



Whistleblowers Australia

PO Box 129, Wollongong NSW 2500

**"All it needs for evil to flourish is for people
of good will to do nothing"- Edmund Burke**

15 February 2017

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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Dear Sir or Madam,

Re: whistleblower protections in the corporate, public and not-for-profit sectors.

Please find below our submission in response to the terms of reference published by the Parliamentary Joint Committee on Corporations and Financial Services for its inquiry and report by 30 June 2017 as follows.

Terms of reference

- a. the development and implementation in the corporate, public and not-for-profit sectors of whistleblower protections, taking into account the substance and detail of that contained in the Registered Organisation Commission (ROC) legislation passed by the Parliament in November 2016;**

The Fair Work (Registered Organisations) Amendment Act 2016 (the 'ROC' legislation) extended existing whistleblowing protections in the Fair Work Act (Cth) 2009 (the 'FWA') to current and former employees and officers of registered unions and associations and their contractors. It's a good step and this inquiry is another, because it opens up the possibility of developing a truly comprehensive national whistleblowing system that can operate across all sectors, the public, corporate, charitable and not for profit (NFP) and include a US style false claims scheme.

I envisage there being two acts. One act to, replace the existing Public Interest Disclosures Act (Cth) 2013 (the 'PID' act) which would apply across

all sectors and another, to provide for a US style false claims scheme, although it could just as well be a part or chapter of a comprehensively revised PID act. This inquiry must strengthen the best and discard the worst of the existing system with a view to its wider application.

Independent investigation, not cover-up is the key

The first thing to do is to recognise and remove the conflicts of interest that have bedevilled all of the PID acts – so that the new act does what it should. By that I mean developing and implementing a system that makes investigation, not cover-up, management's preferred option - because this is what will keep management on the straight and narrow and whistleblowers safe from reprisals and in their jobs.

To do this we need to understand why covering up wrongdoing, is so seductive to so, many in management and make it less so: by legislating a system that publicly rewards good choices and punishes bad. In my observation conceit, self interest, fear and secrecy all drive decisions that otherwise might not be made if the right levers or triggers were applied. The entire process must be open to public scrutiny, with all decisions reported in real time on the organisation's website – so that over time, cover-ups will no longer be seen as the 'smart' option.

Identify where temptation lies and remove it

We need to understand where temptation lies and remove it – legislatively - by that I mean the decision whether or not to investigate a whistleblowing disclosure must be completely taken out of the hands of management. The person delegated with the authority to make that decision and investigate a disclosure or a claim of reprisal must be legally independent of management and the only person with authority so to do. The human resources officer delegated with authority to support and protect whistleblowers (the 'protector') must also be legally independent of management: s/he must not have a role in investigations. And the basis for making a decision to investigate or not, must be based only on an assessment of the facts alleged, together with any other information available in a preliminary sense and by reference to the discloser. The investigator and protector must actively guard against any attempt from anyone to undermine and or demonise the discloser: a criminal and civil cause of action and financial penalty should apply where it can be shown that the management failed by act or omission to support a whistleblower and or the PID system - by (eg) attempting to influence the decision to investigate or not.

Open, real time reporting

This would be a system that openly acknowledges that corrupt collusive conduct happens, so it would also need to deter management from taking otherwise legitimate decisions to get around it. For example if management decided to deny or withdraw funding for an investigation, it should be required by law to provide a full written explanation in reply to the investigator's preliminary report, which report should set out the salient allegations and facts disclosed and under investigation. Both reports should be made publicly available on the website and to government and or corporate boards and shareholders as appropriate for their consideration in relation to (eg) a claim for an increase in executive salary & bonuses. Again, a cause of action and financial penalty should apply where it can be shown that the management

failed to support a whistleblower and or the PID system by (eg) attempting to or covering up wrongdoing.

