

10 February 2017

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

Dear Secretary,

Thank you for the opportunity to provide a submission to the Committee's inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.

Please don't hesitate to contact me if I can assist further with the Committee's work involved in this important undertaking.

Yours sincerely

Karen Hutchinson

## **Whistleblower protections in the corporate, public and not-for-profit sectors**

### **Introduction**

I am a 'whistleblower.'

I have been a 'whistleblower' since 2009.

I ask that you consider my submission in light of it being the real, lived experience of one who identifies publically and proudly as a 'whistleblower.'

I began my role as a Commonwealth Public Servant in 1998. It wasn't until 2008 on returning to work after being on sick leave for an extended period of time that I became aware of serious breaches of the '*Public Service Act 1999s; Code of Conduct*' being committed by several of my work colleagues.

I reported these matters to management and insisted that unless these issues were appropriately addressed I would take matters into my own hands and go directly to the Public Service Commission myself.

Consequently, I found myself bullied, intimidated and threatened by my agency's own management team and forced to abandon my Commonwealth employment after suffering a severe psychological injury that continues to date to prevent me any ability to participate in gainful, meaningful employment.

### **Terms of Reference**

1 - 3. No suggestions to make.

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

As an Australian Public Servant it is a tenet of that service to 'blow the whistle' where there is any direct evidence or a genuinely held suspicion that wrong-doing is occurring.

*'Making a public interest disclosure accords with the ethical culture of the Commonwealth public sector, including the employee's duty to act with integrity in the course of Australian Public Service and Parliamentary Service employment (s 13 of the Public Service Act 1999; s 13 Parliamentary Service Act 1999).'*

I believe that reward incentivised whistleblowing would prejudice the process because it would be far too easy for a situation to be artificially created to provide just such an opportunity for financial reward to arise.

The idea of a 'reward system' would be something of an anathema to any 'whistleblower' worth their salt who do what they do because it is the right thing and not because there is a potential for reward.

Surely the very basis for whistleblowing arises in circumstances where individuals seek reward and benefit through their own acts of corruption and maladministration in the first instance.

I recognise and fully endorse a previous suggestion made that 'whistleblowers' should be awarded lifetime compensation to address the certainty that they will be made immediate social pariahs and excluded from any ongoing employment opportunities when their history of whistleblowing becomes known.

The only thing that will encourage genuine whistleblowing is to remedy the real and well evidenced fears people hold for their careers, reputations, wellbeing, family's safety and security.

Until there is a dramatic change to the 'cover-up' and protectionist cultural zeitgeist this country suffers from 'whistleblowers' will remain an endangered species.

5. *'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;'*

These considerations relate to perhaps the greatest failings of the current legislation available to 'whistleblowers.'

Our Australian court system has become the place justice goes to die.

How else do you possibly account for the fact that the '*Public Interest Disclosure Act 2013*' (the PID Act) has been available for three years with no prosecutions for the reprisals taken against 'whistleblowers?' Naively you might suggest it's because no reprisal action has been reported or taken against 'whistleblowers,' however, there is more than sufficient anecdotal evidence of several such claims languishing in a legal netherworld where government departments and agencies have instructed their legal attack dogs to keep them out of the courts and hidden from the glare of public scrutiny by any means necessary.

As follows the standard *modus operandi*, we 'whistleblowers' have our financial means removed first by having our jobs taken from us. With it goes our ability to afford legal assistance to then be forced to become self represented litigants in the courts which has become nothing more than the play thing of government with their high priced lawyers who are instructed to frustrate and delay matters, to wear us down and compromise our health until such time as we are primed and desperate enough to be bought off with a mean settlement offer that allows the perpetrators to keep all the nasty details of their corruption safe and secret.

The wholesale decimation of funding made available for Legal Aid is yet another failing of the current government in its quest to save money and allow the most vital of public services to be ruined and retarded so that it can no longer be a viable option for 'whistleblowers,' who find themselves in the firing line for outing their corrupt employers.

This just reinforces the notion that justice is only available to those who can afford it. In this country you get the justice you can pay for.

Perhaps it's the fact that 'whistleblowers' are reporting on wrong-doing occurring in the government sector this razing of vital Legal Aid services could be viewed as being a purely self-protective measure?

How could the *PID Act* legislation not have envisioned the circumstances it would invite when it did not include a similar '*Fair Work Act 2009*' clause s. 361 to ensure that a reverse onus of proof be invoked? Or perhaps it was considered and summarily rejected?

Why wasn't it made easier for 'whistleblowers' to access justice when they attempt to file in the Federal Circuit Court or Federal Court of Australia? Even the, little better than useless 'general protections' provisions of the *Fair Work Act*, allow for an affordable nominal fee for filing in the courts, whereas attempting to file for contraventions of the *PID Act* attract substantial fees. 'Whistleblowers' trying to access justice are then subjected to the humiliating experience of having to request an exemption from paying legal fees because of financial hardship, no doubt caused by the loss of their job for whistleblowing in the first place!

