

SUBMISSION
INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE
AUSTRALIAN GOVERNMENT PUBLIC SECTOR

INTRODUCTION

On 10 July 2008 the Attorney-General, the Hon. Robert McClelland MP, on behalf of the Cabinet Secretary, Senator the Hon. John Faulkner, asked the House of Representatives Standing Committee on Legal and Constitutional Affairs to inquire into and report on whistleblowing protections within the Australian Government public sector.

This is a joint submission to the inquiry into whistleblowing protections within the Australian Government public sector from the following Commonwealth integrity agencies:

- The Australian Public Service Commission
- The Office of the Privacy Commissioner
- The National Archives of Australia

which has been prepared in consultation with the Commonwealth Ombudsman. The Office of the Privacy Commissioner has limited its comments to privacy-related issues.

The Department of Education, Employment and Workplace Relations has been consulted in the development of the joint submission and has provided a written contribution, which is at Attachment A.

Summary of submission

The current whistleblowing provisions cover Australian Public Service (APS) staff employed under the *Public Service Act 1999* (Public Service Act). This is the only Commonwealth legislation that provides protection. The system provides protection from victimisation or discrimination to APS employees who make allegations of a breach of the APS Code of Conduct against another APS employee as well as allegations about serious misconduct (such as corruption and fraud). This submission argues that the current provisions are too narrow and protection should be expanded under any new scheme to include non-APS Commonwealth employees, contractors and consultants, current and former people engaged under the *Members of Parliament (Staff) Act 1984* (MoPS Act) as well as current and former members of Parliament.

There is confusion about the current whistleblowing arrangements in the APS, in particular what is considered a public interest disclosure (as opposed to an employment-related complaint), who is authorised to receive a whistleblower report and the difference between leaking information and whistleblowing.

This submission argues that widespread or serious misconduct raising issues of public interest should be considered as protected public interest disclosures under any new legislation, whilst disagreements about management decisions or employment-related

decisions are different and should continue to be protected under other existing legislation. Unauthorised leaks should continue to be dealt with by existing legislation.

An expanded system should have clear procedures for whistleblowers to follow in order to make a protected disclosure. This submission outlines the benefits of adopting a two-stage process in which whistleblower reports are dealt with through internal agency procedures in the first instance. Where these procedures are exhausted or unavailable due to the allegation being against an agency head, then there should be an alternative external avenue for reporting, such as to an integrity agency. In our view, it would be most efficient for an existing integrity agency, such as the Australian Public Service Commission who already has substantial legislative and APS specific expertise, to expand its functions and adopt such a role.

As the new whistleblower system will be expanded to all Commonwealth and some non-Commonwealth employees, not just the APS, it will be important to ensure that whichever agency is responsible is properly resourced.

BACKGROUND

Current Commonwealth legislative context

The Australian Government sector is made up of a range of agencies covered by a wide array of legislation. Nearly half of Australian Government agencies employ staff under the Public Service Act.

Other agencies employ staff under separate Commonwealth legislation, for example, the *Parliamentary Service Act 1999* (for Parliamentary Service departments) and the *National Gallery Act 1975* (for staff of the National Gallery of Australia). Generally speaking, non-APS Australian Government agencies with individual legislation have special responsibilities, functions or financial management requirements that go beyond the Public Service Act framework.

The Australian Public Service Commission currently has statutory powers only over agencies that are covered by the Public Service Act. Of the 232,000 employees in 185 agencies across the Australian Government sector, around 100 agencies and 155,000 employees are covered by the Public Service Act.

The Public Service Act contains the only disclosure protection provisions in the Australian Government sector. In that Act, whistleblowing refers to the reporting of information which alleges a breach of the APS Code of Conduct by an employee or employees within an APS agency (section 16 of the Public Service Act). The Public Service Act's provisions which protect whistleblowers only cover current staff employed under the Public Service Act reporting against other staff employed under the Public Service Act. Whistleblowing allegations must be made through defined channels.

There is no definition of 'public interest' in the Public Service Act, no restriction on the nature or seriousness of the conduct reported, provided that it is an allegation that there has been a breach of the Code. There is also no restriction relating to what may be an employee's motivation to make a report.

The experience of both the Public Service Commissioner and the Merit Protection Commissioner, who are authorised to receive whistleblower reports in certain circumstances, is that matters referred to them under the APS whistleblowing scheme tend to be from APS employees complaining about personal employment-related actions or grievances or concerns expressed by members of the public about the conduct of APS employees, rather than public interest matters such as those envisaged by this inquiry and described under 2(a) of the terms of reference. In respect of complaints by the public, the Public Service Act provides limited capacity for either Commissioner to inquire into such matters and these are generally referred to the relevant agency head for attention.

In the current system if the individual has not specifically invoked the whistleblowing provisions, normal Code of Conduct procedures or Review of Action procedures apply. Furthermore, a whistleblowing allegation must be made to an authorised person, whereas other Code of Conduct allegations have no such limits. Eighteen per cent of APS agencies rely solely on the agency head to receive whistleblower reports.

The 2006-07 State of the Service Report revealed some confusion among APS employees about the current arrangements for whistleblower reports. This has been of concern to the Australian Public Service Commission and prompted plans to make amendments to the Public Service Act to clarify the arrangements. The sorts of amendments under consideration included focusing the whistleblower scheme on alleged breaches of the Code of Conduct which raise public interest issues (rather than internal employment-related and other complaints), making clear that ‘leaking’ information would not be a protected disclosure, streamlining the investigation process and including clear roles for both the Public Service Commissioner and the Merit Protection Commissioner. Of course, the Public Service Act would have still provided protection for APS employees who make allegations of a breach of the Code of Conduct against another APS employee. These ideas were shelved following the Government’s announcement about its proposed broader whistleblowing scheme, including the outcome of this inquiry.

The whistleblowing provisions are balanced by a requirement, under Regulation 2.1 of the Public Service Regulations 1999 (PS Regulations), that APS employees have a duty not to disclose information which they obtain in connection with their employment, unless they are authorised to do so or the information is already lawfully in the public domain by the time of disclosure. APS employees who make such information public have breached the Code of Conduct. This is considered ‘leaking’ rather than whistleblowing. The APS Code of Conduct also requires APS employees to comply with all applicable Australian law.

In addition, under section 70 of the *Crimes Act 1914* (Crimes Act), it is an offence for a Commonwealth employee to publish or communicate any fact or document which comes to their knowledge, or into their possession, by virtue of being a Commonwealth officer, and which it is their duty not to disclose.

Section 14 of the *Privacy Act 1988 (Cth)* (Privacy Act) prescribes eleven Information Privacy Principles (IPPs) that govern the way most Australian Government agencies collect, use, disclose and handle personal information. The principles also give individuals the right to gain access to information held about them and they oblige

agencies to correct information if it is inaccurate. In general, whistleblowing disclosures within an agency would be considered a 'use' under IPP 10 while disclosures outside an agency would be considered a 'disclosure' under IPP 11.

Extracts of the specific provisions of the legislation referred to above are provided in Attachment B.

Whistleblower protection under the Public Service Act

Section 16 of the Public Service Act: 'Protection for whistleblowers' prohibits victimisation of, or discrimination against, an APS employee who reports a breach, or an alleged breach, of the Code of Conduct to an agency head, the Public Service Commissioner or the Merit Protection Commissioner, or persons authorised by them. Other APS employees, such as witnesses to an alleged breach, are not specifically protected by section 16. However, the behaviour of any APS employee towards these witnesses remains subject to the APS Values and Code of Conduct.

This section of the Public Service Act adds an additional, more visible protection to the provision in the Code of Conduct which requires employees, when acting in the course of their employment, to treat everyone with respect and courtesy and without harassment. Regulation 2.4 of the PS Regulations provides a framework for agencies to develop processes for dealing with such whistleblower reports. The 2006-07 State of the Service Report found that 88 per cent of APS agencies had established procedures for dealing with whistleblowing reports under regulation 2.4. A copy of regulation 2.4 is at Attachment B.

In the APS there is an expectation that employees will report suspected breaches of the Code to the relevant agency head in the first instance. The majority of reports are handled at the agency level.

An APS employee may make a report directly to either the Public Service Commissioner or the Merit Protection Commissioner, provided the relevant Commissioner agrees that the report relates to an issue that would be inappropriate to report to the agency head. If there is no such agreement, the employee is advised to make the report to the agency head.