A current case concerning the former CEO of Origin Energy, who left only last October after being CEO since 2000 illustrates this very point. Whistleblower Sally McDow alleges he “altered reports to the board to delete references to material risk issues including those relating to non-compliance with mandatory legislative and regulatory obligations for the electricity division, upstream divisions and the multi-billion dollar Australia Pacific LNG project, which is a joint venture between Origin, ConocoPhillips and Sinopec.” At least three other executives are implicated in the alleged cover-up, by internal whistleblower reports going back about three years. Sally McDow was sacked: <http://www.smh.com.au/business/energy/origin-energy-denies-cover-up-after-accusation-in-explosive-lawsuit-20170124-gtxhcx.html>

Out there – publicly talking up the system

It should not be enough for organisational heads to just implement and fund a PID system and collect the statistics, all the while comfortable in the knowledge that (eg) shareholders can be assured annually that management is doing the right thing - when they're seeking a pay rise. They must be required to be out there in the organisation publicly talking up the system and leaving no one in any doubt that the job a whistleblower does is valued and respected. They must take a public stand for the organisation, if this system is to succeed. It is the only way a culture of integrity can be developed and sustained: by routinely and publicly acknowledging, thanking and even promoting whistleblowers for coming forward - whether or not their disclosure is substantiated.

If at the end of any financial year the organisation's public record on their website shows that it has met its challenges with integrity and objectivity, it would be a testament to the organisation's culture - because it would be based on how it had *actually* handled wrongdoing. It should be able to be advanced in support of promotion by a manager or a whistleblower.

External watchdogs to deter bad behaviour

Then, to complete the loop - external watchdogs must not be able to refer disclosures back to the organisation's *management* for its investigation as is presently the case. They should be required to deal directly and *only* with the organisation's 'independent' investigative officer. They should not be able to refer a disclosure back at all, if that disclosure concerns executive and senior management wrongdoing for the obvious reasons. It avoids the very natural tendency to unconsciously trust in those you may know or can relate to professionally and it avoids a 'them and us' attitude. It reinforces true objectivity.

External watchdogs should be able to refuse to investigate a disclosure, which has already been investigated internally but only if it can publicly endorse the *facts, findings and recommendations* made by the organisation's independent investigator – both reports being posted on the organisation's website. For far too long, external watchdogs have naively trusted in self regulation, in secret.

Control executive power, not just whistleblowers

These changes would not alter current reporting pathways, which require internal disclosure - but I think the argument for change is there. I understand the practical benefits of internal disclosure but it hasn't been a resounding success, because the existing system is principally directed at keeping the power and control firmly in the hands of management - and it is failing, because all too often that is the problem. On the evidence over more than 20 years it's been management that needs boundaries, not whistleblowers. It's management that needs to be controlled, to deter it from turning a blind eye and or colluding to cover up, even foster wrongdoing. It has undermined the act's purpose, doesn't produce better outcomes and too many disclosures are conveniently disposed of as statistics. It is misguided, unwarranted and counterproductive and it will ensure failure in the private sector if executive power is allowed to continue, unchecked.

Allow public exposure, reward internal disclosure

The better approach is to legislative to allow a whistleblower to go the media, a politician or other third party *at the outset*, but at a policy level encourage even reward internal disclosure as a first step. It would be a powerful practical deterrent to management bad behaviour - but if it did occur, management *would not be able to cry foul* and the wrongdoing not the whistleblower would be the focus - which is as it should be. It would make management much more wary of taking a wrong step, knowing they couldn't control when it might all come out. It would narrow the window of opportunity for reprisals. And most whistleblowers would continue to use internal pathways, perhaps in greater numbers than they have to date. Why? In most cases it would be more likely to achieve the direct, *local reckoning* that whistleblowers have always preferred, and because the media has always been and will always be, choosy in what they want to pursue. In my experience small issues aren't usually their thing, unless it has grown into something very much bigger and juicy because of a cover-up with the usual blatant reprisals. Of course, some seriously bad behaviour will always make the news, but it would be sooner rather than later and limit the collateral damage - to all concerned - and that would be a good thing.

The great majority of 'principal officers' or executive and senior managers do, do the right thing and would not be inconvenienced or troubled by these changes. I think they'd welcome them.

A more even handed, open approach

I understand these measures may seem severe even draconian to some, but it happens often enough to warrant a more even handed legislative and policy approach that assumes - not only that would be whistleblowers make vexatious claims - but that some managers do incompetently and corruptly collude to cover-up wrongdoing and get rid of the whistleblower - because that's the evidence, since the 1990s (see eg. the four (4) examples below).

At the heart of these changes lies an absolute need for transparency and accountability - in real time - not years later, after the media has got involved and the appetite for putting things to rights has dwindled into testy resentment, which is a real gift for the wrongdoers who scramble to call in favours from their mates.

