Queensland
Integrity Commissioner

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Mr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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By email: corporations.joint@aph.gov.au

Dear Mr Hodder

I refer to your letter dated 9 January 2017, inviting me to give evidence to the Parliamentary Joint Committee at its hearing in Brisbane on 23 February 2017.

This submission is intended to provide a general indication of my views on the subject of the committee's inquiry, and I have set out my comments under each of its terms of reference.

I note at the outset that I have no direct involvement in the operation of any whistleblower scheme in my present role, and my operational experience principally relates to the public sector scheme in South Australia, where I held the position of Ombudsman for the period 2009-14.

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;*

In my view, a robust whistleblower protection scheme is an integral part of any integrity system, and it is highly desirable that a scheme or schemes should operate in the Australian corporate, public and not-for-profit sectors.

In general, I endorse the approach outlined in the *Whistling While They Work* project (**the WWTW project**),[1] and the best practice operational model outlined in the resources stemming from that project, notably *Whistling While They Work: A good practice guide*

[1] See http://www.whistlingwhiletheywork.edu.au/, retrieved on 10 January 2017.

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for managing internal reporting of wrongdoing in public sector organisations.[2] I see no reason why that approach should not also apply to the corporate and non-government sectors.

I endorse especially the 'if in doubt, report' philosophy underpinning the WWTW project model.

I note that the model also reflects the philosophy 'that organisations must accept their obligations to take reports seriously, respond appropriately and professionally (even if the outcome is no action), and support and protect persons who come forward with reports of wrongdoing'.[3] I note also that the supporting research revealed that 'this was the element with which most organisations continue to struggle'.

As a consequence I suggest one limited qualification to the model, which reflects my view about the 'continuing struggle' which organisations have in responding appropriately to public interest disclosures. It also reflects the need for certainty regarding the question of when a disclosure should amount to a public interest disclosure.

Whilst I endorse the element of the WWTW project which suggests that there should be multiple avenues available for reporting,[4] it is my view that ultimate responsibility for determining what is a public interest disclosure should rest with an independent decision-maker, which has expertise in the determination of the public interest.

In my experience, this decision is a critical point in the process of managing disclosures, and the conflicting interests of whistleblowers and organisations mean that differences of opinion will often arise. An independent body should provide at least an avenue of appeal to resolve them.

Currently, in the public sector context it is common for responsibility for the receipt of disclosures to be dispersed amongst agencies such as an Anti-Corruption or Integrity Commission, the Ombudsman, the Commissioner of Police and the public body to which the disclosure relates.[5]

In my experience, such arrangements mean that non-central agencies have difficulty developing expertise in handling disclosures. Such a decentralised system can be inefficient, can discourage the making of disclosures and can act as a practical impediment to the good operation of whistleblower protection.

In the public sector context, it is usually the case that a central integrity body (an ICAC, Integrity Commission or Ombudsman) has relevant triage, investigative and education

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[2] Peter Roberts, A.J. Brown and Jane Olsen, *Whistling While They Work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations*, ANU E Press, 2011. Available at http://www.whistlingwhiletheywork.edu.au/?page_id=13

[3] Roberts, Brown and Olsen, p12.

[4] Roberts, Brown and Olsen, p37.

[5] See, for example, Chapters 2 and 3 of the *Public Interest Disclosures Act 2010* (Qld.), s.5(4) of the *Whistleblowers Protection Act 1993* (SA), and s.7 of the *Public Interest Disclosures Act 2002* (Tas.).

functions, and it appears to me that such a body is the obvious one to assume a broader responsibility for determining what are public interest disclosures.

I appreciate that a similar centralised structure is likely to require modification in its application to the corporate and non-government sectors. However, I think it is important that an external assessment should be available to consider the situation in which an organisation initially determines that a disclosure does not meet the criteria for protection.

In all sectors, the external assessment should be undertaken by an independent body which is at arms-length from the organisation to which the disclosure relates. I note that under the *Fair Work (Registered Organisations) Act 2009*, protected disclosures will be made to officers of the Registered Organisations Commission or other regulatory agencies, not to the organisations to which the disclosure relates.[6]

b. *the types of wrongdoing to which a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors should apply;*

In my view, the range of available disclosures should cover all types of social, economic and environmental harm which have a public interest dimension. The introduction of complex definitional limitations can cause practical difficulties for both whistleblowers and organisations. It is better to err on the side of inclusion than to provide an opportunity for debate on whether wrongdoing of a particular type falls within a limited definition.

Further, it is my view that each scheme should require an early formal determination – subject to the 'appeal' process outlined above - as to whether a disclosure is to be treated as a public interest disclosure. Legislation which effectively leaves it as a matter for the subjective judgement of the whistleblower and/or the organisation as to whether a disclosure meets the criteria for protection results in confusion and disagreement.

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

Subject to the comments which I have made above about the need for an independent determination of what is a public interest disclosure, I believe that as a general rule whistleblower protection should be integrated with broader complaint-handling and human resource management obligations for all types of organisations.

It follows that in my view, separate whistleblower protection regimes should be integrated into the existing regulatory schemes for each sector.

