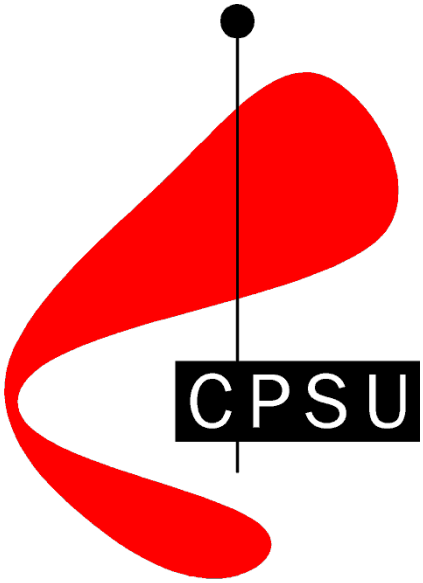

CPSU (PSU Group) Submission to the

Inquiry into the Public Interest Disclosure Bill 2013

April 2013

The Community and Public Sector Union (CPSU) is an active and progressive union committed to promoting a modern, efficient and responsive public sector delivering quality services and quality jobs. We represent around 60,000 members in the Australian Public Service (APS), other areas of Commonwealth Government employment, ACT Public Service, NT Public Service, ABC, SBS and the CSIRO.

As the major union representing Commonwealth Government employees, the CPSU welcomes the opportunity to make a submission to this inquiry on *the Public Interest Disclosure Bill 2013* (the Bill). This submission builds on the submission the CPSU previously made to the 2008 Inquiry into 'Whistleblowing protection within the Australian Government public sector'.

In a number of respects the comments in this submission mirror those made by the CPSU in the 2012 inquiry into the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (the Wilkie Bill).

The need for legislation to be passed by Parliament

For some time, the CPSU has been of the view that the current protections for whistleblowers in the federal public sector are wholly inadequate. Legislative reform in this area is essential and long overdue.

The current legislative protection for whistleblowers in the *Public Service Act* 1999 is inadequate. Although recent amendments to the Act now require public interest disclosures to be properly investigated, the Act is quite limited in scope only protecting disclosures by APS employees about Code of Conduct breaches.

The *Public Service Act* only goes as far as to protect an APS employee from victimisation by a person performing functions for an Agency in relation to allegations of a breach of the APS Code of Conduct. Victimisation is however not an offence for which the Act provides a remedy.

As a public sector union, the CPSU strongly supports a statutory scheme that provides appropriate protections for public sector workers who blow the whistle on issues of public interest. We support such a scheme not only because it is in the interests of public sector workers, but also because it will promote more open and transparent government and enhance public confidence in government administration.

The CPSU made a submission to the 2008 Inquiry and appeared before the House of Representatives Standing Committee on Legal and Constitutional Affairs. The Report of that Committee was handed down in February 2009 and the Government accepted many of its recommendations.

In our view, it is essential that this Parliament capitalises on the work of the 2008 Inquiry and passes effective public interest disclosure legislation. The CPSU broadly supports the proposed legislation and has made a number of recommendations where, in our view, the Bill could be improved or clarification is required.

Categories of people who may make protected disclosures

For public interest disclosure legislation to be effective, the categories of persons who may make such disclosures must not be artificially constrained to those directly engaged by APS agencies.

It is increasingly common for government services to be designed and delivered through different levels of government or a combination of government and private providers. This often includes directly employed Commonwealth employees working with private contractors, consultants and State/Territory government employees.

The CPSU believes the protection for public interest disclosures should extend to current and former employees of all Commonwealth Government agencies and any statutory appointment to those agencies.

In addition to the directly-engaged employees of such agencies, there is a public interest in ensuring that current and former private contractors and consultants performing work on behalf of the Commonwealth Government have similar protections.

The CPSU believes that the definition of public official at clause 69 of the Bill is sufficiently broad to cover all of these groups.

One area worthy of further consideration is the intersection with State public sector employees. There are an increasing number of areas in which the Commonwealth and State/Territory Governments are undertaking joint initiatives. Where this occurs, the protections of the legislation should be extended to State public sector employees in respect of any alleged disclosable conduct. It is unclear whether the Bill would offer protection to State public sector employees in those circumstances.

Recommendation:

- Public servants employed by a state or territory governments who are performing work for joint-state and Commonwealth body, or a joint working group, should be classed as public officials in clause 69 and gain protection under the Bill.

Types of disclosures that should be protected

Defining the types of conduct that could be subject to a disclosure is critical. These should not be limited to criminal conduct, but also cover types of maladministration. The CPSU believes that clause 29 of the Bill covers appropriate categories of conduct.