A different social contract

Any idea that employers are able to keep a whistleblower safe so long as everything is kept under wraps has well and truly had its day. It's only ever helped wrongdoers, their cronies and those they can co-opt to do their dirty work in secret. People trade secrets for self gain: everything from popularity, notoriety and coercion through to criminal gain, so the failed 'confidentiality' systems like those propped up by section 20, need to go. They have only ever isolated whistleblowers from the support they need and should have. Instead we need employers and systems to openly respect and support whistleblowers and the work they do, so that everyone knows from the top down what is required of them and what won't be tolerated. We need to develop a different social contract, one that publicly rewards good behaviour and deters bad.

No wrong way to blow the whistle

We'll start to get good decisions right across the board once managers appreciate that if they put a foot wrong they can be assured there will be real consequences and that everyone will know. For too long, our legislators have been fiddling away at the edges thinking the PID system is not working as well as it might because the whistleblowers are going about it the 'wrong' way. Enough, I say. There is no wrong way to make a public interest disclosure, if you want integrity to be the norm - but if we continue to ignore the elephant in the room, we'll rue the day when our country is rated up there with the very worst. This is not something that the market can fix either, without the right laws and regulations being in place first.

The elephant in the room

The evidence for these changes is there for you to see in the many stories that just keep coming. Note Printing Australia, Securrency, the RBA, the four big banks, IOOF, NBN co, the NSW RSL, St Vincents Hospital, Myers, Origin Energy, Appco, the HSU, the CFMEU, 7-Eleven, Dominos, Myers, St Vincents Hospital and the billion dollar VET-FEE-HELP scandals - and that's just those that come to mind.

It's now nearly 25 years since we began this journey. The stories are all the same and so are the reasons for failure.

In the early 1990s Lesley Pinson, auditor took her claims of serious, systemic and top down fraud in the NSW State Rail Authority (SRA) to her senior management. They gave her a hard time, chose not to investigate, covered it up and pushed her out. The ICAC didn't want to know, so she went to the media, Brian Langton MP and auditor-general Tony Harris who decided to investigate. His report was the catalyst for the break-up of the SRA into four separate entities. Barry O'Keefe OC, the ICAC commissioner famously told ABC radio he'd always known the SRA was corrupt - pity he'd decided not to investigate on the SRA's say so!

<https://www.newspapers.com/newspage/121353674/.html>

In the mid 90s a whistleblower who worked for the government funded Australian Disability Enterprises (ADE) took her concerns that their intellectually disabled workers were being underpaid to the management. She thought they would want to fix it. They didn't. They gave her a very hard time. She was pushed out. She asked lawyers Maurice Blackburn to take it on. They did, and won. Then the lawyers filed a class action for the ten thousand disabled workers who work for ADE across the country.

They won in excess of \$100 million - just before Christmas last year - and twenty years on the government is still squabbling about how to calculate a disabled worker's wage. <http://www.abc.net.au/news/2016-12-16/class-action-settlement-intellectual-disability-workers-approved/8126860?pfmredir=sm>

In 2005 Brian Hood, former company secretary of the Reserve Bank of Australia (RBA) owned subsidiary Note Printing Australia made an internal disclosure to his management. He thought they'd want to fix it. The RBA didn't either. He was pushed out. He is 'still waiting to testify in the Australian-first case he helped launch - a prosecution of two companies and their former executives for bribing foreign officials'. The RBA agreed to pay a penalty of more than twenty million dollars under the Proceeds of Crime Act. He is unemployed. <http://www.smh.com.au/national/should-australian-whistleblowers-earn-multimillion-dollar-bounties-20161222-gtgz7e.html>

In 2008 Jeff Morris, Commonwealth Bank (CBA) whistleblower took his claims of fraud to management, thinking they would want to fix it up. They didn't. The ASIC didn't either. He was forced out. Jeff went to the media, persuaded the Senate Economics Committee to take a look and six years on the CBA is still very publicly, trying not to do the right thing. He is unemployed. www.afr.com/.../the-man-who-blew-the-whistle-on-cba-20140627-je1m.html

There is a pattern here and it is plain for all to see. 1992 - 2016. Internal disclosure, cover-up, reprisals, the watchdog defers to the management's assessment, the media sees the evidence for what it is, delves a bit deeper, runs the story, another watchdog takes up the cudgels, a politician gets involved and so it goes. The fault doesn't lie with what whistleblowers do. It never has.