An APS employee may also refer a report to either Commissioner where the employee is not satisfied with the outcome of the agency head's investigation of the report. One of the specific functions of the Public Service Commissioner is to inquire into reports made in connection with section 16 of the Public Service Act, that is, victimisation of complainants. Section 43 of the Public Service Act gives the Public Service Commissioner inquiry powers equivalent to those of the Auditor-General. To date those powers have not needed to be used.

Nature and number of Public Service Act whistleblowing reports¹

¹ As reported in the 2006-07 State of the Service Report at www.apsc.gov.au/stateoftheservice/0607/partsixcode.htm

In 2006-07, 21 employees from 10 APS agencies were investigated as a result of a report made under their agency's whistleblower procedures. This represented 2% of all misconduct investigations and compares to 3% in 2005-06 and 4% in 2004-05.

The Merit Protection Commissioner received 20 whistleblower reports during 2006-07, five more than in 2005-06. Issues raised included alleged bullying and harassment, and conflict of interest.

The Public Service Commissioner received 21 whistleblower reports in 2006-07, four more than in 2005-06. Matters raised in the reports ranged from concerns about management of recruitment processes and non-approval of leave, to allegations of victimisation, bullying and harassment. Allegations were made against an agency head and the then Merit Protection Commissioner.

Rights as private citizens

An APS employee, as a private citizen, can make a complaint about most matters of government administration to the Commonwealth Ombudsman. Under its enabling legislation, there is no provision for the Ombudsman to investigate complaints about an APS employee's employment. However, if the Ombudsman decides that it is a significant matter, he or she can effectively protect the complainant by investigating the matter as an 'own motion' investigation under section 5(1)(b) of the *Ombudsman Act 1976*—that is, the Ombudsman becomes the complainant. Of course, other Australian Government employees who are not covered by the Public Service Act can make complaints to the Commonwealth Ombudsman as well.

APS employees, as private citizens, are entitled to comment on government policy, but public criticism of government policies in areas in which the employee is working or has responsibilities could be seen as a breach of the Code of Conduct. This would constitute a failure to uphold the APS Value in section 10(1)(a) of the Public Service Act—the *Australian Public Service is apolitical, performing its functions in an impartial and professional manner*.

If an individual is acting in his or her private capacity in disclosing information about alleged misconduct, the disclosure would not be covered by the Privacy Act. If on the other hand, the disclosure is made by an individual as a representative of an agency, that disclosure would be covered by the Privacy Act.

Whistling While They Work research project

For the past three years, Griffith University has led a collaborative national research project, *Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector*, jointly funded by:

- the Australian Research Council
- five participating universities, and
- 14 industry partners, including integrity and public sector management agencies from six Australian governments such as the Commonwealth Ombudsman (the Australian Public Service Commission was a minor contributor).

The project examined the management and protection of internal witnesses, including whistleblowers, in the Australian public sector, including a study of organisational experience under the various public interest disclosure regimes by comparing, identifying and promoting current best practice.

The major research involves a survey of over 7,600 public officials from 118 public agencies in the Commonwealth, Queensland, New South Wales and Western Australian public sectors. The Commonwealth Ombudsman is represented on the project Steering Committee.

For the purposes of the project, whistleblowing is defined as the '*disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action*'. It includes internal whistleblowing, regulatory whistleblowing and public whistleblowing.

On 9 September 2008 the project group will publish its first comprehensive report—*Whistleblowing in the Australian Public Sector*.

While we are broadly supportive of this research and elements of the report's proposed best practice approach to amending the legislation, not all aspects are appropriate or necessary for implementation at the Commonwealth level.

For example, the report's list of 'key principles' to provide guidance for those jurisdictions reviewing or drafting public interest disclosure legislation are designed to apply only to people working in a public sector agency. They will therefore have limited use in a broader model that could include a scheme covering former public sector employees as well as current and former consultants and contractors. The key principles promote best practice, which may not be practical to implement in all Commonwealth agencies.

The report notes that much of the research data contains 'broad positive messages', and while the report will help to inform the Government's consideration of a new public interest disclosure system, some recommendations may be difficult and costly to implement.

The report will also include a set of recommendations intended to apply to all organisations and jurisdictions, based on the key findings. While many of the recommendations are likely to be useful, in our view some are not practical or necessary. They would be difficult for government/agencies to implement and would require a level of resources which may not be commensurate with the problem or risk, given the very broad range and scope of 'wrongdoings'.

The report's limitations include the failure to differentiate between serious malfeasance (e.g. fraud, corruption) and very minor misdemeanours (e.g. inadequate record keeping, failure to fully follow all selection procedures). All these are repeatedly referred to in the report as 'wrongdoings', which we consider to be misleading given much of the reported wrongdoing is related to minor misconduct. Our preferred definition under section 2 below, could reduce such confusion.

Other jurisdictions

In Australia, all jurisdictions except the Northern Territory, have some form of public interest disclosure legislation. The types of disclosures permitted generally include illegal activity, maladministration, public wastage and corrupt conduct, and those who can make disclosures ranges from public officials and officers, to any natural person. Disclosures can be made to a range of positions, include the relevant Ombudsman, Auditor-General and the public sector agency where the conduct has occurred. Protection includes criminalisation of reprisals and relief from certain civil and criminal liability.

Internationally, similar schemes exist. For instance, Canadian public servants may make disclosures relating to illegal activity or misuse of public funds to the relevant agency or the Public Sector Commissioner, and be protected from reprisals. Likewise, in New Zealand, current or former public sector employees may make disclosures regarding unlawful or corrupt conduct to the head of the organisation or an appropriate authority, and be protect from civil and criminal liability.

The Organisation of Economic Cooperation and Development (OECD) supports the empowerment of both public servants and citizens to report misconduct through clear and known reporting procedures and providing protection for whistleblowers.

A summary and comparison of the current systems in place in other Australian jurisdictions, as well as selected international jurisdictions is attached to this submission (see [Attachment C](#)).

COMMENTS AND VIEWS AGAINST THE TERMS OF REFERENCE

- 1. The categories of people who could make protected disclosures:**
 - a. these could include:**
 - i. persons who are currently or were formerly employees in the Australian Government general government sector², whether or not employed under the *Public Service Act 1999***
 - ii. contractors and consultants who are currently or were formerly engaged by the Australian Government**
 - iii. persons who are currently or were formerly engaged under the *Members of Parliament (Staff) Act 1984*, whether as employees or consultants, and**
 - b. the Committee may wish to address additional issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise.**

We support a wider ranging system than is currently in place to cover non-APS Commonwealth employees, contractors and consultants as well as current and former people engaged under the *Members of Parliament (Staff) Act 1984* (MoPS Act). This wider coverage would create a framework that covers and protects all Commonwealth employees, not just employees covered by the Public Service Act making disclosures about other APS employees, as is currently the case.

In our view, the current provisions in the Public Service Act are too narrow to comprehensively support integrity within the system. Extensions to 1(a)(i), (ii) and (iii) as proposed would work to uphold the accountability and openness of government decision making. It would also be consistent with other Australian jurisdictions—namely, Queensland, New South Wales and Tasmania—as well as Canada, New Zealand and the United States which allow disclosure by a wide range of public officials and officers, including legislators, contractors and former public officers.

In addition, a scheme with wider coverage would recognise the connections between APS employees and those in the wider Commonwealth public sector, including the links between APS employees and MoPS Act employees. The recent introduction of the Code of Conduct for Ministerial Staff demonstrates the importance of such relationships.

The term ‘former’ requires definition. It may be necessary to impose a time limit to determine who could be categorised as a ‘former’ employee or contractor. An appropriate time limit could be similar to that concerning the recording of Code of Conduct breaches, where, under the *Administrative Functions Disposal Authority (AFDA)* Entry No 1759 – ‘Reviews’, records relating to misconduct should be retained for no more than five years after the last entry on the file, provided there has

² As defined in the Australian Bureau of Statistics publication, *Australian Systems of Government Finance Statistics: Concepts, Sources, Methods*, 2003, p256 as ‘institutional sector comprising all government units and non-profit institutions controlled and mainly financed by government’.

been no subsequent misconduct. After this date, the misconduct information is no longer considered relevant. This would ensure protected public interest disclosures are relevant, reduce potentially vexatious claims, avoid lengthy litigation and reduce 'decision-shopping'. Similarly, the Commonwealth Spent Convictions Scheme under Part VIIC of the Crimes Act allows a person to disregard some old criminal convictions after ten years and provides protection against unauthorised use and disclosure of this information.