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

[6] The offices to which a disclosure may be made are specified in s.337A(b).

I have no experience of compensation arrangements such as bounty systems, and I do not express a view on this policy question.

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;*

In my experience, public interest disclosures often are entangled with other human resource issues such as personal, employment or workplace grievances. It is necessary to strike a balance between on the one hand, the need for those who make public interest disclosures to have access to appropriate protections and services, including access to justice; and on the other, the need to ensure that people do not seek to categorise a matter as a public interest disclosure simply to obtain access to services which would not otherwise be available to them.

When the relevant body formally determines that a matter is a public interest disclosure, the whistleblower should be provided with all necessary supports, including legal services, as outlined in the WWTW project.[7]

Generally, the obligations of an organisation to ensure no detriment should commence from the time that a disclosure is made, rather than the date on which a formal determination is made that a disclosure is a public interest disclosure. In other words, there should be a presumption that a disclosure is a public interest disclosure unless and until a determination is made that this is not the case.

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

I am cautious about attempting to specify what amounts to detrimental action, since the provision would need to cover a very wide range of possible actions. I prefer a broader provision along the lines of s.40 of the *Public Interest Disclosures Act 2010* (Qld.) which is as follows:

> **40 - Reprisal and grounds for reprisal**
>
> (1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—
>
> (a) the other person or someone else has made, or intends to make, a public interest disclosure; or
>
> (b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.
>
> (2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.

[7] Roberts, Brown and Olsen, Part D, p73-99.

(3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.

(4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.

(5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.

I believe also that the Queensland Act provides a reasonable mix of remedies, covering civil liability – including vicarious liability – administrative review or appeal, relocation, injunctive relief, complaint under the *Anti-Discrimination Act 1991*, and some appropriate offence provisions.[8]

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;*

I acknowledge that it is good practice for organisations to adopt procedures to support and protect persons who make or may make disclosures, as outlined in the WWTW project.

Further, under the Queensland Act, 'reasonable procedures' are required to determine the process to be used to decide whether a disclosure should be protected. S.17 of the Queensland Act provides as follows:

17 - How disclosure to be made

(1) A person may make a disclosure to a proper authority in any way, including anonymously.

(2) However, if a proper authority has a reasonable procedure for making a public interest disclosure to the proper authority, the person must use the procedure.

(3) Despite subsection (2), if the proper authority is a public sector entity, the person may make the disclosure to—

(a) its chief executive officer; or
(b) for a public sector entity that is a department—the Minister responsible for its administration; or
(c) if the proper authority that is a public sector entity has a governing body—a member of its governing body; or
(d) if the person is an officer of the entity—another person who, directly or indirectly, supervises or manages the person; or

[8] See ss.41-56, and ss.64-70.

(e) an officer of the entity who has the function of receiving or taking action on the type of information being disclosed.

However, if the model which I have suggested above is adopted, there is not the same need for obligations to be imposed on corporate, not-for-profit and public sector organisations for this purpose. This is because the assessment of whether a disclosure is a public interest disclosure is the ultimate responsibility of an independent decision-maker.

I am conscious that insisting on such procedures may impose a significant compliance burden on, for example, small NGOs when the likely incidence of whistleblower disclosures is unlikely to warrant them.

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

If the model which I have suggested above is adopted, there will need to be a direct obligation on the identified decision-maker to deal with 'appeals' about whether a disclosure is a public interest disclosure.

In my view it is also helpful to provide a single oversight body which acts as a source of advice and good practice to other players in each sector. Under the Queensland Act, this role is described as an oversight agency, and the role is fulfilled by the Queensland Ombudsman.[9]

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

In my view, s. 20(1) of the *Public Interest Disclosures Act 2010* (Qld.) provides a reasonable answer to the question of when disclosure to a third party or the media is justified. It provides:

> (1) This section applies if—
>
> (a) a person has made a public interest disclosure under this chapter; and
>
> (b) the entity to which the disclosure was made or, if the disclosure was referred under section 31 or 34, the entity to which the disclosure was referred—
>
> (i) decided not to investigate or deal with the disclosure; or
>
> (ii) investigated the disclosure but did not recommend the taking of any action in relation to the disclosure; or
>
> (iii) did not notify the person, within 6 months after the date the disclosure was made, whether or not the disclosure was to be investigated or dealt with.

[9] See s. 58 of the *Public Interest Disclosures Act 2010* (Qld.). The main functions of the role are listed in s.59, and include monitoring the management of public interest disclosures, reviewing the way in which disclosures are handled, and providing education and advice.

Under the approach which I have suggested above, the provision would require modification such that the 'trigger point' is when a decision-maker has determined that a disclosure is a public interest disclosure. Subsequent disclosure to third parties or the media should attract protection if the organisation to which the disclosure relates has not dealt appropriately with the matter within a reasonable time from the determination, say 3 months.

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

I have no further comments on this issue.

k. any related matters.

There are no related matters which I wish to raise.

Please don't hesitate to contact me should you require any further comment.

Yours sincerely

Richard Bingham
QUEENSLAND INTEGRITY COMMISSIONER

17 January 2017