Maybe the committee might consider making it a mandatory requirement that a lawyer be appointed to take these matters into the courts on behalf of the 'whistleblower' or even refuse an employer access to external legal services or utilising their own legally trained employees to rebalance and create a more 'level playing field' with the formalities of the legal system being relaxed to assist self represented litigants.

If legal representation is to be maintained then it seems to me that the most reasonable method of ameliorating any perceived imbalance of 'power' could be remedied by requiring the 'defendant' to fund the 'plaintiffs' cause of action. That would provide a 'value added' benefit for both parties where the 'defendant' might seriously reconsider perpetrating the behaviours that saw them into the court to risk their reputation in a public forum. It would likely serve as a far better deterrent than the long, expensive and fraught turning of the wheels of a broken justice system can promise with the 'penalty unit' fine system it currently utilises.

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

*'To receive compensation for harm suffered as a result of making a disclosure, the onus is on public servant whistleblowers to demonstrate causation between the disclosure and the reprisal.'*

Obviously the onus of proof should shift immediately to those who have had allegations levelled at them on the demonstrable evidence that detriment to the 'whistleblower' has occurred.

I consider the definition of detrimental action and reprisal currently available under the *PID Act* is more than adequate to the task.

Criminal liability in concert with a reversed onus of proof to be met on the civil standard of 'balance of probabilities' would be a welcome addition. If there was a real prospect of employees facing a jail term people might think twice before causing harm to a work colleague who has 'blown the whistle.'

The penalty fines available should be to a strict liability standard and job loss should be mandatory.

The usual practice of indemnified coverage for legal services and fines should not be provided for individual employees who are found liable for wrong doing. They should be held individually and severally liable in all instances.

*7. '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 believe that maladministration is the essential precursor to corruption proliferating within the *corporate, not-for-profit and public sectors*.

I consider that the most damaging and duplicitous aspect of the current 'whistleblower' protections available under the *PID Act* are bound to the mandatory requirement to report to the management of the employer you are whistleblowing against.

Who was the bureaucratic 'efficiency' master who decided that internal reporting was the way to go? No doubt arguing there was no need to consider setting up a separate body with independent investigative powers, no need to have the legislative power to call witnesses or examine evidence and certainly no need to provide support or protection for those foolhardy souls who whistleblow.

Were the dreaded words ICAC or National Integrity Commission whispered in the hallowed halls by the corrupted minions and masters when they were considering setting up their in-house risk management teams?

How dare you deliver up such pathetic and pointless *PID Act* legislation to be used as an experiment to hapless 'whistleblowers' like me to attempt.

In truth it's all about 'managing' the optics and protecting the government's reputation.

This exercise of 'putting lipstick on a pig' would have been trotted out by senior management as allowing departments and agencies to get their ducks in a row, find out where the leaks are and take the necessary action to shut it down.

When I approached the appropriate government oversight agency in order to make a 'whistleblower' report to them about my employer in 2013 a senior manager responded to my complaint stating that because the *PID Act* legislation hadn't come into effect yet she wouldn't consider investigating any aspect of my complaint. Reading between the lines of her 'official' correspondence, it was clearly intended that I should interpret her rejection as an invitation to 'p... off' and not bother her again.

I don't consider it's only cynicism that leads me to believe that the relationship between the main regulatory oversight agency and the government is nothing if not an enabler at best and a conspiratorial ally at worst.

As a consequence I was probably one of the first people to submit a '*public interest disclosure*' to my own agency on 30 January 2014 after the legislation assented on 15 January 2014. I would also have likely been the first of the many subsequent 'whistleblowers' to have their 'disclosure' rejected and determined by some high ranking SES officer as '*vexatious or frivolous*' about two weeks later.

When I submitted another '*public interest disclosure*' in January 2015, I did so knowing exactly the course the internal investigation would take.

The collective impunity displayed by the agency concerned over the course of their investigation into my '*public interest disclosure*' defies belief and shows beyond doubt that employers cannot be tasked with investigating themselves when it comes to exposing corruption and wrong-doing.

The Commonwealth Ombudsman agreed to three extensions of time to allow the agency over nine months in total to complete a 'thorough and independent investigation' into my claims. All the while I'm giving them an almost weekly update on the reprisals that are being taken against me by the employees I had named in my '*public interest disclosure*.'

It wasn't long before I found out that all those I had named had been provided with access to my '*public interest disclosure*.'

When the investigation was dragged, kicking and screaming to its long overdue conclusion and offered up its pre-determined findings, all the SES level officers involved proved to be just a little careless when they left sufficient clues that two investigation reports had been prepared but only one had been cited in the final agency report.

