

Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Honourable Senators,

### **Terms of Reference**

That the following matters be referred to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report by 30 June 2017:

- 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;
- b. the types of wrongdoing to which a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors should apply;
- c. the most effective ways of integrating whistleblower protection requirements for the corporate, public and not-for-profit sectors into Commonwealth law;
- d. compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America;
- e. measures needed to ensure effective access to justice, including legal services, for persons who make or may make disclosures and require access to protection as a whistleblower;
- f. the definition of detrimental action and reprisal, and the interaction between and, if necessary, separation of criminal and civil liability;
- g. 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;
- h. the obligations on independent regulatory and law enforcement agencies to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures;

- i. the circumstances in which public interest disclosures to third parties or the media should attract protection;
- j. 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
- k. any related matters.

A whistleblower is anyone who discloses corruption, fraud, conflicts of interest or criminal activity to a person who is adversely affected by the activity or a person who represents, acts or has a duty of care to or for such a person or, a to the media if such persons fail to act reasonably or within a reasonable time.

Unfortunately those in government will always define a whistleblower more narrowly to protect themselves.

It has been well said that the opposition (party) loves whistleblowers but those in government hate whistleblowers. The reason is that any corruption or immorality disclosed is likely to be that of the government or a government department. Any disclosure will be manna for the opposition but a plague for the government. Thus it stands to reason that the government will always be loath to enact adequate, or any, whistleblower protection except for whistleblowing that protects or advances the interests of those in government.

Legislation passed by those in government will always curtail the legitimate actions, reduce the protections, and increase penalties for whistleblowers who disclose the inappropriate actions of the government or government departments (including the public service).

On the other hand disclosures not about the government will be rewarded. For example, crime stoppers disclosures, disclosures to the tax department, and in some countries fraud against the government is highly rewarded with some payments in the millions of dollars. The False Claims legislation in the US is an example.

Whilst these disclosures in the interests of the government are of great benefit, the sheer hypocrisy of those in government has to be pointed out. Only

disclosures to the benefit of those in government are rewarded or protected. Disclosures against the government or government departments are not protected or actively punished.

Disclosures are often referred back to the organisation in question. Or the investigator is paid by the organisation. It stands to reason that any serious investigation will find the disclosure 'unsubstantiated'. The banking ombudsman is paid for by the banks. No serious complaint will ever be substantiated. It has to be admitted that the banking ombudsman is useful if the bank loses a clients cheque, but that is the limit.

A possible answer:

1. Full protection of those who disclose against the government could be rolled in over time. This would allow time for behaviour and normative beliefs to change.
2. Disclosure should be to a nominated person outside the organisation and legally independent.
3. If disclosure is made to an inappropriate person that person must be obliged to pass the disclosure to the appropriate person and keep the disclosure confidential. This will avoid the gambit of ambiguously defining the authorised person and using this as a procedural defence.
4. Retaliation against the discloser should be a punishable offence and conviction.
5. Appropriate disclosure should be a protection and defence against a suit for deformation.
6. Making a demonstrably false disclosure should also be an offence.
7. Inaction for an unreasonable time (say 3 months) or lack of reasonable progress should allow the disclosure to be made to the press.
8. The Human Resources Department (HR) is paid by the organisation and has a duty to 'get rid of the trouble maker' when that is desired by the organisation. HR cannot be relied on to support whistleblowing or a person who has made a disclosure.
9. If a False Claims type disclosure is introduced part of the income could be used to budget an independent investigative and supportive organisation.

Dr Michael Cole LRCP, MRCS, FRACP.

Retired Paediatrician and current final year law student.