

## Scope of statutory protection

### Introduction

- 6.1 Research and anecdotal reports have shown that whistleblowing involves a range of risks and unintended consequences. A formal protection mechanism for people who make public interest disclosures will be an essential underpinning of the new scheme.
- 6.2 In considering model public interest disclosure provisions, this chapter examines the following:
- statutory protection in current legislation;
  - protection against victimisation, discrimination, discipline or an employment sanction, civil or equitable remedies including compensation;
  - immunity from criminal liability and from liability for civil penalties; and
  - immunity from civil actions such as defamation and breach of confidence.

### Statutory protection in current legislation

- 6.3 Where there is no whistleblower protection, a person making a public interest disclosure may be liable for criminal, civil and administrative sanction and adverse treatment in the workplace. On the other hand, employers are under a duty to provide a system of protection. Such a system includes active steps to prevent or stop harassment and

persecution and legal protection, plus positive obligations placed on the employer.<sup>1</sup>

- 6.4 Currently in the Australian Government public sector, there is limited whistleblower protection available through s. 16 of the *Public Service Act 1999* and s. 16 of the *Parliamentary Service Act 1999*. The protection available is protection against victimisation or discrimination of a person who reports a breach of the Code of Conduct provisions of those Acts.<sup>2</sup>
- 6.5 Given the lack of protection for whistleblowers in the Australian government public sector, a program of reform to provide protection has received broad support in submissions to the Committee.
- 6.6 The Community and Public Sector Union submitted that the provision of statutory protection for public sector whistleblowers is essential and long overdue. The Union was of the view that, because of its limited scope, the legislative protection in the *Public Service Act 1999* does not ensure that those individuals who make a disclosure are properly protected.<sup>3</sup>
- 6.7 In addition to the potential legal and administrative penalties a whistleblower might face, adverse action may occur in the workplace including dismissal, harassment and injury to individuals and independent contractors.<sup>4</sup>
- 6.8 Adverse treatment against an employee who has made a public interest disclosure is likely to involve a series of events over time. Research shows that reprisals might be officially sanctioned or they could be the result of an individual or individuals acting without authority.<sup>5</sup>
- 6.9 The number of whistleblowers who report adverse treatment from management or co-workers as a result of their disclosures is between 20 and 30%, which represents a sizeable proportion of those who responded to the WWTW surveys.<sup>6</sup>

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1 *Wheadon v State of New South Wales* (unreported, District Court of New South Wales, Cooper J, 2 February 2001).

2 A number of submissions noted problems with the implementation of the Commonwealth whistleblower provisions. For example see, Name Withheld, *Submission no. 46*.

3 Community and Public Sector Union, *Submission no. 8a*, p. 1.

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

5 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. 130.

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, p. 137.

6.10 The types of adverse treatment experienced by whistleblowers were documented in the WWTW project report. Table 5.13 from that report is reproduced below.

Table 6.1 Types of treatment and harm experienced by whistleblowers

Type of bad treatment and harm <sup>a</sup>	All whistle blowers	Whistle blowers experiencing any harm	Case handlers and managers <sup>b</sup>
Threats, intimidation, harassment or torment	43.1	63.9	59.1
Undermined authority	29.9	44.3	38.2
Heavily scrutinised work	29.2	43.3	40.0
Ostracism by colleagues	28.5	42.3	56.9
Questioning of motives for whistleblowing	25.0	37.1	53.8
Unsafe or humiliating work	21.5	32.0	14.2
Forced to work with wrongdoers	20.8	30.9	25.8
Financial loss	18.1	26.8	9.8
Essential resources withdrawn	17.4	25.8	12.4
Missed promotion	16.7	24.7	22.7
Poor performance report	16.7	24.7	30.7
Involuntary transfer	16.7	24.7	29.3
Reference denied or poor reference given	16.0	23.7	16.0
Training denied	15.3	22.7	20.4
Given little or no work	15.3	22.7	20.4
Overworked	13.9	20.6	15.6
Made to see psychiatrist or counsellor	13.2	19.6	26.2
Disciplinary action or prosecution	13.2	19.6	15.1
Forced to take leave	11.8	17.5	20.4
Harassment of friends, colleagues or family	11.1	16.5	13.8
Property destroyed, damaged or stolen	11.1	16.5	11.6
Lost entitlements	7.6	11.3	8.4
Sacked	5.6	8.2	5.3
Suspended	4.9	7.2	8.0
Demoted	3.5	5.2	6.7
Put on probation	3.5	5.2	4.9
Assault or physical harm	1.4	2.1	6.2

