

## Categories of people who could make protected disclosures

### Introduction

- 3.1 Information that might form the basis of a public interest disclosure could potentially come from a wide range of sources. This chapter discusses the categories of people who may seek to make protected disclosures, such as:
- current and former Australian Government public sector employees including those employed by Australian Public Service (APS) agencies and non-APS Commonwealth authorities
  - members of the public including:
    - ⇒ public servants in their capacity as private citizens; and
    - ⇒ private sector employees.
  - contractors and consultants;
  - parliamentary staff;
  - volunteers;
  - overseas staff; and
  - other organisations and individuals.
- 3.2 The chapter refers to relevant provisions in other jurisdictions and in previous legislative proposals in considering the categories of people covered by public interest disclosure legislation.
- 3.3 The issue of who can make protected disclosures is linked to the types of disclosures that are to be protected, the conditions that apply to a person

making a disclosure and the scope of statutory protection available. These matters are addressed in subsequent chapters.

## Members of the public

- 3.4 Some contributors to the inquiry argued that any member of the public should be able to make a protected public interest disclosure regardless of their formal relationship with the organisation that is the subject of the allegation.<sup>1</sup> Whistleblowers Australia submitted that:

There is no reason why any person who has knowledge of malpractice or other public service wrongdoing should not be entitled to report that information. Any person who makes a report must be protected from any harm as a consequence of making the report.<sup>2</sup>

- 3.5 Similarly, the Department of Defence submitted:

The experience of Defence with the Defence Whistleblower Scheme is that often reports are made by family members. Indeed, the scheme has also received vital information from the general public. This raises the issue of whether 'any person' such as a family member, contractor, service provider or member of the public, might be afforded the same statutory protections as those considered for Government personnel, so long as the disclosure is in the public interest.<sup>3</sup>

- 3.6 The Deputy Commissioner for the NSW Commission Against Corruption told the Committee:

... we get a lot more information from members of the public and people who are not making protected disclosures than we do from protected disclosures, which does raise the issue of whether protection should be more broadly available to people who have information of interest to the ICAC and like agencies.<sup>4</sup>

- 3.7 There are currently some avenues for members of the public to pursue suspected wrongdoing in the public sector. At the Commonwealth level, any member of the public can seek assistance or make a complaint about a

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1 For example see Dr Sawyer, *Submission no. 57*, p. 4; Mr Arundell, *Submission no. 2*, p. 1; Post Office Agents Association Limited, *Submission no. 15*, p. 3.

2 Whistleblowers Australia, *Submission no. 26*, p. 16 (emphasis in original).

3 Department of Defence, *Submission no. 48*, p. 1.

4 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, p. 78.

range of government administration matters by directly approaching the relevant agency or responsible Minister.

- 3.8 Other specialist authorities that may receive complaints from the public concerning government administration include the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity, the Privacy Commissioner and the Australian Human Rights Commission.<sup>5</sup>
- 3.9 The Commonwealth Ombudsman submitted that the protection afforded to members of the public who complain to a government agency, Minister or complaint handling authority are limited.<sup>6</sup>
- 3.10 As discussed in Chapter 1, public servants are generally restricted in publicly disclosing information without authority. However, there is some scope for public servants to make general comments about government policy when speaking as members of the public. As private citizens, public sector employees are entitled to openly discuss government policy provided that they do not publicly criticise government policy in the areas in which they are working. Such public criticism of government policy could be considered a breach of the APS Code of Conduct and the value that the 'Australian Public Service is apolitical, performing its functions in an impartial and professional manner'.<sup>7</sup>
- 3.11 In principle, any person who provides information to assist with the detection of wrongdoing should be granted legal protection.<sup>8</sup> Legislation in all Australian jurisdictions with the exceptions of the Commonwealth, New South Wales and Tasmania, has taken an open approach to who may make a protected disclosure by specifying that any person is able to make a protected disclosure about specified conduct in the public sector.<sup>9</sup>
- 3.12 The open or 'sector-blind' categorisation of people who can make protected disclosures under most of the state legislation reflects the intention of the original legislation in South Australia and Queensland that whistleblower protection laws cover both the private and public sector.<sup>10</sup>

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5 Commonwealth Ombudsman, *Submission no. 31*, p. 3.

6 Commonwealth Ombudsman, *Submission no. 31*, pp. 3-4.

7 Australian Public Service Commission, *Submission no. 44*, p. 5; s. 10(1)(a) *Public Service Act 1999*.

8 Commonwealth Ombudsman, *Submission no. 31*, p. 3.

9 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 60.

10 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 8.

- 3.13 The Law Institute of Victoria supported the open approach of the Victorian legislation arguing that ‘outsiders’ to the public service may have an important contribution to make:

There will be situations where outsiders will be best placed to initiate and provide the pertinent evidence substantiating an allegation of serious wrongdoing. Those outsiders frequently have a pivotal position in being able to identify such serious wrongdoing and thus make a credible disclosure initiating investigations. For example, there are many persons working in the private and charitable sectors that can become aware of maladministration and be in a position to make a disclosure.<sup>11</sup>

- 3.14 The issue of protection for people who make disclosures concerning misconduct in the private sector is examined in Chapter 9.

