



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

***Inquiry into Whistleblowing
Protections within the Australian
Government Public Sector***

August 2008

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), ACT Public Service, NT Public Service, ABC, SBS and the CSIRO.

As the major union representing Commonwealth Government employees, the CPSU welcomes the *Inquiry into Whistleblowing Protections within the Australian Government Public Sector*. This is an issue of great significance to our members and was a specific focus in the CPSU's recent 'Agenda for Change' membership conferences. Our submission is based on the observations and experiences of our members in the Commonwealth public sector.

The CPSU believes that the provision of statutory protection for public sector whistleblowers is essential and long overdue. The current legislative protection, in the *Public Service Act 1999*, is grossly inadequate and 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. The 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 believes there are three components to a system which provides fair and effective protections for whistleblowers:

1. effective legislation;
2. an independent agency to enforce that legislation and facilitate public interest whistleblowing; and
3. public sector cultural change to encourage public interest whistleblowing.

Each is discussed in turn below.

1. Effective legislation

Categories of people how could make protected disclosures

For there to be effective whistleblowing protections in the public sector, 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. It therefore would not be sufficient to merely improve the protections afforded under the *Public Service Act* as this only extends to those directly engaged by departments, executive agencies and certain statutory agencies.

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 to make public interest disclosures.

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.

There is 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 Commonwealth maladministration or misconduct.

The motivation for a statutory scheme is to ensure that individuals making public interest disclosures about the public sector are protected and those disclosures are appropriately investigated. For the scheme to be meaningful, the central principle should be that statutory protection is attached to any Government work.

Types of disclosures that should be protected

The CPSU believes disclosures on the following issues should be protected:

- Illegal activity;
- Corrupt conduct;
- Misuse/waste of public funds;

- Maladministration;
- Danger to public health or safety; and
- Danger to the environment.

A broad category such as maladministration needs to be included, similar to the South Australian, Queensland and New South Wales legislation. This is important as there are many circumstances in which conduct may not be illegal or corrupt, but is clearly improper and a public interest disclosure would be justified. Issues of professional misconduct could also fall within this category.

Reprisals against whistleblowers would constitute illegal activity and therefore also could be disclosed.

Conditions that should apply to a person making a disclosure

A person should be entitled to the protection of the legislation 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 wrongdoing¹.

The test of whether there were reasonable grounds for such a belief should be based on the information known to that person at the time they made the disclosure.

Consequently, disclosures made maliciously, based on information known to the individual to be false or misleading or that the individual should have reasonably known to be false or misleading, would not be protected.

Whilst the CPSU agrees that whistleblowing should not be motivated by an individual's personal opinion or grievance, the ability to further examine the motives of a whistleblower may undermine the statutory protection. Disputes entirely about policy disagreement should not be protected under legislation, however where the individual making the disclosure has a genuine belief, on reasonable grounds, that there has been misconduct and/or the disclosure shows misconduct, legislative protection should be afforded regardless of whether the disclosure also is critical of government policy.

Similarly, even if a disclosure is, in part, motivated by a personal grievance, if it contains valid allegations of misconduct, that individual should be protected for the purposes of the legislation. Basically, an agency or individual accused of improper conduct by way of a protected disclosure should not have the opportunity to deal with the allegations by discrediting the person who made

¹ See Dr AJ Brown, 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation A Discussion Paper' p22. The paper discusses the importance of ensuring that an individual who honestly and reasonably believes there has been misconduct or wrongdoing, but is ultimately proved wrong, is protected and similarly, that a person who makes a disclosure not knowing it discloses misconduct or wrongdoing.

them. The investigation and findings of the Ombudsman into the treatment of whistleblowers in the Australian Federal Police demonstrates the inherent risks if an agency is allowed to try to discredit the whistleblower rather than deal with the substance of the allegations².

Whistleblowing legislation in some States, such as Victoria and Tasmania, requires a threshold that conduct must be criminal or justify termination of employment before a disclosure has statutory protection. The CPSU believes that such a threshold is too high and would render the legislation useless. There may be instances where conduct is not actually illegal but highly improper. In these circumstances, disclosure should be protected. Similarly the requirement that the conduct must justify dismissal presupposes that disclosures will always focus on the conduct of individuals. There may be circumstances where there are legitimate disclosures outlining organisational failure rather than individual failure.

Scope of statutory protection

To be effective, legislation must give whistleblowers who make protected disclosures immunity from relevant secrecy and crimes legislation, defamation actions and effective protection against reprisals. The statutory protection must extend not only to the initial disclosure, but also in respect of any subsequent information or evidence provided by the whistleblower or by any other witness.

The protection against reprisals must be sufficiently broad to cover both formal and informal action that may be taken against an individual who makes a protected disclosure. There are obvious ways that an employee may be subject of reprisal conduct, for example through misconduct proceedings or being overlooked for a promotion. Contractors or consultants may also suffer prejudicial alteration, for example through termination of a contract or refusal to re-engage, and this must be reflected in the legislation.