Ask yourself, what do you want?

I can't see any of you thinking that systemic theft, fraud, bribery, reprisals, cover-up, even rank incompetence is all okay, so long as no one ever knows. You might wince, wishing it had all been achieved quietly in-house, but you've got to ask yourself what you want. If calling the shots, not being embarrassed, your legacy and not being put on the spot, is more important than putting a stop to the fraud and corruption - then we've all got a problem. If you're defensively thinking, but management isn't always corrupt, you'd be right - but sometimes it is and it seems on the available evidence, reasonably often - and that is what the current system doesn't recognise or deal with. It should and it must.

Brian Hood and Jeff Morris, like Lesley Pinson and the ADE whistleblower before them have lost their livelihood - and future. And while many applaud them for having done the right thing, no one will employ them. In my observation it's because they know they can't be trusted *not to* blow the whistle on them! They'd be right. Both men have demonstrated they know what doing the right thing actually means - in practice. I'll give you just one example of this sort of thinking (refer DPP v Murray Kear, NSW 16/3/2016). In his evidence former SES commissioner Murray Kear said something like he could no longer have deputy commissioner Tara McCarthy on his team because he couldn't trust her - because she wouldn't accept his decision to cover it up! That is, he was saying he could not trust her to cover his back if

he covered something up. This has got to change. It would – if all those who won't employ Brian or Jeff, were operating in a society that publicly puts a premium on good behaviour, on fearlessly getting in there and putting things to rights – they'd want someone like Brian and Jeff. I know of only one instance in nearly 25 years where a CEO knowingly, *took on* a whistleblower because he had demonstrated he had the personal integrity and competence that she wanted in an employee. I rang her. If it says something about the CEO, then you'd be right – she was willing to walk the talk! So if any of my readers instinctively want to identify with her, stay with that thought - and run with it.

Whistleblowing - only ever in the public interest

Finally, it is hard to comprehend how the federal PID process could have been conceived in the way it has, without anyone actually understanding what whistleblowing *is* - other than to ask some time down the track whether all those personal grievances we have been getting should be protected (Ombudsman's report 2016) - because a whistleblowing disclosure is not the same as a workplace claim or grievance and with one exception should not be protected. I had thought the calls, I was getting were the exception, but it turns out it is widespread. It is absolutely essential to bring sections 8, 25 and 26 of the PID act into line with the publicly understood reasons for its being.

It is a case of failed thinking and application. The PID act refers to 'public interest' disclosures at every turn, starting with section 6 which, significantly, deals with the act's objects or purpose - but it doesn't tell you anywhere what makes a disclosure, a '*public interest*' disclosure. Sections 25 and 26 should define it as a disclosure made by an officer *in or on behalf of the public interest* – but all it does is define 'a' disclosure as a disclosure made by a 'public' officer - which rather leaves the word 'interest', hanging out there in the breeze. It's little wonder that so many of our public agencies are in complete disarray with so many of the handlers and the claimants, identifying them as whistleblowers when in fact, they are not (whistleblowers).

A whistleblower makes a public interest disclosure or claim *for and on behalf of* the injured party – which party is the state, the agency, corporation or internal department however it is characterised on its facts. The whistleblower is legally a relator like a Director of Public Prosecutions or a US style 'false claims' litigant - whereas an employee makes a workplace claim or grievance on his or her *own* behalf for an injury they have personally suffered. A whistleblower has no personal interest in a claim's outcome, unless they are also one of a class of persons like the Myers' cleaner and whistleblower or implicated in the wrongdoing like former HSU officer, Kathy Jackson. Note a whistleblower's claim for injury or loss suffered for making a PID is a personal claim or grievance and the only one that should be protected.

It is absolutely essential that this failure is addressed legislatively, in policy and most importantly in the field, now.

b. the most effective ways of integrating whistleblower protection requirements for the corporate, public and not-for-profit sectors into Commonwealth law;

At a general level, legislators need to amend the PID act by reference to the failures I've identified above, before adapting its operation to include the

corporate, public and not-for-profit sectors, their volunteers and a US style false claims act to provide for a fully comprehensive PID act. (Refer also to our (2) submissions to the 2016 review of the PID act and (i) below in relation to the terms of reference arising out of that review.)