## Public sector insiders

- 3.15 An alternative argument put to the Committee was that public interest disclosure legislation for the Australian Government public sector should apply only to those who have worked within that sector as their information is usually the most valuable, they are the most vulnerable to reprisals, and that they require specialised procedures to address the consequences of the disclosures.<sup>12</sup>
- 3.16 The insider’s knowledge of wrongdoing is a feature of public sector whistleblowing arrangements in the United States. When considering a whistleblower’s submission, the Office of Special Counsel (OSC) takes into account factors including whether the disclosure is reliable, first-hand information. Where the whistleblower’s knowledge is second-hand, an investigation is not usually conducted. Speculation does not provide OSC with a sufficient legal basis to initiate an investigation.<sup>13</sup>
- 3.17 The application of public interest disclosure protection to ‘insiders’ conforms to a conventional understanding of a whistleblower as a member of the organisation about which a disclosure is made. ‘It is their internal position in the organisation that is most likely to make them

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11 Law Institute of Victoria, *Submission no. 35*, p. 5.

12 Aspects of this argument have been presented in the evidence noted below.

13 Office of the Special Counsel 2008, *Whistleblower disclosures*, at <http://www.osc.gov/wbdisc.htm>

aware of internal wrongdoing and also most likely to place them under pressure to stay silent'.<sup>14</sup>

- 3.18 For Associate Professor Thomas Faunce, the specialised knowledge of insiders and the constraints they face are fundamental to being a whistleblower:

... the whistleblower is presumptively an insider who acquires knowledge that the community does not have. The whole idea of a being a whistleblower is that they feel that the institution itself is somehow morally compromised and that they cannot go through the usual channels because the institution has locked in various things which make it impossible. That is the nature of whistleblowing.<sup>15</sup>

- 3.19 According to the Commonwealth Ombudsman, a protection scheme must be focussed and structured if it is to properly target internal public sector whistleblowers:

... conforms to the primary objective of public interest disclosure legislation, which is to facilitate disclosure of wrongdoing by those who have worked within an organisation ... Confining the legislation in that way also enables a more focussed and structured scheme to be devised. In particular, it will be simpler to define the responsibilities of government agencies if the disclosures to which the Act applies are all made by people who have some current or prior working relationship to an agency.<sup>16</sup>

- 3.20 In elaborating on this view, the Commonwealth Ombudsman cited the research of the WWTW project:

What [the research] shows is that an area in need of great improvement is internal procedures – recording whistleblowing complaints, inquiring into whether a person faces disadvantage or retaliation and so on. The area in need of greatest reform is internal processes. That is another strong reason for designing a scheme that is tailored to the problem and the challenge, but while bearing in mind that it is not the whole picture.<sup>17</sup>

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14 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. 9-10.

15 Associate Professor Faunce, *Transcript of Evidence*, 18 September 2008, p. 21.

16 Commonwealth Ombudsman, *Submission no. 31*, p. 3.

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

3.21 The Murray Bill considered that whistleblower legislation should focus on 'public officials' who were defined as:

- (a) any person employed by the Commonwealth of Australia, whether as an Australian Public Service employee or by any other Commonwealth body or agency;
- (b) a senator or member of the House of Representatives;
- (c) a judicial officer;
- (d) a person, organisation or corporation contracted to provide goods or services to a Commonwealth department or agency;
- (e) an employee of a person, organisation or corporation contracted to provide goods or services to a Commonwealth department or agency;
- (f) a person undertaking any activities as a volunteer subject to the supervision of a Commonwealth department or agency;
- (g) a person employed under the Members of Parliament (Staff) Act 1984;
- (h) a member of the Australian Defence Force;
- (i) a person who has occupied, but no longer occupies, one of the positions described in this definition, but only with respect to conduct which occurred while he or she occupied a position described in this definition.<sup>18</sup>

3.22 The merits of considering particular categories of people who, as insiders, could make a protected disclosure, including those proposed in the Murray Bill are discussed below.

## Current and former public servants

### Employees of the Australian Public Service

3.23 A majority of submissions supported the inclusion of current employees of the APS within categories of people who should be able to make public interest disclosures.

3.24 Section 9 of the *Australian Public Service Act 1999* provides that the APS consists of agency heads and APS employees, with 'agency' defined as

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18 Clause 5, Public Interest Disclosure Bill 2007, introduced by Senator Murray.

departments, executive agencies and statutory agencies.<sup>19</sup> However, not all APS agencies employ staff under the *Australian Public Service Act 1999*.

