



**Community and Public Sector Union**

---

Level 10, 440 Collins Street  
Melbourne Vic 3000  
Phone 1300 137 636 • Fax 03 8620 6324

23 November 2012

Ms Anna Dacre  
Committee Secretary  
House of Representatives Standing Committee on  
Social Policy and Legal Affairs  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

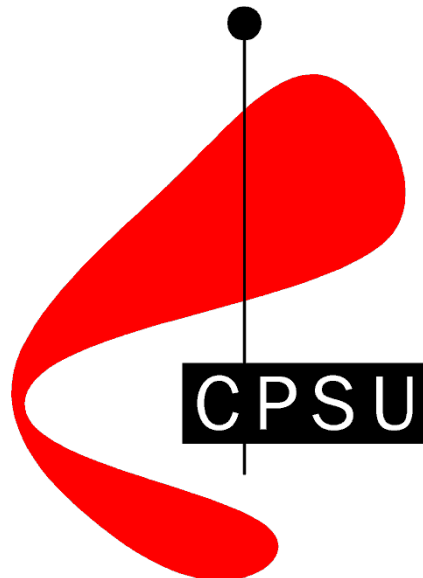
email: [spla.reps@aph.gov.au](mailto:spla.reps@aph.gov.au)

Dear Ms Dacre

The Community and Public Sector Union (CPSU) welcomes the opportunity to make a submission to the House Standing Committee on Social Policy and Legal Affairs inquiry into the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* and the *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012*.

Yours sincerely

Louise Persse  
Assistant National Secretary



**CPSU (PSU Group) Submission to the  
Inquiry into the Public Interest  
Disclosure (Whistleblower  
Protection) Bill 2012**

November 2012

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

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

Public interest disclosure legislation should provide an opportunity and protection for genuine whistleblowers which are in the interests of open and transparent government.

### **The need for legislation to be passed by Parliament**

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

The current legislative protection for whistleblowers in the *Public Service Act* 1999 is clearly inadequate. It does not ensure that public interest disclosures are properly investigated or indeed that those individuals who make the disclosure are properly protected.

The *Public Service Act* 1999 contains only a passing reference to whistleblowers, despite the fact it sets out the employment conditions and protections for employees of departments, executive agencies and certain statutory agencies of the Commonwealth. The *Public Service Act* only goes as far as to protect an APS employee from victimisation by a person performing functions for an Agency in relation to allegations of the breach of the Code of Conduct. Victimisation is however not an offence for which the Act provides a remedy, there is no obligation on agencies to investigate disclosures and no mechanism to facilitate public interest disclosures.

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

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

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

## Effective legislation

### *Categories of people who could make protected disclosures*

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

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

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

There is potentially an issue about the definition of agency in clause 10 of the Bill. The definition of 'agency' includes a Department, Executive Agency and Commonwealth authority. Department and Executive Agency are terms used under the *Public Service Act*. That Act also however covers Statutory Agencies which are included in the *Public Service Act* definition of agency. According to the Department of Finance and Deregulation there are currently 69 agencies prescribed as a 'statutory agency' under the *Public Service Act*.

Whilst the definition of 'agency' in the Bill includes Commonwealth authority, that is separately defined in the Bill to cover authorities covered by *Commonwealth Authorities and Companies Act* and therefore would not deal with this issue.

It is clear that the Bill intended to cover statutory APS agencies; they would for example be covered by clause 14 of the Bill as currently drafted. The exclusion of 'statutory agency' in clause 10 of the Bill appears to be an oversight. It may be argued that these agencies would still be picked up by other elements of the clause 10, however in our view it would be preferable that statutory agencies are explicitly included in the definition of agency in clause 10.

<p><b>Recommendation:</b> Clause 10 of the Bill be amended to specifically include statutory agencies as defined by the <i>Public Service Act</i>.</p>
--

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

The CPSU believes that the definition of public official at clause 11 of the Bill is sufficiently broad to cover all of these groups.