The CPSU agrees with the exclusion in clause 23 that public interest disclosures should not be available if the entire basis of the complaint is that the discloser disagrees with a policy decision of the Government of the day.

In order for a person to have the confidence to make a public interest disclosure, they must be able to clearly understand the types of conduct that may be the subject of a disclosure. If the Bill passes, public sector workers and other individuals covered by the legislation should be provided with information about the types of conduct that would fall within these categories.

The CPSU is pleased to note that subclause 62(b) gives the Ombudsman the function of conducting educational and awareness programs. This is one area that should be the subject of such a program.

An example of an area that may need clarification is the definition of 'maladministration', in particular in regard to conduct that is 'unreasonable, unjust or oppressive'. These are terms that, although they may have a legal definition, may not be immediately apparent to the average person.

The definition of a public interest disclosure at clause 2 is limited by reference to the designated publication restriction. While there may be a legitimate need to protect certain types of confidential information from publication, there does not seem to be an obvious reason why internal disclosures, which are not made public, need to be subject to this restriction. In addition, it is likely that if a designated publication restriction existed, the person making the public interest disclosure would not be aware of it. This adds another layer of uncertainty which may dissuade people from making a public interest disclosure.

Consideration should be given to whether the blanket exclusion of all disclosures that are contrary to a designated publication restriction is the most effective way to achieve this goal. The existence of a designated publication restriction could instead be an additional factor in determining whether a public interest disclosure is contrary to the public interest.

Recommendations:

- Guidance should be provided to agencies and individuals covered by the scheme regarding the types of conduct that would constitute disclosable conduct as defined in clause 29.
- Consideration should be given as to whether the exclusion of disclosures that are contrary to a designated publication restriction is necessary or could be better addressed in the Bill.

To whom a public interest disclosure may be made

Internal disclosures

An effective public interest disclosure scheme must ensure that disclosures are made to a person or body capably of independently and rigorously investigating that disclosure.

The CPSU supports the provisions in clause 34 of the Bill which sets out the authorised internal recipient of disclosures. The CPSU believes it is important that the Bill allows for disclosures to be made to an external agency, being the Ombudsman, IGIS, or other investigating agency that has the power to investigate the disclosure.

The Bill protects disclosures made to an agency that are made to the authorised officer in the agency. Clause 36 of the Bill defines authorised officer as the principal officer, or other public official, who is appointed in writing as an authorised officer.

However, in practice a lot of public interest disclosures would be made to the discloser's supervisor or manager. Under the Bill as it is drafted, such disclosures would not be protected. The CPSU recommends that a provision be added equivalent to paragraph 15(1)(i) of the Australian Capital Territory's *Public Interest Disclosure Act 2012* which allows

a disclosure by a public official to be made to 'a person who, directly or indirectly, manages the discloser'.

Disclosure to third parties

An important part of the public interest disclosures scheme is the ability to make disclosures to third parties, including journalists, in certain limited circumstances. The CPSU is pleased that this Bill allows external disclosures in instances where an internal disclosure has been made but not sufficiently acted on, as well as in emergency situations.

The current Bill proposes to allow for third party disclosures, where an internal disclosure has been made and the following criteria have been met:

- investigation has been completed, or has failed to be completed in the time limit;
- the investigation was inadequate, or the response to the investigation was inadequate;
- the disclosure is not contrary to the public interest;
- no more information is disclosed than is reasonably necessary in the public interest;
- the disclosure is not contrary to a designated publication restriction;
- the information doesn't not consist of intelligence information; and
- none of the conduct with which the disclosure is concerned related to an intelligence agency.

There are a number of requirements to be fulfilled before an external disclosure may be made. These requirements are not necessarily clear in the Bill and may lead to uncertainty as to whether a disclosure to a third party is protected. Such uncertainty may deter potential disclosers from making a public interest disclosure or may deny protection to a person who makes a disclosure in good faith.

This is exacerbated by the fact that the prerequisites for an external disclosure to be protected are based on an objective test. Therefore a discloser who, not being entitled to all the facts about an investigation makes an external disclosure on the reasonable belief that the internal investigation was inadequate, risks finding themselves without protection if the investigation is later determined to be adequate.

The CPSU recommends that prerequisites for an external disclosure when an internal disclosure has already been made, should be based on a subjective standard such as that the discloser 'has a reasonable belief'.

If the Bill passes, further information and guidance should be provided to public sector workers and other individuals covered by the legislation regarding the circumstances when it would be permissible for disclosures to be made to third parties. For example, while the Bill sets out a number of circumstances in which an external disclosure would be contrary to the public interest, it does not elaborate on the circumstances in which the public interest would favour a disclosure.

