

Principles and definitions

Introduction

- 2.1 It is important to establish the main objectives, guiding principles and key terms of new public interest disclosure provisions to both provide reasonable certainty to those who may be drawn into the scope of new public interest disclosure legislation, and to send a clear message about the intentions of the legislation and its coverage.
- 2.2 While there is broad agreement on the need for more comprehensive public interest disclosure legislation for the Australian Government public sector, evidence to the inquiry indicates that there is a range of views on what the purpose of the new legislation should be. A diversity of interpretations has been taken on certain key terms such as 'whistleblower' and 'public interest'.
- 2.3 This chapter first considers perspectives on the main purpose of new legislation, considering arguments about democratic accountability, government efficiency and protecting the interests of those who speak out. The second part of the chapter looks at possible principles that should underpin new public interest disclosure legislation.
- 2.4 The chapter then assesses the arguments put to the Committee concerning the nomenclature of new legislation, including why the Committee prefers the term public interest disclosure as the title for new legislation.

The purpose of public interest disclosure legislation

- 2.5 At its most practical level, new public interest disclosure legislation would have the purpose of filling a gap in existing Commonwealth legislation by

extending whistleblower protection to those outside the existing arrangements, strengthening the nature of that protection and improving related administrative procedures.

2.6 However, many contributors to the inquiry felt that new legislation should go further, setting out a clear statement of its overarching objectives. Professor Ronald Francis suggested that new legislation should have a preamble setting out the main values framing the approach to public interest disclosures.¹

2.7 The Committee heard a number of views on the broader purpose of public interest disclosure legislation. According to Mr Peter Bennett, national President of Whistleblowers Australia, public interest disclosure laws are about exposing official misconduct and facilitating the release of information in the public interest:

A fundamental issue is the unlawful conduct of public officials who misuse their discretionary powers to stop public interest disclosures and the unjust laws that currently exist which allow the prosecution of those making public interest disclosures which serve the public interest.²

2.8 The Commonwealth Ombudsman endorsed the thirteen principles for public interest disclosure legislation advanced by the WWTW project team. The first principle recommends that the objectives of the legislation should be:

- to support public interest whistleblowing by facilitating disclosure of wrongdoing;
- to ensure that public interest disclosures are properly assessed and, where necessary, investigated and actioned; and
- to ensure that a person making a public interest disclosure is protected against detriment and reprisal.³

The objects of state and territory legislation on public interest disclosures are generally consistent with this suggestion.

2.9 A common view of the purpose of legislation is that it should support transparency and accountability in government, a higher principle of the public good. This purpose was reflected in clause 3 of the Murray Bill:

1 Professor Francis, *Transcript of Evidence*, 21 August 2008, p. 34.

2 Mr Bennett, *Transcript of Evidence*, 27 October 2008, p. 32.

3 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 283.

The purposes of this Act are to increase the transparency and accountability of institutions of government by:

- (a) facilitating the disclosure of information in the public interest; and
- (b) ensuring that disclosures of information in the public interest are properly dealt with; and
- (c) providing protection for public officials who disclose information in the public interest, including relief from liability at law.

2.10 Another common theme concerning the main purpose of the legislation was the need to protect people who speak out. For example, the Community and Public Sector Union told the Committee:

The motivation for a statutory scheme is to ensure that individuals making public interest disclosures about the public sector are protected and those disclosures are appropriately investigated. For the scheme to be meaningful, the central principle should be that statutory protection is attached to any Government work.⁴

2.11 The Secretary to the Attorney-General's Department suggested an objective for a new Act in terms of promoting 'efficient and effective government':

... you are not doing it for politicians, you are not doing it for journalists, you are not doing it for public servants. You are doing it because there is a public interest in effective and efficient administration.⁵

2.12 The Australian Standard on Whistleblower protection programs for Entities AS 8004 - 2003 noted the need to detect misconduct and the benefits of establishing a protection program in its foreword:

A whistleblower protection program is an important element in detecting corrupt, illegal or other undesirable conduct (defined later in this standard as 'reportable conduct') within an entity, and as such, is a necessary ingredient in achieving good corporate governance.

An effective whistleblower program can result in—

- (a) more effective compliance with relevant laws;

4 Community and Public Sector Union, *Submission no. 8a*, p. 2.

5 Mr Roger Wilkins AO, *Transcript of Evidence*, 27 November 2008, pp. 2, 13, 15, 19.

- (b) more efficient fiscal management of the entity through, for example, the reporting of waste and improper tendering practices;
- (c) a healthier and safer work environment through the reporting of unsafe practices;
- (d) more effective management;
- (e) improved morale within the entity; and
- (f) an enhanced perception and the reality that the entity is taking its governance obligations seriously.

