

**Community and Public Sector Union**

Stephen Jones • National Secretary

2 March 2009

Professor Rosalind Croucher  
Commissioner  
Australian Law Reform Commission  
Level 25  
135 King Street  
Sydney NSW 2000

Dear Professor Croucher

**RE: CPSU (PSU Group) submission to Australian Law Reform  
Commission Inquiry into Secrecy Laws**

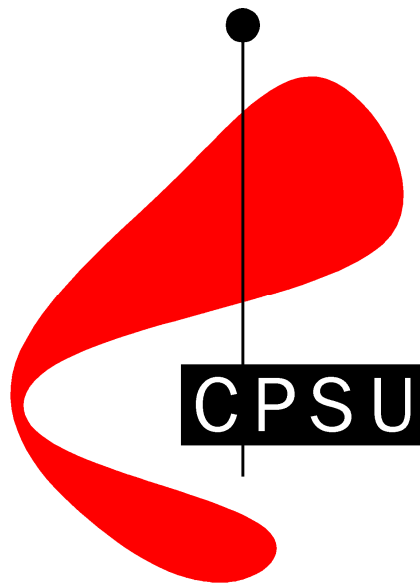
Please find enclosed the CPSU submission to the ALRC Review of Secrecy Laws.

If you wish to discuss any of the matters raised in this letter the CPSU contact is Dr Kristin van Barneveld, Director of Policy and Research CPSU, ph 02 8204 6930.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stephen Jones', written in a cursive style.

Stephen Jones  
CPSU National Secretary



**CPSU (PSU Group) Submission to  
the:**

***ALRC Review of Secrecy Laws***

**March 2009**

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”), Commonwealth Government authorities, ACT Public Service, NT Public Service, ABC, SBS and the CSIRO.

As the major union representing Commonwealth Government employees, the CPSU welcomes the Australian Law Reform Commission (“ALRC”) Review of Secrecy Laws. A review of secrecy provisions is long overdue. The definition and regulation of Commonwealth information as secret or confidential with criminal or civil sanctions is of concern to CPSU members, both as Commonwealth employees and as citizens.

This submission is based on the direction outlined in the CPSU’s ‘Agenda for Change’ and the observations and experiences of CPSU members in the Commonwealth public sector. The need for open, transparent and accountable government is a foremost concern for CPSU members. This can only be achieved by having clearly defined legislation dealing with secret information and when it can legally be disclosed. Such laws are in the interests not just of public sector workers, but also more open and transparent government and would enhance public confidence in government administration.

The CPSU supports a legislative scheme which provides clarity for Commonwealth employees who need to quickly and easily identify what information is secret and in what circumstances legal disclosures can be made. The current legislative protection for whistleblowers in the *Public Service Act 1999* is grossly inadequate and does not ensure that disclosures made in the public interest are properly investigated or indeed that those individuals who make the disclosure are properly protected. The CPSU notes that the House Standing Committee on Legal and Constitutional Affairs’ Report - *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* was released on 25<sup>th</sup> February 2009. The recommendations in that Report, if adopted into legislation, will provide some clarity around when disclosures can be made and what protections are available for whistleblowers. Given the recent release of the Report, this submission to the ALRC should be considered an initial submission. The CPSU would like the opportunity to provide further comments to the ALRC once we have had a chance to review the Report in detail.

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1. **Transparent government and the nature of secret information**
2. **Treatment of whistleblowers and statutorily ‘protected disclosures’**
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6. **Conclusion: Striking an effective and fearless balance – cultural change**
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## Consultation

As part of the consultation for the Review, the CPSU in conjunction with the ALRC hosted two forums in Canberra on 4 February 2009. These provided an opportunity for CPSU members and other public service employees to voice their opinions and concerns about the extent, nature and need for reform of Commonwealth Government secrecy provisions. Professor Rosalind Croucher attended the forum and said of the participation:

*The forums were an invaluable contribution to our consultations and a necessary complement to those, for example, at agency level. The ALRC welcomed the candour and willingness to share of the participants in the forums.*

In addition to the open forums, the CPSU conducted an on-line survey, inviting members and non-members to give their opinion of current secrecy provisions and their experiences.

