

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

# IN THE PUBLIC INTEREST

REPORT OF THE SENATE SELECT COMMITTEE ON  
PUBLIC INTEREST WHISTLEBLOWING

AUGUST 1994

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## TERMS OF REFERENCE

*Terms of reference agreed to 2 September 1993:*

- (1) That a select committee, to be known as the Select Committee on Public Interest Whistleblowing, be appointed to inquire into and report, on or before 31 August 1994, on the following matter:

Whether the practice of whistleblowing should be the subject of Commonwealth legislation to enable the making of such disclosures in the public interest and, if so, what form the legislation should take.

- (2) That in conducting its inquiry the committee should examine in particular:
  - (a) what persons and organisations, as subjects of whistleblowing, should be covered by the legislation;
  - (b) the nature of any protection that should be extended to whistleblowers and to the subjects of whistleblowing;
  - (c) whether a new agency should be created to receive and investigate disclosures and to investigate any discrimination suffered by whistleblowers as a result of those disclosures, or whether an existing Commonwealth agency should have that role;
  - (d) what powers any investigating body should have;
  - (e) the nature of any protection that should be extended to any investigating body and its members; and
  - (f) what remedies and penalties should be provided for whistleblowers and for the subjects of whistleblowing.

The terms of reference were amended on 22 February and 31 May 1994 to extend the reporting date.

*Reference of a bill to the Committee, agreed to 27 October 1993.*

That the Whistleblowers Protection Bill 1993, introduced into the Senate by Senator Chamarette on 5 October 1993, be referred to the Select Committee on Public Interest Whistleblowing for inquiry and report on the same day as the Select Committee is to report on the matter referred to it on 2 September 1993.

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## LIST OF ABBREVIATIONS

AFP	Australian Federal Police
AMA	Australian Medical Association
ANF	Australian Nurses Federation
ANSTO	Australian Nuclear Science and Technology Organisation
APC	Australian Press Council
BASI	Bureau of Air Safety Investigations
CAA	Civil Aviation Authority
CJC	Criminal Justice Commission (Queensland)
DFAT	Department of Foreign Affairs and Trade
EARC (Queensland)	Electoral and Administrative Review Commission
Elliott Committee	House of Representatives Standing Committee on Banking, Finance and Public Administration
F&PA Committee	Senate Standing Committee on Finance and Public Administration
Gibbs Committee	Committee to Review Commonwealth Criminal Law
HREOC	Human Rights and Equal Opportunity Commission
ICAC	Independent Commission Against Corruption (NSW)
IIAA	Institute of Internal Auditors - Australia
MPRA	Merit Protection and Review Agency
MSPB	Merit Systems Protection Board (USA)
NCA	National Crime Authority
OSC	Office of Special Counsel (USA)
PEARC	Parliamentary Committee for Electoral and Administrative Review (Queensland)

PSC	Public Service Commission
QWS	Queensland Whistleblower Study
RANZCP	Royal Australian and New Zealand College of Psychiatrists
RBA	Reserve Bank of Australia
WAG	Whistleblowers Action Group (Queensland)

### Reports

EARC Report	Report on Protection of Whistleblowers, Electoral and Administrative Review Commission, October 1991
Elliott Report	Focussing on Fraud, Report on the Inquiry into Fraud on the Commonwealth, House of Representatives Standing Committee on Banking, Finance and Public Administration, (Paul Elliott, MP - Chairman), November 1993
Finn Report	Official Information, Integrity in Government Project: Interim Report 1, Professor Paul Finn, ANU, 1991
F&PA DFAT Report	Report on the Management and Operations of the Department of Foreign Affairs and Trade, Senate Standing Committee on Finance and Public Administration, December 1993
F&PA Ombudsman Report	Review of the Office of the Commonwealth Ombudsman, Senate Standing Committee on Finance and Public Administration, December 1991
Gibbs Report	Review of Commonwealth Criminal Law - Final Report, (Sir Harry Gibbs - Chairman), December 1991
PEARC Report	Report on Whistleblowers Protection, Parliamentary Committee for Electoral and Administrative Review, Queensland, April 1992