a Percentages in columns total more than 100% owing to multiple outcomes being reported. See the source document for a fuller description of the data.

b Percentages in the column refer to case handlers and managers who reported direct experiences of whistleblowers experiencing reprisals. See the source document for more details.

Source *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 127.*

6.11 The WWTW study noted that 65 percent of whistleblowers who reported adverse treatment believed it was deliberate action by one or more levels

of management.<sup>7</sup> Many submissions supported that finding. For example, Mr Smythe told the Committee:

Managers go to inordinate lengths to protect themselves and their colleagues regardless of the true intentions of the complainant, and even if they act within the letter of the law they may not be acting in the spirit of the law. Remembering that placing managers in positions of confidence only serves to support the retaliation or to allow the best form of defence is attack approach.<sup>8</sup>

6.12 The detriment caused by reprisals is usually of a type that falls short of the legal thresholds required to prove criminal liability on the part of any individual. The result is that it is unlikely that criminal sanction, alone, is the appropriate strategy for reducing the risk of reprisal.<sup>9</sup>

6.13 Several submissions to the Committee referred to the problem of proving that detrimental action had occurred. Dr Kathy Ahern told the Committee that while a matter may appear 'rational on the surface', retribution can be subtle and similar to workplace bullying. For example, people might be not copied into emails for important meetings and then 'told that they are too sensitive or they are making too much out of it'.<sup>10</sup>

6.14 The Deputy New South Wales Ombudsman, Mr Chris Wheeler, observed that some things, such as people being moved against their will or being transferred to a lower paying position might be relatively easy to prove but detrimental action can often be difficult to demonstrate:

... a lot of the things that are alleged to occur as detrimental action leave no fingerprints. For example, 'I was treated differently to my colleagues. They got an opportunity to act up or they got this or that, whereas my career has slowly but surely gone downhill. I cannot point to anything that I could prove in a court or a tribunal, but the overall issue is that it appears to me that I am being detrimentally treated because I made my disclosure.'<sup>11</sup>

6.15 It was noted that despite there being a reverse onus of proof in New South Wales – where an employer has to show that detrimental action was not

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7 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. 130.

8 Mr Smythe, *Submission no. 42*, p. 5.

9 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. 130.

10 Dr Ahern, *Transcript of Evidence*, 28 October 2008, pp 29-31.

11 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, pp. 22, 27.

the result of a disclosure – the five cases that had been prosecuted had ‘failed on evidentiary or technical grounds’.<sup>12</sup>

- 6.16 The WWTW team noted that the general lack of success in obtaining compensation under state and territory laws can be blamed on a process that would either require demonstrating detriment to a criminal standard of proof or, in other circumstances, the behaviour giving rise to detriment not being discernible from other behaviour.<sup>13</sup>
- 6.17 Dr Brown subsequently drew the attention of the Committee to what he described as a ‘nationally significant’ case where the Ombudsman Victoria has recommended that compensation be paid to a number of mistreated public sector whistleblowers, rather than leaving them to exercise their right to initiate civil action on their own behalf under the *Whistleblowers Protection Act 2001* (Vic).<sup>14</sup>
- 6.18 The significance of the development in Victoria is that a Victorian legislative provision provides for the Ombudsman to review how a person is treated and that resulted in the Ombudsman substantiating a claim of detriment. The implication being that authority to make a finding that has evidentiary value should be given to a regulatory or oversight agency, as a more suitable arrangement for whistleblower protection, than the legislation simply allowing self-help through a private action in tort.
- 6.19 While aspects of protection can be designed into procedures such as confidentiality, the two main forms of protection for those who make public interest disclosures are the removal of the threat of legal consequences arising from disclosure and workplace protection of people from reprisal or adverse treatment for having made the disclosure.<sup>15</sup>

