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

Dear Secretary

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

Thankyou for the further opportunities to assist the Committee.

Please find below an outline of key points raised/flagged with the Committee in discussion on 31 May 2017. Where relevant these points incorporate my responses to the Questions on Notice from the Committee, of 18 May and 24 May 2017.

Please note that other than where I make specific reference to preliminary findings from the Whistling While They Work 2 project, my views are in my personal professional capacity and are not necessarily reflective of the WWTW2 research team or any of the project partner organisations.

The eight key issues previously identified were:

1. **Scope and definition of disclosable conduct**
2. **Protection of third party (including media/public) disclosures**
3. **Statutory requirements for organisational processes/procedures**
4. **Basis of civil and employment remedies**
5. **Role of rewards and bounties**
6. **Oversight / support agency**
7. **Achieving a comprehensive approach (esp. re: tax)**
8. **Process for bringing public sector (PID Act 2013) into line with new standards.**

1. Scope and definition of disclosable conduct

Questions on Notice - 24 May 2017

Whistleblower protections are limited to whistleblowing about disclosable conduct that is defined in various Acts. For the private sector disclosable conduct is often limited to breaches of the relevant Act, e.g. the Corporations Act for corporations.

1) The whistleblower protections added to the Fair Work (Registered Organisations) Act 2009, expanded the scope of disclosable conduct to an offence against a law of the Commonwealth. If this definition of disclosable conduct had been in place previously would whistleblowers associated with the following events have been eligible for protection:

- ***Commonwealth financial planning advice quality investigation and compensation;***
- ***Comminsure unpaid life insurance claims investigation;***
- ***Macquarie Bank advisers and exams investigation and compensation;***
- ***NAB financial advisers exams investigation and compensation;***
- ***Opes Prime investigation;***
- ***Storm Financial investigation; and***
- ***ANZ bonus interest investigation and compensation.***

The broadened definition now added to the Fair Work (Registered Organisations) Act 2009 (breach of Commonwealth law) would substantially increase the likelihood that such disclosures would attract protection – to the extent that they revealed either potential criminal offences (fraud etc) or breaches of regulatory requirements, operating licences and the like.

Certainly the scope needs to be broadened extensively beyond simply breaches of corporations legislation, to any/all breaches of Commonwealth law (subject to some considerations below).

However, a feature of many of these major matters is that while evidence of breaches of law might be suspected or eventually emerge, this is often a conclusion reached after disclosures are reasonably made, based simply on breaches of professional standards, accepted operating procedures or practices in a given business field, or breaches of accepted ethical standards (formal and informal codes of conduct). Further, any scope of disclosable conduct limited only to breaches of law, invites litigious responses to disclosures whereby no disclosure is recognised nor action taken in the absence of at least a 'prima facie' legal breach, or of evidence that could support a criminal or civil action for that breach. The objective should be to encourage organisations and regulators to act on disclosures, not look for legal excuses not to act. Therefore it is important that the protections, and obligations of employers to act, be capable of being triggered in instances where there is a reasonable basis for disclosure, even if it is not, or not yet, clear that the matter (if/when proved) amounts to a breach of law.

2) The Public Interest Disclosure Act 2013 (Cth) has a broader definition of disclosable conduct, which includes: • contraventions of Commonwealth, state, territory or foreign laws; • corruption or perverting the course of justice; • abuse of public trust; • fabrication or misconduct relating to scientific advice; • wastage of public resources; and • danger to health, safety or the environment. Are there any enhancements that should be made to the public sector definition of disclosable conduct?

It should be noted that in addition, the PID Act includes 'maladministration, including conduct that (a) is based, in whole or in part, on improper motives; or (b) is unreasonable, unjust or oppressive; or (c) is negligent.' This is an important category, also relevant to (3) below.

The 2016 Moss Review of the PID Act recommended (Rec 5) that it be clarified that disclosures about breaches of the APS Code of Conduct (and hence a breach of the *Australian Public Service Act*), which may involve personal or personnel grievances only, should not necessarily amount to public interest disclosures unless they also involve either another substantive category of 'public interest' wrongdoing or are systemic or serious in nature. This enhancement should be made, albeit carefully, recognising the considerations identified by Mr Moss.