Consideration should also be given to whether and how current and former members of the Australian Parliament would be included. In Tasmania, current members of Parliament may make disclosures under the *Public Interest Disclosures Act 2002*. Additionally, the Queensland legislation allows legislators and judicial officers to make disclosures, and in South Australia, Western Australia, the Australian Capital Territory and in the United States, any 'natural person' can make a disclosure. In our view, this would be an important inclusion because Parliamentarians receive a wide variety of information from the public and they should be encouraged to disclose serious public interest questions.

Further, the current APS whistleblowing protections for APS employees extend to those employees on duty overseas, although locally engaged staff are not covered. The extent of this coverage should continue under the new scheme.

2. The types of disclosures that should be protected:

- a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment, and**
- b. the Committee should consider:**
 - i. whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit, and**
 - ii. whether grievances over internal staffing matters should generally be addressed through separate mechanisms.**

We believe the aim of a new scheme should be to provide an avenue to report serious public interest breaches. People would remain protected under the Public Service Act for reporting allegations of breaches of the Code of Conduct by APS employees. Therefore, in the new scheme, protected public interest disclosures should be confined to reports of widespread or systemic misconduct that raise issues of public interest, such as fraud and corruption. An example would be the Australian Wheat Board (a non-APS agency) bribery scandal.

Disclosures about other activities such as maladministration or wastage of public funds could be protected as part of the new scheme, although these activities do not

fall neatly into ‘public interest’. For example, a report into the equine influenza outbreak found it was as a result of administrative failure rather than fraud or corruption. There is little doubt this issue was a public interest case, but not all issues are so clear cut. In some instances, it could be difficult to prove that such activities were in the public interest rather than relating to personal grievances. Reports of breaches that do not qualify as ‘public interest’ reports would continue to be protected with under current provisions in the Public Service Act. Where there is doubt over whether an activity should be protected, the person authorised to receive a whistleblowing report should consider if there has been a serious and substantial failure of administration at the cost of the public interest.

Disagreements about management decisions, and complaints and grievances about employment decisions or internal staffing matters should not be accepted as a protected disclosure in the public interest. There are already separate and well defined avenues for dealing with such disagreements through the Public Service Act, including established agency procedures and the review of actions provisions set out in Part 5 of the PS Regulations. There is a tendency by some people to seek reviews from all available sources either consecutively or concurrently—that is, ‘review shopping’—which is inefficient and costly.

We believe the new scheme should strengthen the current definition of whistleblowing, by limiting the scope of the new scheme to issues in the public interest. This may include fraud, corruption, illegal activity or serious administrative failure. While it may not be possible to precisely define ‘public interest’, people authorised to receive reports should be provided with guidance on what may constitute public interest matters and what would be more appropriate to be considered under other provisions. Because of the judgement involved in making a decision about what is ‘public interest’, it would be preferable to have one person receiving all disclosures.

Protection should not be afforded to people who disclose confidential information in order to air disagreement with government policy, cause embarrassment to the Government or gain personal benefit. Unauthorised leaks should not be covered by these provisions as the proper reporting channels have not been followed and disclosure is made external to the APS. Further, the person choosing to leak the information is not likely to be fully aware of all the implications of disclosure to an external party, including other open investigations. For example, in the Kessing case, a former APS employee in the Australian Customs Service provided confidential reports about airport security to News Limited. Although some sections of the media have claimed that the subsequent security upgrade would not have occurred otherwise, Kessing was convicted under section 70 of the Crimes Act (disclosure of information by Commonwealth officers). It is not clear whether Kessing pursued available avenues within his agency or allowed sufficient time for the agency to respond prior to leaking the information.

Unauthorised leaking is not just an issue for the public service. All employees have a duty to their employer to protect confidential information. This duty operates concurrently with the common law duty of fidelity. Therefore, any change to the current framework should define and explicitly exclude leaks.

Allegations of Code of Conduct breaches made by APS employees about other APS employees would still be covered under the current legislative protections. That is, such complainants would be protected from discrimination and victimisation under section 16 of the Public Service Act.

Private citizens may also lodge complaints with the Commonwealth Ombudsman about most matters of government administration.

- 3. The conditions that should apply to a person making a disclosure, including:**
 - a. whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a)), and**
 - b. whether penalties and sanctions should apply to whistleblowers who:**
 - i. in the course of making a public interest disclosure, materially fail to comply with the procedures under which disclosures are to be made, or**
 - ii. knowingly or recklessly make false allegations.**

We consider that the system should include deterrents to discourage allegations which are false, misconceived or lacking in substance, as well as deterrents to discourage non-compliance with procedures as described in 3(b) above.

However, there should not be any repercussions for a complainant just because a complaint is not upheld, that is, for people who hold an honest and reasonable belief that a public interest disclosure is necessary and make one in good faith, but the allegation is not substantiated upon investigation.

The system should not be too burdensome on whistleblowers, although some conditions should exist to lessen the likelihood of false or unsubstantiated allegations. There should be a requirement to produce some proof of the allegation—suspicion or gossip should not be sufficient grounds to instigate an investigation.

If a whistleblower does not comply with the proper procedures or processes for making a public interest disclosure, there should be some consequence for that person. Penalties could mirror the range of sanctions under section 15(1) of the Public Service Act, although currently these only relate to APS employees. At a minimum, such disclosures should be protected under public interest disclosure legislation.

If the scheme is widened to incorporate non-APS and former APS employees, this would affect the type of penalties that may be imposed for making an allegation which is false, misconceived or lacking in substance. As noted above, it may be more difficult to impose a sanction or penalty on former employees. Under the Public Service Act, where an employee is found to have breached the Code of Conduct, a range of sanctions are available related to the nature of the employment relationship. Sanctions can range from a reprimand, through to a fine or reduction in classification

level, to termination. Clearly, however, some of these types of sanctions would not be appropriate, relevant or possible to apply to some complainants. For example a reduction in classification level is irrelevant to MoPS Act employees who do not have classifications; similarly termination is irrelevant to a former APS employee. The new scheme will need to determine a range of penalties that can be applied equally and consistently to any complainant, for example, fines or dismissal.

- 4. The scope of statutory protection that should be available, which could include:**
 - a. protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection**
 - b. immunity from criminal liability and from liability for civil penalties, and**
 - c. immunity from civil law suits such as defamation and breach of confidence.**

We agree that there should be statutory protection for genuine whistleblowers who do not fall under 2(b)(i) above.

Under the Public Service Act, APS whistleblowers are protected against victimisation and discrimination by another APS employee. However, the Australian Public Service Commission has been considering amendments to these provisions to strengthen these protections. For example, the victimisation of a whistleblower could also be made a specific breach of the APS Code of Conduct and any such act would then be subject to the range of sanctions under section 15(1) of the Public Service Act.

However, as noted earlier, plans to progress amendments to the whistleblower provisions of the Public Service Act have been deferred until the Government makes decisions on a broader scheme.

The scheme should include mechanisms which allow a whistleblower to remain anonymous where it is lawful and practicable to do so.

Criminal matters fall under the jurisdiction and expertise of the Australian Federal Police and the Commonwealth Department of Public Prosecutions. However, if the scheme includes some level of immunity from criminal or civil litigation for whistleblowers, we believe this should specifically be limited to genuine whistleblowers who have made approved protected public interest disclosures. Immunity should not be granted if a person makes a whistleblower report in retaliation or to pre-empt a whistleblower report or criminal proceeding against them. It should also be relevant to the matter at hand, so that any other ongoing investigations (including Code of Conduct or even performance management proceedings) are not delayed. Other Australian jurisdictions as well as New Zealand provide protection from civil and criminal liability. Other international jurisdictions, including Canada, United Kingdom, United States and South Africa, protect whistleblowers from victimisation, retaliatory action and 'occupational detriment' including harassment and intimidation.

Whistleblowers have different motivations for making reports and, if they were all protected from litigation (particularly defamation) some whistleblowers may be tempted to take their claims further than they otherwise would have. An increase in the number of vexatious or unsubstantiated claims could potentially undermine the effectiveness and credibility of the scheme and become just another avenue for review.