## Statutory protection in the states and territories

- 6.20 In the Australian states and territories, public interest disclosure legislation tends to protect whistleblowers through the following:
- relief from criminal liability for breach of statutory secrecy provisions;
  - relief from civil liability for defamation or breach of confidence;

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12 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 27.

13 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. 273.

14 Dr Brown, *Submission no. 68*, p. 4.

15 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. 272.

- protection against disciplinary or other workplace sanctions, such as reduction in salary or reclassification or termination of employment; and
  - legal redress for any detriment suffered as a result of making a disclosure.<sup>16</sup>
- 6.21 Section 23(1)(b) of the *Public Interest Disclosure Act 2003* (WA) places a positive obligation on the principal executive officer of all public authorities to provide protection from detrimental action or the threat of detrimental action for any employee who makes an appropriate disclosure of public interest information. This is regarded as ‘the benchmark’ in existing legislation.<sup>17</sup>

## Scope of protection for the Australian Government public sector

- 6.22 Most submissions to the Committee recommended that protection be provided against those matters listed in the terms of reference: victimisation; discrimination; discipline or an employment sanction; civil or equitable remedies, including compensation; and to include immunity from criminal liability and from liability for civil penalties.<sup>18</sup>
- 6.23 A number of witnesses drew the Committee’s attention to the distinction between the substance of a disclosure and the needs of a person making a disclosure, including protection from adverse consequences. It was argued that each is a discrete matter and should be handled through separate processes.<sup>19</sup>
- 6.24 The reasons for separating the substantive issue from personnel management matters include: the need to develop and improve upon workplace culture; the skill sets and authority required to resolve the substantive issues will generally be different to those required to resolve workplace issues at an agency level; and, with the exception of the APSC, the role of oversight or integrity agencies likely to be involved does not include management of workplace issues.

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16 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. 272.

17 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. 268.

18 For example, Ms Merrylin Bulder, *Submission no. 32*, p. 8.

19 For example, Australian Commission for Law Enforcement Integrity *Submission no. 13*.

## Protection against adverse action

- 6.25 It was submitted to the Committee that public interest disclosure legislation should cover as many employment-like relationships as necessary to reflect the ways in which government does business, and that volunteers and contractors could be included.<sup>20</sup>
- 6.26 Victimisation, discrimination, discipline or employment sanctions are adverse actions taken against an employee. Different forms of adverse action, such as not accepting goods and services, could be taken by a principal against a contractor.
- 6.27 Adverse action by an employer against an employee is described in the Fair Work Bill 2008 as action to dismiss the employee, injure the employee in his or her employment, altering the position of the employee to the employee's prejudice, or discriminating between the employee and other employees of the employer.<sup>21</sup>
- 6.28 The Fair Work Bill 2008 describes adverse treatment in contractual relationships as adverse action by the principal when the principal terminates the contract, injures the independent contractor in relation to the terms and conditions of the contract, alters the position of the independent contractor to the independent contractor's prejudice, refuses to make use of, or agree to make use of, services offered by the independent contractor or refuses to supply, or agree to supply, goods or services to the independent contractor.<sup>22</sup>

