriate and are directed to the substance of the allegation made rather than the character or motives of the person making it. It may be preferable if the requirement that the discloser be informed of any decision not to investigate specified that reasons should be given for the decision.
- 8.4 Clause 18 prevents a disclosure being referred to another agency if there is a risk of unlawful reprisal or prejudice to the conduct of the investigation. Consideration might be given to spelling out what a proper authority is to do in these circumstances, as the receiving agency may not be able to investigate a particular disclosure.

## **9. Unlawful Reprisals**

- 9.1 In the Ombudsman's view, protective provisions are capable of being abused and an appropriate object of the Bill might be to limit the occasions on which this occurs and provide sanctions when it does. The normal processes of public administration should be able to continue. One option that the Bill might incorporate would be to permit a chief executive to certify that an administrative action would have occurred whether or not a disclosure had been made.
- 9.2 An official or agency minded to carry out reprisals could do so in a number of ways, including in relation to the employment of an official, the laying of criminal charges or administrative penalties against a person or the cancellation or refusal of a benefit or permission. The reprisal could be carried out by the subject of a disclosure or by someone else or another agency acting on the advice of the subject. The detriment or threat could be caused to the discloser or to someone else associated with the



whistleblower. The Ombudsman considers that a comprehensive scheme of protection might take into account these possibilities.

- 9.3 The Bill contains a range of tools against reprisal, including relocation of officials, criminal sanctions, a basis for damages and a protection against civil action. However, the relocation provision may be difficult to apply in small agencies or with specialised staff.
- 9.4 One particular issue that the Bill might address is the possibility of reprisals against the person conducting the proper authority's investigation or a person providing information to the investigator.

## **10. The Committee's issues**

- 10.1 The Committee asked for comments about the issues of credibility, effective procedures and public accountability reporting.
- 10.2 In the Ombudsman's view, a whistleblowing scheme will be credible in the public's eyes if it:
- has the clear backing of Parliament;
  - operates alongside other well-accepted mechanisms aimed at ensuring the same or compatible outcomes;
  - has, at some stage, a role for a body external to an agency to which an allegation relates to oversight what is done; and
  - assigns to an office a leadership role in the scheme to ensure that processes exist and reports are made and to provide a public figure with whom the scheme can be associated.
- 10.3 It is probably too much to hope that any scheme will be accepted with equal enthusiasm by all affected by it. The nature of whistleblowers is such that some may never be able to accept a conclusion which departs from their preferred position. A credible scheme provides assurance to the Parliament and to the public at large and provides a standard by which Parliament, the public, officials and the media can assess allegations rather than simply accepting or rejecting them.
- 10.4 In the Ombudsman's view, a scheme will provide effective procedures if:
- the procedures include acceptably fair and thorough minimum requirements but, apart from that, are capable of being changed to deal with issues particular to agencies;
  - the procedures are transparent – those involved in the process know and can understand what will happen at each stage;
  - there is the potential for oversight or involvement by someone external to the agency under investigation.

- 10.5 Reporting processes are the mechanism by which Parliament and the public can be assured that processes are in place and are being accessed by those who wish to make an allegation. The requirement for annual reporting is always useful, but it may be useful to permit a proper authority to report at other times on matters of public interest. Such reports might be useful if, for example, there has been a serious public misunderstanding about some event.

## 11. A Role for the Ombudsman?

- 11.1 In our view, the Ombudsman, in the context of his role in encouraging effective and efficient public administration, would have a useful role in the scheme established by the Bill. His national network of offices and access to staff with specialist skills as investigators would also be useful in ensuring public confidence in a credible scheme for public interest disclosures. His office has experience with statutory powers to obtain information and his staff have experience in handling sensitive material with discretion.
- 11.2 The work that has been done by the Ombudsman in recent years in ensuring that agencies deal with complaints made to them in an appropriate and effective way would be valuable experience for the task of ensuring that agencies develop, maintain and use sound processes in dealing with disclosures.
- 11.3 The Ombudsman could be made a proper authority (as could the Auditor-General and the Inspector-General of Intelligence and Security). The Ombudsman's broad jurisdiction (beyond Public Service and Parliamentary Service Act agencies) may be relevant, as may the range of coercive and reporting powers which can be used when required in an investigation. The proposal by the Joint Committee of Public Accounts and Audit that the Ombudsman's jurisdiction be extended to Commonwealth contractors would also make the Ombudsman a logical choice as a proper authority.
- 11.4 The Ombudsman would also be well-placed to be the central point for contact and public awareness of the public interest disclosure scheme. This would not preclude him from referring complaints to more appropriate agencies, but would enable this role to be performed in parallel with his other investigations.

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CANBERRA

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