Key guiding principles

- 2.13 Many contributors to the inquiry noted the need for public interest disclosure legislation to balance a number of important public values such as the legitimate confidentiality requirements of government, the right of the public to access information, the right of those involved with disclosures to appropriate confidentiality, the rights of those against whom allegations have been made to natural justice, and the need to expose and address wrongdoing in the public sector.
- 2.14 The other twelve suggested principles from the WWTW project are:
- subject matter of disclosure
 - ⇒ 'Legislation should specify the topics or types of proscribed wrongdoing about which a public interest disclosure may be made. The topics should cover all significant wrongdoing or inaction within government that is contrary to the public interest'.
 - person making disclosure
 - ⇒ The primary condition for a disclosure to be protected is that the whistleblower 'holds an honest and reasonable belief' the allegation shows proscribed wrongdoing or that the disclosure 'shows or tends to show' proscribed wrongdoing.
 - receipt of disclosure
 - ⇒ 'Legislation should allow a public interest disclosure to be made to a variety of different people or agencies'
 - recording and reporting
 - ⇒ 'All public interest disclosures to an organisation should be formally recorded, noting the time of receipt, general subject matter and how the disclosure was handled'.
 - acting on a disclosure

- ⇒ An agency receiving a disclosure should be obliged to assess and act on the disclosure, keep the whistleblower informed, and report on the nature and outcome of disclosures in its annual report.
- oversight agency
 - ⇒ ‘One of the external agencies with responsibility for public interest disclosures should be designated as the oversight agency for the administration of the legislation’.
- confidentiality
 - ⇒ ‘Disclosures should be received and investigated in private, so as to safeguard the identity of a person making a disclosure to the maximum extent possible within the agency’s control’.
- protection of person making a disclosure
 - ⇒ ‘A person who has made a disclosure to which the legislation applies should be protected against criminal or civil liability, or other detriment, for making the disclosure’.
- disclosure to an outside agency
 - ⇒ ‘A disclosure made to a person or body that is not designated by the legislation to receive disclosures (for example, the media) should be protected in exceptional circumstances as defined in the legislation’.
- agency responsibility to ensure protection
 - ⇒ Agencies should establish proper internal procedures, ensure staff are made aware of their responsibilities, assess the risk of detriment to whistleblowers, protect whistleblowers and take remedial action where whistleblowers suffer detriment.
- remedial action
 - ⇒ Agencies should prevent or remedy detriment to those who make disclosures.
- continuing assessment and protection
 - ⇒ Agencies or the oversight body should conduct assessments of those who make disclosures to determine the longer term impact of speaking out.⁶

2.15 Dr Kim Sawyer, who has written extensively on the subject, suggested the following principles devised by American academics Vaughn, Devine

6 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, pp. 283-287.

and Henderson as seven key principles on which to base public interest disclosure legislation:

- focus on the information disclosed, not the whistleblower;
- relate the law to freedom of expression laws;
- permit disclosure to different agencies in different forms;
- include compensation or incentives for disclosure;
- protect any disclosure, whether internal or external, whether by citizen or employee;
- involve whistleblowers in the process of the evaluation of their disclosure; and
- have standards of disclosure.⁷

Who is a whistleblower?

- 2.16 The introduction to this report commenced with a brief and very broad definition of blowing the whistle, adapted from the Oxford English Dictionary. According to this general definition an individual blows the whistle by informing on a person or exposing an irregularity or a crime.
- 2.17 The above definition broadly accords with a conventional understanding of whistleblowing. However, in defining the term, greater precision is necessary to avoid giving credibility to a range of activities that could be covered where people describe themselves as whistleblowers.
- 2.18 Whistleblowing can be distinguished from 'leaking' where an official covertly provides information directly to the media, 'to seek support and vindication in the court of public opinion'.⁸ As discussed in Chapter 4, unauthorised disclosures made to embarrass the government may infringe on the right of the government to make its decisions in confidence and therefore may not be eligible for protection.
- 2.19 A succinct academically recognised definition of whistleblowing is as follows:
- disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their

7 Dr Sawyer, *Submission no. 57*, p. 4.

8 Martin, B, 'Bucking the system: Andrew Wilkie and the difficult task of the whistleblower' in Anila V Menon (ed.) 2007, *Whistleblowers: impact and implications*, Hyderabad: Icfai University Press, pp. 23-32.