3) Are there any constitutional or other limitations that would prevent the definition of disclosable conduct for the private sector being broadened to include:

> ***• a breach of any Commonwealth law;***
>
> ***• a breach of any applicable organisational governance arrangements, including organisational or industry codes of conduct; or***
>
> ***• any other appropriate professional standards.***

Not to my knowledge, provided that the relevant provisions relating to the second and third dot points can be safely characterised as laws with respect to the proper governance of corporations (i.e. 'constitutional corporations' under section 51(xx) of the Constitution), or to the employment or working conditions of employees or officers of corporations, or as incidental to the enforcement or implementation of other valid Commonwealth laws or regulations (e.g. wherever a Commonwealth regulatory requirement on business is valid, then a law to protect witnesses or other persons who assist with ensuring the effective enforcement of those requirements will also be valid). These heads of power would seem to provide ample scope for extending protection to disclosures that concern breaches of accepted professional, industry or ethical standards which may or may not amount to breaches of 'law'.

The challenge for the Committee is to frame a definition of disclosable conduct which is broad enough to include all the above categories, but which does not trigger unnecessary obligations on companies where a breach of law, standards or procedures is merely 'technical' (without any significant or substantive adverse impact on other persons, or on the public interest), or where the matter *purely* involves personal or personnel/employment grievances (i.e. not involving the interests of persons beyond the immediate grievance or dispute) which can be appropriately dealt with through other dispute channels, without needing to trigger 'public interest' protection requirements. That is, where the interests of clients, consumers, members of the public, significant numbers of other employees, or the good governance of the organisation generally, are not directly affected – simply the immediate personal interests of the employee(s) concerned.

The need to strike this balance is the reason for the Moss Review recommendation #5 above.

It was also the reason behind amendment of UK Public Interest Disclosure Act regime in 2013. Prior to this time (since 1998), section 43B of the *Employment Rights Act 1996* (UK) (disclosures qualifying for protection) had provided that 'qualifying disclosures' were disclosures which the worker reasonably believes tends to show one or more of the following matters:

- a criminal offence
- the breach of a legal obligation
- a miscarriage of justice
- a danger to the health and safety of any individual
- damage to the environment
- deliberate concealment of information tending to show any of the above five matters

However, because many individual personal or employment grievances may involve a 'breach of a legal obligation' without affecting any other interests, section 17 of the Enterprise and Regulatory Reform Act 2013 amended the above provision by inserting the requirement that 'in the reasonable belief of the worker making the disclosure', it is 'made in the public interest' along with tending to show one or more such matters.

Rather than fixing this retrospectively, the new Australian provisions could adopt a similar list, extended to include breaches of industry, organisational or professional standards, while making it clear that where the **sole basis** of the disclosure is a breach of law or standards, that the possible or suspected breach should either be criminal, or a breach affecting the interests of other persons or the public in a substantial or significant way.

4) Are there any other thresholds that should be considered for potential inclusion in the definition of disclosable conduct for the private sector?

The Committee should consider recommending that, in addition to conduct amounting to breaches of recognised standards or codes, qualifying disclosures may concern any conduct by a corporation, its officers, employees or agents which adversely affect the interests of other persons or the public in a substantial or significant way, and which is based, in whole or in part, on dishonest or improper motives; or is unjust or oppressive; or is negligent (i.e. involves a breach of a duty of care with respect to those persons, including fiduciary duties). This equivalent to 'maladministration' (in a public sector context) would result in a more comprehensive definition of the type of wrongdoing, the disclosure of which should trigger action and protections.

2. Protection of third party (including media/public) disclosures

Although some stakeholders have submitted that there should be no need for protections to extend to employees who make disclosures beyond their organisation and perhaps regulators, it is clear from international research and best practice legislative design principles that an effective disclosure regime should incorporate at least three tiers:

a. Internal disclosures, where safe and appropriate (including disclosures to whistleblowing services, e.g. hotlines, contracted by the organisation; or disclosures to the board or audit committee);

b. Regulatory disclosures (including to police/law enforcement), wherever a competent regulator exists to receive and deal with the disclosure, and an internal disclosure was (a) unsafe/unviable, (b) inappropriate because the organisation was unlikely to act on the matter, or likely to do worse, e.g. destroy evidence or victimise others, or (c) made but did not lead to satisfactory action;

c. Third party (including media) disclosures where (a) neither internal or regulatory disclosure channels were available or safe, or (b) an internal or, failing that, a regulatory disclosure was made, which did not lead to satisfactory action; or (c) some emergency circumstances exist to justify a disclosure to third parties or the media, without first making either an internal or regulatory disclosure.