- 3.25 Only half of all Commonwealth agencies or two-thirds of Commonwealth government employees are covered under existing whistleblower provisions of the *Australian Public Service Act 1999*.<sup>20</sup> The Australian Public Service Commission (APSC) submitted that the current provisions for the APS are too narrow and that coverage should be extended to non-APS Commonwealth employees.<sup>21</sup> A list of relevant APS agencies is outlined in the table below:

Table 3.1 Categories of Australian Public Service Agencies

Category:	APS Agencies:	Examples:
A	Departments	Attorney-General's Department, Department of Agriculture, Fisheries and Forestry
B	Statutory Agencies which employ all staff under the <i>Public Service Act 1999</i>	Aboriginal Hostels Limited, Administrative Appeals Tribunal
C	Statutory Agencies which have the capacity to employ staff under the PS Act as well as their own enabling legislation (dual staffing bodies)	Australian Bureau of Statistics, Australian Electoral Commission
D	Executive Agencies	Bureau of Meteorology CrimTrac Agency
E	Bodies which employ staff under the PS Act which operate with some degree of independence (eg. some are identified separately under the Financial Management and Accountability Act 1997)	Ausaid – Australian Agency for International Development (part of the Department of Foreign Affairs and Trade) Child Support Agency (part of the Department of Human Services)

Source Australian Public Service Commission, *Australian Public Service agencies*

- 3.26 Commonwealth agencies outside the APS include those subject to the *Commonwealth Authorities and Companies Act 1997* such as the Australian Wine and Brandy Corporation, the Australian Broadcasting Corporation, the Australian National University and the Tiwi Land Council.

#### Employees of the Australian Government general government sector

- 3.27 The inquiry terms of reference cited the following Australian Bureau of Statistics (ABS) definition of the general government sector:

19 See s. 7, *Australian Public Service Act 1999*.

20 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 1.

21 Australian Public Service Commission, *Submission no. 44*, p. 8.

[the] institutional sector comprising all government units and non-profit institutions controlled and mainly financed by government.<sup>22</sup>

3.28 At the national level of government, the general government sector includes APS Agencies, and non-APS Commonwealth employees within a 'government unit' defined as 'unique kinds of legal entities established by political processes which have legislative, judicial or executive authority over other institutional units within a given area'.<sup>23</sup>

3.29 Australian Government general government units therefore include Commonwealth agencies that employ staff under the *Australian Public Service Act 1999*, statutory agencies that employ staff under their own enabling legislation, and other non-APS Commonwealth authorities such as public non-financial corporations (eg. Australia Post) and public financial corporations (eg. the Australian Prudential Regulation Authority), and members of the Defence Force (employed under the *Defence Act 1903*).

3.30 The definition of Commonwealth officer relevant to the disclosure provisions in the *Crimes Act 1914* encompasses the above public sector employees and includes those who perform 'services for on behalf of the Commonwealth'. The complete definition is:

"Commonwealth officer" means a person holding office under, or employed by, the Commonwealth, and includes:

(a) a person appointed or engaged under the Public Service Act 1999 ;

(aa) a person permanently or temporarily employed in the Public Service of a Territory or in, or in connection with, the Defence Force, or in the Service of a public authority under the Commonwealth;

(b) the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police (all within the meaning of the Australian Federal Police Act 1979 ); and

(c) for the purposes of section 70, a person who, although not holding office under, or employed by, the Commonwealth, a

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22 Australian Bureau of Statistics 2003, *Australian system of government finance statistics: concepts, sources and methods*, p. 256.

23 See, Australian Bureau of Statistics 2003, *Australian system of government finance statistics: concepts, sources and methods*, para 2.29.

Territory or a public authority under the Commonwealth, performs services for or on behalf of the Commonwealth, a Territory or a public authority under the Commonwealth; and

(d) for the purposes of section 70:

(i) a person who is an employee of the Australian Postal Corporation;

(ii) a person who performs services for or on behalf of the Australian Postal Corporation; and

(iii) an employee of a person who performs services for or on behalf of the Australian Postal Corporation.<sup>24</sup>

3.31 Notably, the ABS classification allocates public universities to the national level of government because they are considered to be implementing national policy in the form of tertiary education. They are the only example of a multi-jurisdictional unit funded by both state and federal governments, not controlled by the Commonwealth level of government yet allocated to that level.<sup>25</sup>

3.32 The National Tertiary Education Union submitted that the inclusion of university employees within new public sector whistleblower legislation would unduly interfere with the current whistleblower arrangements in the university sector:

... universities are unique and diverse institutions with considerable operational complexity – for example, a typical university's activities will involve teaching, research, administration, governance, collaboration with external organisations (including the various tiers of government) and community engagement. Therefore, situations that may be considered to be 'whistle blowing' may not only be covered by specific whistleblower provisions but may also encompass an institution's policy, principles and regulations around academic freedom, freedom of speech, research integrity, official misconduct and discipline processes, as well as relevant state legislation.<sup>26</sup>

3.33 Other submissions to the inquiry from individual academics suggested that current university whistleblower arrangements were inadequate.<sup>27</sup>

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24 Section 3 of the *Crimes Act 1914*.

25 Australian Bureau of Statistics 2003, *Australian system of government finance statistics: concepts, sources and methods*, para 2.47.