Those failures require changes to:

- limit the role and function of executive officers ('principal officer', sections 73 and 77) to deny them a role in making the decision to investigate a disclosure or not and or to protect a discloser;
- ensure that only the officer with responsibility for investigating the disclosure (the investigator) is able to decide whether or not to investigate a disclosure;
- ensure that only the officer with responsibility for the safety and protection of whistleblowers (the 'protector') is able to make decisions so to do;
- ensure that investigators and protectors are legally independent of their employer in their work;
- amend sections 8, 25 and 26 to define a 'public interest disclosure' as a disclosure made *in or on the behalf of* the public interest;
- deny protection for personal grievances other than those that disclose a reprisal for making a public interest disclosure;
- ensure that all employees understand what distinguishes a public interest disclosure from a personal grievance;
- develop and implement a new social contract to keep whistleblowers safe, anchored in top down transparency and accountability;
- provide for criminal and civil offences for failing to support a whistleblower and or whistleblowing whether by action or inaction;
- ensure that external watchdogs publish their reasons for adopting another organisation's decision and reasons not to investigate;
- provide for disclosures to be made externally to third parties including investigative bodies, media and politicians *at the will* of the whistleblower without limitation or penalty – but continue to encourage internal disclosures at a policy level on the ground and
- extend the external investigative bodies available under the present act to include: the Australian Securities Investment Commission, the Australian Competition and Consumer Commission, National Crime Authority, Australian Federal Police and the Australian Charities and Not for Profit Commission – in addition to the Ombudsman and IGIS which are currently available.

Public interest disclosure agency or PIDA

Establish a public interest disclosure agency or PIDA to register, publicly promote, protect and support whistleblowers and whistleblowing across all sectors. It would (eg) be able to seek injunctive relief for whistleblowers, prosecute claims of reprisal and seek penalties for the failure of management to support whistleblowers and whistleblowing.

Establish a '**false claims' division** within the PIDA to register and monitor false claims actions and receive, assess and resolve claims for compensation under a false claims scheme – that is, a PIDA could become largely self funding.

It must have a strongly preventative, educative function online, on the ground and in real time that fosters public knowledge and awareness, by gathering

data [eg., about the number of whistleblowers and wrongdoers promoted, sacked, demoted or forced out sick under cover of workers compensation claims, bogus re-structures and confidential agreements and the related costs, false claims], conducting research and driving reform via parliament and regular public review.

Whistleblowers Australia has been calling for a PIDA like body for nearly 25 years.

c. compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America;

The compensation arrangements provided by US whistleblower protection laws and our PID and FWA, rely on claims for personal loss and injury sustained by the whistleblower as distinct from the US 'bounty' system, which compensates the whistleblower for the *litigation risk* (of losing) an action s/he takes on as a relator on behalf of the state. This distinction should remain.

I understand that the US federal false claims act allows a whistleblower to file a claim on behalf of the state in a court of superior jurisdiction, for *treble* the amount alleged to have been defrauded (the 'false claim'). The claim remains sealed for 60 days to allow the state time to decide whether or not to take it over. If it does, it reduces the amount a whistleblower may claim to between 15-20% of the court award. If the state decides not to be involved, the whistleblower may claim up to 30% of the court award, the award being the property of the state. Reinstatement and compensation for loss due to (eg) unlawful termination, loss of livelihood, superannuation is able to be claimed under the protection laws, which laws are analogous to the FWA and PID acts.

False claims scheme

I envisage a scheme that allows a whistleblower to file a 'sealed' claim on behalf of the Commonwealth in the Federal Court, to be served on the solicitors acting for the Commonwealth: the Commonwealth to have 60 days to decide whether or not to take it over. I understand the Australian Government Solicitor's Office (AGS) is the government's solicitor, but wonder whether the ACCC or the ASIC might be better placed to provide that advice and litigate, if that is the decision? But whoever it might be, it *can't* also act for the whistleblower in his or her claim for compensation without compromising one or the other, which is why there must be a separate PIDA to protect a whistleblower's statutory interests.

The temptation here is to want to rebuild the wheel, which would delay the drafting and implementation of a false claims scheme unnecessarily, when the US federal law in its current form has been in operation since at least the late '80s and has allowed the state to recoup billions in false claims. So I strongly urge you to resist the temptation and adapt proven laws to our jurisdiction as simply as possible with a full review to be undertaken in no more than a year from the date it takes effect.