The CPSU believes that a concept such as 'prejudicial alteration' as it exists in freedom of association provisions under the *Workplace Relations Act 1996*, should be replicated for whistleblowers. The benefit of such a provision is that it would cover *any* actions that have the effect of altering the protected person's position to their prejudice taken because they made a disclosure, not just formal actions. The legislation must also make reprisal action an offence for which there is a remedy.

Once it is shown that a person has been the subject of prejudicial alteration, the onus would be on the agency to show it is not because the person had made a protected disclosure. Conduct motivated in part by the fact that the person made a disclosure should be covered by the protection against reprisals. It should not be the case that the individual subject of the reprisal

² Commonwealth Ombudsman 'Professional reporting and internal witness protection in the Australian Federal Police – a review of practices and procedures', November 1997.

has to show that the conduct was motivated by the sole reason that he/she had made a disclosure. For there to be a truly effective right to make a protected disclosure, there must be an effective mechanism against any kind of reprisal.

As well as these 'negative' rights, whistleblowers should also have the 'positive' statutory right to have disclosures and complaints properly investigated. The CPSU believes that this would mean in the course of the investigation, the whistleblower would have the opportunity to give evidence to the investigating agency and the right to receive progress reports on the investigation.

Legal protection should be extended in circumstances where:

- an individual has made a protected disclosure and has attempted without success to have that disclosure dealt with; or
- an individual has made or sought to make, a protected disclosure and there is no possibility of success in a reasonable timeframe.

These extensions would protect an individual who made a disclosure to a third party, including a parliamentarian or the media. The first ensures that where a disclosure is not properly addressed because of bureaucratic failure there is a way for that disclosure to be aired. The second is broader, and deals with issues that are time-sensitive and where the public airing of the disclosure is justified on those grounds.

Currently NSW is the only jurisdiction that allows a protected disclosure to be made to a third party. The CPSU believes the extension of the legal protection to disclosures in the circumstances set out above is important as it ensures there is an ultimate way for a disclosure to be aired. That is, even if the system fails an individual making a legitimate disclosure about matters of public interest, that individual will be protected in raising the issue elsewhere. The extension of the protection also increases the incentive for Government and Commonwealth agencies to ensure whistleblower disclosures are properly addressed.

2. Independent agency to enforce the legislation

Whistleblowing legislation is meaningless unless it is supported by an independent and impartial agency with responsibility for enforcing the legislation and investigating disclosures. Potential whistleblowers and the public at large will have greater confidence in the integrity of the system if a distinct, independent agency is assigned specific responsibility for this issue.

Public Service Ombudsman

The CPSU believes that an independent agency must have responsibility for investigating disclosures. This role should be undertaken by a 'Public Service Ombudsman', situated within the office of the Commonwealth Ombudsman.

The Ombudsman already has a role in reviewing administrative action and investigating allegations of maladministration. A 'Public Service Ombudsman' should be a statutory appointment with responsibility for investigating disclosures, reporting disclosures and taking action to improve public service culture in respect of whistleblowers.

Investigations regarding whistleblowers in the APS are currently performed by Agency Heads and the Public Service or Merit Protection Commissioners. We believe there are cogent reasons for removing this function and entrusting it to a separate statutory authority.

Making a disclosure

Whistleblowers should be able to make a disclosure to the relevant Agency Head or the Public Service Ombudsman. It may be appropriate that the Agency has the opportunity in the first instance to investigate the allegations, however we believe it would be unwise to mandate this as an initial step. If the whistleblower does make a disclosure to the Agency Head and is dissatisfied with the response, he/she must have the opportunity to go the Public Service Ombudsman.

Within agencies, there must be an obligation on managers generally to facilitate the making of disclosures. That is, where an individual makes a disclosure to a manager within a Commonwealth agency that manager must then advise the Agency Head or his/her delegate of the disclosure.

Whistleblowers should be given the opportunity to make disclosures anonymously. Whilst in a practical sense it may be necessary for the individual to identify themselves to the Public Service Ombudsman, the identity of the whistleblower should not be revealed to the agency without his/her consent. The Agency Head or Public Service Ombudsman must investigate any disclosure made anonymously where it can be reasonably supposed the person making the disclosure falls within the class of protected persons under the legislation and there is sufficient detail to investigate. This could not, however, override the right of any relevant person to natural justice in the investigation process. For example, if the Public Service Ombudsman anonymously received an internal accounting document which showed misappropriation of government funds, it would be reasonable to suppose the person who made the disclosure was a protected person and there would presumably be sufficient detail to investigate the disclosure.