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

### Definitions

In considering the subject of whistleblowing, the Committee has adopted as broad a definition as possible to include disclosures by people from within or outside the organisation in which the wrongdoing occurred and embracing a wide range of activities to constitute wrongdoing. (para 2.12)

### Overview comments

The Committee acknowledges that whistleblowing is a legitimate form of action within a democracy and that there have been, there are, and there will continue to be occasions on which whistleblowing is the only available avenue for the concerned ethical citizen to expose wrongdoing in the public or private sector. (para 2.14)

The Committee believes that a fundamental shift in Australian values and ethics is necessary to overcome the stigma and trauma associated with whistleblowing. Notwithstanding the recommendations in this report, the Committee encourages organisations and institutions in both the public and private sectors, to reassess the value of reporting wrong-doing and welcomes any initiatives, programs or strategies aimed at addressing this culture-change. The Committee appreciates that, notwithstanding the implementation of any legislative initiatives recommended in this report, in order to effect a shift in traditional workplace values and ethics, legislation must be accompanied by national leadership and education programs specifically targeted at workplace ethics. (para 2.20)

### International legislative activity

The Committee acknowledges that legislative action on whistleblower protection is occurring in a number of comparable international legislatures and believes that the

experience and future developments within these legislatures should be monitored with a view to benefiting from their experiences. (para 3.34)

#### Education to bring about cultural and attitudinal change

The Committee recommends that a significant national education campaign directed at changing corporate and official attitudes towards whistleblowing at all levels within an organisation - both public and private, and within the community generally, should be undertaken as a matter of priority. The Committee further recommends that, in order to enhance the campaigns acceptance and likelihood of success, strong public statements of support should be given at the political, senior management and union level. (para 6.35)

The Committee recommends that the proposed national education campaign should involve recent developments in ethics and accountability as a base from which to emphasise, in positive terms for the organisation and ultimately the public interest, the benefits of reporting wrongdoing, accepting such reports and taking appropriate investigative and corrective action. (6.50)

#### Public interest disclosure/whistleblower protection legislation

The Committee recommends that the practice of whistleblowing should be the subject of Commonwealth legislation to facilitate the making of disclosures in the public interest and to ensure protection for those who choose so to do. (para 6.66)

The Committee recognises the symbolic importance of any whistleblower protection legislation but is nevertheless concerned to ensure that symbolism and rhetoric are not regarded as a substitute for positive action. (para 6.65)

The Committee further recommends that regular meetings should be held between Commonwealth and State Ministers (Ministerial Council) and organisations responsible for administering whistleblower protection or equivalent legislation. (para 6.66)

## Public Interest Disclosures Agency and Board

The Committee recommends that:

### Public Interest Disclosures Agency -

- . Legislation be enacted to establish an independent agency, to be known as the Public Interest Disclosures Agency (the Agency).
- . The role of the Agency should be to receive public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures, to provide a national education program and to make and oversee the implementation of recommendations relating to its role.
- . The Agency should consist of an administrative unit with the capacity to contract relevant experts as required, and an education unit.
- . The Agency should have the following accountability mechanisms:
  - a. Report annually to Parliament;
  - b. Present special reports to Parliament on any matters relating to its functions and operations which the Agency considers need Parliamentary support or action;
  - c. Maintain files, statistics and records of cases;
  - d. Provide evidence of client satisfaction through surveys, the results of which will form part of the annual report.

### Public Interest Disclosures Board -

- . A Public Interest Disclosures Board should be created whose role would be to provide direction to and control over the Agency in the performance of its functions.
- . The Board should be supported by a small secretariat from within the Agency.
- . Appointments to the Board should aim at achieving gender equality and include nominees from the following organisations: Human Rights and Equal Opportunity Commission, Privacy Commission, Commonwealth Ombudsman's Office, Merit Protection and Review Agency, a recognised whistleblower support group, a Public Interest Advocacy Centre, an Ethics group, a Trade Union, and other national community organisations.