- 5. Procedures in relation to protected disclosures, which could include:**
- a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two**
 - b. the obligations of public sector agencies in handling disclosures**
 - c. the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education), and**
 - d. whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted.**

Our view is that the system should have clear procedures for public interest disclosures to follow in relation to protected disclosures. This could be set out in a broad two-stage process, as follows:

1. Follow internal agency public interest disclosure procedures.
2. If these are exhausted, or are unavailable due to the allegation being against an agency head, then provide an alternative avenue for reporting, such as an integrity agency.

Stage 1 – internal procedures

Our view is that internal agency procedures should always be followed in the first instance. Individual agencies are best placed, where the allegation does not relate to the agency head, to initially determine alleged wrongdoings within their own context, prior to allegations being passed on to another authority. This allows issues to be handled quickly and efficiently by the agency, which promotes confidence in the system. It also provides an opportunity for the agency to determine whether the report is a genuine disclosure or should be dealt with under other provisions.

The importance of appropriate procedures within agencies cannot be overstated. The more informed agencies and their employees are about public interest disclosures and redress avenues, the more effective the system will be. Good practice guidance should be provided to agencies to develop their internal disclosure procedures. This will assist agencies in identifying genuine issues and concerns, and dealing with them promptly, as well as allay some of the concerns with the current system. To recognise the serious nature of disclosure reports, we believe agency heads should have a greater role in dealing with such reports.

There is a perception that some APS employees are reluctant to report others who breach the Code of Conduct. Agencies have a responsibility to ensure that employees are comfortable with reporting wrongdoing, suspected breaches of the Code are investigated fairly and reasonably, and sanctions have substance and are respected by employees. Quality assurance mechanisms, such as staff and client surveys, should be used to monitor adherence to appropriate standards and improve agency practice. These are all key aspects of agency health and governance and results should be regularly incorporated into review and planning procedures.

Stage 2 – external avenues

Our view is that there are four broad options for dealing with stage 2 above.

Consideration could be given to:

1. a single, new and separate agency, or
2. an existing integrity agency with an expanded role—the Australian Public Service Commission or the Commonwealth Ombudsman, or
3. continuing with multiple approaches depending on who the complainant is (i.e. APS staff reporting against other APS staff dealt with under the Public Service Act, members of the public reporting against Commonwealth agencies dealt with by the Commonwealth Ombudsman, etc) but with a common framework to reduce issues such as decision-shopping.

Option 1 - a single, new and separate agency

The benefits of option 1 are that a single responsible agency, providing an integrated approach in this area, could provide a clear and unambiguous process for whistleblowers to follow and could minimise ‘decision-shopping’.

The major disadvantage of this approach is that it would be inefficient—there are existing bodies with similar roles, such as the Australian Public Service Commission and the Ombudsman, that would be well suited to undertake a broader role, albeit with legislative amendment and appropriate resourcing.

We are aware that some commentators and State jurisdictions see a need nationally for a new, independent body, such as an anti-corruption commission along the lines of the New South Wales Independent Commission Against Corruption, the Queensland Crime and Misconduct Commission or the Western Australian Corruption and Crime Commission. In the State environment, a major benefit of an ICAC-type body is the visible statement of commitment and the reassurance it gives to the public. In addition, with States having responsibility for community and local functions, including policing matters, it is considered that there are more opportunities for individuals to be targeted and influenced.

There are not many incidents of systemic corruption in the Commonwealth public sector, but it is an issue of importance as it goes to the integrity of the sector. While there have been some high profile incidents, such as the Australian Wheat Board (a non-APS agency) bribery scandal, the Commonwealth has not experienced the scandals and corruption to the same extent as some other jurisdictions.

The likelihood of employees in the Commonwealth public sector being subject to influence is limited given the checks and balances in place at the 'transaction' end of government, such as certain decision-making delegations resting with people not in direct contact with the public. While it is acknowledged that some agencies deal direct with the public, such as the Australian Taxation Office and Centrelink, sophisticated processes and systems for detection help to mitigate against the risk of inappropriate behaviour and activities.

The Commonwealth also has very effective electronic detection arrangements, a range of fraud control and risk assessment strategies and considerable external scrutiny through the Senate and the Australian National Audit Office, not to mention the intense scrutiny from groups like the media and academia.

In addition, in the APS the Code of Conduct is not discretionary i.e. it is prescribed by law and there are sanctions for people who are found to have breached the Code. The situation is not so clear cut in other Australian jurisdictions where individual agencies may have Codes of Conduct but there is not an overarching Code such as in the APS. In any case, incidents in the APS, when they do occur, are more a matter of mismanagement, ignorance or lack of imagination or flexibility rather than deliberate malpractice or corruption.

In this environment, it would be hard to justify the significant costs and time taken to establish a new agency in the Commonwealth where misdemeanours are not common. Such a move could be misinterpreted as a response to suspected serious and widespread malfeasance (there is no evidence of this) and as a lack of confidence in existing integrity agencies (which are highly regarded).

Other disadvantages of Option 1 include the possible risks of confusion about the separate agency's role compared to agencies' internal processes (stage 1 above) and a temptation for complainants to go straight to the separate agency (stage 2), which would be a disincentive to the agency to take early intervention and responsibility for its resolution.

It should be noted that, while anti-corruption style commissions typically have strong secrecy provisions, they are generally not covered by privacy regulation. For example, the NSW Crime Commission and the Independent Commission Against Corruption (ICAC) are specifically exempt from compliance with privacy principles under section 27 of the NSW *Privacy and Personal Information Protection Act 1998*.

The Privacy Act offers useful protections for an individual's personal information. If a separate agency approach were to be adopted at the Commonwealth level, there would need to be further consideration of how it would interact with the Privacy Act. As such, secrecy provisions may not provide reasonable access rights to an individual (either the respondent or the complainant) and may not require notice to be given regarding the use of an individual's personal information. If a new agency were to be established outside the coverage of the Privacy Act, guidelines would need to be developed to ensure that personal information is handled appropriately.

Option 2 - an existing integrity agency with an expanded role: Australian Public Service Commission

Option 2 largely retains the benefits of option 1 but with less risk of the disadvantages by using a ‘single agency’ approach achieved through an expanded role for an existing ‘integrity’ body. This could be done easily by expanding the existing agency head’s powers of investigation.

The Australian Public Service Commission already has a positive and independent reputation, both in Australia and internationally. The Commission’s primary clients are necessarily limited to agencies governed by the Public Service Act given its statutory limitations.

The Commission would be well suited to take on the role, particularly on the basis of:

- the Public Service Act contains the only disclosure protection provisions in the Australian government sector
- the Public Service Act covers everyday matters where officials make allegations about breaches of the APS Values and Code of Conduct and more serious issues that might fall under the new protected public interest disclosure scheme
- a proven track record in research, monitoring, analysis and reporting arrangements of a range of public interest disclosure matters
- a comprehensive background in handling sensitive and complex investigations, including mediation
- as part of its existing work, the Commission has robust arrangements for the handling and providing of sensitive and confidential advice, including through the SES Advisor role and the advice provided through the Public Service Commissioner and Deputy Commissioner
- expertise in communicating new and ongoing arrangements for whistleblowing in the APS, as well as developing education material and providing necessary training
- being able to provide a ‘one-stop-shop’ for all disclosures and thereby avoiding the confusion of having to deal with different agencies
- the Public Service Commissioner’s other current statutory independent roles.

Given the fine line in judgement in determining what is an issue for public interest disclosure as opposed to breaches of the Code of Conduct, it would be wise to keep these roles to one person in one agency.

In addition, the Australian Public Service Commission has been responsible for the APS Values since their formal inception over a decade ago, so charging the Commission with the responsibility of an alternative avenue for reporting would be a natural extension of that role. The role of the Public Service Commissioner could be expanded through amendments to the Public Service Act.

To effectively implement and maintain the integrity of an expanded role for the Public Service Commissioner, additional resources would be required.

Another option would be for the Commonwealth Ombudsman to take on the role. The Ombudsman's Office also has a positive and independent reputation with the Australian public. It has broad powers across the Australian Government sector but does not have any powers in relation to APS Values and the Code of Conduct. The Ombudsman's independence is drawn largely from being appointed by the Governor-General; the selection process falls under the new transparent and merit-based selection policy arrangements.

A number of risks are associated with an expanded role for the Ombudsman, including:

- the likely confusion by APS employees of the extent to which the Ombudsman could consider employment matters, and
- the Ombudsman's legal obligations to attend to all complaints received, including relatively minor issues under the office's existing role, which may detract resources and focus from the most serious allegations of fraud and corruption.