employers, to persons or organisations that may be able to effect action.⁹

- 2.20 An earlier study conducted by the University of Queensland includes the public interest aspects of disclosure among other matters in its definition of whistleblower:

The whistleblower is a concerned citizen, totally or predominantly motivated by notions of public interest, who initiates of his or her own free will, an open disclosure about significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrong doing.¹⁰

- 2.21 The University of Queensland definition of whistleblower incorporates the motive for the making the disclosure, the absence of coercion in making the disclosure, the publicity of the disclosure, the degree of wrongdoing disclosed, the occupational role of the discloser, and the entity to which the disclosure is made. All of those factors are important in determining the scope of protection that may be available to a whistleblower and are discussed further in subsequent chapters.
- 2.22 In 1999, one of the noted academics in the University of Queensland study, William De Maria, elaborated on other characteristics of being a whistleblower including the inevitable result of suffering. Dr De Maria argued that the 'non-suffering whistleblower is a contradiction in terms'.¹¹
- 2.23 The Commonwealth Ombudsman's view was that there must be something of the character of an 'insider's knowledge' involved for a matter to be a public interest disclosure.¹² Some state and territory whistleblower legislation does not restrict its application to public service insiders and provides for anyone to make a protected disclosure. The issue of who should be able to make a protected disclosure is addressed in Chapter 3.

9 Miceli, MP & Near, JP 1984, 'The relationships among beliefs, organisational position, and whistle-blowing status: a discriminant analysis', *Academy of Management Journal*, vol. 27, no. 4, pp. 689. This definition was adopted by the Whistle While They Work Project Team. See, Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 8.

10 De Maria, W 1994, 'Quarantining dissent: the Queensland public sector ethics movement', in *Australian Journal of Public Administration*, Vol. 54 no. 4, December 1995, p. 447.

11 De Maria, W 1999, *Deadly disclosures: whistleblowing and the ethical meltdown of Australia*, Kent Town, Wakefield Press, p. 25.

12 Professor McMillan, *Transcript of Evidence*, 4 September 2008, p 6.

- 2.24 A concept that features strongly in working definitions of whistleblowing used by Australian academics is the 'public interest'. Similarly, the national representative and advocacy body for whistleblowers, Whistleblowers Australia, defined the term 'whistleblower' as referring to a person who makes a 'public interest disclosure'.¹³ The public interest is discussed further in the section below.

Use of the term whistleblower

- 2.25 None of the current state and territory legislation on whistleblower protection defines the term 'whistleblower', despite the term forming part of the title of the legislation in South Australia, Queensland and Victoria.
- 2.26 State and territory whistleblower legislation refers instead to public interest disclosures, protected disclosures or both. These terms reflect the objects of the legislation, that is the facilitation of public interest disclosures, the proper handling of those disclosures once they have been made and the protection of the whistleblowers who made them.
- 2.27 The word 'whistleblower' is not defined in the *Public Service Act 1999*. However, by implication of s. 16 of that Act which provides for 'Protections for whistleblowers' a whistleblower is an 'APS employee [who] has reported breaches (or alleged breaches) of the Code of Conduct to the Public Service or Merit Protection Commissioner or their agency head (or authorised delegate).
- 2.28 One of the key roles of the APSC is to evaluate 'the extent to which agencies incorporate and uphold the APS Values'.¹⁴ The most recent APSC Circular to agencies on whistleblower reports released in 2001, described a whistleblower as 'essentially an informant, assisting management in the performance of its function to maintain the standards of conduct set out in the Code of Conduct'.¹⁵
- 2.29 In 2005, the element of public interest appears to have emerged in the APSC's definition of whistleblowing. In the APSC publication on the practical implications of the APS values, 'whistleblowing refers to the reporting, in the public interest, of information which alleges a breach of the APS Code of Conduct by an employee or employees within an agency'.¹⁶