Investigating a disclosure

The general principle must be that once a disclosure is made, there is a statutory duty on the Agency Head or the Public Service Ombudsman to genuinely investigate the allegations and make a report. When a disclosure is made to an Agency Head, the Agency Head or his/her delegate must advise the whistleblower of the right to take the disclosure to the Public Service

Ombudsman. If the Agency Head believes it is inappropriate or impractical for the matter to be dealt with internally, the Agency Head must refer the matter to the Public Service Ombudsman. The outcome of any complaint and investigation must be reported to the Public Service Ombudsman.

The obligation to investigate would not be imposed where the disclosure is not a protected disclosure for the purposes of the legislation and/or where the disclosure is vexatious. The decision that the disclosure does not need to be investigated should however only be made by the Public Service Ombudsman. Therefore if an Agency Head receives a disclosure he/she believes does not require investigation, it must be referred to the Ombudsman for determination. The Public Service Ombudsman should provide the individual with reasons for the decision not to investigate.

The Public Service Ombudsman must be given far-reaching powers to investigate disclosures. Given the extent of these powers, it is not appropriate that Agency Heads be prescribed similar statutory powers. The general powers they have as an employer should be sufficient to investigate any disclosure in the first instance.

The Ombudsman should have the power to:

- take evidence;
- call witnesses;
- require the production of documents;
- make recommendations to an Agency Head about any matter arising from the investigation of a disclosure, including any allegations of reprisal action taken against a whistleblower; and
- require information from an Agency Head about the implementation of any recommendations.

A whistleblower, and any person required to give evidence in relation to an investigation, shall have the right to be represented in the investigation process. In addition a person the subject of an investigation process should be fully afforded natural justice in answering any allegations.

Investigations should be conducted in private, although a whistleblower should have the right to receive progress reports and be informed of the final outcome of the investigation process, including any recommendations made to the Agency involved.

In the course of making recommendations about any matter arising from the investigation of a disclosure the Public Service Ombudsman should also inform the relevant Minister.

To ensure transparency, the Public Service Ombudsman should also report to Parliament and the relevant Ministers on any investigation process where the Agency Head has failed to implement the Ombudsman's recommendations. In addition to that requirement, the Ombudsman should publish statistics on the number, nature and outcome of whistleblowing investigations in the public service.

Powers in respect of allegations of reprisal

The Public Service Ombudsman should have specific powers to make recommendations to remedy any improper conduct taken against a whistleblower. Allegations of reprisal would constitute illegal conduct, and therefore it would be open to any protected person to make a disclosure about any reprisal conduct. It would seem more likely however, that issues about the treatment of the whistleblower will come up during the course of the investigation into the whistleblower's substantive disclosure.

The Public Service Ombudsman should have the power, of its own motion or acting on a complaint, to make recommendations to an Agency about compensation, reinstatement or other remedial action for a whistleblower. In the course of making such recommendations the Public Service Ombudsman should also inform the relevant Minister. Where the Agency fails to institute the recommendations of the whistleblower, the matter shall be reported to Parliament and the relevant Ministers. In doing so, however, an individual whistleblower's privacy must be maintained unless he/she consents otherwise.

The Public Service Ombudsman should also have a role in prosecuting individuals who take reprisal action against whistleblowers. This should include initiating legal action where it is believed there has been a breach of the legislation.

3. Public sector cultural change

Whilst effective legislation supported by a bureaucratic structure will provide the framework for public interest whistleblowing, it is also important that the public service culture supports whistleblowing as crucial to maintaining the integrity of the public service. Currently in the public service the issue is somewhat 'taboo', poorly understood by employees and managers alike. A shift in public sector culture needs to take place to legitimise whistleblowing.

Commonwealth agencies must be required to develop procedures for dealing with whistleblowing in consultation with the CPSU, including internal reporting mechanisms and support services for employees who have or are considering whistleblowing. Agencies must actively distribute these policies to employees, contractors and consultants. Agencies should also have a central person nominated to deal with whistleblowing issues, similar to Freedom of Information practices in many departments.

Managers and employees need to be educated about the importance of whistleblowing, the circumstances in which a disclosure is protected and the proper avenues by which a disclosure should be made. Just as new employees are trained in other public sector employment issues and

practices, they must be similarly advised of the role of whistleblowers and their statutory rights.

Commonwealth agencies should also have to broadly report on whistleblowing. This would include statistics in agency annual reports on the number of disclosures made, either internally or externally to the Ombudsman, and the ultimate outcomes of investigations into those disclosures.

Concluding Paragraph

It is our view that legislative change is necessary to facilitate public interest whistleblowing and promote a more open and transparent government. It is a legitimate public activity and furthers the public interest. The Government and the public service should embrace whistleblowing and encourage it, rather than shy away from the difficult questions that are sometimes raised by whistleblowers. Whistleblowing has been poorly recognised and inadequately protected in the Commonwealth public sector, we therefore welcome the commitment to provide legislative protection and look forward to working with the Government towards its implementation.