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

It is unclear whether the Bill would offer protection to State public sector employees in those circumstances.

**Recommendation:** That public servants employed by a state or territory governments who are performing work for the Commonwealth or a joint-state and Commonwealth body be classed as public officials in clause 11 and gain protection under the Bill.

### *Coverage of Parliamentarians*

The Bill proposes to include Members of Parliament and Senators within the scheme of the legislation. Specifically Members of Parliament and Senators are included as persons about whom allegations may be brought under the scheme and as authorised recipients of the public interest disclosures. The Bill proposes that disclosures about Senators are made to the President, Members of Parliament to the Speaker and *Members of Parliament Staff Act* (MOPS) employees to the MP/Senator, or Speaker or President.

The issue of whether this was the appropriate vehicle to address allegations of misconduct by those elected officials was discussed in the course of the 2008 Inquiry and the Government's response to that Inquiry.

Specifically, the intersection between a potential legislative whistleblowing scheme and the Parliament's role in managing any allegations of misconduct by Parliamentarians was raised.

It is of course appropriate that allegations of misconduct by Parliamentarians in the course of their official duties are properly addressed. It would appear that if the Bill was to pass there would be two potential avenues for allegations to be addressed, whether through existing Parliamentary systems or the legislative public interest disclosure scheme.

In our view, it is not useful for there to be confusion about the appropriate avenue to deal with allegations of wrongdoing on behalf of Parliamentarians. The CPSU would also be concerned if as a result of including Parliamentarians within the scheme whistleblowing become overly politicised.

These issues should be given due consideration by the Committee.

### *Types of disclosures that should be protected*

Defining the types of conduct that could be subject to a disclosure is critical. These should not be limited to criminal conduct, but also cover types of maladministration.

The CPSU believes that clause 9 of the Bill does cover appropriate categories of conduct.

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

It should be noted that if the Bill passes, further information and guidance should be provided to public sector workers and other individuals covered by the legislation to illustrate the kind of conduct that would fall within these categories. Some of the categories are qualified by a particular judgment about the potential impact of conduct, for example a substantial and specific danger to public health or the environment or maladministration that affects a person's interest in a substantial and specific way. In these circumstances it is particularly important that there is some information available to people to illustrate what conduct may reasonably fall within these categories.

### *To whom a public interest disclosure is made*

An effective public interest disclosures scheme must ensure that disclosures are made to a person or body capable of independently and rigorously investigating that disclosure. In the CPSU's 2008 submission to the Inquiry, we suggested public interest disclosures should be capable of being made to either the relevant agency or an external agency like a Public Service Ombudsman.

The CPSU supports the provisions in clauses 12 and 17 of the Bill which define disclosure officer and other persons who can receive disclosures. The CPSU believes it is important that the Bill provides for disclosures to an external agency, being the Ombudsman.

### *Disclosure to third parties*

An important part of the public interest disclosures scheme is the ability to make disclosures to third parties, including journalists, in certain instances.

The 2008 Inquiry recommended that external disclosures should be protected when a public interest disclosure was not acted on in a reasonable timeframe having regard to the nature of the matter and where a matter threatens immediate serious harm to public health and safety.

The current Bill proposes to allow for third party disclosures, where a disclosure is made but:

- the person refused to accept the disclosure;
- the disclosure was not investigated, even though that was required by the legislation;
- if 3 months after making disclosure the discloser has not been informed of whether it will be investigated;
- the discloser has not received a progress report for 3 months; or
- the disclosure has been investigated and there is clear evidence of disclosable conduct but no action was taken.

The Bill does not however deal with the possibility of third party disclosures where there is a threat of immediate serious harm to public health and safety. This is a deficiency in the Bill and should be reconsidered.

**Recommendation:** Consideration should be given to allowing third party disclosures in situations that pose a serious and immediate threat to public health and safety.