26 National Tertiary Education Union, *Submission no. 63*, p. 4.

27 Dr Ahern, *Submission no. 56*, p. 3; Dr Stewart, *Submission no. 50*, p. 1.

Dr Kim Sawyer emphasised that universities are very different to government agencies due to the mix of public and private funding and that the shielding of that sector from broader public sector regulatory systems has compounded accountability issues:

In the university, the values of the institution become the values of the Vice-Chancellor. Many of our universities are sealed against outside regulation. Systemic problems occur because the culture is the homogeneous culture of the CEO. And systemic failure results because there is no questioning of that culture.<sup>28</sup>

- 3.34 Universities are currently covered in public interest disclosure legislation in three Australian jurisdictions. The Queensland *Protected Disclosures Act 1994* includes universities as prescribed public sector entities. The Victorian *Whistleblowers Protection Act 2001* and the Northern Territory *Public Interest Disclosures Act 2008* include universities as ‘public bodies’.

#### Employees of other organisations in receipt of Commonwealth funding or information

- 3.35 It was put to the Committee that employees of any body in receipt of Commonwealth funding or information should be covered by the new Commonwealth public interest disclosure scheme.<sup>29</sup> The Queensland Council of Unions argued:

... that if an enterprise is in receipt of Commonwealth funding the enterprise should be subject to the same standards of fairness, transparency and accountability as the Commonwealth public sector.<sup>30</sup>

- 3.36 The Queensland Nurses Union noted that nurses work in diverse areas that attract federal funding:

Nursing is a regulated profession and nurses work across a broad range of settings, including aged care, public and private hospitals, doctors’ surgeries, schools, the Red Cross blood service, the prison system, remote communities, the Defence Force and so on. Much of this work results in nurses being directly employed by government agencies or directly employed by organisations dependent upon government funding.<sup>31</sup>

- 3.37 The Attorney-General’s Department suggested that consideration be given to the inclusion of state and territory government and private sector
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28 Dr Sawyer, *Submission no. 57*, p. 3.

29 For example, Dr Sawyer, *Submission no. 57*, p. 4.

30 Queensland Council of Unions, *Submission no. 36*, p. 3.

31 Mr Ross, *Transcript of Evidence*, 28 October 2008, p 22.

employees within a new whistleblower scheme where they are in receipt of information from the Commonwealth Government.<sup>32</sup> The Community and Public Sector Union argued for the inclusion of state officials due to the sharing of Commonwealth information through joint initiatives.<sup>33</sup>

- 3.38 The sharing of official information between Commonwealth and state public sector agencies and the private sector is likely to increase as governments seek more inclusive and innovative responses to ongoing policy challenges. As the Prime Minister noted in his address to the Commonwealth Senior Executive Service:

While always protecting the Commonwealth's interests, I have a greater expectation that you will work constructively with State and Territory counterparts to achieve lasting reform.

... A more inclusive policy process means engaging average Australians as well as experts, think tanks and business and community groups in policy development and delivery.<sup>34</sup>

- 3.39 The extension of whistleblower protection to employees of all entities in receipt of Commonwealth funding or official information could have far reaching implications. It would not only include private sector bodies directly contracted with the Australian Government public sector (discussed below), but include a very broad range of state and local government authorities, including hospitals, education providers and infrastructure developers.

#### Former public servants

- 3.40 The Australian Public Service Commission submitted that the category of 'former' be restricted to a time limit of five years. This would be consistent with the Administrative Functions Disposal Authority (AFDA) Entry No 1759, requiring that records documenting reviews of misconduct are held for up to five years after all action is completed. It was noted that the Commonwealth Spent Convictions Scheme under Part VIIC of the *Crimes Act 1914* provides a time limit of 10 years after which certain criminal convictions are disregarded.<sup>35</sup>

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32 Attorney-General's Department, *Submission no. 14*, p. 1.

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

34 The Prime Minister, the Hon Kevin Rudd MP, Address to heads of agencies and members of the senior executive service, Great Hall, Parliament House Canberra, 30 April 2008.

35 Australian Public Service Commission, *Submission no. 44*, p. 9.

- 3.41 Imposing a time limit on former public servants making protected disclosure could improve the efficiency and focus of the whistleblowing scheme, as the APSC explained:

This would ensure protected public interest disclosures are relevant, reduce potentially vexatious claims, avoid lengthy litigation and reduce 'decision-shopping'.<sup>36</sup>

## Contractors and consultants

- 3.42 Contractors, consultants and their employees directly engaged with the public sector make up a growing part of the workforce providing services to or on behalf of government. They are often in a similar position as public servants to observe wrongdoing, can face similar risks when speaking out and yet are excluded from the existing APS whistleblower framework.

- 3.43 The National Secretary of the Community and Public Sector Union, Mr Jones, noted the current overlap in responsibilities that may occur between public sector employees and contractors:

In many areas of Commonwealth government employment you have people working as employees and people working as contractors doing exactly the same job. In some workplaces they are working side by side and in some instances they are working in different workplaces. It would be absurd to regulate people performing the one function because they are employees in a particular way and not regulate people performing exactly the same function who are employed by the Commonwealth in a different way.<sup>37</sup>

- 3.44 In reflecting on the inclusion of contractors, the Secretary to the Department of Immigration and Citizenship, Mr Metcalfe, told the Committee:

We have IT contractors with whom it just happens to be the way that their employment arrangements are. If they were raising issues about waste of public funds or other malfeasance then you would say that to all intents and purposes they are really within the organisation and that the processes should apply to them.<sup>38</sup>

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36 Australian Public Service Commission, *Submission no. 44*, p. 9.