In addition, under this option there would need to be a very clear distinction between the types of cases to be handled by the Ombudsman and those referred to the Australian Public Service Commission for review. Development of detailed (and most likely complex) protocols would be critical for the effective operation of the system.

The Ombudsman's Office is making its own submission and can provide the Committee with further detail on the impact on its work and how it could legally and practically happen.

Option 3 - continuing with multiple approaches

Option 3 may be the simplest scheme to implement because it would draw on existing processes and systems. Under this approach, we would expect that the Australian Public Service Commission, the Ombudsman's Office and other integrity agencies would continue in their current roles under enhanced legislation, but within some kind of overarching framework to facilitate a 'virtual' integrity agency approach. This would require amendments to current legislations and would be necessary to provide a mechanism for coordinating education, monitoring and reporting, and minimising 'decision-shopping'.

Under this option, however, there is a strong risk that potential complainants will be confused about which process and system applies to them and what approach they should take. This could unintentionally encourage complainants to 'leak' rather than 'disclose' or discourage legitimate and significant complaints.

Third party disclosure

Our view is that disclosure to a third party should not be protected (see 5(d) above). It is worth noting that New South Wales is the only jurisdiction to extend protection to disclosures to media and politicians, although there is the requirement that a whistleblower exhaust all other avenues for disclosures, or that there be an imminent and significant risk of danger, before such a disclosure is permitted. Particularly with

options 1, 2 and 3 described above, there should be no recourse to further avenues such as the media. Instead, perhaps there could be an appeals or review process made available.

The potential impact of these options on the Public Service Act and the Public Service Commissioner's and Merit Protection Commissioner's role under current legislation is discussed under section 6 below.

Regardless of which model is adopted, the whistleblowing provisions in the Public Service Act will need to be amended to include non-APS agencies and individuals.

Privacy obligations

No matter who discloses the alleged misconduct, the agency receiving the allegation must comply with the Privacy Act in the way it handles personal information.

Procedures

There should be clear procedures in place for making protected disclosures. Such procedures should be easily accessible so as to ensure that all parties understand how the whistleblowing process operates, particularly in regard to how personal information may be handled.

- Agencies should have appropriate authorisations to use and disclose the information collected from the informant.
- Potential whistleblowers would need to understand from the outset if and when their identity might be revealed. This could either be by seeking the individual's consent or by providing a notice explaining what will happen to the information. The consent model would be preferable as it offers an individual some control over their personal information. Either of these approaches would be consistent with IPP 2 which requires agencies to inform individuals:
 - why the agency is collecting the information
 - the agency's legal authority to collect the information
 - to whom the agency usually sends the information.
- All personal information regarding whistleblowing matters should be handled securely in accordance with IPP4. This principle requires agencies to take 'security safeguards' as are reasonable in the circumstances. Given the potential sensitivity of the information to both the whistleblower and alleged wrongdoer, it would be reasonable that security safeguards include robust protections.
- Personal information should be destroyed or deleted where it is no longer relevant.

Legislation should include protections to safeguard the reputation and information privacy of all individuals involved in whistleblowing matters. Though the terms of reference do not specifically refer to the protections for the subjects of complaints,

these should be developed alongside those for whistleblowers as well as for third parties. This could include restrictions on who can access the information and on the authorised uses and disclosures of the information.

6. The relationship between the Committee's preferred model and existing Commonwealth laws.

Depending which option was implemented, relevant legislation, including the Public Service Act and the Ombudsman Act, may need to be amended. As noted above, the Australian Public Service Commission's proposals to amend the Public Service Act have been put on hold until the Government's plans for a broader scheme are finalised.

As already noted in the background section of this submission, the Public Service Commissioner and Merit Protection Commissioner currently have roles in receiving reports:

- from APS employees who have already made a report to their agency head but are not satisfied with the outcome
- about agency heads, and
- about victimisation resulting from a whistleblowing report.

A distinction should also be clearly made between approved whistleblowing—that is, public interest disclosures—and leaking of information.

The Office of the Privacy Commissioner should retain jurisdiction for alleged interferences with privacy where personal information is mishandled by an agency.

If a new single agency were to be established, it might be useful for it to be given the status of an enforcement body under the Privacy Act for the purposes of investigating whistleblowing matters.

Any new framework should allow complaint matters to be referred to the appropriate agency if there is an overlap of responsibilities. In this framework it will be important to limit the flow of information to those who have a genuine 'need to know'. If concurrent investigations by a number of agencies are being considered (for example law enforcement, the Office of the Privacy Commissioner, the Australian Public Service Commission or a new single oversight agency) the framework should define the permitted purposes of sharing the information. This would ensure that details of the alleged misconduct are only disclosed when it is absolutely necessary for the investigations.

The National Archives of Australia is currently reviewing the *Administrative Functions Disposal Authority* (AFDA) to include specific reference to records related to cases of whistleblowing.

7. Such other matters as the Committee considers appropriate.

N/A

Department of Education, Employment and Workplace Relations Whistleblowing submission

1. Categories of people

The Department of Education, Employment and Workplace Relations (DEEWR) supports with the Australian Public Service Commission a wider ranging system covering not only core APS staff but also non APS Commonwealth employees, contractors, consultants and persons engaged under the *Members of Parliament (Staff) Act*. However, in doing so, DEEWR notes the following for further consideration:

- the difficulties of giving protection to people outside immediate Government employment, such as contractors/consultants; and
- expectations of the Government and the public on issues of accountability. A clear understanding of expectations will assist in establishing suitable parameters.

2. Types of disclosures to be protected

DEEWR supports the view that protected disclosures should be limited to widespread or systemic illegal behaviour that raises issues of public interest. However, in doing so the need to expand on some definitional aspects is noted. For example: could 'widespread or systemic misconduct/illegal behaviour', on face value, exclude a single but serious incident?

There would also be value in clarifying the difference between disclosures and unauthorised leaks.

DEEWR does not support complaints and grievances about employment decisions or internal staffing matters being accepted as a protected disclosure.

3. Conditions applying to person making disclosure

DEEWR supports the Australian Public Service Commission's view that sanctions and penalties should also apply to frivolous or false claims. It is noted however that there may be a need to allow for the exercise of discretion in issuing a penalty on a whistleblower who fails to follow set procedures. Additionally there could be a differentiation in penalties between disclosures that are made merely carelessly, and those that are made maliciously.

4. Scope of statutory protection

DEEWR agrees with the Australian Public Service Commission that there should be a level of statutory protection afforded to whistleblowers. Given the legal issues involved, the scope of the protection afforded should be developed in consultation with the relevant agencies including the Attorney-Generals' Department.

5. Procedures in relation to protected disclosures

DEEWR supports the option of a single integrity agency to deal with cases that are exhausted by internal procedures or can not be dealt with internally. The proposed integrity agency could also receive complains or referrals from whistleblowers.

Should the integrity agency option be pursued, a number of issues would need to be addressed, including:

- the powers of the integrity agency to review agencies' decisions/mechanisms;
- any requirements for a level of commonality to be maintained across all agencies for how to deal with disclosures and whistleblowers;
- reporting obligations of the integrity agency, perhaps annually, especially to avoid any scope for third party reporting;
- Options for appeals and/or review including consideration of what status would be accorded to any decision of the integrity agency. That is, would a decision of the integrity commission count as an administrative decision capable of being judicially reviewed or reviewed on the merits. Additionally, would the integrity agency be subject to reviews by the Commonwealth Ombudsman.

6. Relationship between preferred model and existing Commonwealth laws

With respect to the proposal for a single integrity agency, it is DEEWR's view that given the protections accorded to whistleblowers in the *Public Service Act 1999* (Public Service Act), the interaction of any wider whistleblowing protections with those under the Public Service Act, including the respective roles of the Public Service Commissioner and the integrity commissioner, need to be considered.

Public Service Act 1999

10 APS Values

- (1) The APS Values are as follows:
 - (a) the APS is apolitical, performing its functions in an impartial and professional manner;

13 The APS Code of Conduct

- (1) An APS employee must behave honestly and with integrity in the course of APS employment.
- (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.
- (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
- (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.

