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# International Bar Association
# Anti-Corruption Committee

# Supplementary Submission on Whistleblower Protections Questions on Notice 24 April 2017

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**Supplementary Submission on Whistleblower Protections**
**Questions on Notice 11 April 2017**

## 1 Introduction

### 1.1 *International Bar Association*

(a) The International Bar Association (**IBA**) Anti-Corruption Committee (the **Committee**) made a submission dated 10 February 2017 (the **Submission**) to the Joint Parliamentary Committee on Corporations and Financial Services (the **Joint Parliamentary Committee**) in relation to its review of whistleblower protections in Australia in the corporate and not-for-profit sectors.

(b) On 11 April 2017, the Joint Parliamentary Committee sent the Committee a series of Questions on Notice which it requested a response by 24 April 2017.

(c) The Committee's response to the Questions on Notice are set out below which should be read together with the Submission.

## 2 Questions on Notice

### 2.1 *Corporate Sector*

(a) The Joint Parliamentary Committee asked for comment on "*which of the best practice criteria should be considered in any reforms for corporate sector whistleblower legislation in Australia*". Attached to the Questions on Notice was an extract of "best practice criteria for whistleblowing legislation" (the **Criteria**) from the *Breaking the Silence; Strength of Witnesses in G20 Whistleblower Protection Laws* Report published by Simon Wolfe and others (the **Breaking the Silence Report**).

(b) The Criteria covered 14 broad categories. This response does not propose to identify each and every criteria.

(c) In the Committee's opinion, all of the Criteria identified in the Breaking the Silence Report should, consistently with the recommendations in the Committee's Submission, be introduced into legislative whistleblower protection reforms for the corporate sector in Australia. The Breaking the Silence Report starkly demonstrates that in the corporate sector, Australia fails on almost every one of the Criteria with 5 criteria flagged as being "somewhat or partially comprehensive". All other criteria are flagged as "absent/not at all comprehensive".

(d) In relation to Criteria 13, which deals with oversight authority, the Breaking the Silence Report gives a description of the criteria as "oversight by an independent whistleblowing investigation/complaints authority or tribunal". Consistent with the Committee's Submission, the Committee is strongly of the opinion that a separate statutory office, to apply across all sectors should be created which not only operates to provide oversight in relation to any statutory and independent investigation of whistleblower complaints, but should, where

appropriate, be empowered by legislation to take action where there are examples of retaliation or reprisal against a whistleblower.

(e) That body, if it is to be an enforcement agency, should have either separately, or as part of it but operating separately, an independent officer who assesses any claims for compensation and/or rewards payable to a whistleblower, should a more robust compensation and reward scheme be included in part of any legislative reform in Australia.

(f) In the Committee's Submission, it reviewed recent amendments to the *Fair Work (Registered Organisations) Amendment Act 2016* (the **FWO Act**) (at section 5.2(d)). One feature that should be considered in any corporate and not-for-profit sector whistleblower protection reforms is whether exemplary damages should be recoverable by a whistleblower. The Committee repeats what it said in its Submission on this point. It may act as a useful development but is likely to be tempered by the fact that if a whistleblower is left to pursue complex private claims for exemplary damages against a well-resourced employer, such claims are traditionally hard to establish[1] and are, in the Committee's experience, unlikely to mean anything in practice to encourage disclosure of serious misconduct. In addition, the success of these reforms will have to deal with the existing common law approach that questions whether exemplary damages are permissible where a person has been sanctioned by the criminal law[2]. While a statutory cause of action might be said to arise, how it will be applied by the courts is yet to be seen.

(g) The Committee believes that if substantial legislative reform occurs in Australia, then it will apply and be applied by multi-national corporations even if those entities have a management structure and presence outside Australia yet operate and conduct business in Australia. It is the Committee's experience that such companies, operating globally and subject to a number of jurisdictions dealing with whistleblowers, generally adopt the highest legislative standards to which they are subjected to and they apply those standards across their business operations throughout the world. The Committee does not believe it would be productive to create separate legislative requirements to be imposed upon multi-national corporations.

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[1] At common law, aggravated damages and exemplary damages are usually difficult to establish. Aggravated damages fix upon the circumstances and manner of the wrongdoing of a defendant while exemplary damages are imposed as punishment and deterrent on the wrongdoer. Indeed, in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages (see *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 130; approved in *New South Wales v Ibbett* [2006] HCA 57; (2006) 231 ALR 485 at [38] to [48]).