This would assist in minimising the potential for whistleblowers to act rashly or without following the appropriate course of action provided by the Bill. It would also assist agencies in understanding the timeframes for conducting investigations and the requirement to keep disclosers informed about progress.

Recommendations:

- The Bill should be amended to allow public interest disclosures to be made to a person's supervisor or manager.
- The prerequisites for an external disclosure should be determined on a subjective standard based on the 'reasonable belief' of the discloser.
- Further information and guidance should be provided to agencies and workers about when third party disclosures may be made.

Immunity and Protection from reprisals

Immunity of whistleblowers

The CPSU supports the measures in the Bill to provide legal protection and immunity from civil, criminal and administrative liability for a person who makes a public interest disclosure.

Clause 11 of the Bill states that whistleblower immunity does not apply to statements that are false or misleading. While it is important that persons who deliberately make false and damaging statements are excluded from protection under the scheme, this drafting of this clause would also remove the protection from people who honestly believe that the information that they are disclosing is true and disclose the information in good faith.

Subclause 11 should be amended in order to only remove the immunity of people who *knowingly or recklessly* make a statement that is false or misleading.

Protection from reprisals

Protection from reprisal action against whistleblowers is critical. The CPSU supports the provisions in the Bill that provide protection from reprisals.

It is particularly pleasing that the Bill makes it explicit that reprisal action is a matter covered by the General Protections provisions of the *Fair Work Act 2009*. For persons covered by the *Fair Work Act*, this will provide an effective remedy in a well known jurisdiction. It provides the option of less formal and easily accessible resolution processes as an alternative to, or prior to, Federal Court action.

However, clause 22 of the Bill only declares the making of a public interest disclosure under the Bill to be a 'process or proceeding under a workplace law' if the disclosure was made by a public official who is an employee. The General Protections in the *Fair Work Act* apply not just to employees but to 'persons' who could include contractors and certain other classes of non-employees. Therefore the restriction of clause 22 of the Bill to employees may unduly limit the classes of people who are protected by the *Fair Work Act* when making a public interest disclosure.

Given that there is the intention that people who suffer reprisals after making a public interest disclosure should be protected by the *Fair Work Act,* consideration should also be given as to whether any consequential amendments to that Act are required to give effect to this.

It is also important that the Bill creates its own avenue for disclosers to seek civil remedies if they have suffered or been threatened with reprisal action. This will help protect people who

are outside of the coverage of the *Fair Work Act* or who have not brought an action within the relatively short time limits of the *Fair Work Act*.

To ensure that disclosers who have suffered reprisal action are not deterred from taking action where needed in the courts, the CPSU recommends that the Bill replicate the "no costs" provisions of the *Fair Work Act*. This would involve a provision stating that an applicant for damages is not required to pay the other party's costs if unsuccessful, unless the matter has been brought vexatiously or there has been some other abuse of process.

The CPSU supports the fact that the Bill also makes a criminal offence of taking reprisal action or threatening reprisal action. This is an important disincentive to stop people taking such action. However, there should be more of a distinction between the civil and criminal protections in the Bill.

Criminal convictions require the higher 'beyond reasonable doubt' standard of proof as compared with the 'balance of probabilities' test for civil matters. The Bill must make it clear a criminal conviction or the laying of criminal charges is not a prerequisite for a successful civil action. This ensures that whistleblowers who wish to bring a civil action are not deterred by the thought that criminal charges must also be brought. It also ensures that the higher standard or proof required for criminal matters is not indirectly applied to civil matters.

There should also be explanatory and educational material to support the legislation that explains the different available remedies and procedures with emphasis on the more accessible *Fair Work Act* remedies where they are applicable.

Recommendations:

- Clause 11 should be amended so that whistleblowers only lose their immunity in relation to statements that are 'knowingly or recklessly' false or misleading.
- Whistleblowers that bring a civil action in the Federal Court should only be liable for the other parties' costs if the action was brought vexatiously or there is some other abuse of process.
- There should be a clear distinction between criminal and civil actions under the act and it should be clear that criminal charges being laid is not a prerequisite for a successful outcome in civil proceedings for reprisal action.
- Explanatory and educational material should be made available to workers to explains the different available remedies and procedures with emphasis on the more accessible *Fair Work Act* remedies where they are applicable

Investigation and oversight

Obligation to investigate

Requiring that an investigation is conducted into a public interest disclosure is a vital first step in an effective public interest disclosures scheme. The CPSU supports the clear obligation contained in clause 47 of the Bill for an investigation to be conducted when a public interest disclosure is allocated. The time limit imposed by clause 52 ensures that investigations will be carried out in a timely manner.