## Existing remedies

- 6.29 The CPSU is of the view that the concept of 'prejudicial alteration', for example through termination of a contract or refusal to re-engage under the *Workplace Relations Act 1996*, would be an appropriate remedy for adverse action because of a person having made a public interest disclosure.<sup>23</sup>
- 6.30 Where remedies are provided for in state and territory legislation, there has been almost no success in obtaining a remedy. This is because the laws, except for Queensland and Victoria, rely largely on self-help in civil matters and, as the WWTW team noted, in *Howard v State of Queensland*, the whistleblower's entitlement to seek damages under s. 43 of the

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

21 Clause 342(1), Fair Work Bill 2008

22 Clause 342(1), Fair Work Bill 2008.

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

*Whistleblower Protection Act 1994 (Qld)* still did not extend to an entitlement to establish that the employer was vicariously liable for the detriment that the whistleblower had suffered.<sup>24</sup>

- 6.31 When the Commonwealth is vicariously responsible for the tortious acts of its employees, the matter is governed by ss. 56 and 64 of the *Judiciary Act 1903*. The issue of employer responsibility for acts or omissions by employees is not straight-forward and this may be a matter to be included in legislation to ensure that there is no legislative gap.
- 6.32 In the Commonwealth setting, except for a very narrow range of circumstances related to codes of conduct, there is no specific protection for people making a public interest disclosure.
- 6.33 The *Workplace Relations Act 1996* may have the effect of providing limited protection against dismissal.<sup>25</sup> As the *Workplace Relations Act 1996* is directed at matters other than public interest disclosures, protection from criminal and civil liabilities arising out of public interest disclosures are not available under that Act and, as with some of the state and territory legislation, protection only extends to complaints to the correct body.<sup>26</sup>

### Period of transition in legislation

- 6.34 The Committee's reference for this inquiry predated by some five months the introduction of a new workplace relations bill, the Fair Work Bill 2008, on 25 November 2008. The Committee's public hearings took place up until 27 November 2008. The Bill has passed the House of Representatives and, at the time of tabling this report, was being considered by a Senate committee.
- 6.35 The effect of the timing of this inquiry and the introduction of the new legislation was that neither those making written submissions, nor those who appeared as witnesses, had the opportunity to give evidence in the light of what is proposed in the Fair Work Bill 2008.
- 6.36 As the Fair Work Bill 2008 is under consideration by Parliament, a synopsis of the types of protective provisions contained in it is at Appendix D. Those protective provisions cover adverse treatment in the workplace and are not significantly different to the types of workplace protection that witnesses before the Committee supported.

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24 *Howard v State of Queensland* (unreported, QCA, McMurdo P, Thomas JA, Ambrose J, 9 June 2000), 23.

25 Workplace Ombudsman, *Submission no. 66*, p. 6.

26 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, pp. 82, 83.

## Proposals to the Committee on workplace protective measures

- 6.37 Witnesses recommended against providing unique legislative arrangements to protect employees from adverse treatment in the workplace. Instead, they promoted the use of industrial relations laws and processes, occupational health and safety arrangements and personnel management practices for protection against adverse treatment.
- 6.38 The preference for the use of existing industrial relations mechanisms reflects the practice in the United Kingdom and Japan, where public interest disclosure legislation has its genesis in workplace laws. By way of contrast with the UK and Japan, the initiative for this inquiry arises from issues of accountability and integrity in the public sector.
- 6.39 The thrust of the submissions received by the Committee was that workplace protection under a disclosure scheme should be seen as a part of an agency's values and personnel and workplace activities.<sup>27</sup> Nevertheless, there is an inevitable cross-over with workplace matters owing to the potential for a whistleblower to be treated adversely in the workplace despite the fact that an employer is required to promote and develop measures to ensure employees' health, safety and welfare at work.<sup>28</sup>
- 6.40 Dr Brown wrote to the Committee subsequent to the publication of the WWTW report to suggest that the interrelationship between whistleblower schemes and an employer's existing obligations be recognised as a part of normal workplace practice because:

It is becoming clearer that these obligations are more akin to employers' other responsibilities to ensure their organization functions in a way which recognizes and protects the occupational health and safety (OH&S) of employees, than has previously been recognized in research and policy-making relating to whistleblowing.