Existing three-tiered public sector legislation in Australia, and legislation for both the public and private sectors in the UK and other jurisdictions, offers a number of specific ways in which these principles can be expressed. However, the broad principles are clear, and their importance is borne out by practical experience.

Members of parliament may also play a role as, in effect, a form of regulatory disclosure. This is clearly recognised in some public sector legislation; the role of MPs in relation to disclosures about private or not-for-profit sector wrongdoing is less clear cut, but is obviously a political reality. The key question is what obligations can or should be applied to the role of MPs as disclosure recipients.

The most advanced precedent is the Queensland *Public Interest Disclosure Act 2010* (see Attachment 1). The effect of the provisions is that an MP who receives a disclosure, is under the same obligations as any other receiving authority to handle the disclosure appropriately, including legal obligations to protect identity and avoid actions that would damage a whistleblower – unless they exercise their rights as parliamentarians, in parliament. In other words, parliamentary privilege is not affected. However, the intent of the provisions is that MPs should seek to ensure that disclosures made to them are properly dealt with, by referring them to appropriate agencies for action wherever possible (as opposed to *simply* using the whistleblower or the matter for their own political advantage, which may be inconsistent with the most effective form of investigation or with the whistleblower's welfare).

The Committee could consider a similar approach.

3. Statutory requirements for organisational processes/procedures

For organisations to take their responsibilities seriously, and be ready to take the necessary steps when required, it is clear that statutory triggers are required to ensure that employers either have, or are ready to implement, minimum whistleblower protection procedures.

In terms of current knowledge regarding the content of effective procedures, the preliminary results from the WWTW2 project (published in November 2016 and May 2017) confirm the wide variation in strength of processes between different sectors, the overall weakness of current processes on key issues, and the extent to which organisations currently lack both guidance and incentives (whether positive or negative) to have reasonable processes in place.

Two approaches could be taken, which are not mutually exclusive and to some degree overlap:

- A statutory requirement for minimum procedures, dealing with key basic issues common to all employment contexts, with allowance for these to be appropriate to the circumstances of each company – in the manner recommended by Transparency International Australia's response to Questions on Notice;
- Identification of the key duties that an organisation has, in relation to facilitating, protecting and acting on disclosures – in a manner similar to Australia's model Workplace Health & Safety Law and regulations – with the enforcement of these intended to drive organisations to ensure they have appropriate processes in place.

In either case, reference could be had to published standards, or one or more codes of practice published by the oversight agency, as providing guidance to companies and the courts on minimum appropriate standards for discharging these duties.

Advice on the International Standards Organisation and Standards Australia's current progress towards a replacement to the 2004 Australian Standard on Whistleblower Protection was provided by email on 30 May 2017.

The enforceability of these requirements would lie in the exposure to additional (e.g. exemplary) damages or penalties that an organisation would face in the event that a whistleblower suffered detriment *and* the organisation was unable to show that it had taken reasonable steps to prevent

or avoid that detriment, e.g. by having and implementing appropriate processes. Whereas if an organisation is able to show that it took reasonable precautions and exercised due diligence to prevent or avoid the detrimental outcome, including by having and using appropriate processes, then it could be relieved of liability (in a manner similar to s. 14(2) of the PID Act 2013).

4. Basis of civil and employment remedies

Section 337BB of the *Fair Work (Registered Organisations) Act 2009* creates an important new basis for more effective remedies to protection whistleblowers, by providing that liability for compensation will arise either:

- where a person by act or omission causes detriment to a person, because they believe or suspect them to be a whistleblower (a reprisal); *or*
- where detriment is caused to a whistleblower by act or omission, as the result of a failure to fulfil a duty to prevent or control that detriment – irrespective of whether any belief or suspicion that they had made a disclosure was a direct reason for the damaging acts or omissions themselves, or who was directly responsible for those acts.

This second step is akin to the recognition of organisations' duties under workplace health and safety law, to prevent foreseeable dangers from manifesting – rather than simply outlawing and penalising acts or omissions that are deliberately or negligently dangerous, after they have occurred.

This step provides an important reason to further differentiate between criminal (and civil) liability for deliberate *reprisals* against whistleblowers, which require a higher element of intent and causality to be proven; and organisational responsibility to compensate for *detriment suffered* as a result of blowing the whistle, irrespective of intent, wherever there is a failure in a duty to take steps to prevent those detrimental outcomes (including a failure in support, which is unlikely to ever satisfy a definition of *reprisal*).