16 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 Regulations 1999

2.1 Duty not to disclose information (Act s 13)

- (1) This regulation is made for subsection 13 (13) of the Act.
- (2) This regulation does not affect other restrictions on the disclosure of information.
- (3) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
- (4) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:
 - (a) was, or is to be, communicated in confidence within the government; or
 - (b) was received in confidence by the government from a person or persons outside the government;whether or not the disclosure would found an action for breach of confidence.
- (5) Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee if:
 - (a) the information is disclosed in the course of the APS employee's duties; or
 - (b) the information is disclosed in accordance with an authorisation given by an Agency Head; or
 - (c) the disclosure is otherwise authorised by law; or
 - (d) the information that is disclosed:
 - (i) is already in the public domain as the result of a disclosure of information that is lawful under these Regulations or another law; and
 - (ii) can be disclosed without disclosing, expressly or by implication, other information to which subregulation (3) or (4) applies.
- (6) Subregulations (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.

Note Under section 70 of the *Crimes Act 1914*, it is an offence for an APS employee to publish or communicate any fact or document which comes to the employee's knowledge, or into the employee's possession, by virtue of being a Commonwealth officer, and which it is the employee's duty not to disclose.

2.4 Procedures for dealing with whistleblowers reports (Act s 16)

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

Note Section 16 deals with reports of breaches (or alleged breaches) of the Code of Conduct.

- (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.

Crimes Act 1914

70 Disclosure of information by Commonwealth officers

- (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence.
- (2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

Privacy Act 1988 (Section 14)

Principle 1 - Manner and purpose of collection of personal information

1. Personal information shall not be collected by a collector for inclusion in a record or in a generally available publication unless:

(a) the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector; and

(b) the collection of the information is necessary for or directly related to that purpose.

2. Personal information shall not be collected by a collector by unlawful or unfair means.

Principle 2 - Solicitation of personal information from individual concerned

Where:

(a) a collector collects personal information for inclusion in a record or in a generally available publication; and

(b) the information is solicited by the collector from the individual concerned;

the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, before the information is collected or, if that is not practicable, as soon as practicable after the information is collected, the individual concerned is generally aware of:

(c) the purpose for which the information is being collected;

(d) if the collection of the information is authorised or required by or under law - the fact that the collection of the information is so authorised or required; and

(e) any person to whom, or any body or agency to which, it is the collector's usual practice to disclose personal information of the kind so collected, and (if known by the collector) any person to whom, or any body or agency to which, it is the usual practice of that first mentioned person, body or agency to pass on that information.

Principle 3 - Solicitation of personal information generally

Where:

(a) a collector collects personal information for inclusion in a record or in a generally available publication; and

(b) the information is solicited by the collector:

the collector shall take such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is collected:

(c) the information collected is relevant to that purpose and is up to date and complete; and

(d) the collection of the information does not intrude to an unreasonable extent upon the personal affairs of the individual concerned.

Principle 4 - Storage and security of personal information

A record-keeper who has possession or control of a record that contains personal information shall ensure:

(a) that the record is protected, by such security safeguards as it is reasonable in the circumstances to take, against loss, against unauthorised access, use, modification or disclosure, and against other misuse; and

(b) that if it is necessary for the record to be given to a person in connection with the provision of a service to the record-keeper, everything reasonably within the power of the record-keeper is done to prevent unauthorised use or disclosure of information contained in the record.

Principle 5 - Information relating to records kept by record-keeper

1. A record-keeper who has possession or control of records that contain personal information shall, subject to clause 2 of this Principle, take such steps as are, in the circumstances, reasonable to enable any person to ascertain:

(a) whether the record-keeper has possession or control of any records that contain personal information; and

(b) if the record-keeper has possession or control of a record that contains such information:

(i) the nature of that information;

(ii) the main purposes for which that information is used; and

(iii) the steps that the person should take if the person wishes to obtain access to the record.

2. A record-keeper is not required under clause 1 of this Principle to give a person information if the record-keeper is required or authorised to refuse to give that information to the person under the applicable provisions of any law of the Commonwealth that provides for access by persons to documents.

3. A record-keeper shall maintain a record setting out:

- (a) the nature of the records of personal information kept by or on behalf of the record-keeper;
- (b) the purpose for which each type of record is kept;
- (c) the classes of individuals about whom records are kept;
- (d) the period for which each type of record is kept;
- (e) the persons who are entitled to have access to personal information contained in the records and the conditions under which they are entitled to have that access; and
- (f) the steps that should be taken by persons wishing to obtain access to that information.

4. A record-keeper shall:

- (a) make the record maintained under clause 3 of this Principle available for inspection by members of the public; and
- (b) give the Commissioner, in the month of June in each year, a copy of the record so maintained.

Principle 6 - Access to records containing personal information

Where a record-keeper has possession or control of a record that contains personal information, the individual concerned shall be entitled to have access to that record, except to the extent that the record-keeper is required or authorised to refuse to provide the individual with access to that record under the applicable provisions of any law of the Commonwealth that provides for access by persons to documents.

Principle 7 - Alteration of records containing personal information

1. A record-keeper who has possession or control of a record that contains personal information shall take such steps (if any), by way of making appropriate corrections, deletions and additions as are, in the circumstances, reasonable to ensure that the record:

- (a) is accurate; and
- (b) is, having regard to the purpose for which the information was collected or is to be used and to any purpose that is directly related to that purpose, relevant, up to date, complete and not misleading.

2. The obligation imposed on a record-keeper by clause 1 is subject to any applicable limitation in a law of the Commonwealth that provides a right to require the correction or amendment of documents.

3. Where:

(a) the record-keeper of a record containing personal information is not willing to amend that record, by making a correction, deletion or addition, in accordance with a request by the individual concerned; and

(b) no decision or recommendation to the effect that the record should be amended wholly or partly in accordance with that request has been made under the applicable provisions of a law of the Commonwealth;

the record-keeper shall, if so requested by the individual concerned, take such steps (if any) as are reasonable in the circumstances to attach to the record any statement provided by that individual of the correction, deletion or addition sought.

Principle 8 - Record-keeper to check accuracy etc of personal information before use

A record-keeper who has possession or control of a record that contains personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date and complete.

Principle 9 - Personal information to be used only for relevant purposes

A record-keeper who has possession or control of a record that contains personal information shall not use the information except for a purpose to which the information is relevant.

Principle 10 - Limits on use of personal information

1. A record-keeper who has possession or control of a record that contains personal information that was obtained for a particular purpose shall not use the information for any other purpose unless:

(a) the individual concerned has consented to use of the information for that other purpose;

(b) the record-keeper believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person;

(c) use of the information for that other purpose is required or authorised by or under law;

(d) use of the information for that other purpose is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or

(e) the purpose for which the information is used is directly related to the purpose for which the information was obtained.

2. Where personal information is used for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue, the record-keeper shall include in the record containing that information a note of that use.

Principle 11 - Limits on disclosure of personal information

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:

(a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;

(b) the individual concerned has consented to the disclosure;

(c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;

(d) the disclosure is required or authorised by or under law; or

(e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

2. Where personal information is disclosed for the purposes of enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the purpose of the protection of the public revenue, the record-keeper shall include in the record containing that information a note of the disclosure.

3. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

WHISTLEBLOWING LEGISLATION IN AUSTRALIA³
Who can make a disclosure?

South Australia <i>Whistleblowers Protection Act 1993</i>	<ul style="list-style-type: none"> • A person
Queensland <i>Whistleblowers Protection Act 1994</i>	<ul style="list-style-type: none"> • Public officials and officers • Includes: everyone employed by State Government such as legislators, judicial officers and officers of Government owned corporations • Anybody may make a disclosure about dangers to person with a disability, dangers to the environment, or reprisals
NSW <i>Protected Disclosures Act 1994</i>	<ul style="list-style-type: none"> • Public officials and officers • Includes: employees of State owned corporations, subsidiaries of State owned corporations, local government authorities, any other individual having public official functions or acting in a public official capacity • Former public officials and officers
Victoria <i>Whistleblowers Protection Act 2001</i>	<ul style="list-style-type: none"> • Any natural person
Tasmania <i>Public Interest Disclosures Act 2002</i>	<ul style="list-style-type: none"> • Public officials and officers • Includes: Members of Parliament, employees of public bodies and councils. • Excludes: judicial officers, Former public officials, Contractors who contract with public bodies, Former contractors
WA <i>Public Interest Disclosures Act 2003</i>	<ul style="list-style-type: none"> • Any natural person
ACT <i>Public Interest Disclosures Act 1994</i>	<ul style="list-style-type: none"> • Any natural person
Commonwealth <i>Public Service Act 1999</i>	<ul style="list-style-type: none"> • Public officials and officers • Includes: Australian Public Service employees • Excludes: legislators, judicial officers and administrators, Government corporations, agency employees, Australian Federal Police, Australian Defence Forces

³ Source: Attorney-General's Department, 2007

WHISTLEBLOWING LEGISLATION IN AUSTRALIA
What type of wrongdoing may be reported?