The CPSU submission is based upon the feedback gathered at both the forums and online.

## 1. Transparent government and the nature of secret information

### 1.1 The incidence of secrecy provisions

Commonwealth employees are subject to many of the 370 distinct secrecy provisions identified by the ALRC in its discussion paper and the confusion that such legislation proliferation causes. The sheer number of provisions is at odds with the obligation of public servants to provide frank and fearless advice since in many cases it is unclear whether information in their possession is subject to secrecy constraints or not.

Legislative provisions that make Commonwealth information secret must be clear, transparent and simple. The application of secrecy provisions should be clearly delineated and the scope and provisions allowing for the sharing of information between government agencies needs to be clearly spelled-out.

**#1 Recommendation: Secrecy provisions should apply logically, consistently and clearly across all Commonwealth government agencies and other relevant bodies.**

### 1.2 The nature of secrecy provisions

The CPSU members who were consulted about this Review expressed concerns that legislation making Commonwealth information secret should be restricted to certain categories and types and/or limited by the circumstances in which that information was created.

CPSU members almost universally expressed the view that some Commonwealth information needed to be protected by secrecy provisions. Reasons of national security, privacy and national interest were the most common reasons given for secrecy. One member commented that it would be reasonable to protect “information which needs to be withheld for reasons of National security”.

However there was a clear view that not all Commonwealth information should be secret and subject to criminal sanctions for disclosure. Rather, any laws which make Commonwealth information secret need to predicate such restrictions upon certain definable qualities, categories or circumstances of the creation of that information which require it be kept secret. A regime for classification of information should be clearly legislated and not reliant upon policy<sup>1</sup>.

Further, there must be consideration of if/when restrictions on information should/can be lifted. One member commented that “after the event/incident/risk has finished/passed [secret information] should be released unless it would pose risk to persons (Defence/government employees)”.

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<sup>1</sup> Adams, Carolyn *Protecting classified and security sensitive information* Reform Issue 83 2002 pp.56-61

**#2 Recommendation: Legislative secrecy provisions should not apply generally to all Commonwealth information, but should distinguish between classified or secret information and other types of information which may nonetheless still be not publicly available.**

**#3 Consideration should be given to time periods after which information previously classified as secret could become publicly available.**

**1.3 Section 70 of the Crimes Act and a general statutory duty not to disclose?**

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| <p><b>QUESTION 2-1</b> Should the unauthorised handling of Commonwealth information remain subject to a general criminal offence? If so, should s70 of the Crimes Act 1914 (Cth) be repealed and replaced by an updated offence in the Criminal Code (Cth)?</p> |
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The CPSU is concerned at the breadth and scope of the general criminal provisions relating to disclosure of Commonwealth information. These include s70 and s79 of the *Crimes Act 1914* and clause 91 of the *Criminal Code Act 1995*. The CPSU broadly agrees with the findings of the Gibbs Review, which recommended:

*It is undesirable that the sanctions and machinery of the criminal law should be applied in relation to the unauthorised disclosure of all forms of official information and this should be avoided if possible.*

*The application of criminal sanctions under the general criminal law of the Commonwealth to disclosure of official information should be limited to certain categories of information and that these should be no more widely stated than is strictly required for the effective functioning of Government.<sup>2</sup>*

There should not be a broadly defined criminal offence relating to disclosure of any Commonwealth information based upon the exercise of employment duties, as is currently expressed in s70. That provision is too broad, and insufficiently tailored toward keeping information secret. It is unhelpful in providing guidance on what information is confidential or where disclosure is permitted.

**#4 Recommendation: Section 70 of the *Crimes Act 1914* be repealed.**

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<sup>2</sup> H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991) at p.315, 317

## 1.4 Employment related duties not to disclose information and open government

**QUESTION 2–2** If it is appropriate to retain a general criminal offence for unauthorised handling of Commonwealth information, how should that provision be framed? Is it appropriate for such a provision to rely on a duty arising separately under the general law or under other legislative provisions?