I believe it may be very valuable for the Committee to note in its report that there are important links - hitherto unappreciated - between issues of whistleblower management and issues of OH&S.<sup>29</sup>

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27 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11. Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 23. Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 22.

28 *Occupational Health and Safety Act 1991* s. 16(2).

29 Dr Brown, *Submission no. 68*, p. 2.

- 6.41 The CPSU submitted that, in addition to the judicial remedies that are available, there should be remedies available through the existing mechanisms to provide mediation and conciliation functions and dispute resolution so that there is 'not just a rush to judicial remedies'.<sup>30</sup> This was supported by the Australian Council of Trade Unions.<sup>31</sup> Typically, in a workplace setting, these functions are provided through industrial relations mechanisms.<sup>32</sup>
- 6.42 The existing industrial relations mechanisms for dispute resolution include courts, tribunals and the Workplace Ombudsman. There are no other authorities equipped with relevant expertise and experience, and the Committee has heard that it is preferable not to create new regulatory or oversight bodies when existing ones are adequate to undertake the task.
- 6.43 The current *Workplace Relations Act 1996* and the Fair Work Bill are not well adapted to protecting persons who make disclosures. The Workplace Ombudsman has described the limitations as to what he can investigate under the Bill in the following terms:
- Whilst the proposed workplace rights provisions may provide more protection against reprisals taken against persons who make public interest disclosures than the current freedom of association provisions, they are not designed, or adequate, for this purpose. For example, workplace rights arise out of workplace entitlements and complaints about an individual's own employment. Matters of corruption, malpractice and the like may not fall into this category if they do not relate to workplace entitlements or the whistleblower's own employment.<sup>33</sup>
- 6.44 The Workplace Ombudsman's concerns reflect earlier submissions about the need to investigate issues such as corruption and maladministration in isolation from issues of adverse treatment in the workplace and for those issues to be regarded as matters related to employment.<sup>34</sup>
- 6.45 It would not be the intention of legislation to require that the Workplace Ombudsman investigate matters of corruption, malpractice and the like nor to provide the immunities from civil and criminal sanction that are recommended in this report. The intention would be that making a public interest disclosure is a workplace right for the purposes of workplace laws
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30 Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 9.

31 Australian Council of Trade Unions, *Submission no. 64*, p. 1.

32 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 16.

33 Workplace Ombudsman, *Submission no. 69*, p. 6.

34 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11. Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 23. Dr Brown, *Submission no. 68*, p. 2.

and that complaints about an individual's own treatment in his or her employment, arising as a result of making a public interest disclosure, would be referable to the Workplace Ombudsman.

- 6.46 The Department of Defence submitted that Defence personnel should be covered by the statutory protections provided by a public interest disclosure scheme but asked that the Committee take note of the particular arrangements whereby Defence personnel are employed.<sup>35</sup> For example, conditions of service are determined by the Minister under the *Defence Act 1903* (Cth) and, under s. 42A of the *Naval Defence Act 1910* (Cth), an authorized person determines conditions of employment.
- 6.47 Various other Acts provide for particular conditions of employment and remuneration of office-holders and specialist categories of employees. These arrangements may cut across a number of agencies, for example the Remuneration Tribunal does not determine the entire range of employment provisions available for office holders.<sup>36</sup>
- 6.48 It is relevant that other groups of employees may have particular employment schemes that exclude them from having workplace relations problems dealt with in courts and tribunals, for example volunteers. Nevertheless, this would not prevent the Workplace Ombudsman investigating a claim of adverse treatment. In that case, rather than using the workplace courts and tribunals, resolution of any matter that arose might rely on the Workplace Ombudsman providing an evidentiary certificate for use in other venues.
- 6.49 Dr Brown has suggested that the Committee consider the merit in empowering a person who is investigating allegations of adverse treatment to make a determination that the treatment took place and issue a certificate to that effect.<sup>37</sup> This could be useful where a person does not come under the jurisdiction of workplace courts or tribunals and assist a person to seek redress through other avenues.