37 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 7.

38 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 22.

- 3.45 There are some legislative provisions to enable protection for contracted service providers and their employees who make whistleblower type allegations. For example:
- section 466.1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* enable employees of Aboriginal and Torres Strait Islander Corporations and their suppliers to make protected disclosures in certain circumstances; and
  - section 96.8 of the *Aged Care Act 1997* enables protection for providers of residential care and their employees who make certain disclosures, with a broadly similar scope of protection.
- 3.46 Evidence to the inquiry showed strong support for including contractors and consultants within categories of people who can make a protected disclosure.<sup>39</sup> It was further noted that relevant procedures should ensure that protection for disclosures by contractors and consultants does not cover matters that are essentially disputes over contracting arrangements.<sup>40</sup>

## Parliamentary staff

- 3.47 Parliamentary staff are another category of public sector employees that may have 'insider' access to information, be in a position to observe serious conduct contrary to the public interest and face risks of reprisal for speaking out.
- 3.48 The Australian Public Service Commission (which supports the function of the Parliamentary Service Commissioner) submitted that persons who are currently or were formerly engaged under the *Members of Parliament (Staff) Act 1984* (Cth) should be included within the categories of people who could make protected disclosures.<sup>41</sup> Section 4(1)(c) of the *Financial Management and Accountability Regulations 1997* (Clth) provides that staff employed under the *Members of Parliament (Staff) Act 1984* are allocated to the agency from which they are paid, currently being the Department of Finance and Deregulation.
- 3.49 The three main categories of employees engaged under the *Members of Parliament (Staff) Act 1984* are ministerial consultants, staff of office-holders (including Ministers), and staff of Senators and Members. The

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39 Australian Public Service Commission, *Submission no. 44*, p. 1; Commonwealth Ombudsman, *Submission no. 31*, p. 2; Department of Defence, *Submission no. 48*, p. 1.

40 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 22

41 Australian Public Service Commission, *Submission no. 44*, p. 1.

allocation of staff to Members of Parliament and certain employment conditions are determined by the Prime Minister.<sup>42</sup> There is currently no general code of conduct for employees engaged under the *Members of Parliament (Staff) Act 1984*, although a Code of Conduct for Ministerial Staff was established in June 2008.<sup>43</sup> The *Members of Parliament (Staff) Act 1984* does not contain whistleblower type provisions.

- 3.50 Employees of the Departments of the House of Representatives, the Senate and Parliamentary Services are appointed under the *Parliamentary Service Act 1999*. That Act contains the same whistleblower provisions as the *Public Service Act 1999*, that is, limited protection may be granted in relation to reported breaches of the Parliamentary Code of Conduct.<sup>44</sup> Employees engaged under the *Members of Parliament (Staff) Act 1984* and the *Parliamentary Service Act 1999* are subject to Commonwealth industrial relations provisions.<sup>45</sup>
- 3.51 The Clerk of the Senate, Mr Harry Evans, expressed his support for the relevant provisions in the Murray Bill.<sup>46</sup> That Bill included employees engaged under the *Parliamentary Service Act 1999* and the *Members of Parliament (Staff) Act 1984* within categories of people who could make protected disclosures.<sup>47</sup>
- 3.52 The Acting Clerk of the Department of the House of Representatives, Mr Bernard Wright, informed the Committee that since the commencement of the *Parliamentary Service Act 1999*, there have been no known cases of whistleblowing in the Department under the Act. While therefore not able to comment on the merits of amending the whistleblower provisions of that Act, the Acting Clerk indicated that if amendments to the *Public Service Act 1999* are to be recommended, parallel amendments to the *Parliamentary Service Act 1999* should be considered.<sup>48</sup>
- 3.53 Employees under the *Members of Parliament (Staff) Act 1984* can be dismissed more easily than staff employed under the *Parliamentary Service Act 1999* or the *Public Service Act 1999*. Section 23(1) of the *Members of Parliament (Staff) Act 1984* provides for termination of employment where a member of parliament dies or ceases to be a member. Section 23(2)

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42 See ss. 12, 21 (3), *Members of Parliament (Staff) Act 1984*.

43 Department of Finance and Deregulation, *Members of Parliament (Staff) Act 1984, Annual report 2007-08*, Commonwealth of Australia, 2008.

44 Section 16, *Parliamentary Service Act 1999*.

45 Currently, the *Workplace Relations Act 1996*.

46 Mr Evans, *Submission no. 67*, p. 1.

47 Clause 5, *Public Interest Disclosure Bill 2007*.

48 Mr Wright, *Submission no. 70*, p. 4.

provides a further general power of a member of parliament to terminate the employment of a staff member.

