

THIS IS A DRAFT OF A BILL PROPOSED FOR INTRODUCTION IN THE SENATE. IT IS BEING CIRCULATED TO STIMULATE DISCUSSION ON THE SUBJECT OF PROTECTING WHISTLEBLOWERS. COMMENTS ARE WELCOME AND SHOULD BE ADDRESSED TO:

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Whistleblowers Protection Bill 1993

**Tabled in the Senate by
Senator Christabel Chamarette
Independent Senator for the Greens (WA)**

25 May 1993

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**Statement of Explanation
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This Bill was originally introduced by my predecessor, Senator Jo Vallentine on 12 December 1991. Following my appointment to fill the vacancy left by the resignation of Senator Vallentine in January 1993, I undertook a major rewrite of the original Bill to take account of the criticisms received.

The object of the Bill is to allow public sector employees and others to disclose, in the public interest, illegal, improper or corrupt conduct or acts that may be of danger to public health, safety or national security.

It seeks to establish a fully independent statutory authority called the Whistleblower Protection Agency, headed by a Commissioner, which will have powers to investigate claims of corruption within Commonwealth government or government agencies made by employees, applicants for employment in a government Agency or by any member of the public. Protection is also extended to consultants engaged by the Government or its agencies.

The major functions of the Agency will be: to investigate allegations of wrongdoing within government and its agencies; to protect the interests of employees, former employees and applicants for appointment to the federal public service; to promote the ethic of openness and public accountability and to support the community perception of whistleblowers as responsible citizens.

The Agency will have the power to receive and investigate allegations about serious wrongdoing involving federal government employees up to, and including, the Prime Minister. Allegations to be investigated would include violations of law, gross mismanagement, gross waste of public funds, abuse of authority, substantial and specific danger to public liability or safety, or suppression of an expert opinion, finding or document.

Whistleblowers will be able to obtain protection from harassment or discriminatory actions over appointment, promotion, disciplinary action, transfer, pay or other benefits that arise. Possible remedies will include re-instatement, re-location and compensation payment. These remedies will be available if the Agency is satisfied that the person had reasonable grounds for believing that the allegations were true on the condition that the allegations were found to be substantially true.

The Agency may approach the Federal Court for an order or injunction restraining a person from taking actions that are prejudicial to a whistleblower.

The Whistleblowers Protection Agency will have the power to recommend disciplinary action or, for severe cases, criminal action against government employees responsible for the harassment or discrimination against whistleblowers.

The Agency may bring evidence that a person has been guilty of an offence to the notice of the Attorney-General.

The Agency may also make reports to the Prime Minister who shall cause a copy of the report to be laid before each House of this Parliament within 5 sitting days of each House. These may be separate reports or included in the next annual report of the Agency.

The Bill also seeks to protect whistleblowers from any legal action as a result of the allegations they make to the Agency. This protection would be extended whether or not the allegations were disproved, but not if they were deliberately false or misleading. A complaint to the Agency will only be made public if it is found to be true. The Agency will publish a list of all complaints in its annual report that will be tabled in Parliament, however, only the full details of substantiated and true claims will be revealed.

The Commissioner and persons acting under the direction or authority of the Agency will also not be liable to an action or proceedings taken against them for exercising the powers conferred by this Bill.

A *Parliamentary Joint Committee on the Whistleblowers Protection Agency* will inquire into and report on the activities of the Agency and other matters that the Commissioner has drawn to the attention of the Committee.

The Bill sets out the process for appointment and powers of the Commissioner as well as the administration of the Agency.

In that regard, I wish to specifically point to several clauses of note in the Bill.

First, the process of appointment of the Commissioner is unusual in that, while the Governor-General will appoint a person to the position on the advice of the Prime Minister, either House of Parliament may disallow the appointment within 10 sitting days after the instrument of appointment has been laid before the House. A similar process of suspension and removal of the Commissioner will be in force to protect the office of Commissioner from political interference.

The Commissioner will be employed on similar terms and conditions as are applicable to an officer performing the duties of an equivalent classification in the public service, however the Commissioner's remuneration will be determined by the Remunerations Tribunal and the *Commonwealth Employees (Redeployment and Retirement) Act 1979* does not apply to the office of Commissioner.

This Bill is being introduced into the Senate, so I have been unable to include a particular clause because of constitution constraints. I would hope that section 43 of the finalised Act would read:

"All costs and expenses incurred by or in connection with the performance of the powers and functions of the agency are a charge on the Consolidated Revenue and are payable out of the Consolidated Revenue Fund without further appropriation than this section."

This would ensure that the agency would not be starved of funds by a hostile government of the day. I would like to point out that the operations of the agency would still be open to review by the *Australian National Audit Office* and would remain responsible to parliament for its expenditure through the *Parliamentary Joint Committee*.

The Royal Commission Act 1902, the Ombudsman Act 1976 and the Human Rights and Equal Opportunity Act 1986 all contain some provision for individuals to make complaints about government breaches of ethical standards. However, none of these pieces of legislation were specifically intended to offer protection to whistleblowers.