## Compensation for detriment

- 6.50 There are potentially many issues that would attract compensation arising from adverse treatment in the workplace, including the need for remedies connected with the termination of employment. There are matters related

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35 Department of Defence, *Submission no. 48*, p. 4.

36 Australian Government Remuneration Tribunal, Judicial and Related Offices at <http://www.remtribunal.gov.au/judicialRelatedOffices/default.asp?menu=Sec3&switch=on>

37 Dr Brown, *Submission no. 68*, p. 4.

to rehabilitation through occupational health and safety laws that might arise as a result of a person making a public interest disclosure.

- 6.51 These issues support the position that standard workplace systems should be used to manage an individual's workplace difficulties should they arise after making a disclosure.
- 6.52 The Committee heard that it would be preferable that, rather than focus on compensation for detriment, disclosure legislation should support the ideas of prevention and restitution. Whistleblowers Australia for example, commented that most people do not look for compensation. 'All they want to do is go back to the position they were in without a loss and accept a really nice, genuine apology'.<sup>38</sup>
- 6.53 Whistleblowers Australia proposed that should financial remedies and compensation be proposed for reprisals against a public interest disclosure, payment must rest with the relevant agency, but that the agency should reclaim against those who carried out the reprisals or who failed to comply with statutory duties.<sup>39</sup>
- 6.54 It was suggested that a scheme would have to build in special measures for support and for compensation of people who suffer real injury such as psychological distress.<sup>40</sup>
- 6.55 With the exception of New South Wales, state and territory legislation allows a person suffering adverse treatment to sue for detriment in the Supreme or District Court. The following table from the WWTW report sets out the current arrangements.

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38 Mr Bennett, *Transcript of Evidence*, 9 September 2008, p. 25.

39 Whistleblowers Australia, *Submission no. 26*, p. 30.

40 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11.

Table 6.2 Civil, equitable and industrial remedies for detriment

Legislation	Civil Action (Tort)	Equal opportunity/ anti-discrimination	Workplace relations law	Injunction relief
SA 1993	Yes	<i>Equal Opportunity Act 1984</i>	No	No
Qld 1994	Yes	<i>Unfair treatment of Office</i>	<i>Industrial Relations Act 1998, unfair dismissal</i>	Yes
NSW 1994	No (common law only)			
ACT 1994	Yes	No	No	Yes
Cth 1999	No	Victimisation or discrimination	No	No
Vic 2001	Yes	No	No	Yes
Tas 2002	Yes	No	No	Yes
WA 2003	Yes	<i>Equal Opportunity Act 1984</i>	No	No

Source 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 272.

6.56 The majority of evidence received about rewards being paid to whistleblowers related to qui tam schemes.<sup>41</sup> Those schemes are discussed in Chapter 5 of this report. Otherwise, the distinction was drawn between compensation which would restore a person to their previous position and monetizing a whistleblowing scheme. A number of witnesses resisted that idea on public policy grounds:

It is important that truth-telling not be monetized as a good for which one is paid, but as a public service that is the duty of every citizen.<sup>42</sup>

6.57 Mr Wheeler remarked that, a scheme should not provide compensation mechanisms that allow a person to 'take on an organisation or a colleague at a tribunal' in the expectation that a person 'might get some money at the end of the day'.<sup>43</sup>

6.58 Many submissions noted the damaging personal effects of adverse treatment, including depressive illnesses.<sup>44</sup> Any legislation that provides

41 In the United Kingdom, the suggestion that qui tam claims be introduced has been seen as likely to undermine cultural values that support a disclosure scheme. See Public Concern at Work 30 November 2007, *Rewarding whistleblowers as good citizens*, Response to the Home Office consultation, p. 8.