<p>South Australia <i>Whistleblowers Protection Act 1993</i></p>	<ul style="list-style-type: none"> • Illegal activity • Unauthorised use of public money • Substantial mismanagement of public resources • Mal-administration • Substantial risk to public health or safety or the environment
<p>Queensland <i>Whistleblowers Protection Act 1994</i></p>	<ul style="list-style-type: none"> • Illegal activity and official misconduct • Substantial waste of public funds • Mal-administration • Substantial and specific danger to public health or safety or the environment • Substantial and specific danger to a person with a disability
<p>NSW <i>Protected Disclosures Act 1994</i></p>	<ul style="list-style-type: none"> • Illegal and corrupt conduct • Public wastage • Mal-administration
<p>Victoria <i>Whistleblowers Protection Act 2001</i></p>	<ul style="list-style-type: none"> • Illegal and corrupt conduct • Public wastage • Substantial risk to public health or safety or the environment
<p>Tasmania <i>Public Interest Disclosures Act 2002</i></p>	<ul style="list-style-type: none"> • Illegal and corrupt conduct • Public wastage • Substantial risk to public health or safety or the environment
<p>WA <i>Public Interest Disclosures Act 2003</i></p>	<ul style="list-style-type: none"> • Illegal activity and improper or corrupt conduct • Substantial waste of public resources • Substantial and specific risk to public health or safety or the environment
<p>ACT <i>Public Interest Disclosures Act 1994</i></p>	<ul style="list-style-type: none"> • Illegal and corrupt conduct • Public wastage • Substantial and specific danger to health or safety of the public • Unlawful reprisals
<p>Commonwealth <i>Public Service Act 1999</i></p>	<ul style="list-style-type: none"> • Breaches of APS Code of Conduct • Illegal and corrupt conduct • Public wastage • Mal-administration

WHISTLEBLOWING LEGISLATION IN AUSTRALIA
What sort of protection is provided to a whistleblower?

<p>South Australia <i>Whistleblowers Protection Act 1993</i></p>	<ul style="list-style-type: none"> • Relief from civil and criminal liability for defamation and breach of confidence, not liable under a disciplinary process • Victimisation gives rise to tort action or equal opportunity or anti-discrimination action under the <i>Equal Opportunity Act 1984</i>
<p>Queensland <i>Whistleblowers Protection Act 1994</i></p>	<ul style="list-style-type: none"> • Relief from civil and criminal liability for defamation and breach of confidence, not liable under an administrative or disciplinary process • Criminalisation of reprisals • Reprisals may be dealt with as a tort or through an action for discrimination or unfair treatment in other tribunals. • Injunctions may be sought at the Industrial Commission or Supreme Court
<p>NSW <i>Protected Disclosures Act 1994</i></p>	<ul style="list-style-type: none"> • Relief from civil and criminal liability for defamation and breach of confidence , not liable under a disciplinary process • Criminalisation of reprisals
<p>Victoria <i>Whistleblowers Protection Act 2001</i></p>	<ul style="list-style-type: none"> • Relief from civil and criminal liability for defamation and breach of confidence, not liable under an administrative or disciplinary process • Criminalisation of reprisals • Reprisals may be dealt with as a tort • Injunctions may be sought in the Supreme Court
<p>Tasmania <i>Public Interest Disclosures Act 2002</i></p>	<ul style="list-style-type: none"> • Relief from civil and criminal liability, not liable under an administrative process (including disciplinary action) • Criminalisation of reprisals • Reprisals may be dealt with as a tort • Injunction or other appropriate order may be sought in the Supreme Court
<p>WA <i>Public Interest Disclosures Act 2003</i></p>	<ul style="list-style-type: none"> • Relief from civil and criminal liability for breach of confidence, not liable under an administrative process • Criminalisation of reprisals • Reprisals may be dealt with as a tort or through an action for discrimination or unfair treatment under <i>Equal Opportunity Act 1984</i>
<p>ACT <i>Public Interest Disclosures Act 1994</i></p>	<ul style="list-style-type: none"> • Relief from civil and criminal liability for breach of confidence, qualified privilege in relation to a defamation action • Criminalisation of reprisals • Reprisals may be dealt with as a tort • Injunction or other appropriate order may be sought in a relevant court
<p>Commonwealth <i>Public Service Act 1999</i></p>	<ul style="list-style-type: none"> • Protection from victimisation and discrimination • No explicit relief from legal or disciplinary consequences

WHISTLEBLOWING LEGISLATION IN AUSTRALIA
To whom can disclosures be made?

<p>South Australia <i>Whistleblowers Protection Act 1993</i></p>	<ul style="list-style-type: none"> • Any public agency in respect of its own officials and operations and matters falling within its sphere of responsibility • Minister of the Crown • Presiding Member of a House of Parliament if conduct relates to a Member of that House
<p>Queensland <i>Whistleblowers Protection Act 1994</i></p>	<ul style="list-style-type: none"> • Any public sector entity about its own conduct and conduct of its officers, or where it has powers to investigate • Minister of the Crown (arguably)
<p>NSW <i>Protected Disclosures Act 1994</i></p>	<ul style="list-style-type: none"> • Officer of a public or investigating authority in relation to its officers or to which the disclosure relates • Ombudsman • Auditor-General • Corruption Commission • Member of Parliament • Journalist
<p>Victoria <i>Whistleblowers Protection Act 2001</i></p>	<ul style="list-style-type: none"> • Public body in relation to its members, officer and employees • Ombudsman in relation to Chief Commissioner of Police or the police force • Presiding Member of a House of Parliament if conduct relates to a Member of that House
<p>Tasmania <i>Public Interest Disclosures Act 2002</i></p>	<ul style="list-style-type: none"> • Public body in relation to its members, officers and employees • Ombudsman • Commissioner of Police • State Service Commissioner • Presiding Member of a House of Parliament if conduct relates to a Member of that House
<p>WA <i>Public Interest Disclosures Act 2003</i></p>	<ul style="list-style-type: none"> • Public body in relation to matters falling within its sphere of responsibility • Auditor-General • Police • Corruption Commission • Chief Justice • Police Commissioner • Presiding Member of a House of Parliament if conduct relates to a Member of that House
<p>ACT <i>Public Interest Disclosures Act 1994</i></p>	<ul style="list-style-type: none"> • Public body in relation to its officers or employees or where it has a function or power to investigate • Ombudsman • Auditor-General
<p>Commonwealth <i>Public Service Act 1999</i></p>	<ul style="list-style-type: none"> • Public Service Commissioner • Merit Protection Commissioner • Agency Head

WHISTLEBLOWING LEGISLATION IN CANADA, UNITED KINGDOM, NEW ZEALAND, UNITED STATES AND SOUTH AFRICA
Who may make a disclosure?

<p>Canada <i>Public Servants Disclosure Protection Act 2007</i></p>	<ul style="list-style-type: none"> • Public servants • Includes any person employed in the public sector, Royal Canadian Mounted Police and chief executives. • Does not include Canadian Forces, Canadian Security and Intelligence Forces
<p>United Kingdom <i>Public Interest Disclosures Act 1998</i></p>	<ul style="list-style-type: none"> • Employees, workers, contractors, trainees, agency staff, homeworkers, every professional in the NHS • Does not include genuinely self employed persons (except in the NHS), volunteers, intelligence services, army. • April 2004 provisions to cover police officers
<p>New Zealand <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Employee of an organisation • Employee can be former, homeworker, person on secondment, contractor, manager, member of the armed forces of the NZ Defence Force • Organisation can be one or more persons, un/incorporated, public or private, includes intelligence and security agencies
<p>United States <i>Whistleblower Protection Act 1989</i></p>	<p>Note – 5 schemes</p> <ol style="list-style-type: none"> 1. Employees, former employees, applicants for employment, employees who obtained the information in connection with the performance of their duties and responsibilities. 2. Any person other than those persons described under 1. above 3. Any person 4. Any person 5. Employee, former employee or applicant for employment
<p>South Africa <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Employee – private or public sector • Employee is defined as any person, excluding independent contractors, who works for another person or the State and receives or is entitled to receive remuneration or any person who assists in carrying on or conducting the business of an employer

WHISTLEBLOWING LEGISLATION IN CANADA, UNITED KINGDOM, NEW ZEALAND, UNITED STATES AND SOUTH AFRICA
What type of wrongdoing may be disclosed?