- Parliamentary involvement should be included by the appointment of a Senator and Member of the House of Representatives. The Member should be a government nominee and the Senator a non-government nominee or alternatively the Parliamentary members should include a government and non-government nominee.
- Members of the Board should be appointed for a period of three years, with eligibility for reappointment to a second term only. (para 7.47)

#### Legislative coverage - public and private sector

The Committee recommends that the Public Interest Disclosures Agency and the provisions of the supporting legislation be given the widest coverage constitutionally possible in both the public and private sector. (para 8.69)

In recognition of the constitutional limitations of the Commonwealth Parliament to enact a comprehensive scheme to cover whistleblowers throughout the private sector, the Committee encourages States and/or relevant industry groups to provide avenues for the reporting and investigation of wrongdoing, in those areas where the Commonwealth Parliament cannot constitutionally act. (para 8.70)

The Committee considers that, with mutual cooperation between the Commonwealth, the States and industry groups, whistleblower protection legislation can be a reform on a national level. (para 8.68)

#### Coverage of specific areas with public/private sector involvement

##### *Education*

The Committee recommends that legislation extend to academic institutions, where it can, and, regardless of legislative initiatives, the Committee encourages institutions to accept dissent as integral to the pursuit of knowledge. (para 8.83)

### *Health care and administration*

The Committee recommends that, where constitutionally possible, the Commonwealth Parliament should legislate to provide whistleblower protection for disclosures made about the health care industry. The Committee acknowledges the public interest nature of the work of all sections of the health care industry and welcomes initiatives at/in work places within the industry to encourage and protect those who make disclosures in the public interest. (para 8.92)

### *Banking*

The Committee recommends that, as in the education and health care spheres, the banking industry should be subject to whistleblowers protection legislation to the extent to which the Commonwealth Parliament is constitutionally able. The Committee further recommends that the Charter of the Reserve Bank of Australia be amended to empower the reserve bank to receive and investigate public interest disclosures relating to the banking industry. (para 8.104)

### *Policing*

The Committee recommends that the Australian Federal Police be covered by the whistleblower protection legislation and, in noting the reporting inadequacies which exist in the State police forces, strongly urges reform in those areas. Given the seeming lack of success of police force reform to date, the Committee is of the view that additional action in the form of education initiatives and strategies needs to be directed at whistleblower protection in police forces together with the development of a policy to assist and encourage internal informers within all State police forces. (para 8.116)

## Public Interest Disclosures

### *Acts of wrongdoing and their disclosure*

The Committee recommends that the definition of whistleblowing should include the public interest disclosure of the following categories of wrongdoing and that 'any person' should be able to make such disclosures:

- . **illegality, infringement of the law, fraudulent or corrupt conduct;**
- . **substantial misconduct, mismanagement or maladministration, gross or substantial waste of public funds or resources;**
- . **endangering public health or safety, danger to the environment.**

The Committee considers that the investigation of these public interest disclosures should not be precluded where the wrongdoing occurred before the commencement of the legislation or the disclosure within five years prior to the commencement of the legislation. (para 9.13)

### *Identity of whistleblower*

The Committee recommends that the Public Interest Disclosures Agency not receive disclosures or complaints made anonymously. However, before referring the disclosure for investigation, the Agency should have the power to protect the identity of the maker of a disclosure on the application of that individual. The subject of a disclosure should have the right to apply for a reversal of any such order made or granted. The Agency may make orders having the force of law in respect of such applications. (para 9.24)



### *Internal reporting systems*

The Committee recommends that all public and private sector organisations should formulate or, where appropriate, review and expand relevant internal reporting systems and procedures to specifically deal with whistleblowers and their reports of wrongdoing. The Committee considers that the internal reporting of wrongdoing should be actively promoted and encouraged within organisations when the requisite procedures are in place to deal effectively with such allegations. (9.31)

### *Screening process*

The Committee recommends that the functions of the Public Interest Disclosures Agency should include -

- . To act as a "clearing house" for complaints and allegations so as to identify those matters which properly come within the category of public interest disclosures, and
- . To advise and assist persons in respect of those matters which are not identified as public interest disclosures and to make formal referrals to the appropriate authority. (para 9.43)