[2] In *Gray v Motor Accidents Commission* [1998] HCA 70 at [42]; 196 CLR 1, the High Court said that "*the purposes for the awarding of exemplary damages have been wholly met if substantial punishment is exacted by the criminal law. The offender is punished; others are deterred. There is, then, no occasion for their award. Secondly, considerations of double punishment would otherwise arise*...."; applied in *Cheng v Farjudi* [2016] NSWCA 316 at [44] to [87] where the NSW Court of Appeal held, at [87] that the position in Australia is that exemplary damages may not be awarded where substantial criminal punishment has been imposed. However, the High Court in *Gray* did not preclude an award of exemplary damages where something other than substantial punishment was imposed, and in accordance with the authorities in this Court exemplary damages may be awarded in some circumstances notwithstanding that a criminal sanction has been imposed.

## 2.2 *Public Sector*

(a) The Committee believes, consistently with its Submission, that whistleblower legislation protections and an overall statutory regime should be consistent across all sectors in Australia, whether public, private or not-for-profit.

(b) In terms of the Criteria in the Breaking the Silence Report, the Committee believes that they should all apply. While there is some justification for some differences in how a public sector system operates where there are security, intelligence or other national critical issues that might justify a more stringent process of non-disclosure, in broad terms, a completely consistent approach should prevail.

(c) The Committee restates its views about the FWO Act, which are set out in its Submission.

(d) The Committee has reviewed the *Review of the Public Interest Disclosure Act* 2013 conducted by Mr Phillip Moss AM and published on 15 July 2016 (the **Moss Review**). The Moss Review found that there were two principal challenges to the statutory regime under the *Public Interest Disclosure Act* 2013 (Cth) (the **PIDA**) as it applied to the Commonwealth public sector[3]. Those challenges were:

(i) how the PIDA interacted with other procedures for investigating wrongdoing which were overly complex, often isolated from other integrity and accountability legislative frameworks and which were legalistic, making it difficult to resolve a disclosure complaints; and

(ii) the kind of disclosures was too broad, with most matters being more related to personal employment-related grievances rather than more serious integrity risks such as fraud, serious misconduct or corrupt conduct.

(e) The Moss Review made a series of important recommendations[4]. Subject to the comments in this submission, the Committee generally endorses those recommendations and makes the following comments set out below.

(i) The Moss Review noted that 70% of responses to the Review's online survey from disclosers felt unsupported, vulnerable to adverse consequences or that their agency was not committed to the PIDA[5]. This is, in itself, an indictment on the success of a system that ought, in the Committee's opinion, be based on a credible process of independent investigation where a discloser is treated fairly and with respect. If Commonwealth public servants do not feel they will be so treated, the system is doomed to fail and any cultural change highlighted by the Moss Review simply will not occur.

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[3] The Moss Review, page 6.

[4] The Moss Review, pages 7 and 8.

[5] The Moss Review, page 53, para 132.

(ii) The Committee supports the fact that there should be a higher degree of scrutiny and monitoring of all Commonwealth agencies concerning public interest disclosures and the transparency of the decision-making process in any investigation. This is particularly so because disclosures in the public sector are more likely to involve, if serious, questions of public trust and accountability, the performance of public officials and the expenditure of public monies in an improper or illegal manner.

(iii) The Moss Review suggested that while the PIDA was an appropriate mechanism for the public sector, it was ill-adapted to the private sector for two reasons – the accountability processes and mechanisms are different and the conduct the PIDA seeks to address (abuse of public office) is not the same as in the private sector[6]. It appears as if the Moss Review accepted that private sector whistleblowing regimes were managed by other organisations. In the Committee's opinion, such "management" is threadbare at best and non-existent at worst, a position supported by the substantial majority of submissions lodged with the Joint Parliamentary Committee. In addition, the Committee believes there is no difference in principle between the serious offence of abuse of public office to any other criminal offence that might be committed in the private sector. Each is serious, each warrants a consistent and similar regime so that disclosures can be freely made and properly and independently investigated in circumstances where the discloser feel properly protected from retaliation and discrimination.

(iv) The Moss Review appeared to recommend the creation of more investigative agencies under the PIDA. The Committee considers that it would be counter-productive. The Committee believes that, consistent with its Submission, there should be one over-arching statutory authority or agency responsible for all public and private sector whistleblowing complaints. To increase the number of investigative agencies is, in the Committee's opinion, likely to result in unnecessary cost, duplication of services and facilities, an increased likelihood of inconsistency and a lack of meaningful standardisation or harmonisation across Australia. That would not, in the Committee's opinion, be consistent with strengthening the Commonwealth's public sector pro-culture disclosure which lies at the heart of the Moss Review.