Consideration should also be given to the final circumstance in which third party disclosure is allowed, outlined above, and how this interacts with the oversight role of the Ombudsman. Part 8 of the Bill gives the Ombudsman the power to review decisions of agencies in respect of public interest disclosure matters, including whether or not action is taken in respect of allegations.

It is unclear how the Ombudsman's role in this regard, sits with the right to make a third party disclosure where there was a failure to take action. It would be inappropriate for a discloser to be entitled to make a third party disclosure, if the matter was still under review by the Ombudsman.

**Recommendation:** The intersection between s50(2) and s31(1)(e) should be clarified. The opportunity to make third party disclosures should not be available until there is a final decision in respect of the disclosable conduct, allowing the Ombudsman the opportunity to review the process as intended.

The Bill provides important limitations upon disclosure to third parties, including that the discloser honestly believes on reasonable grounds there is disclosable conduct and a disclosure to a third party must not reveal more than is reasonably necessary to show this conduct is disclosable conduct. The CPSU believes these limitations are appropriate.

It should also be noted that if the Bill passes, further information and guidance should be provided to public sector workers and other individuals covered by the legislation regarding the circumstances when disclosures can be made public. Such guidance would be important in explaining when the protection of the Bill is provided and when it is lost. This would assist in minimising the potential for whistleblowers to act rashly or without following the appropriate course of action provided by the Bill. It would also assist agencies in understanding the timeframes for conducting investigations and the requirement to keep disclosers informed about progress.

### *Immunity provisions*

The CPSU also supports the measures in the Bill to provide legal protection and immunity from liability for a person who makes a public interest disclosure. Protection from reprisal action against whistleblowers is critical.

## **An independent agency to enforce the legislation**

### *Procedures for conducting investigations*

Requiring that an investigation is conducted into a public interest disclosure is a vital first step in an effective public interest disclosures scheme. In the CPSU's 2008 submission to the Inquiry, we noted the weakness of *the Public Service Act's* whistleblowing provisions which do not require an investigation be conducted. The CPSU supports the clear obligation contained in clause 22 of the Bill for an investigation to be conducted when a public interest disclosure is received.

However, the CPSU believes greater clarity may be required regarding the investigative procedures an agency follows upon receipt of a public interest disclosure.

Clause 26 requires a public interest disclosure be investigated pursuant to procedures under a law of the Commonwealth for a disclosure of that kind. That clause then lists various laws under which procedures can be established and includes procedures established under s15(3) of the *Public Service Act 1999* related to Code of Conduct investigations or procedures established under clause 35 of the Bill which must be consistent with the standards set by the Ombudsman under clause 54.

Section 15(3) of the *Public Service Act* requires an agency head establish procedures for determining whether an APS employee has breached the APS Code of Conduct. This provision allows each APS agency to have different procedures for investigating Code of Conduct breaches for APS employees providing they meet certain statutory minimums, for example procedural fairness.

Many types of disclosable conduct under the Bill would also be possible breaches of the *Public Service Act* Code of Conduct. Clause 26 appears to give the agency a choice about whether it treats a public interest disclosure according to investigative procedures established for a Code of Conduct, or in accordance with standards set by the Ombudsman. Potentially agencies could utilise the investigative procedure of a lesser standard which could weaken the public interest disclosure scheme.

The CPSU does not support an *ad hoc* approach to investigating public interest disclosures. Clause 26 should provide greater guidance to agencies in situations where there are two (or more) investigative procedures regarding matters of this kind. The more rigorous of the available procedures and standards should be followed for public interest disclosures.

Additionally, there are broader requirements in the Bill for agencies to develop procedures for handling disclosures which are set out in clause 35. These should be developed by agencies in conjunction with the relevant unions, including the CPSU. This would provide an opportunity for union members and effected employees to provide feedback and develop workable procedures for that agency.

**Recommendation:** The Bill provide clearer guidance to agencies about the investigative procedures to be followed regarding public interest disclosures to ensure the most rigorous standard is applied for those investigations. That unions be consulted by agencies when they develop procedures for dealing with public interest disclosures.