The sheer number of secrecy provisions and their broad application illustrates the need for greater openness and transparency in how secret information is handled by Commonwealth employees. In its Agenda for Change, the CPSU advocates open and transparent government in the interest of all Australians. Our policy states:

*Public engagement in governance should not be limited to voting every three or four years. There is a growing appetite for a style of government which is engaging, inclusive and open to scrutiny.*

*This drives a need to reform not only the way the community can engage in policy formation and service delivery at its conception but also our Freedom of Information and whistleblower laws – measures which are aimed at political and administrative malfeasance.*

The Agenda for Change articulates the need for reform of the way information is managed by the Commonwealth Government. A fundamental prerequisite of open and accountable government is for the law to be clear as to the nature, source and applicability of Commonwealth employees obligations to keep confidential information secret.

For this reason the CPSU recommends that Commonwealth information be clearly divided into at least three categories: secret information that is subject to criminal sanction; Commonwealth information that may be subject to other non-disclosure or confidentiality duties and other Commonwealth information.

**#5 Recommendation: Legislation should clearly separate classified information that is subject to Commonwealth secrecy provisions from other types of non-secret Commonwealth information which may be subject to other non-disclosure obligations.**

Non-secret Commonwealth information that may otherwise be confidential because of employment contract or other obligations should be subject to civil rather than criminal sanction. However, not all Commonwealth information would be subject to confidential duties. For example, a Commonwealth employee who is subject to disciplinary procedures should not be prevented by non-disclosure laws from discussing non-secret information with their union.

Guidance materials and training outlining the nature of these employment based duties must be provided to APS employees and APS management. The scope and applicability of these duties must be clear and the

consequences of breaching these obligations ascertainable. To ensure consistency with other employment-related disciplinary matters, allegations that an employee has disclosed non-secret Commonwealth information should be dealt with in a similar manner to other disciplinary issues. For example, procedural fairness should be afforded and the process and potential sanctions for a breach of such a duty could reflect the current provisions in the *Public Service Act 1999* for a breach of the code of conduct (s15). According to s15, sanctions include termination, reduction in classification, deduction from salary or reprimand.

**#6 Recommendation: Commonwealth information not subject to classification or secrecy requirements with attendant criminal sanction but which is otherwise confidential should be regulated consistent with other employment-related disciplinary matters.**

### **1.5 Commonwealth information and Reg 2.1 of the *Public Service Regulations***

The duty imposed by Regulation 2.1 does not adequately proscribe the employment related nature of the duties regarding disclosure of information, nor provide adequate defences for disclosure. The connection between reg 2.1 and s70 of the *Crimes Act 1914* remains of significant concern to the CPSU.

**#7 Recommendation: Reg 2.1 of the *Public Service Regulations* be amended, repealed or replaced as part of broader reform of secrecy provision legislation.**

## **2. Treatment of whistleblowers and statutorily ‘protected disclosures’**

**QUESTION 4–1** If it is appropriate to retain a general criminal offence for unauthorised handling of Commonwealth information, what exceptions or defences should be incorporated in such a provision? For example, should such an offence apply only where the person concerned had reasonable cause to believe that his or her conduct would harm specified public interests? If so, should such a provision be framed as an exception or as a defence?

**QUESTION 4–6** What should be the relationship between exceptions and defences provided under Commonwealth secrecy laws and possible new Commonwealth public interest disclosure legislation? For example, should public interest disclosure be incorporated as an exception to criminal offences for unauthorised handling of Commonwealth information?

### **2.1 Circumstances when disclosure of secret information should be permitted**

Commonwealth information that is subject to secrecy provisions which prevent its disclosure should not operate exclusively and without exceptions. CPSU members suggested a number of circumstances where disclosure of otherwise secret or confidential information may be justified and should be legal. These included:

- To allow Australia to maintain economic health and security, or where people will be at serious risk of their lives.
- Secrecy provisions should apply only to that information which affects the national security of Australia and the protection of its people as a whole. Secrecy laws should not be used to keep information from individuals or used to harass.

Where disclosure is legal and permitted, this should be clearly and adequately defined. Such exceptions or defences to secrecy provisions could include suspicion of corrupt or illegal behaviour, national security or where there is a clear public interest in disclosure.