- 3.54 Protecting staff employed under the *Members of Parliament (Staff) Act 1984* can be difficult due to the often highly charged political environment within members' offices. Staff of members are often members of political parties and could be subject to reprisal from their party. Members' staff can face harsh consequences for breaching confidentiality:

We have had cases in the past where a staffer actually released information without the consent of the member to another member, which caused political embarrassment to that member, and the Speaker of the day took the view that that was a breach of faith in terms of their relationship and dismissed the person, and that dismissal stood.<sup>49</sup>

- 3.55 Members can be vulnerable if disclosure provisions are abused, for example, in cases where staff are politically active and working against their own member. The New South Wales Clerk of the Parliament told a NSW parliamentary committee:

... members are very vulnerable to malicious complaints against them. It is one of the things I counsel all new members on when they start here to be very careful about the employment of staff and the relationship that they have with staff. It is why we have put together the guide for members in employing staff. We have had situations where there has been irreconcilable breakdown between the member and the staff member. Sometimes those people have worked outside this organisation and worked very amicably, but once they have become a member of Parliament things have changed. I think there are a lot of tensions and stresses that can happen in a member's office that do not happen in other workplaces.<sup>50</sup>

- 3.56 Personnel grievances within the offices of Commonwealth members of parliament are not uncommon. The latest Annual Report of the *Members of Parliament (Staff) Act 1984*, noted that in the year to June 2008, the total

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49 Mr Grove, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 46.

50 Ms Lovelock, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 28. These comments were made in the context of the NSW Parliament but would generally apply in relation to members of the Commonwealth Parliament.

legal costs of termination of employment and unfair dismissal claims by the staff of members amounted to \$105,455.<sup>51</sup>

- 3.57 The *Protected Disclosures Act 1994* (NSW) applies to staff of the parliamentary departments and the staff of members. However, the use of those provisions by parliamentary staff is relatively rare. In New South Wales, only two formal disclosures have been made in relation to each of the Houses. Notably, none of those disclosures were made by staff of members.<sup>52</sup>
- 3.58 The content of disclosures made by parliamentary staff could concern the conduct of members of parliament in relation to parliamentary proceedings. Matters about participants in parliamentary proceedings are related to the special powers, privileges and immunities of each House under the doctrine of parliamentary privilege.<sup>53</sup> Chapter 8 discusses procedures in relation to parliamentary privilege and disclosures relating to proceedings in parliament.

## Volunteers

- 3.59 The volunteer sector is another growing part of the workforce that plays a role in providing services to the community on behalf of government. ABS surveys have found that about five million Australians, or 34% of the adult population, are volunteers. While most operate in the private not-for-profit sector, about 14% of volunteering occurs in government sector organisations.<sup>54</sup>
- 3.60 The Committee heard that current and former volunteers with public sector bodies and current and former volunteers with organisations that work for public sector bodies on a contractual basis should be included within categories of people who could make protected disclosures.<sup>55</sup>

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51 Department of Finance and Deregulation, *Members of Parliament (Staff) Act 1984, Annual Report 2007-08*, Commonwealth of Australia, 2008, p. 43.

52 Ms Lovelock, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 16; Mr Grove, *Report of proceedings before the committee on the Independent Commission against Corruption*, 1 December 2008, p. 43.

53 Parliamentary proceedings have certain immunities from ordinary law in accordance with s. 49 of the Constitution of the Commonwealth of Australia and the *Parliamentary Privileges Act 1987*.

54 Australian Bureau of Statistics 2006, *Voluntary work Australia*, 4441.0, p. 3, 56.

55 Commonwealth Ombudsman, *Submission no. 31*, p. 2.

## Persons overseas

- 3.61 Many Australian Government public sector employees work outside Australia supporting a wide range of international activities including immigration, humanitarian and trade services. They may be engaged under the *Public Service Act 1999* or other legislation to perform duties overseas or may be volunteers on government projects.
- 3.62 There was general consensus that Australian officials working overseas should be included within the categories of people who could make protected disclosures. As the Commonwealth Ombudsman pointed out, protection is particularly important in this context because ‘risk of reprisal or disadvantage can be greater where a person is working in a small office overseas’.<sup>56</sup>
- 3.63 The Department of Defence submitted:
- Defence personnel, including contractors, and sometimes their accompanying spouses and families, are regularly posted overseas for both long and short term duty. It seems appropriate that the proposed statutory protection should be extended to these persons.<sup>57</sup>
- 3.64 Another important category of staff employed by the Australian Government public sector but located outside Australia are locally engaged personnel employed under s. 74 of the *Public Service Act 1999* or other legislation. Foreign nationals working outside Australia, but paid by the Australian Government, are subject to the laws of the country they are in.
- 3.65 As locally engaged staff make up the majority of personnel in Australia’s overseas missions. They may have access to official information and are often involved with decision making across a range of matters such as visa processing. The Department of Immigration and Citizenship, for example, employs about 800 staff overseas who are not Australian citizens.<sup>58</sup>
- 3.66 The Australian Public Service Commission agreed that protection should be extended to locally engaged staff in so far as it is possible to offer protection under Australian law from consequences in Australia.<sup>59</sup>

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56 Commonwealth Ombudsman, *Submission no. 31*, p. 4.