Clause 48 of the Bill sets out a number of circumstances in which a person may exercise discretion not to investigate a public interest disclosure. There should be grounds to decline to investigate if a disclosure is vexatious, lacking in substance, or has already been or is currently being adequately investigated. However, some of the grounds to refuse to

investigate may be drafted too broadly. For instance, it is difficult to see how paragraph 48(1)(b) 'information that is disclosed does not tend to show any instance of disclosable conduct' adds to the ground of '…lacking in substance' in paragraph 48(1)(d). Also, it is unclear what would constitute 'serious disclosable conduct' for the purposes of paragraph 48(1)(c).

The discretion not to investigate a disclosure must be sufficiently precise so as to only arise in circumstances where there has been no public interest disclosure or investigation is otherwise impossible.

Ombudsman oversight

The CPSU called for an independent body to investigate and oversee the public interest disclosures regime in its submission to the 2008 Inquiry. The CPSU supports the role given to the Ombudsman under the Bill, including its role in managing, educating and reporting about public interest disclosures and assisting agencies. This submission has already provided examples of where the educational role of the Ombudsman will be important to the effective operation of the scheme.

However, the roles given to the Ombudsman and IGIS in the Bill stop short of being an active oversight regime. The Bill enables the Ombudsman and IGIS to 'assist' agencies but does not establish any oversight arrangements other than an annual report that the Ombudsman is required to present to the Minister. This is one area in which the Bill could be improved.

The CPSU supports the role given to the Ombudsman by Clause 74 to develop standards for Agency procedures for receiving disclosures, conducting investigations and preparing reports of investigations. This will help ensure a consistent standard of investigations. However, in addition to setting standards, the 2008 Inquiry recommended that the Ombudsman have the power to approve agency procedures.

Other than the requirement in subclause 76(3) for agencies to provide the Ombudsman with the information necessary to compile the annual report, there is no requirement for Agencies to present the Ombudsman with copies of their procedures or final reports of investigations. Nor is the Ombudsman required to approve agency procedures as recommended by the 2008 inquiry. This is another area in which the Bill, and the Ombudsman's oversight function, could be enhanced.

The oversight role of the Ombudsman and IGIS would be strengthened if there was more active oversight of procedures and investigations as they happen, with the ability to make recommendations, rather than oversight being limited to the preparation of the annual report.

Following up investigations

It is unclear what recourse a whistleblower has if they consider that the investigation of a public interest disclosure was inadequate or the discretion not to investigate a disclosure was exercised improperly. It seems their only option under the scheme would be to lodge a new public interest disclosure about the same issue which, in certain circumstances, could include a disclosure to a third party. This would not necessarily ensure that the matter is investigated.

A role for the Ombudsman in reviewing the decisions regarding public interest disclosures made by agencies is warranted. One appropriate model for this may be the Ombudsman's

review powers as contemplated by clauses 49 and 50 of the Wilkie Bill. These provisions would provide discretion for the Ombudsman to review decisions relating to public interest disclosures and make recommendations or take other action.

It would also be appropriate that such a review could be initiated by the person who has made the public interest disclosure. This could be modelled on s 33 of the *Public Service Act* 1999 review rights, which enable an APS employee to seek a review of a decision which adversely affects their employment.

Similarly, where a report of an investigation makes recommendations, subclause 59(4) requires the principal officer of an agency to ensure that appropriate action is taken in response to recommendations. However, there is no clear oversight of this. While subclause 76(2) requires the Ombudsman to include statements in its annual report about action taken by agencies to address recommendations, the scheme would be improved if the Ombudsman had more active oversight of this and the ability to make recommendations.

The enhanced role for the Ombudsman

There is an important and enhanced role in overseeing the public interest disclosures scheme for the Ombudsman under the Bill. The role of the Ombudsman requires corresponding commitment of resources and staffing. The CPSU believes the Ombudsman should receive sufficient ongoing funding to allow it to properly conduct these enhanced roles.

Recommendations:

- Care should be taken to ensure that the discretion not to investigate a public interest disclosure is not unnecessarily broad and would only arise in circumstances where there has been no public interest disclosure or investigation is impossible.
- The Ombudsman and IGIS should be given a more active oversight role in which they oversee and review procedures, current investigations and reports, and may make recommendations to agencies or take actions where necessary.
- The Ombudsman be provided sufficient ongoing funding to fulfil additional functions proposed under the Bill

Conclusion

The CPSU supports public interest disclosure legislation being passed by this Parliament.

In respect of this Bill we have identified some areas that, in our view, require greater consideration or revision. We however call on the Parliament to take action on this issue.

The current provisions for whistleblowers are clearly inadequate and it is essential that there is legislation that protects whistleblowers through a structured and clear process for raising matters of genuine concern. Such legislation would promote open and transparent government.