After having my '*Freedom of Information*' request to receive a copy of the hidden report refused I managed to find sufficient references the SES author had inadvertently quoted that suggested the second report was requested to omit findings made in the first report that employees had not been involved in fraudulent activities, had not acted corruptly and had not breached any '*Code of Conduct*' provisions of the '*Public Service Act 1999*.'

This cover-up was presented to me with the CEO's endorsement writ large across the final page of the agency's final investigation report.

There was no evidence of any fraud, corruption, maladministration, abuse of public office, false or misleading statements made, privacy breaches committed and there was certainly no reprisal action taken against you, or harm caused, or detriment experienced. You're just imagining that we're withholding payments from you and we haven't denied any of your claims as a form of punishment for you making a 'whistleblower' disclosure.

In fact, every single claim you've made has been found to be entirely unsubstantiated, but if you're in any way dissatisfied with our investigation you can take the matter to the Commonwealth Ombudsman.

... and now I'm expected to face off against the behemoth that is the Commonwealth government to plead and beg to be given my correct entitlements all the while they are instructing their 'pit bull' legal team to savage me in the courts. What a cheery prospect I have to look forward to.

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

As evidenced by the Philip Moss report into the independent statutory *'Review of the Public Interest Disclosure Act 2013,'* the only matters freely acknowledged are minor infractions that hardly raise an eyebrow, focusing on little more than raising complaints that resources are being wasted because they are being diverted into investigating workplace grievances and bad recruitment decisions and that the overwhelming nature of complaints do not reveal any demonstrable evidence of maladministration, misconduct or corruption.

It is increasingly evident that the only way to provide *'proper protection of whistleblowers and investigation of whistleblower disclosures'* is by establishing an ICAC or Independent National Integrity Commission. There must be assured oversight by a regulatory body that is completely independent of government.

The current oversight arrangements residing with the Commonwealth Ombudsman are ineffective and even given an increase in funding and appropriate resourcing the likely continued failure of employees to follow legislation or be effectively trained merely highlights the vested interest that exists because the Commonwealth Ombudsman is first and foremost a servant of the government.

As for the Australian Federal Police (AFP), there is no will to offer proper protection for 'whistleblowers' or investigate disclosures because it is seen as detracting from their primary directive which of course comes with government agenda attached.

Consequently, there is unlikely to be any serious consideration given to providing additional funding or resourcing to the AFP by the government to enable them to provide the necessary protections or investigation services.

9. *'The circumstances in which public interest disclosures to third parties or the media should attract protection;'*

If an independent body was established where the integrity of the system was routinely and publically acknowledged to be above reproach then there would be no need for 'whistleblowers' to disclose to third parties or the media.

As it currently stands, the media has become little more than a bunch of whimpering yellow bellies, unwilling to disseminate even legitimately 'leaked' information, in accordance with the PID Act, where there exists even the slightest possibility for members of the media to be prosecuted or maybe even jailed.

This effectively stymies 'wrong doing' being brought to light and exposed to public scrutiny and so this continues to serve the vested interests of those corrupted forces from inception at the 'coal face,' so to speak.

10 - 11. No suggestions to make.

### **Conclusion**

What kind of a society do we live in where it is a measure of courage and bravery anytime somebody makes the right decision, follows the legislation or chooses the honest option?

Equity, accountability, integrity and honesty are all measures entirely lacking in today's Australian Public Service. Is it because it has been ground down to a threadbare operating level where the only people who have managed to keep their employment are those who have shown the necessary willingness to acquiesce to their political masters demands, happily forsaking their decision making independence?

Perhaps it is just the overwhelming contempt employees have for the laws of the Commonwealth, safe in the knowledge that the victims of these unlawful administrative decisions will be unable or unwilling to litigate against the weight of the Commonwealth who can and do roll out their obscenely expensive, tax-payer funded litigation teams to crush and destroy any and all opposition.

I want all these rotten, immoral, unethical and dishonest people to lose their jobs, especially in light of the fact that these employees were never fit and proper people to hold those jobs in the first place. They have no concept of what being a public servant even means, taking their lead from those in the most senior positions who promote themselves as the ringing endorsement of all that is good and great in the public service.

You must ensure that every person who joins the public service has an innate understanding of what independence in administrative decision making is and that integrity, honesty and equity is encoded into their personal DNA.

The public service must be populated with people who don't get off on the pervasive schadenfreude that has infected our society and ensure that the most vulnerable among us are well supported and respected and not treated as the scapegoats for the 'self service' that peddles its wares under the trading name of the Australian Public Service.

Until such time as there is a dramatic improvement to the system that allows 'whistleblowers' to maintain their anonymity or preferably an Independent National Integrity Commission or Federal Independent Commission Against Corruption (ICAC) is established, then I recommend they keep information to themselves. The price they have to pay to tell the truth is far too great and costs far too dearly.

You talk about rewarding 'whistleblowers' (instead of punishing them) when all that's required and all we really want is for us and our families to be kept safe.

Karen Hutchinson