57 Department of Defence, *Submission no. 48*, p. 3.

58 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 18.

59 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 17.

- 3.67 The Justice and International Mission Unit of the Uniting Church of Australia told the Committee of the importance of whistleblower protection in addressing corruption in the context of international aid.<sup>60</sup>
- 3.68 The OECD noted that the Department of Foreign Affairs and Trade is the only Commonwealth agency to encourage its staff overseas to report suspected foreign bribery and recommended further support for potential whistleblowers.<sup>61</sup>
- 3.69 Procedural difficulties in protecting public sector whistleblowers outside Australia, such as maintaining the confidentiality of the informant are discussed further in Chapter 8.

## Other organisations and individuals

### Commonwealth agencies with existing protected disclosure frameworks

- 3.70 The Committee heard from some areas within the Commonwealth public sector that have more comprehensive protected disclosures frameworks including law enforcement agencies, the Australian Intelligence Community (AIC) and the Australian Defence Force. In the case of the intelligence community and law enforcement agencies, these frameworks are set out in legislation.<sup>62</sup>
- 3.71 The Australian Commission for Law Enforcement Integrity (ACLEI) is responsible for preventing, detecting and investigating serious and systemic corruption issues in the Australian Federal Police (AFP), the Australian Crime Commission and former National Crime Authority.<sup>63</sup> The AFP has a Professional Standards regime covering four categories of misconduct and AFP officers are encouraged to disclose their concerns through the 'Confidant Network' of officers trained in handling integrity issues.<sup>64</sup>
- 3.72 The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer tasked with reviewing AIC agencies.<sup>65</sup> The

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60 Dr Zirnsak, *Transcript of Evidence*, 21 August 2008, pp. 75-78.

61 *Australia - phase 2: report on implementation of the OECD anti-bribery convention 16 January 2006*, OECD, Paris, p. 34.

62 *The Inspector-General of Intelligence and Security Act 1986 and the Law Enforcement Integrity Commissioner Act 2006*.

63 Australian Commission for Law Enforcement Integrity, *Submission*, no. 13, p. 1.

64 Australian Federal Police, *Submission no. 38*, pp. 7-9.

65 Australian Intelligence Community agencies are: the Australian Security Intelligence Organisation, Defence Imagery and Geospatial Organisation, Australian Secret Intelligence Service, Defence Signals Directorate, Defence Intelligence Organisation, Office of National

IGIS is empowered to receive whistleblower reports and complaints concerning AIC activities and undertake formal inquiries.<sup>66</sup>

- 3.73 The Department of Defence provided the Committee with information on its internal whistleblower scheme which has been in operation since 2002. The Defence scheme covers defence force personnel, public servants employed by the department, contractors and Defence civilians.<sup>67</sup>

#### Anonymous disclosures

- 3.74 Many contributors to the inquiry argued that whistleblowers should be able to make a protected disclosure anonymously if they wish. It was suggested the prospect of remaining anonymous would encourage people to speak out.<sup>68</sup>
- 3.75 STOPline, which provides whistleblower hotline services to the public and private sector, supported the view that people are more confident in speaking out if they can be assured anonymity:

Here at STOPline 64% of whistleblowers request total anonymity and 43% of those are happy for us to know their identity but do not want it provided to their employer. The principal reason for this is that they lack faith in their organisations capacity to keep their identity confidential. In other words it is not about suspected corruption at the top of the organisation; simply an incapacity to handle the matter with the required level of discretion and confidentiality.<sup>69</sup>

- 3.76 The value of anonymity is recognised in the Australian Standard AS 8004 – 2003 Whistleblower protection programs for entities, paragraph 2.4.5:

A whistleblower who reports or seeks to report reportable conduct should be given a guarantee of anonymity (if anonymity is desired by the whistleblower) bearing in mind, that in certain

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#### Assessments.

- 66 Inspector-General of Intelligence and Security, *Submission no. 3*, p. 2. Mr Nathan Rogers referred the Committee to a United States Congressional Research report which discusses pathways relevant to personnel in national security settings, *Submission no. 1*, p. 1.
- 67 Department of Defence, *Submission no. 48*, p. 1. Defence civilians are those subject to defence force discipline as defined in s. 3 of the *Defence Force Discipline Act 1982*.
- 68 Mr Newlan, *Transcript of Evidence*, 21 August 2008, p. 4.
- 69 STOPline Pty Ltd, *Submission no. 25*, p. 9.

circumstances, the law may require disclosure of the identity of the whistleblower in legal proceedings.<sup>70</sup>