New penalties and compensatory measures for whistleblowers should apply under the FWA and PID act as appropriate for failing to support a whistleblower and or the PID system including: (eg) not publishing PID decisions and reports on the website and in real time; de-funding and or stopping an investigation; disrupting, misleading and deceiving an

investigation; not punishing wrongdoers; promoting wrongdoers, not promoting whistleblowers and concealing, covering up wrongdoing including reprisals by (eg) coercing others into confidential financial agreements to keep the facts and their involvement hidden.

Public interest defence

The defences available under section 23 of the act should apply only to those who make disclosures *in or on behalf of* the public interest and not as is the case, to a *public* officer who makes a disclosure - because that is not necessarily whistleblowing - it may be a personal grievance not deserving of protection. It should be developed as a 'public interest defence' for general application across all areas of civil, administrative and criminal liability and specifically to address (eg) claims of stealing or theft of documents or information and the unauthorised disclosure of information under (eg) section 70 of the Crimes Act and the Australian Border Force Protection (Cth) Act 2015.

It should be based only on proving on the facts that the claim was brought for and on behalf of the public - and not on his or her behalf - unless s/he is also one of a class of whistleblowers or implicated in the wrongdoing. The public being the state, the agency, organisation, corporation or department however it is characterised on the facts. The severity and significance of the wrongdoing disclosed by the whistleblower is not and should not be relevant to the question of whether or not the claim is a public interest disclosure and deserving of protection.

d. the definition of detrimental action and reprisal, and the interaction between and, if necessary, separation of criminal and civil liability;

There are some problems with section 13, which defines taking a reprisal. It is predicated on a person taking a reprisal in circumstances where he or she '*believes or suspects*' that a person '*made, may have made or proposes to make a public interest disclosure*' and that that '*is the reason, or part of the reason*' for taking the reprisal.

This description should capture all categories of persons who might take reprisals, but it doesn't. It fits the wrongdoer, the person with his fingers in the till, his helper, his mate and or subordinates who have been coerced into it for one reason or another - but their ability to inflict the harm set out under section 13(2) is rather limited - unless he or she is or has the ear of or was acting for a person in a sufficiently senior position with the requisite authority. The trouble is section 13 (1)(b) completely leaves the person or employer, who 'would' or 'should' know - out of the picture and off the hook.

This test should be abandoned or changed to include those who '*know or should know*' because ordinarily it's the employer who inflicts the sort of harm section 13(2) deals with: that is, dismiss an employee, injure an employee in his or her employment, alter an employee's position to his or her detriment or discriminate between the alleged discloser and the other employees. And even if a whistleblower was disposed to sue an individual, s/he would undoubtedly sue his or her employer as well.

I don't pretend to know what the answer is, but the definition also needs to be internally consistent with other sections like 19(2), which indicates that in a criminal prosecution it is not necessary to prove that the other person made,

may have made or intended to make a public interest disclosure. In other words the employer knows and or accepts that it was made.

The NSW equivalent also accepts that the employer knows: it only requires evidence to be adduced to suggest a PID was made, before requiring the respondent employer to prove beyond a reasonable doubt that the PID was not **'the'** reason for causing detriment. It is not without its problems, so you might like to consider the decision handed down on 16/3/16 in the DPP v Murray Kear.

Murray Kear needed only to prove 'on balance' that there were many reasons for wanting to sack the whistleblower to avoid a conviction. The evidence at trial was that he made much of any conflict even when there was none - and none at all *before* the whistleblower made a disclosure - so as to justify her termination. The court found he had discharged the burden on balance because he had many reasons. On my analysis if he had been required to prove beyond reasonable doubt that her making a PID was *not* **'one'** of the many reasons why he had sacked her - rather than **'the'** reason then, based on the evidence reported in the decision it would have gone against him. It would address what actually happens - employers deploy a series of bogus performance reviews after the disclosure is made to cover their tracks.

Finally, to section 13(3), which states that 'a person does not take a reprisal against another person to the extent that the person takes administrative action that is reasonable to protect the other person from detriment'. It is outrageous. It says it is okay to forcibly relocate a whistleblower against their will, rather than remove the person who they must 'know' is causing the detriment. Section 13(3) is heaven sent for the employer who wants to clothe their actions in false concern and a respectability they don't deserve. It is clearly wrong headed. It has to go.