### *Obligation to complete investigations within a reasonable timeframe*

Clause 22 establishes that a public interest disclosure should be investigated, subject to certain limitations. Clause 29 establishes that a discloser must be kept informed of proceedings. Clause 30 establishes that the Ombudsman (or Inspector-General of Intelligence and Security) must be kept informed about the progress and outcome of an investigation into a disclosure. There does not seem to be however, a clear obligation that the investigation be completed and a decision made about the disclosable conduct. This is of course implied in the clauses mentioned, but should be specifically stated.

There should also be an obligation to investigate the matter within a reasonable timeframe. This was the subject of some consideration in the 2008 Inquiry and the Government's response to that Inquiry.

The Bill currently only deals with this peripherally by allowing third party disclosures, where the discloser has had no contact for 3 months. It would however be beneficial if there was an overarching obligation about completing investigations in a reasonable timeframe. Obviously what a reasonable timeframe is may differ substantially depending on the nature of the disclosable conduct.

If it were deemed inappropriate for inclusion in a Bill, this issue could be set out as one of the issues on which the Ombudsman must publish standards.

### *Role and powers of the Ombudsman*

An independent body to investigate and oversee the public interest disclosures regime is something the CPSU called for in its 2008 submission to the Inquiry. The CPSU supports the



role given to the Ombudsman under the Bill, including its role in managing, monitoring, reviewing, educating and reporting about public interest disclosures.

The CPSU supports in particular the role given to the Ombudsman to oversee the investigation and action of agencies regarding public interest disclosures. This is provided in clauses 49, 50 and 51. It is appropriate that agencies to whom the disclosure relates should be able to conduct the initial investigation and assessment and make decisions about the disclosure.

Clause 34 (4) and (5) give the Ombudsman the power to make recommendations or directions in regards to an agency's public interest disclosure procedures. This is an appropriate role for the Ombudsman and consistent with their oversight responsibilities.

The 2008 Inquiry recommended that the Ombudsman have the power to approve agency procedures.

The current provisions do differ somewhat from that recommendation of the Inquiry, as it is not clear that the Ombudsman would receive the agency procedures prior to those procedures being finalised and put into operation. Rather clause 35(4) establishes that the agency should give the Ombudsman (or Inspector-General of Intelligence and Security) a copy of their procedures and subsequently the Ombudsman (or Inspector-General of Intelligence and Security) can make recommendations or provide feedback.

It would be preferable if the role of the Ombudsman in this regard was more clearly set out and involved the approval of those procedures.

**Recommendation:** The Bill should more clearly establish the Ombudsman's role in approving agency public interest disclosure procedures.

### *The reviewing role for the Ombudsman*

A role for the Ombudsman in reviewing the decisions regarding public interest disclosures made by agencies is warranted. Clauses 49 and 50 provides discretion for the Ombudsman to review decisions relating to disclosures and the CPSU believes this should give the Ombudsman appropriate oversight of investigations and decisions taken by agencies regarding public interest disclosures.

Issues around the intersection between the Ombudsman's function reviewing decisions and the right to make third party disclosures have been raised above.

### *The enhanced role for the Ombudsman*

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

**Recommendation:** The Ombudsman be provided sufficient ongoing funding to fulfil additional functions proposed under the Bill.

### Public sector cultural change

Cultural change towards greater openness, transparency and good government will be important in implementing a public interest disclosures scheme. This can be done by placing clear obligations upon agencies about handling public interest disclosures, protection from prosecution, detriment or victimisation and a strong role for the independent Ombudsman. The CPSU believes the Bill accomplishes this.

The Ombudsman must play a role in leading such cultural change. Protecting the integrity of the public interest disclosures scheme should be a key role of the Ombudsman. Currently the Bill provides in clause 42 for Ombudsman to take action to prevent or remedy detrimental action. The CPSU supports these provisions.

These efforts need to be replicated within agencies to ensure a public interest disclosure scheme can work effectively and achieve its aims.

### Conclusion

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

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

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