42 NSW Council for Civil Liberties, *Submission no. 17*, p. 4.

43 Mr Wheeler, *Transcript of Evidence*, 9 September 2008, p. 27.

44 Dr Lennane, *Transcript of Evidence*, 27 October 2008, p. 18.

for compensation would not take away a personal right to sue for damages in a situation where the detriment included an injury.

## Immunity from criminal and civil liability

- 6.59 Evidence to the Committee indicated broad agreement that protection under a public interest disclosure system should include providing protection for individuals (and contractors) from administrative sanction and criminal and civil liability.
- 6.60 There was broad agreement that there should be no sanction in the legislation for a person making a public interest disclosure although there should be no protection if the public interest disclosure was made knowingly to be false or misleading.<sup>45</sup>
- We do not suggest that there is a need for specific statutory provisions within, say, public interest disclosure legislation which provide sanctions against a vexatious whistleblower. We think the provisions of the Public Service Act, where they apply, or the general law, where it applies, provide a sufficient regime to deal with that sort of behaviour.<sup>46</sup>
- 6.61 Apart from disciplinary measures that could arise out of either common law or equitable duties of an employee to an employer, a person or body corporate is potentially exposed to detriment through action for:
- breach of the *Crimes Act 1914*, *Public Service Act 1999*, or other agency legislation and regulations and departmental instructions;
  - breach of privacy principles;
  - breach of confidence;
  - breach of a code of conduct;
  - criminal defamation;
  - defamation; and
  - injurious falsehood.
- 6.62 The range of relationships between agencies and their 'employees' includes conventional employer-employee arrangements, contractual arrangements and volunteers among others. In addition, special provisions apply in defining employee relationships for the purposes of
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45 Community and Public Sector Union, *Submission no. 8a.*, p. 3.

46 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 11.

particular legislation, for example the *Financial Management and Accountability Act 1997* and the *Occupational Health and Safety Act 1991*.<sup>47</sup>

- 6.63 Each employment-like relationship attracts different types of duties and degrees of protection at common law and equity and there is no precision in how the law works. For example, an employer may be vicariously liable for the actions of an employee but when the actions of a contractor attract a liability, the exact circumstances will determine who is liable.
- 6.64 At other times it is difficult to discern the exact nature of a relationship because it turns on specific issues in the relationship, such as the amount of control that is exercised, which is a matter of fact to be decided judicially.<sup>48</sup>
- 6.65 The Chief Executive Officer of the Post Office Agents Association (POAA), gave evidence that the organisation represents a group of people providing an essential public service and that, although in a contractual relationship with a government agency, they are doing almost identical work to that being done by government employees.<sup>49</sup>
- 6.66 In the circumstances described by POAA, a contractor's employee, who makes a disclosure about his employer's practices to Australia Post, could be in breach of a common law or equitable obligation to his or her employer, yet the matter may relate to an essential public service and be in the public interest.
- 6.67 The Community and Public Sector Union described for the Committee the arrangements for veterinary officers and meat inspectors who are engaged as contractors and are at the front line of national biosecurity and the multimillion dollar meat trade. The CPSU's view was that it would be 'inconceivable' to exclude them from a protection scheme.<sup>50</sup>
- 6.68 Unlike the postal workers who are employed by a contractor, the veterinary officers and meat inspectors are on individual contracts for programs, which is an increasingly common means of delivering government services and yet another employment-like arrangement.
- 6.69 The complex relationship issues have been handled in state legislation by legislating liability away or for absolute privilege to apply. For example, the Queensland *Whistleblowers Protection Act 1994* legislates away liability

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47 Department of Education, Employment and Workplace Relations, *Submission no. 66*, p. 2.

48 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 73 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

49 Mr Kerr, *Transcript of Evidence*, 21 August 2008, p 27.

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

for civil, criminal and administrative matters, provides a defence of absolute privilege for defamation proceedings and makes specific provision for a breach of confidence, breach of other laws and disciplinary matters, as set out below:

Section 39 General limitation

(1) A person is not liable, civilly, criminally or under an administrative process, for making a public interest disclosure.