The Committee should recommend that the grounds for criminal and civil liability be separated to make the gaining of civil remedies more realistic, and remove the current dependency (whether explicit or implicit) on the need for compensable acts or omissions to have been undertaken *for the reason* that a person was believed or suspected to have made a disclosure.

Questions on Notice - 18 May 2017

3) a. In general terms, how do the compensation provisions in Australian states and territories compare with the AUS-PIDA Act 2013?

The State and Territory provisions are generally deficient by comparison, because they copied US-style compensation provisions and treat reprisals as a poorly defined type of personal injury claim (like a tort) in the general courts; and do not provide the type of public interest costs protection provided by the Cth PID Act and Fair Work (Registered Organisations) Act. Nor do most of them provide any recourse to a lower-cost tribunal, such as Fair Work Australia, rather than the general courts.

In Queensland, Western Australia and South Australia there is nevertheless recourse to the Anti-Discrimination Commission and Tribunal (potentially) for compensation flowing from victimisation for having blown the whistle. This has been used only in rare instances.

3) b. Section 14 of the AUS-PIDA Act 2013 would appear to allow a court to require both an individual responsible for reprisals and their employer to be liable to pay compensation to a

whistleblower. Would you be able to advise if a court would have the same capacity to make both the person responsible for the reprisals and their employer liable under:

i. Section 337BB of the Fair Work (Registered Organisations) Commission Act 2009

It is unclear, but tends to suggest that only individuals can be held liable, other than (possibly) to the extent that another respondent failed to fulfil a duty to prevent, refrain from, or take reasonable steps to ensure other persons under the respondent's control prevented or refrained from, any act or omission likely to result in detriment to the target. An approach similar to the PID Act would be preferable (but taking into account the need to broaden and differentiate the basis for compensation).

ii. Section 1317AD of the Corporations Act 2001

It tends to suggest that only individuals can be held liable. An approach similar to the PID Act would be preferable (but taking into account the need to broaden and differentiate the basis for compensation).

5. Role of rewards and bounties

Question on Notice - 18 May 2017

2) Have any Australian states or territories established a reward or bounty system for whistleblowers?

Not to my knowledge.

In my view, Australia can benefit from international (principally US) experience of bounty systems, by accepting the principle that where whistleblowing results in substantial recovery of losses or frauds, or enforcement action leading to penalties (or settlements), this confirmation of the value of whistleblowing should be reflected in a return of a significant proportion of that value to the support and protection of whistleblowers themselves.

This is different to using bounties and rewards to 'incentivise' whistleblowing, with its risks of perverse incentives.

In my view, a sensible Australian adaptation of these schemes could see:

- Up to 20% of all recovered corporate/organisational frauds, confiscated criminal assets, and regulatory penalties or settlements resulting from whistleblowing disclosures, automatically made available for award to the whistleblower (subject to safeguards regarding the utility of the information, the timeliness of the disclosure and the conduct of the whistleblower themselves);

- A principle that should the whistleblower also seek compensation for detriment suffered from blowing the whistle, the compensation payable by an employer may be reduced to take account of any amount already collected by the whistleblower as a proportion of any penalty or recovery paid by that employer;

- Another 20% of recovered corporate/organisational frauds, confiscated assets, and regulatory penalties or settlements arising from whistleblowing (and any of the first 20% not awarded to the whistleblower for any reason, i.e. up to 40%) automatically made available to the independent oversight agency for the scheme, for the provision of advice and support services (including legal support) for whistleblowers generally – most of whom have no access to such support or potential rewards.

- These resources could also be used to build up a general fund for compensating whistleblowers who suffer detrimental outcomes, for whom no other viable compensation channel exists, similarly to criminal injuries compensation schemes.

6. Oversight / support agency

There is a substantial case for establishing a new, independent agency to provide support, protection and oversight for whistleblowing cases in the private and not-for-profit sectors. This is because no existing Commonwealth regulatory agency has a sufficiently broad jurisdiction to take on this function, on behalf of all regulators; and the desirability of separating investigation responsibilities (the role of regulators) from the support and protection responsibilities providing the primary need for a new agency.

In my view, this would not be a sensible role for the Commonwealth Ombudsman or a public sector integrity agency, because the focus would be supporting private and not-for-profit sector entities and employees. However, the services developed by such an agency may also assist public sector oversight bodies (both Commonwealth and State), just as they would assist Commonwealth regulators or enforcement agencies for whom whistleblowers are an important asset, such as ASIC, ACCC, APRA, AFP etc.