### *Exemption from secrecy provisions*

The Committee recommends that those who make public interest disclosures should be exempt from sanctions and disciplinary action for breach of secrecy provisions, in all but a narrowly defined category of disclosures. Special arrangements should be provided to enable these narrowly defined disclosures to be made to the Inspector-General of Intelligence and Security or, in limited situations to a Federal Court Judge. The Inspector-General of Intelligence and Security Act should be amended accordingly. (para 9.52)

The Committee further recommends that the existing provisions of the Crimes Act should be amended to allow the disclosure of information in the public interest to be a defence against prosecution. (para 9.53)

## Protection of whistleblowers

### *Disclosure according to reporting procedures*

The Committee recommends that protection to whistleblowers should be conditional upon whistleblowers reporting wrongdoing in accordance with the procedures proposed in this report, namely relevant internal systems, to the Public Interest Disclosures Agency or to the media in limited circumstances. (para 9.34)

### *Investigation of victimisation*

The Committee recommends that the MPRA be the primary organisation for investigating complaints of victimisation and harassment of public sector whistleblowers, but with enhanced powers to receive complaints specifically from whistleblowers and to make recommendations and orders for restitution. The Public Interest Disclosures Agency should oversee the MPRA's investigation of complaints and provide an avenue of appeal over MPRA actions. (para 9.62)

The Committee recommends that legislation to protect whistleblowers should extend as far as constitutionally possible to cover the private sector. Where this is not possible, the Committee encourages the appointment of industry ombudsmen and recommends that the terms of reference of such Ombudsmen be so framed as to enable those officers to receive and investigate complaints of victimisation and harassment of private sector whistleblowers. (para 9.68)

The function of the Public Interest Disclosures Agency should be, in the matter of victimisation of public sector whistleblowers, to oversee the investigation of complaints of harassment, ill-treatment or victimisation of whistleblowers, such complaints being received and investigated by the MPRA or the Human Rights and Equal Opportunity Commission, as the case may be. The Agency's function in the protection of private sector whistleblowers should be to refer complaints to the relevant industry

Ombudsmen or HREOC and to monitor progress with the resolution of those complaints. (para 9.68)

#### *Protection of whistleblowers - remedies*

The Committee recommends that whistleblower legislation make provision for a tort of victimisation. The Committee further recommends that, as far as is constitutionally able, the Human Rights and Equal Opportunity Commission through an extension of its powers be an alternative forum and course of action available to public and private sector whistleblowers to facilitate their obtaining compensation for victimisation. (para 11.13)

#### Use of psychiatry

The Committee recommends that the medical profession settle guidelines which expressly describe the ethical obligations of medical practitioners, especially psychiatrists, where patients are referred by employers. (para 9.77)

The Committee recommends that the use of psychiatry in relation to whistleblowers be comprehensively dealt with as part of the national education program. Such inclusion should be with a view to expanding community awareness and to developing employer sensitivity in relation to such matters. (para 9.77)

#### Protection for subjects of whistleblowing

The Committee recommends that the rights of the subjects of whistleblowing be protected in accordance with the principles of natural justice. In addition the investigations should be conducted privately in so far as the public interest is best served, and, where allegations are not substantiated after due and proper investigation, the details of the complaint should not be publicly released. (para 9.80)

The Committee recommends that where a person makes an allegation, knowing it to be false in a material particular, the making of such a false allegation should constitute an offence under the whistleblowing protection legislation. Where such an offence is proven, the person who made the allegation should be subject to a penalty being fine and/or community service orders. (para 9.83)

#### Counselling and advice

The Committee recommends that counselling services should be community-based, provided through a private/community group or ethics foundation with mixed government/corporate financial support, preferably based on the model of the St James Ethics Centre or Public Concern at Work in the UK. (para 9.99)

The Agency's function in relation to counselling should be to ensure that whistleblowers and those who are the subjects of whistleblowing have access to confidential counselling services. The Agency should maintain regular liaison with the counselling services to ensure that whistleblowers needs are being met. (para 9.99)