(2) Without limiting subsection (1) –

(a) in a proceeding for defamation the person has a defence of absolute privilege for publishing the disclosed information; and

(b) if the person would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice – the person –

(i) does not contravene the Act, oath, rule of law or practice for making the disclosure;

(ii) is not liable to disciplinary action for making the disclosure.

- 6.70 The Queensland legislation covers the critical points raised in the terms of reference, and it appears to cover employment and employment-like relationships. For example, s. 39(2)(b)(i) would appear to cover situations like the postal contractor's employee bypassing his or her employer and making a disclosure to Australia Post and, likewise, a contractor in possession of in-confidence information going to an oversight agency.
- 6.71 The protection against liability for having made a disclosure does not rule out the possibility of consequences arising from an offence or other misconduct that is revealed when making a public interest disclosure. In those circumstances other common law or *Evidence Act 1995* safeguards would apply to the treatment of that information.
- 6.72 That type of circumstance is covered in the Queensland *Whistleblowers Protection Act 1994* which makes it clear that a disclosure is not a means of escaping an earlier liability so that criminality and misconduct cannot be rewarded by making a disclosure. The Queensland provision is set out below.

Section 40 Liability of discloser unaffected

A person's liability for the person's own conduct is not affected only because the person discloses it in a public interest disclosure.

- 6.73 A further view put to the Committee was that there should be no penalty arising from a disclosure having not been upheld except in cases where a

person has knowingly provided false information.<sup>51</sup> This matter is dealt with elsewhere in this report.

- 6.74 The Queensland legislation is one model for providing protection against civil, criminal and administrative liability and by all categories of persons eligible to make a report.

## View of the Committee

- 6.75 The current scope of protection for people who make whistleblower reports in accordance with s. 16 of the *Public Service Act 1999* is inadequate and discourages people from speaking out. People within the public sector should have a right to raise their concerns about wrongdoing within the sector without fear of reprisal. The public sector should aim to prevent victimisation, discrimination, discipline or employment sanction from occurring in the first place. The next chapter discusses relevant procedures that aim to achieve that goal.
- 6.76 Where reprisal occurs, mechanisms should be available to protect an individual and to compensate for real detriment suffered by a person making the disclosure.
- 6.77 The Committee considers that a reliance on workplace legislation for dispute resolution is the most appropriate approach and should be a principle for developing public interest disclosure legislation.
- 6.78 In the Commonwealth setting there are relevant workplace laws and agencies with expertise to manage workplace disputes including those that equate to detrimental or adverse treatment in the workplace. Legislative linkages should be created between public interest disclosure legislation and workplace laws by defining the entitlement to make a public interest disclosure as a workplace right. This would allow any adverse treatment in the workplace to be a matter referable to the Workplace Ombudsman in the same manner as any other workplace dispute.

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51 Commonwealth Ombudsman, *Submission no. 31*, p. 8. See Australian Public Service Commission, *Submission no. 44*, p. 11

**Recommendation 13**

- 6.79 **The Committee recommends that the Public Interest Disclosure Bill define the right to make a disclosure as a workplace right and enable any matter of adverse treatment in the workplace to be referred to the Commonwealth Workplace Ombudsman for resolution as a workplace relations issue.**
- 6.80 The Committee considers that protections for those who make a public interest disclosure should include immunity from criminal liability and from liability for civil penalties and immunity from civil actions such as defamation and breach of confidence.

**Recommendation 14**

- 6.81 **The Committee recommends that the protections provided under the Public Interest Disclosure Bill include immunity from criminal liability, from liability for civil penalties, from civil actions such as defamation and breach of confidence, and from administrative sanction.**
- 6.82 The following chapter provides a discussion of other aspects of protection that concern the administration of a public interest disclosure system and the responsibilities of agencies.