- 3.77 It is often the case that a person will choose to speak out about serious wrongdoing anonymously at first, and then reveal their identity once they are assured that confidentiality can be maintained.<sup>71</sup>
- 3.78 In some cases, it can be difficult to conduct an investigation and afford natural justice to individuals on the basis of anonymous disclosures. The practical implementation of procedures in relation to protected disclosures is discussed further in Chapter 8.
- 3.79 Legislation in Victoria, Tasmania and the Northern Territory currently provides protection for people who make anonymous disclosures. The other jurisdictions are silent on the issue.<sup>72</sup>
- 3.80 The Committee heard that anonymous disclosures from public sector insiders should be protected:
- ... to facilitate anonymous disclosures, the scheme should extend to any person who has provided information anonymously, of a nature that reasonably suggests the person falls into one of the listed categories.<sup>73</sup>

## **View of the Committee**

- 3.81 The Committee was asked to focus on whistleblowing protections within the Australian Government public sector. The Committee considers that the Australian Government public sector should remain the focus of the legislation because it is public sector insiders who are most vulnerable to reprisals and are more likely to provide the most critical information.
- 3.82 Public interest disclosure legislation should target 'insiders' to the Australian Government public sector, that is direct employees, and others who are most likely to have insider information such as former employees, current and former employees of contractors and consultants to the public sector, and current and former parliamentary staff, volunteers and

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70 Standards Australia, *Submission no. 16*, Attachment A, Australian Standard AS 8004–2003 *Whistleblower protection programs for entities*.

71 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 11.

72 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 11.

73 Commonwealth Ombudsman, *Submission no. 31*, p. 2.

overseas staff including locally engaged staff. People making anonymous disclosures who, on the basis of the information provided, are reasonably viewed as being in one of the above categories of 'insiders' should receive protection.

- 3.83 The same categories of public sector insiders associated with Commonwealth agencies that have more comprehensive whistleblower protection schemes, such as the law enforcement and intelligence communities, should be treated no differently to categories of people who can make protected disclosures. However, the procedures in relation to protected disclosures from those bodies may differ with regard to the existing legislation for those agencies.
- 3.84 Staff of Members of Parliament should be included in whistleblower protection. In recognition of the political environment within which staff work and their employment arrangements which may not provide an internal disclosure option, the Committee considers that the Commonwealth Ombudsman should be the authority authorised to receive public interest disclosures from the employees of Members of Parliament employed under the *Members of Parliament (Staff) Act 1984*.
- 3.85 There may be situations where certain categories of employees with a more distant relationship to the Australian Government public sector seek to make a protected disclosure, for example, a former volunteer of a not for profit body contracted to a local government authority to implement a federally funded program. There should be no automatic protection afforded to people in such instances but a decision maker should be able to grant protection in appropriate circumstances.
- 3.86 Where the disclosure originates from a person connected with a state based entity and concerns the use of Commonwealth funding or information and has an 'insider perspective', the authorised recipient of the information should consider the nature of that information prior to granting protection in relation to the disclosure.
- 3.87 It may be that disclosures concerning the Australian Government public sector from people who do not qualify for automatic protection, such as those connected with a state-based or private sector entity, qualify under different conditions and the scope of statutory protection is limited or different procedures apply. These issues are discussed further in subsequent chapters.
- 3.88 Others who seek whistleblower protection who are outside the categories of those who can make protected disclosures described above, such as those who have a client-type relationship with a public sector agency,

have recourse to the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity, the Privacy Commissioner and the Australian Human Rights Commission.

- 3.89 The Committee notes that members of the public who make disclosures or raise complaints against public sector service providers do not have the same scope of protection afforded to them as that under consideration for whistleblowers in this inquiry. The Committee considers that the issue of protection for members of the public who make such complaints outside the current terms of reference could be addressed in a future review.

### **Recommendation 3**

- 3.90 **The Committee recommends that the Public Interest Disclosure Bill define people who are entitled to make a protected disclosure as a 'public official' and include in the definition of public official the following categories:**
- **Australian Government and general government sector employees, including Australian Public Service employees and employees of agencies under the *Commonwealth Authorities and Companies Act 1997*;**
  - **contractors and consultants engaged by the public sector;**
  - **employees of contractors and consultants engaged by the public sector;**
  - **Australian and locally engaged staff working overseas;**
  - **members of the Australian Defence Force and Australian Federal Police;**
  - **parliamentary staff;**
  - **former employees in one of the above categories; and**
  - **anonymous persons likely to be in one of the above categories.**

**Recommendation 4**

- 3.91 The Committee recommends that the Public Interest Disclosure Bill provide that the Commonwealth Ombudsman is the authorised authority for receiving and investigating public interest disclosures made by employees under the *Members of Parliament (Staff) Act 1984*.

**Recommendation 5**

- 3.92 The Committee recommends that the Public Interest Disclosure Bill include a provision to enable a decision maker within the scheme to deem other persons to be a 'public official' for the purposes of the Act. Those who may be deemed a public official would have an 'insider's knowledge' of disclosable conduct under the legislation and could include current and former volunteers to an Australian Government public sector agency or others in receipt of official information or funding from the Australian Government.

**Recommendation 6**

- 3.93 The Committee recommends that, after a period of operation of the proposed legislation, the Australian Government consider introducing protection for members of the public to make public interest disclosures about the Australian Government public sector.