13 Whistleblowers Australia, *Submission no. 26a*, p. 2.

14 Section 41, *Public Service Act 1999*.

15 Australian Public Service Commission, Circular No 2001/4: *Whistleblowers' reports*, 2001.

16 See Chapter 17, *Whistleblowing*, APSC, *APS Values and code of conduct in practice*, 2005.

- 2.30 The Community and Public Sector Union did not favour the use the term 'whistleblower' because of negative connotations.¹⁷ Indeed there may be good reasons to avoid the term 'whistleblower' in legislation because of its imprecision, negative connotations and the further implications of placing individual whistleblowers at the centre of procedures:
- the term whistleblower can imply ethical choice and social ostracism yet it can form part of routine professional duty;
 - some consider whistleblowers as heroes and therefore entitled to unlimited protection but it may be unreasonable for that protection to extend to unrelated matters;
 - whistleblowers may be characterised as perpetual victims of their sacrifice, again this is not always the case;
 - another view of the whistleblower is of a 'dobber' who is not a team player and therefore untrustworthy; and
 - framing provisions around the whistleblower can distract from other important objectives of the legislation such as the treatment of the information disclosed.¹⁸
- 2.31 The word whistleblower was omitted from the Murray Bill. According to Senator Murray, the word whistleblower was not used:
- ... to emphasise that the focus should not be upon the person providing information (who may do so for a variety of reasons) but rather on the disclosure itself. The shift is designed to place primacy on addressing the issue raised rather than the person who raised it.¹⁹
- 2.32 Others names put forward for whistleblowers include 'internal witnesses', 'confidential informants', 'complainants', 'internal informers', 'reporters', 'professional reporters', and 'internal integrity witnesses'. Each of those terms comes with their own historical baggage, connotations and symbolic resonances.
- 2.33 Rather than adopting a new term or adapting one from another area, a minimalist approach would be to retain the word whistleblower in new legislative provisions and define the term with reference to the making of

17 Mr S. Jones, *Transcript of Evidence*, 9 September 2008, p. 7.

18 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, pp. 6-7.

19 Senator Murray, Second Reading Speech, Public Interest Disclosures Bill 2007, Senate Hansard, 14 June 2007, p. 1.

a public interest disclosure, as suggested by Whistleblowers Australia. The definition of whistleblowers, for the purpose of the legislation, would then depend on how the term 'public interest' is defined.

Public interest

2.34 Like the term whistleblower, the term 'public interest' can be defined in a number of ways and in a number of contexts. Indeed, it may not be possible to arrive at an all encompassing definition of the public interest.²⁰

2.35 In relation to the disclosure of official information, possible injury to the 'public interest' has been used as a justification for preventing the disclosure of information in common and statute law. The 'public interest' has also been used to provide an exemption from a duty of secrecy to enable the disclosure of third party information.²¹

2.36 The Australian Law Reform Commission notes that:

Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations, high level advice to government, communications or negotiations between governments, national security, police investigation methods, and in relation to the activities of Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives.²²

2.37 In its submission to the inquiry, Whistleblowers Australia argued that agencies have tended to abuse the public interest argument to unduly withhold information from the public and avoid proper scrutiny:

Agencies involved in such matters invariably claim that they have a public interest role and that the disclosure of any information about such matters is contrary to that public interest. But what these agencies are actually claiming is that the public should not know what they are doing.²³

2.38 The President of Whistleblowers Australia was critical of information being withheld by reason of details being contained in a document which could actually be excised so as to enable release of the rest of the

20 Australian Law Reform Commission 2008, *Review of secrecy laws: issues paper no. 34*, p. 100.

21 Finn, P 1991, *Integrity in government project: interim report 1*, Australian National University, p. 147.

22 Australian Law Reform Commission 2008, *Review of secrecy laws: issues paper no. 34*, p. 30.

23 Whistleblowers Australia, *Submission no. 26*, p. 5, emphasis in original.

document. He was of the view that public interest matters are relative, and a test of 'the greater public interest' might be developed.²⁴

- 2.39 Dr Peter Bowden suggested that rather than focusing on what is in the public interest, disclosable conduct should be defined by what harms the public interest:

An action that is illegal or that brings harm or has the potential to bring harm, directly or indirectly to the public at large, now or in the future, is not in the public interest.²⁵

- 2.40 Ms Cynthia Kardell argued that public interest is an elusive term that need not be defined in legislation because its meaning depends on the circumstances of particular disclosures:

Public interest is a term that we will all understand at our various sorts of levels and in our various capacities. We know what the intention is. We know what it implies. It is the beginning point, if you like; it is the criterion by which you then assess the circumstances that you are being asked to assess as to whether or not the disclosure should be protected, whether that person should have protection.²⁶

- 2.41 Reflecting on the elusiveness of the term, one witness offered a more personal definition of the public interest:

To me the public interest is when your grandchildren look back in 50 years time, and say, 'Well, he acted in the public interest.' In other words, he acted to preserve the long-term standing of the institutions, not the short-term returns.²⁷