The Committee recommends the establishment of a toll free hotline to enable Australia-wide point of contact with the Public Interest Disclosures Agency. (para 9.104)

#### Legal aid and assistance

The Committee recommends that Legal Aid Commissions be informed that whistleblowers and actions arising from whistleblowing ought to be considered as one of the categories of actions for which legal aid may be granted, if the applicant is otherwise assessed as eligible. The Committee encourages community oriented legal services to provide legal assistance and advice to whistleblowers and associated persons. (para 9.112)

### Reporting wrongdoing to the media

The Committee recommends that whistleblowers should have limited recourse to the media without being disentitled to protection under the legislation and endorses the Gibbs Committee recommendations in this regard. Whistleblowers should be protected where they make a disclosure of "wrongdoing" within the meaning of the legislation, to the media, where to do so is excusable in all the circumstances. In determining whether it is excusable in all the circumstances the factors to be taken account of should include the seriousness of the allegations, reasonable belief in their accuracy and reasonable belief that to make a disclosure along other channels might be futile or result in the whistleblower being victimised. (para 9.130)

### Defamation laws

The Committee further recommends that whistleblowers who make disclosures through the media should not be given any special exemption from the laws of defamation. (para 9.130)

The Committee recommends that legislative changes be initiated to ensure the uniformity of defamation laws in all States and territories, in accordance with previous recommendations made by bodies such as the Law Reform Commission. Of particular concern to the Committee is the use of defamation law to suppress critical comment, including "stop writs" which prevent public consideration of matters of immediate concern. (para 9.135)

### Investigating public interest disclosures: Powers and protection

The Committee recommends that any investigating body must be equipped with sufficient powers to enable it to competently and efficiently perform the investigations with which it is charged.(para 10.7)

The Committee recommends that the Ombudsman's office should be the primary organisation to which the Agency would refer whistleblowers complaints for investigation, but with enhanced legislative powers and functions. (para 10.12)

The Committee recommends that Commonwealth regulatory agencies, where applicable, be responsible for the investigation of public interest disclosures in the private sector. (para 10.34)

The Committee recommends that any organisation charged with the investigative function in relation to public interest disclosures should be conferred with powers to require production of documents and evidence, examine witnesses, and to report on and refer matters as relevant and appropriate. (para 10.16)

The Committee recommends that investigating agencies should have power to override secrecy provisions which serve to prevent information being disclosed which might assist the investigators in their task. The Committee has recommended that public sector whistleblowers be exempt from sanctions for contravening relevant secrecy or confidentiality provisions in all but a narrow category of cases. The Committee further recommends that the same exemption should also apply to witnesses who are called upon to give evidence relevant to an investigation of a public interest disclosure. (para 10.35)

The Committee recommends that the power of entry should be available to the Public Interest Disclosures Agency and the relevant investigating body in prescribed circumstances on application to a Judge of the Federal Court of Australia for a warrant. (para 10.27)

The Committee recommends that the Public Interest Disclosures Agency and the investigating bodies be empowered to utilise expertise as and where it is deemed necessary. Such expertise may be procured by secondment, transfer, contract or by whatever means are necessary to obtain expert services. (para 10.30)

The Committee recommends that the Public Interest Disclosures Agency and Board, their members and officers and the investigating agency and its officers should, in the least, be protected from:

1. Harassment, intimidation and obstruction in the performance of their duties; and
2. Civil action arising from the performance of their duties, in terms similar to that protection contained in Sections 33 (1) and 37 of the Ombudsman Act 1976. (para 10.44)

### Rewards

The Committee recommends that a system of rewards for whistleblowing should not be included in the whistleblower protection scheme proposed in this report. (para 11.20)

### Whistleblowers Protection Bill 1993

The Committee concludes that with the introduction and passage of whistleblower protection legislation in the form recommended in this report, further parliamentary consideration of the Whistleblowers Protection Bill 1993 should not be required. (para 12.35)