**#8 Recommendation: There be express statutory exceptions and/or defences to breaches of secrecy provisions. The exceptions should be of a clear and limited nature and outline the circumstances where otherwise secret information may be legally disclosed.**

### **3. Whistleblower protection and a ‘protected disclosures’ Ombudsman**

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| <p><b>QUESTION 6–5</b> In practice, how effective are the processes set out in the Public Service Act 1999 (Cth) and related instruments for investigating and enforcing suspected breaches of secrecy provisions that amount to breaches of the Code of Conduct?</p> |
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#### **3.1 Inadequacy of current s16 of the *Public Service Act* and need for ‘protected disclosure’ legislation**

Section 16 of the *Public Service Act 1999* provides little protection for Commonwealth employees who may have information about corrupt or illegal behaviour. Section 16 deals only with breaches of the code of conduct and requires the issue be raised only with an agency head, the Merit Protection Commissioner or the Public Service Commissioner.

There was clear consensus among CPSU members about the inadequacy of existing whistleblower protections and the need for a legislated exception to secrecy laws which allowed for independent body to which ‘protected disclosures’ could be made and victimisation prevented.

**#9 Recommendation: s16 of the *Public Service Act* be repealed or amended to be part of, or reflect, broader secrecy legislation. That legislation should include an express exception dealing with statutorily ‘protected disclosures’ and whistleblowing.**

### 3.2 A 'protected disclosures' Ombudsman:

**QUESTION 6–10** In practice, how effective are the mechanisms in place for monitoring and overseeing the application and enforcement of secrecy laws by Commonwealth agencies?

**QUESTION 6–11** Are there any other issues relating to the practical framework for protecting Commonwealth information that the ALRC should consider?

There was strong support among CPSU members for an independent body to whom complaints and allegations could be raised without breaching secrecy provisions or employment duties not to disclose confidential information. As part of a survey conducted by the CPSU of its members, the following suggestions were made:

- There should be a safe forum for the Whistle blower to contact like an Inspector General/Ombudsman, independent of the agency.
- Any person reporting illegal or corrupt behaviour should be immune from prosecution, provided the accusation was not malicious or vindictive.

The CPSU supports the creation of an independent body to oversee, investigate and regulate 'protected disclosures' legislation and whistleblowing allegations. In our submission to the *Inquiry into Whistleblowing Protections within the Australian Government Public Sector* the CPSU commented:

*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 submits such a body should have a full range of investigative powers regarding 'protected disclosures', disclosures in the public interest,<sup>3</sup> and whistleblowing allegations. Further comments received by the CPSU as part of its secrecy review consultation suggested:

*The whistleblower capability should receive and follow-up complaints, oversee and monitor mandatory ongoing training and awareness programs in government and in private sector entities, have the power to remove authorities of private sector entities who fail to demonstrate compliance with training and awareness programs, follow up to ensure protection of whistleblowers (i.e. monitoring of a whistleblower's situation over a number of years after the complaint is lodged), determine access to whistleblower complaint information and ensure*

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<sup>3</sup> Brown AJ, Latimer P *Symbols or substance: Priorities for the reform of Australian public interest disclosure legislation* Griffith Law Review (2008) Vol 17 No.1 pp.223-251

*follow through on issues raised in any complaint. I believe an effective process is critical.*

Circumstances of 'protected disclosures' could include:

- Illegal activity;
- Corrupt conduct;
- Misuse/waste of public funds;
- Maladministration;
- Danger to public health or safety; and
- Danger to the environment.

A 'protected disclosure' would give that whistleblower protection from secrecy and other provisions if:

- the person when making a disclosure honestly believes, on reasonable grounds, that there has been misconduct or wrongdoing; or
- the person makes a disclosure not knowing it discloses misconduct or wrongdoing.<sup>4</sup>

**#10 Recommendation: An independent body be created to administer whistleblowing and allow for 'protected disclosure' of otherwise secret information and express categories of such disclosure to include corruption and maladministration.**

### **3.3 A powerful role for a Public Service Ombudsman?**

Allowing for 'protected disclosures' would require an Ombudsman-style agency to oversee, regulate and investigate disclosures and allegations of corrupt or illegal behaviour. Such a body would deal with disclosures both of secret or classified information and otherwise confidential Commonwealth information obtained in the course of employment.