And even if section 13(3) mistakenly exists to address the sort of circumstances that usually surround personal grievances (eg) where a woman complains about her boss continually ridiculing and harassing her in front of her peers and reducing her to tears - it is still wrong to move the woman *against her will* and particularly so when, as section 13(3) indicates you already know he is bullying her. It's the bully who should be removed! It's the employer who is corrupt.

Generally, we must stop providing managers with the means to explain and justify the unjustifiable and instead, find ways to reward good behaviour and punish the bad.

There needs to be both an administrative and criminal offence. The prospect of being prosecuted administratively and criminally may see employers making more pragmatic choices: for example preferring to force an executive buddy to own up and cop it sweet 'administratively' and fix the problem, rather than going that next step and becoming part of a cover-up. And if the employer could never be sure when a whistleblower might go public, we'd see a lot more of it.

Then there's another issue. The person taking the reprisal can obviously be the person who the whistleblower alleged was (eg) running a private contract cleaning business from their day job. Or he or she could just as easily be the bullying, harassing boss whose bullying is the only catalyst for a personal grievance - because of the confusion caused by the definition in sections 25

and 26, which definition allows for both types of disclosure to form the basis for a complaint under sections 13-19. This is another reason for sections 8, 25 and 26 to be changed in line with the recommendations made under item (a) above.

In summary, we recommend that section 13 be amended to unambiguously apply, *only* to a disclosure made by a person *in or on behalf of the public interest*. Amend or remove the test in section 13 (1) (b) and remove section 13(3). Amend section 19 in line with section 23 to require the whistleblower to adduce evidence to suggest a reasonable possibility of having made a PID, and require the respondent employer to prove beyond a reasonable doubt that the alleged reprisal was not 'one' of the reasons it relied upon in causing the alleged detriment. Provide for an administrative offence with a civil burden of proof, with penalties, including (eg) termination, demotion, retention (conditional on performance) and or financial penalties to apply.

e. the obligations on corporate, not-for-profit and public sector organisations to prepare, publish and apply procedures to support and protect persons who make or may make disclosures, and their liability if they fail to do so or fail to ensure the procedures are followed;

The obligations should be the same across all sectors by reference initially to what already applies in the public sector. Compliance should be part of the relevant registration process. Full information about the policies, procedures, disclosures, investigations and legal and administrative outcomes should be required to be published on websites internally and externally in real time and annually a full report should be made available to their shareholders, boards and stakeholders as appropriate for their consideration and action.

Many of the large corporations already have whistleblower policies, procedures and hotlines so it will not be a huge task or cost to adapt their systems to comply with fresh legislative requirements. The businesses that have no system in place should be encouraged to consider the alternatives, being everything from a booklet, dedicated in-house staff, to acquiring one of the commercially available whistleblower hotline packages or hiring a private solicitor ad hoc to handle whistleblowing disclosures.

The Ombudsman and or ASIC should provide contacts for advice and information and templates for large and small businesses on the internet, which could be downloaded and tailored to their individual needs. For example, a very small organisation might make its procedures available internally as a bundle of documents or as a softcopy on their intranet or website.

The policies and requirements put in place should push corporate, NFP, registered unions and associations and public organisations to make real time transparency and accountability a key feature of their day to day whistleblowing operation and standards. Standards that should make it their business, to publicly get behind their whistleblowers and whistleblowing in any way possible.

The PIDA that we propose should oversee these standards and requirements.

f. the obligations on independent regulatory and law enforcement agencies to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures;

The same conflicts of interest and bad behaviours as occur in public sector agencies are occurring in external regulatory and enforcement agencies, so the same principles and arrangements as are laid out under item (a) above should apply.

The PIDA we recommend would establish the benchmarks to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures and monitor them.

g. the circumstances in which public interest disclosures to third parties or the media should attract protection;

I want you to go back over the four cases I have set out above under item (a) and ask yourself whether or not you think the whistleblower in each case made their disclosure *in and on behalf of the public interest*. Lesley Pinson did a very good job – a job that many were obliged to do, but didn't. It's a legacy that all NSW can enjoy. The ADE whistleblower did a very good job for some of our most vulnerable people, now and into the future. Brian Hood didn't try to get his company to stop bribing potential clients for his own benefit. Jeff Morris didn't try to get his bank to stop defrauding its customers for his own good. He was acting on behalf of the banks better *angels*, the bank we all need, like, to believe in – but can't!