As the Senate Standing Committee on Finance and Public Administration report on the *Management and Operations of the Department of Foreign Affairs and Trade* of December 1992 noted on page 56:

"... the present system in the Australian Public Service, so far as there is one, allows for complaints to external agencies such as the Ombudsman, the Auditor-General, the MPRA or the AFP. Each review body has limited jurisdiction and complaints to any of them can fall through jurisdictional cracks or be reviewed in too narrow a context."

These comments affirm the need for an agency specifically designed to deal with whistleblowing. As can be seen from other comments made by the Committee on the same page there are further compelling reasons for the establishment of such an agency:

"As the system currently operates, genuine whistleblowers are inadequately protected and their complaints may not be properly investigated but genuine, misguided and malicious whistleblowers alike are still able to secure repeated, often expensive, reviews by different bodies."

and

"The absence of a comprehensive system for dealing with whistleblowing incidents probably increases the risk of improper behaviour by whistleblowers while reducing the likelihood that real malpractice will be reported. Unless there is a general perception that reports of malpractice will be competently and honestly investigated, some persons with concerns about administration will see publicity as the only way of having their concerns redressed and others will be deterred from raising them."

This Bill has provisions to guard against claims that are made for personal gain, or which are frivolous or deliberately malicious. These provisions will include criminal liability for any person making a false claim to the Agency.

In an article in *The Australian Law Journal*, Mr J.G. Starke pointed out: "the whistleblower must have reasonable grounds for believing that a crime or civil wrong has taken place or will take place; and there must be evidence of good faith on the part of the whistleblower".

This Bill will complement the existing defences for whistleblowers under common law and will provide some protection for them legally. Our Government and public sector processes have been governed by official secrecy for over a century. Breaches of this secrecy have at times attracted criminal liability and, historically, no defence of public interest has been entertained. In Commonwealth legislation alone there are as many as 150 secrecy provisions which penalise the unauthorised disclosure of information. Possibly the most ubiquitous of these is section 70 of the Crimes Act 1914, which imposes a two year prison sentence for any unauthorised disclosure of information by a current or former Commonwealth employee.

There have been moves to introduce some form of whistleblower protection through state based anti-corruption authorities in New South Wales, Queensland, the Australian Capital Territory and Western Australia. Legislation is urgently needed at the Federal level because the community demands that government and bureaucracy should not be above the law.

The considerable cost and damage and subsequent scandals relating to State government corruption in New South Wales, Queensland and Western Australia may never occurred had individuals been empowered to blow the whistle on corrupt practices. In all cases, some Government employees knew what was going on, but kept quiet. Had they felt protected by law, some of them may have been encouraged to tell the truth, saving taxpayers millions of dollars and preventing political and private sector practices from becoming so debased that the public, to a large degree, lost confidence in the political process.

In Queensland, the Criminal Justice Commission and the Electoral and Administrative Review Commission have just finalised a report recommending state legislation allowing for whistleblowers.

The former Corruption Commissioner, Tony Fitzgerald Q.C., drew attention to what he called an "urgent need" for whistleblower legislation. In his Report released on 3rd July 1989, on public administration and criminal justice in Queensland, he said:

"It is enormously frustrating and demoralising for conscientious and honest public servants who work in a department or instrumentality in which maladministration or misconduct is present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority. Even if they do report their knowledge to a senior officer that officer might be in a difficult position.

As the quote implies there may be no-one who can be trusted with the information. If either senior officers and/or politicians are involved in misconduct of corruption, the task of exposure becomes impossible for all but the exceptionally courageous or reckless, particularly after indications that such disclosures are not only unwelcome but attract retribution. Strong honest leadership is one step which is essential to a build-up of confidence. There is an urgent need, however, for legislation which prohibits any person

from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities.

Fitzgerald went on to argue, "It is necessary to establish a convenient means by which public officers can disclose matters of concern. What is required is an accessible, independent body to which disclosures can be made, confidentially at least in the first instance--and in any event free from fear of reprisals."

Protection for whistleblowers should be an important element of modern government because this encourages employees to be a part of maintaining honest, effective and accountable government.

Employees who blow the whistle on either a private corporation or government, although this legislation deals only with government, are often persecuted and eventually sacked, yet they have usually blown the whistle as an act of conscience with the greater good of society in mind. They are in fact, ethical resisters. By protecting whistleblowers we enable individuals to make an ethical choice between their responsibility to society generally and their obligations to their employers. To refuse such protection may be to require a person's complicity in activities which they abhor.

There are double standards operating at present which condone whistleblowing in some circumstances yet, in other circumstances, see whistleblowers vilified and persecuted. For example, reporting a neighbour for defrauding the Social Security Department is regarded as laudable. If I inform the police of some criminal activity that I witnessed, I may even be paid money from public funds in return for demonstrating loyalty to the state. However, other whistleblowers may be variously ridiculed, referred for psychiatric assessment, sacked and possibly prosecuted because of their actions.

At present, the courts can do little to provide effective protection from harassment and intimidation to an employee who blows the whistle. What eventually breaks whistleblowers down, and deters others from supporting them, is the aversion and subtle abuse which they suffer on a daily basis at work.

That is why I am presenting this Bill today - in an effort to protect future whistleblowers from harassment and intimidation. This legislation will offer extensive protection to the whistleblower, including protection for their physical safety and recompense for any harassment. Our system of liberal democracy should at least offer protection to an ethical resister who blows the whistle in the public interest.