### Further consideration of unresolved cases

The Committee recommends that the Queensland Government establish an independent investigation into these unresolved cases within its jurisdiction. (para 1.13)

## Summary

The Committee's recommendations have been based around three areas it believes are crucial to the consideration of whistleblowing. Firstly, the need to change attitudes towards whistleblowers and the public interest benefits derived from whistleblowing within public and private sector organisations and the community generally. Secondly, the formulation or enhancement of internal reporting systems and procedures within organisations to specifically deal with whistleblowers and their disclosure of wrongdoing. Thirdly, the creation of an independent Public Interest Disclosures Agency and Board to undertake or oversee the investigation of disclosures of wrongdoing and the protection of whistleblowers and the subjects of whistleblowing.

In recommending the creation of a separate Public Interest Disclosures Agency and Board, the Committee is mindful of the desirability of containing set-up and operating costs. It has also taken heed of concerns about duplication of resources and overlap of responsibilities with other existing bodies such as the Ombudsman and the Merit Protection and Review Agency. The Committee is satisfied that an Agency and Board composed of part-time specialist members supported by a small secretariat and ancillary administration and education units, is preferable to a full-time Commissioner and large agency. The Agency is intended to provide a lean, efficient, credible and cost-effective method to handle public interest disclosures. In addition, the proposed external involvement of private sector ethics and community groups in the provision of counselling and support services to whistleblowers, should alleviate any concerns regarding conflict of the Agency's roles and contain operating expenses.

The Committee acknowledges that the effectiveness and benefits from whistleblowing legislation will only be realised if its provisions are viewed as being credible and workable by both potential whistleblowers and organisations who will be subject to it. As an adjunct to this objective, the Committee has endeavoured to propose the most appropriate and cost effective means to achieve greater accountability and responsiveness from government processes. The Committee believes that the creation of a separate Agency whose independence is emphasised through the

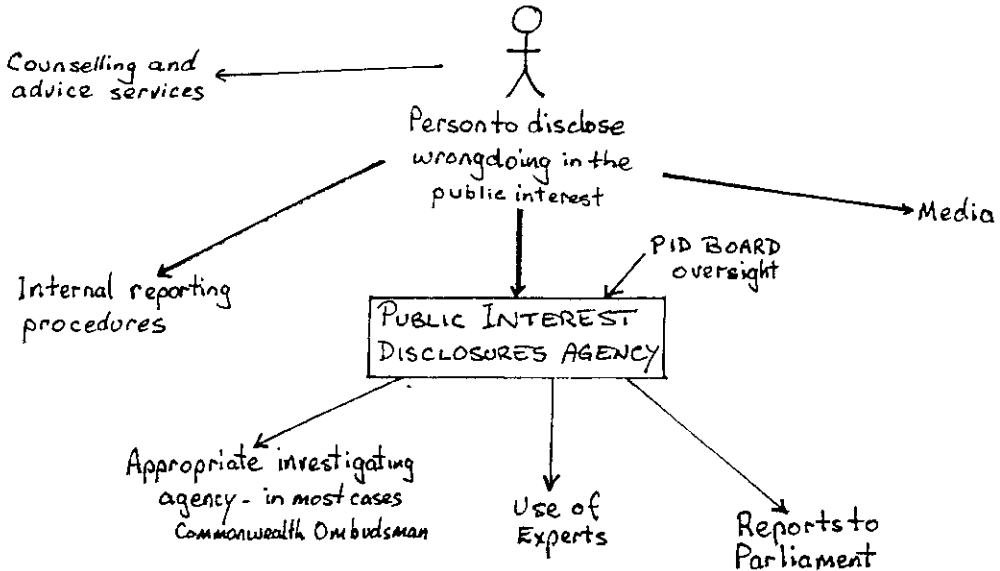


enactment of whistleblower legislation will have a twofold benefit. In the most tangible way it demonstrates a commitment to recognising the legitimacy of whistleblowing and in practical terms provides an 'open' system which facilitates the reform process in the public and private sectors by highlighting maladministration and exposing corruption in the public interest.