<p>Canada <i>Public Servants Disclosure Protection Act 2007</i></p>	<ul style="list-style-type: none"> • Illegal activity and serious breaches of the Code of Conduct • Wrongdoing in, or relating to, the public sector • Misuse of public funds or assets • Substantial and specific damages to life or health and safety or persons or the environment • Knowingly directing or counselling a person to do any of the above
<p>United Kingdom <i>Public Interest Disclosures Act 1998</i></p>	<ul style="list-style-type: none"> • Genuine concerns about crimes • Civil offences • Miscarriage of justice • Dangers to health and safety or the environment • Attempts to cover up these issues • Includes malpractice occurring in the UK or overseas • Includes employees raising good faith concerns about their own employment contracts • The Act applies whether or not the information is confidential
<p>New Zealand <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Illegal activity • Oppressive, discriminatory, grossly negligent acts or omissions by a public official • Unlawful, corrupt, irregular use of funds or resources of a public sector organisation • Serious risk to public health or safety or the environment • Serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial
<p>United States <i>Whistleblower Protection Act 1989</i></p>	<ol style="list-style-type: none"> 1. Violation of any law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, substantial and specific danger to public health and safety. Does not include disclosures that are specifically prohibited by law and disclosures that are specifically required by Executive order to be kept secret in the interests of national security or foreign affairs 2. Violation of any law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, substantial and specific danger to public health and safety Does not include disclosures that are specifically prohibited by law and disclosures that are specifically required by Executive order to be kept secret in the interests of national security or foreign affairs 3. Allegations of a prohibited personnel practice 4. Prohibited political activity by Federal employees and certain State and local officers and employees, arbitrary or capricious withholding of information (not including specifically prohibited intelligence information), activities prohibited by any civil service law, rule or regulation, involvement by any employee in any prohibited discriminatory action that has occurred in the course of any personnel action 5. Personnel action taken/proposed as a result of a prohibited personnel practice
<p>South Africa <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Criminal offences • Failure to comply with a legal obligation • Miscarriage of justice • Risks to the health or safety of an individual • Environmental damage • Unfair discrimination • Concealing any of the above activities • By an employer or an employee of an employer in the public or private sector

WHISTLEBLOWING LEGISLATION IN CANADA, UNITED KINGDOM, NEW ZEALAND, UNITED STATES AND SOUTH AFRICA
What sort of protection is provided to the whistleblower?

<p>Canada <i>Public Servants Disclosure Protection Act 2007</i></p>	<ul style="list-style-type: none"> • Protection from reprisals • Reprisals include: disciplinary action, changes in conditions or remuneration, threats to do any of the above • The Act establishes a Tribunal to hear and investigate disclosures • The tribunal can make remedial orders: compensation, remuneration, reinstatement to a position, rescission of penalties or disciplinary action • Orders are enforceable in the Federal Court
<p>United Kingdom <i>Public Interest Disclosures Act 1998</i></p>	<ul style="list-style-type: none"> • Protection from victimisation and dismissal • Right to bring a claim to an employment tribunal for compensation. <ul style="list-style-type: none"> - Awards uncapped and based on losses suffered - Aggravated damages can be awarded • Interim relief where employment continues or is deemed to continue until a full hearing
<p>New Zealand <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Protection from civil and criminal liability • Protection from retaliatory action, including dismissal • Links to remedies under the Employment Relations Act 2000 - reinstatement to position <ul style="list-style-type: none"> - wages lost - compensation • Links to Human Rights Act 1993
<p>United States <i>Whistleblower Protection Act 1989</i></p>	<p>1 and 2. Special Counsel may request a report by an agency head including action to be taken:</p> <ul style="list-style-type: none"> - changes in agency rules or practices - restoration of an aggrieved employee - disciplinary action - referral of criminal offences to the Attorney-General <p>3. Special Counsel may make recommendations to the Board or the agency that corrective action be taken. The Board may order corrective action:</p> <ul style="list-style-type: none"> - reinstatement of the person - reimbursement of costs and damages <p>4. Special Counsel may order that corrective action be taken eg. reinstatement of person and reimbursement of costs and damages, or that disciplinary action be taken eg. removal, suspension, reprimand, civil penalty</p> <p>5. Can apply for a stay of personnel action. The Board may award corrective action including reinstatement, back pay of income and related benefits, costs. The Board can order corrective action where the personnel action taken was a result of a disclosure</p>
<p>South Africa <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Protection from occupational detriment • Occupational detriment includes: disciplinary action, suspension, harassment, intimidation, refusal of transfer or promotion, transfer against will, altered conditions of employment that are disadvantageous, denial of appointment, threats to do any of the above • Can apply to any relevant court for relief • Any form of occupational detriment is deemed to be an unfair labour practice, which may give rise to remedies under the <i>Labour Relations Act 1995</i>

WHISTLEBLOWING LEGISLATION IN CANADA, UNITED KINGDOM, NEW ZEALAND, UNITED STATES AND SOUTH AFRICA
To whom can the disclosure be made?

<p style="text-align: center;">Canada <i>Public Servants Disclosure Protection Act 2007</i></p>	<ul style="list-style-type: none"> • All chief executives in the public sector must establish internal disclosure procedures • Supervisor/designated senior officer in related area of public sector • Commissioner • Auditor-General Canada: Where the information relates to the Office of the Public Sector Integrity Commissioner • Public: For disclosures about serious offences where there is no time to make any of the above disclosures or there is an imminent risk of danger to the life, health or safety of a person or the environment
<p style="text-align: center;">United Kingdom <i>Public Interest Disclosures Act 1998</i></p>	<ul style="list-style-type: none"> • Internal: employer, Department • Regulatory disclosures: to prescribed persons, for example Health and Safety Executive, Inland Revenue, Financial Services Authority • Wider disclosures: police, media, consumers, non-prescribed regulators. • Must be reasonable, not for personal gain, genuine fear of victimisation if raised internally, concern that evidence would be destroyed, employer or a prescribed regulator has failed to address the wrongdoing, or the wrongdoing is exceptionally serious
<p style="text-align: center;">New Zealand <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Internal: all public sector organisations must have internal procedures to handle disclosures • Deputy/Head of organisation • Appropriate authority (includes various Commissioners, Ombudsman, Solicitor and Auditor-General): where the Agency head is involved in the wrongdoing, or there are urgent or exceptional circumstances, or there has been no action for 20 working days since the disclosure was made • Minister/Ombudsman: Disclosure has already been made to one of the above three persons and no reasonable progress has been made
<p style="text-align: center;">United States <i>Whistleblower Protection Act 1989</i></p>	<ol style="list-style-type: none"> 1. Any person: Disclosure must not be prohibited by law or required by Executive order to be kept secret in the interests of national security/foreign affairs, or Special Counsel (Office of Special Counsel is a statutory body established to receive and investigate disclosures), or Inspector General of an agency, or Another employee designated by the head of an agency to receive disclosures 2. Special Counsel who may refer the information to the relevant agency head 3. Special Counsel, or Merit Systems Protection Board: Where the person has a right to appeal directly to the Merit Systems Protection Board, or where the person has already sought corrective action from the Special Counsel and Special Counsel notifies the person that the investigation has been terminated, or where the person has not received notification from the Special Counsel that action is being taken. 4. Special Counsel 5. Merit Systems Protection Board
<p style="text-align: center;">South Africa <i>Protected Disclosures Act 2000</i></p>	<ul style="list-style-type: none"> • Legal Advisor: In relation to obtaining legal advice • Employer or the employer of the employee: In accordance with prescribed (if any) procedures • Member of Cabinet or Executive Council • Certain persons or bodies: Public Protector, Auditor-General or a prescribed person or body in respect of matter within their sphere of responsibility • General protected disclosure if made in good faith, based on a reasonable belief that the information is true and is not for personal gain and the whistleblower has reason to believe s/he will suffer occupational detriment if the information is disclosed to the employer, OR there is no prescribed body and the person has reason to believe that the information will be concealed or destroyed by the employer, OR previous disclosure of substantially the same information and no action was taken by the employer, OR impropriety is of an exceptionally serious nature