- 2.42 The Committee received evidence that the lack of an agreed and general meaning of the term 'public interest', creates a difficulty for the use of the term for public sector disclosure legislation. As Professor Francis remarked:

I have a problem with the term 'public interest'. It is like the term 'integrity'. It does not really mean a lot to me. 'Integrity' means it is integrated, it is together, but it could be corruptly integrated. I think 'public interest' is a similar case. I would like to see the values set out and then have it judged against the values – not against public interest but against a set of values like openness,

24 Mr Bennett, *Transcript of Evidence*, 27 October 2008, p. 38.

25 Dr Bowden, *Submission no. 18*, p. 2.

26 Ms Kardell, *Transcript of Evidence*, 27 October 2008, p. 39.

27 Dr Sawyer, *Transcript of Evidence*, 27 October 2008, p. 49.

honesty, prudence, goodwill and so on. In that way you actually have standards against which you can make the judgements, not just against public interest.²⁸

- 2.43 In relation to discussions about government accountability and the integrity of public administration, it is recognised that the public has an interest in ensuring that serious wrongdoing by officials is exposed and addressed. As Justice Finn noted in his 1991 report on government integrity:

Consistent with the need to maintain public confidence in the integrity of government, its institutions and officers, it is important both that the public are made aware of serious instances of maladministration and misconduct and that the public be reassured that allegations of these properly investigated and, where substantiated, are remedied appropriately.²⁹

- 2.44 In putting that approach into practice, it would be in the public interest to disclose a matter when it is conduct involving 'suspected or alleged wrongdoing that affects more than the personal or private interests of the person making the disclosure'.³⁰ However, it can sometimes be difficult to draw a distinction between personnel or workplace grievances and official misconduct.³¹ Further, not all types of wrongdoing within that definition of public interest are particularly serious. Serious malfeasance such as systemic fraud and corruption might be treated in the same way as minor misdemeanours such as poor record keeping.³²

View of the Committee

- 2.45 The Committee considers that new legislation on public interest disclosures should have a clear and simple purpose so that anyone who reads the Act can immediately discern its intent. The primary purpose of

28 Professor Francis, *Transcript of Evidence*, 21 August 2008, p. 37.

29 Finn, P 1991, *Integrity in government project: interim report 1*, Canberra, the Australian National University, p. 49.

30 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. xxi.

31 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 36.

32 Australian Public Service Commission, *Submission no. 44*, p. 6.

the legislation should be to promote accountability and integrity in public administration.

- 2.46 The values of accountability and integrity support effective and efficient government while focusing on exposing official misconduct and bringing it to account through remedial action. Accountability in public administration, by exposing and rectifying wrongdoing in the public sector, is in the public interest.
- 2.47 In the Committee's view, the values of accountability, integrity and the public interest should be the values that guide public interest disclosure legislation. The Committee has received valuable suggestions concerning the ideas which should underlie this legislation. However, most of those suggestions focus on outcomes or procedure rather than fundamental values.
- 2.48 While not necessarily explicitly referring to principles and values, contributors to the inquiry referred to rights, responsibilities and obligations. A series of concise values-based principles, framed as rights and responsibilities, could provide a clearer message of the intention of the legislation. In principle:
- it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
 - people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
 - people have a responsibility to raise those concerns in good faith;
 - governments have a right to consider policy and administration in private; and
 - government and the public sector have a responsibility to be receptive to concerns which are raised.
- 2.49 The new legislation should be titled the Public Interest Disclosure Bill. The term public interest need not be explicitly defined, but rather reflected in the purpose of the legislation and its provisions on disclosable conduct. Similarly, the term whistleblower should not be defined in legislation. The purpose and key principles of the legislation described above should be included in a preamble to the Bill.

Recommendation 1

2.50 The Committee recommends that the Australian Government introduces legislation to provide whistleblower protections in the Australian Government public sector. The legislation should be introduced to Parliament as a matter of priority and should be titled the Public Interest Disclosure Bill.

Recommendation 2

2.51 The Committee recommends that the purpose and principles of the Public Interest Disclosure Bill should reflect the following:

- the purpose of the Bill is to promote accountability and integrity in public administration; and
- the provisions of the Bill are guided by the following principles:
 - ⇒ it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
 - ⇒ people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
 - ⇒ people have a responsibility to raise those concerns in good faith;
 - ⇒ governments have a right to consider policy and administration in private; and
 - ⇒ government and the public sector have a responsibility to be receptive to concerns which are raised.