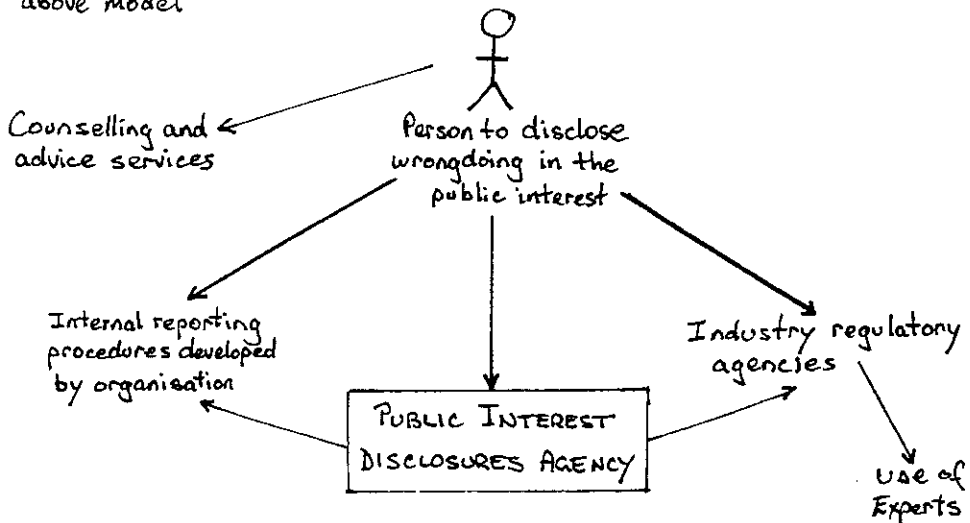
A simplified schematic representation showing the Committee's recommended options for making public interest disclosures and for protecting those making public interest disclosures is attached.

# RECOMMENDED OPTIONS FOR MAKING PUBLIC INTEREST DISCLOSURES

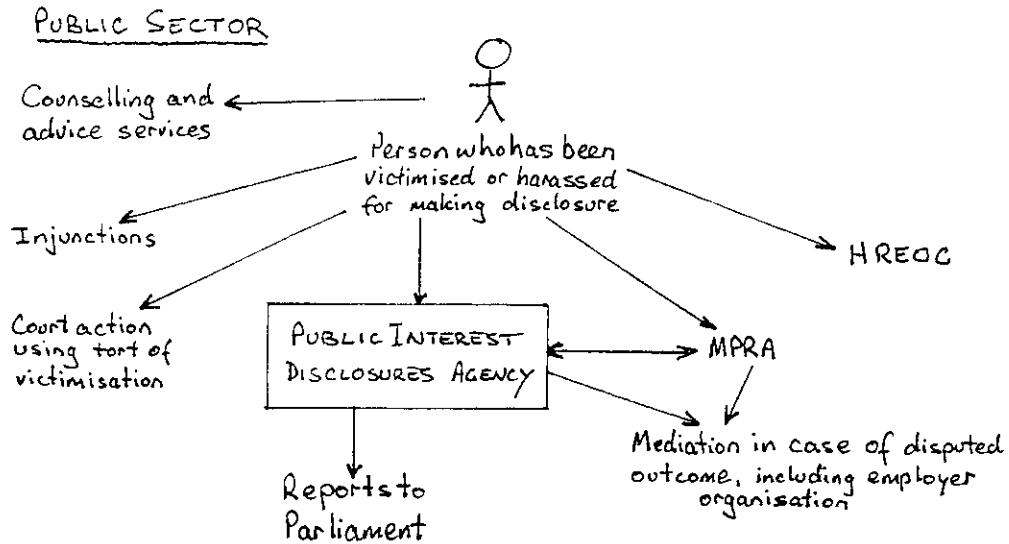
## PUBLIC SECTOR



## PRIVATE SECTOR or not covered within above model



# RECOMMENDED OPTIONS FOR PROTECTING THOSE MAKING PUBLIC INTEREST DISCLOSURES



PRIVATE SECTOR or not covered within above model