Such an organisation should be able to protect the whistleblower from reprisal action, such as discrimination and victimisation, but also more subtle forms of conduct such as being overlooked for a promotion, refusal to re-engage a contractor, and so on.

**#11 Recommendation: The CPSU supports the creation of a Public Service Ombudsman within the current office of the Ombudsman with a full range of investigative powers to perform these functions.**

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<sup>4</sup> See Dr AJ Brown, 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation A Discussion Paper' p.22.

#### 4. Non-APS agencies and the need for accountability of 'information flows'

QUESTION 3-1 In what circumstances should secrecy provisions regulate the behaviour of persons other than Commonwealth officers such as: consultants and others who provide goods and services to the Australian Government; those who enter into arrangements with the Australian Government; and state and territory government employees?

For there to be balance between open government and the need for secrecy provisions, the breadth of persons who are able make 'protected disclosures' as whistleblowers must not be artificially constrained to those directly engaged by APS agencies. It is increasingly common for Government services to be designed and delivered through a mixture of Government and private providers. This can make public accountability for those services difficult.<sup>5</sup> It therefore would not be sufficient to merely improve the protections afforded under the *Public Service Act 1999* as this only applies to those directly engaged by departments, executive agencies and certain statutory agencies.

CPSU members who participated in the consultation process as part of the CPSU submission said there is a need:

- for better legislation that incorporates these bodies or they sign onto those provisions when doing business with the government.
- to hold the relevant statutory authorities and companies responsible for the subsequent treatment of the whistleblowers and not allow them to hide behind obscure laws.

If Commonwealth Officers, Commonwealth employees and others are subject to secrecy provisions, then they should also have corresponding protection of 'protected disclosures' legislation. Protection should be afforded to current and former employees of all Commonwealth Government agencies and any statutory appointment to those agencies. Government agencies should be defined to include Departments and Agencies covered by the *Financial Management and Accountability Act 1997* (that is, Departments of the State, Departments of the Parliament and prescribed agencies) and Commonwealth Authorities and Companies, covered by the *Commonwealth Authorities and Companies Act 1997* (that is, statutory authorities and companies in which the Commonwealth has a controlling interest). All such Government agencies have financial reporting and other obligations, and it is logical that their employees should be able entitled to protection if they make 'protected disclosures' such as those in the public interest.

**#12 Recommendation: Secrecy provisions and other confidential information legislation, along with concordant statutory exceptions and 'protected disclosure' legislation should apply to private sector consultants and companies who do business with government as well as Departments and Agencies covered by the *Financial Management and Accountability Act 1997* and Commonwealth Authorities and**

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<sup>5</sup> Harris Rachel *Avoiding the worst of both worlds: government accountability for outsourced employment services* AIAL Forum No.54 pp.1-30

## **Companies covered by the *Commonwealth Authorities and Companies Act 1997***

### **5. Secrecy and other legislation, *Privacy Act, Freedom of Information Act.***

QUESTION 7-1 Given that the Freedom of Information Act 1982 (Cth) promotes open and accountable government, and secrecy provisions protect Commonwealth information, what should be the relationship between these two regimes?

QUESTION 7-2 If the relationship between secrecy provisions and the Freedom of Information Act 1982 (Cth) (FOI Act) does not strike the right balance, how should this be addressed?

The notion of open and transparent government should be the guiding principle in approaching issues of the ability of the public to obtain information about their Government. The CPSU is concerned that any changes to secrecy provisions to clarify their scope or application must be tailored to fit with the principles of open and transparent government and legislation dealing with freedom of information and privacy. Secrecy provisions and public access to information should not be viewed as opposed to one another, but complementary.

The difficulties with the current freedom of information legislation are well publicised, and the capacity for the government to avoid freedom of information requests is problematic.<sup>6</sup> The CPSU supports any changes to secrecy provisions being part of a wider program to review and clarify the principles and operation of open and transparent government and the regulation of public access to Commonwealth information, secret or otherwise.