(v) The Moss Review regarded prescriptive compliance requirements as a barrier to developing, creating and fostering cultural change. The Committee agrees and believes that any legalistic or prescriptive procedural requirements are invariably counter-productive to a whistleblower in any sector, public or private, and whether an individual whistleblower believes that he or she will be treated fairly and with respect when a disclosure is made.

(vi) The Committee supports the Moss Review's recommendation that there be a more identified, targeted and independent agency to assist whistleblowers or potential whistleblowers to enable them to obtain help and/or advice from experienced

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[6] The Moss Review, page 61, para 156.

lawyers or other professional support services. Again, there should be one organisation that applies across all sectors rather than having any industry specific or sector specific bodies.

**2.3 *Not-For-Profit Sector***

(a) Consistent with what the Committee has said above, it believes the best practice criteria for whistleblowing legislation should apply across all sectors, and that includes the not-for-profit sector.

(b) The Committee recognises that throughout Australia and the not-for-profit sector, the organisations which are not-for-profit range from the substantial international and national bodies to State, regional or community-based organisations. Many of them do not and will never have the infrastructure or resources (particularly financial or employee resources) to be able to, for example, have a full range of internal reporting channels and disclosure procedures. The Committee has some sympathy for these bodies and recognises the need for there to be some exemptions (perhaps based on income and assets) concerning their internal requirements and for them to be treated differently. However, all of the applicable laws in respect of the protection of whistleblowers should apply to this sector to enhance and maintain integrity and trust in the sector (given they are based on the raising and spending of publicly-donated money and many benefit from a tax-free status) and if there are some limits in terms of how individual organisations can or should implement, for example, internal reporting channels or disclosure regimes (and the cost of administering them), that can be alleviated by the creation and operation of an external reporting channel, preferably through an independent agency, being available for current and former members and employees of not-for-profit organisations to make disclosures about improper or illegal conduct. Otherwise, the Committee believes that the best practice criteria should apply consistently across all sectors in Australia.

(c) In relation to the proposed amendments to the FWO Act, the Committee believes those reforms, if the Criteria are applied across all sectors, are equally applicable to the not-for-profit sector.

**2.4 *PIDA Agency***

(a) The Committee has noted the submissions made to the Joint Parliamentary Committee in favour of establishing an independent body (such as a Public Interest Disclosure Agency, or PIDA) to receive disclosures, provide advice to whistleblowers and operate as a clearing house for initial investigations.

(b) The Committee can see some significant benefit in such an agency, particularly in light of the Moss Review of the PIDA and the Commonwealth public sector regime.

(c) It is the Committee's belief however, that such an agency should be empowered not only to receive and consider disclosures, but to investigate and if necessary, prosecute those involved in breaching any whistleblower protection laws.

**2.5 *Harmonisation and Consistency in Whistleblower Protection Laws***

(a) In the Committee's opinion, there are considerable advantages in putting all whistleblower protection laws into one single statute.

(b) The current position is that existing whistleblower protection laws are spread across Commonwealth and State laws and there are differences of approach in terms of various sectors (the public sector, the private sector and all other sectors). This approach leads to inconsistency, differences in legal tests, legalistic approaches at the Commonwealth level (according to the Moss Review) and a tendency that whistleblowers believe that their complaints will not be taken seriously and that they may face retaliation and discrimination.

(c) The current un-harmonious approach of whistleblower protection laws in Australia does little to foster the critical goal identified in the Moss Review; that is, cultural change and strengthening the consistency and fairness of decisions across all public and private sectors. Indeed, the Moss Review made it clear that when disclosures are made, a strong capacity for investigation is needed focused on serious wrongdoing with simpler legislative procedures and effective oversight[7]. To this the Committee would add that the process must be and must be seen to be independent, robust and one which all employees throughout any sector, believe will treat them fairly and with respect if a disclosure is made.

(d) In the Committee's opinion, there should be, where possible, harmonisation, and to the extent that it is possible, the same approach with consistency for all whistleblower protection procedures in the public, private and not-for-profit sectors.

(e) This approach can most readily be appreciated where private sector or not-for-profit organisations undertake contracts or work for the public sector and in some manner they or their employees or contractors are subject to conflicting arrangements and obligations. This does nothing to enhance any process of real cultural change and a belief, importantly and most critically, to be held by employees, that they will feel as if they will be treated fairly and with respect when they make a complaint, the complaint will be properly and independently investigated, and there will be no retaliation, victimisation or discrimination by reason of the complaint having been made.

[7] The Moss Review, page 69, para 180.