Each of them did a good job and a job worth doing!

I think we have to ask ourselves whether we would rather have an executive turn a blind eye to wrongdoing than the sort of public condemnation that the banks (eg) have had to, endure. And whether we'd rather accept that in *going public*, the whistleblowers did what had to be done – because that is what the evidence tells us. If some executives are left red faced and in a funk about their legacy, then that's as it should be – because on what we know, it was never going to be anything but carry on as usual for (eg) the banks without a powerful, very public push from their largest customer - the public.

You might still be clinging to the idea that it might just work, if we require the whistleblowers to do something or other, even though every story in the media over the last 20 years is telling you something different. And maybe you still want the job to be done internally, but you can't and won't get that result, without accepting that some managers routinely game the system - and we need to do something about that. They know that every delay the act provides gives them the time and the opportunity to close it down. They make sure the process fosters fear and anxiety, to herd them into making internal disclosures even when they are scared witless because it's the boss who has his finger in the till.

We need you to understand that by allowing whistleblowers to go to the media or other third parties at *anytime without limitation* in the knowledge that *they have our support* - will mean that managers make better decisions, even when they are implicated in the wrongdoing.

Let me try to explain. If whistleblowers don't have to wait, the executives and managers will realise that delay and other bad behaviours will just make it so much worse if, no when it all comes out. Yes, most whistleblowers will still prefer to make internal disclosures for a whole lot of reasons, but those dodgy few managers will do a proper job because they'll never be sure when it might all be splashed over the media. And if that happens, that they

wouldn't be able to cry foul and the fraud and corruption will be centre stage – not the whistleblower - which is how it should be.

The other part of deterring bad behaviour is to allow a whistleblower to rely on a statutory 'public interest defence' to avoid civil and criminal liability and to claim compensation for the loss and injury due to the risk to life and limb in getting the job done - for us.

h. any other matters relating to the enhancement of protections and the type and availability of remedies for whistleblowers in the corporate, not-for-profit and public sectors; and

I have indicated elsewhere that the protections under the act should apply to the volunteers that work in all areas but mostly in the public, charitable and not for profit sectors. It's an obvious step given many of the volunteers work in a regular way and sometimes over many years and they can hold reasonably senior positions which enable them to have as good a grasp on the goings on as any employee who becomes aware of wrongdoing and wants to do something about it. They are particularly vulnerable given their status and need to be protected to give their sector the very best of opportunities to prosper.

i. any related matters.

I understand the committee is to consider and report on a preferred model for legislation to protect whistleblowing within the Australian Government public sector and that the revised terms of reference issued recently will frame its response.

The terms of reference are worrying. If the legislature confines itself to fiddling away at the edges as it seems it might, it will be a waste of time. For example, you will achieve very little by focussing on identifying and punishing those who don't comply in some way, like those who air disagreements about policy or want to embarrass the executives or complain for personal benefit.

I don't know of any vexatious complaints although I do know of whistleblowers who were delighted to embarrass their old boss when good evidence of fraud allowed poor policy and a failure to regulate to be exposed. The recent rash of claims of fraud in the VET-FEE-HELP industry is a good example of how allegations of fraud and opinions may become inextricably linked. The only way forward is to separate alleged fact from opinion and work out whether and if so how, those facts can be proved before embarking upon an investigation. Delight, even malice is human but not wrong and there's nothing to be gained here, by trying to impose a type of lickspittle subservience.

I don't know of any statistics or research on the incidence of vexatious complaints, but if the committee considers this issue warrants further attention then it should publicly disclose any research it holds or has access to that demonstrates that there is a problem that warrants further punitive measures, other than those that already exist. Far too much time, energy and money is being spent trying to find ways to make protection conditional on compliance with the rules and when, you might reasonably punish them for not getting it right. It is counterproductive and contrary to the act's objectives. Instead the legislature needs to take a more even handed

approach, that recognises that too many executives and senior managers game the system, closing down any challenge to their authority and legacy.

Thank you, for this opportunity.

Yours faithfully,

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