**# 13 Recommendation: Harmonisation between secrecy provisions and other legislation dealing with Freedom Of Information or Privacy needs to be achieved in the interests of open and transparent government.**

### **6. Conclusion: Striking an effective and fearless balance – cultural change**

The purpose of secrecy provisions is to facilitate open and transparent government and an apolitical public service by carefully defining what must be kept secret, why and the exceptions to that rule. To achieve such transparency, the obligations of Commonwealth employees to keep information secret need to be clear, and the source and effect of those obligations in statute and employment contract need to be obvious. There should be clear legislative separation between secrecy provisions which restrain disclosure with criminal sanctions and any broad contractual or equitably based duty not to disclose otherwise confidential information to which civil remedies attend.

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<sup>6</sup> McMillan John *The FOI landscape after McKinnon* Public Administration Today April-June 2007 pp.42-47

An open and accountable government can only be achieved if legislation governing secrecy and whistleblower protections be extended to government businesses, statutory bodies and those organisations which do business with government.

Further, any exceptions or 'protected disclosures' mechanism need to in place to enable the reporting of corrupt or illegal activity. The CPSU suggests that there be an enhanced role for Ombudsman's office through a Public Service Ombudsman.

Where it is necessary for Commonwealth information to be kept secret, this must occur only for as long as necessary and secrecy must be restricted to information of certain types. This should be reflected in how any new secrecy provisions and their exceptions interact with Privacy and Freedom of Information.

Currently in the public service, the issue of secrecy and whistleblowing is somewhat 'taboo', poorly understood by employees and managers alike. A shift in public sector culture needs to take place to legitimise whistleblowing. To expect legislation to effect cultural shift is unrealistic, but legislation can foster an environment where accountability can grow. Such cultural change is in the interest of CPSU members, and all Australian citizens.

## **7. Summary of recommendations**

**#1 Recommendation: Secrecy provisions should apply logically, consistently and clearly across all Commonwealth government agencies and other relevant bodies.**

**#2 Recommendation: Legislative secrecy provisions should not apply generally to all Commonwealth information, but should distinguish between classified or secret information and other types of information which may nonetheless still be not publicly available.**

**#3 Consideration should be given to time periods after which information previously classified as secret could become publicly available.**

**#4 Recommendation: Section 70 of the *Crimes Act* 1914 be repealed**

**#5 Recommendation: Legislation should clearly divide classified information subject to Commonwealth secrecy provisions from other types of non-secret Commonwealth information which may be subject to other non-disclosure obligations.**

**#6 Recommendation: Commonwealth information not subject to classification or secrecy requirements with attendant criminal sanction but which is otherwise confidential should be regulated consistent with other employment-related disciplinary matters.**

**#7 Recommendation:** Reg 2.1 of the *Public Service Regulations* be amended, repealed or replaced as part of broader reform of secrecy provision legislation.

**#8 Recommendation:** There be express statutory exceptions and/or defences to breach of secrecy provisions. The exceptions should be of a clear and limited nature and outline the circumstances where otherwise secret information may be legally disclosed.

**#9 Recommendation:** s16 of the *Public Service Act* be repealed or amended to be part of, or reflect, broader secrecy legislation. That legislation should include an express exception dealing with statutorily 'protected disclosures' and whistleblowing.

**#10 Recommendation:** An independent body be created to administer whistleblowing and allow for 'protected disclosure' of otherwise secret information and express categories of such disclosure to include corruption and maladministration.

**#11 Recommendation:** The CPSU suggests the Public Service Ombudsman could be a full range of investigative powers to perform these functions.

**#12 Recommendation:** Secrecy provisions and other confidential information legislation, along with concordant statutory exceptions and 'protected disclosure' legislation should apply to private sector consultants and companies who do business with government as well as Departments and Agencies covered by the *Financial Management and Accountability Act 1997* and Commonwealth Authorities and Companies covered by the *Commonwealth Authorities and Companies Act 1997*

**#13 Recommendation:** Harmonisation between secrecy provisions and other legislation dealing with Freedom Of Information or Privacy needs to be achieved in the interests of open and accountable government.