Transparency International Australia's responses to questions on notice (18 May 2017) set out sensible objectives for such an agency, including that its focus be on supporting and protecting whistleblowers, including providing advice to whistleblowers and companies, promoting best practice processes and procedures, ensuring that protection is afforded, ensuring that whistleblowers can access their legal rights, and acting on behalf of whistleblowers or on the agency's own motion to remedy reprisals or detrimental outcomes in appropriate cases. However, responsibility for investigating the actual disclosure should continue lie with existing investigative and regulatory agencies, with any new support and protection agency empowered to request information, and give advice and, if necessary, direction to investigating authorities regarding measures needed to ensure the proper support and protection.

As well as working closing with regulatory and integrity agencies, the support agency would work closely with compensation avenues and tribunals (such as the Fair Work Ombudsman and Fair Work Australia) to ensure that remedies were truly accessible; including representing whistleblowers in, or appearing before those tribunals (or the Federal Court). This would prevent the need for any new or additional tribunal to be created.

7. Achieving a comprehensive approach (esp. re: tax)

There appears to be strong support from all stakeholders that to be simpler for business, the overall approach should be standard across all industry sectors and regulatory areas, rather than piecemeal.

This could be achieved by:

- Overall legislation for the private and not-for-profit sectors (based on the corporations power, as well as other heads of power), detailing (1) the main framework, (2) categories of disclosable wrongdoing, (3) investigative and regulatory agencies involved (including ASIC, ACNC, ACCC, APRA, Environment Australia, ROC, ATO, AFP etc), (4) main protections and duties on employers/companies, including provisions for the making of regulations and codes of practice to assist employers, (5) provisions and procedures for bounty/penalty recovery, across all Commonwealth recovery avenues, (6) circumstances

for third party/media disclosures, (7) relations with State agencies, (8) establishing and empowering the oversight agency, and (9) review and oversight;

- Consequential amendments to the Fair Work Act to ensure the necessary remedies were available and readily able to be applied by the FWO and FWA;
- Consequential amendments to other legislation as necessary, including Proceeds of Crime.

Existing provisions in the *Corporations Act, Banking Act, Life Insurance Act*, and the *Fair Work (Registered Organisations) Act* would all be repealed to reduce duplication and inconsistency, and replaced with simple cross-references to reinforce that disclosures under those Acts are public interest disclosures attracting the protections, and any specific responsibilities on those agencies (including referral of information to the whistleblowing support agency).

Similarly, there seems to be no strong case for proceeding with stand-alone whistleblowing provisions in the **taxation legislation**, as initially proposed by Treasury in 2016, as opposed to simply including the ATO and taxation legislation enforcement in the same approach above. This is especially the case when the Treasury discussion paper proposes to define whistleblowers in exactly the same terms (employees, contractors, etc) as would be covered by the above legislation, and taxation legislation enforcement reaches across all companies.

Indeed, the recent ALP policy 'A Fairer Tax System' (11 May 2017) emphasises the risk of complexity, inconsistency and inequity if different whistleblowing provisions are progressed in different legislation in ad hoc way. Without making any judgement on the overall merits of that policy, or any other, it contains particular proposals relating to the treatment of tax whistleblowers which may or may not be consistent with equivalent provisions under other laws, if a piecemeal approach continues. For example, it proposes:

- A cap on the share of penalties able to be collected by whistleblowers, of $250,000 or 1 per cent of the penalty figure (are these the right thresholds);
- Criminal penalties for adverse action against whistleblowers, of 2 years jail and an $18,000 fine (which seems low); and
- Civil action for reinstatement and compensation.

In my view, these mechanisms, thresholds and penalty levels should be as consistent as possible across business and across different areas of regulation, which could be better achieved if tax whistleblowing is incorporated in the same comprehensive approach with other areas of Commonwealth regulation and law enforcement.

8. Process for bringing public sector (PID Act 2013) into line with new standards

A number of features of the PID Act 2013 would likely need to be amended, if that legislation is to be consistent with new standards set by the *Fair Work (Registered Organisations) Act* or other solutions such as suggested above. Consistency is an important factor, because requirements under the PID Act also apply to all Commonwealth contractors and their employees – hence, many businesses who would also come under new private and not-for-profit sector legislation.

Further, a range of amendments were recommended by the 2016 Moss Review, which should be taken up. These include Recommendation 10: That the procedural requirements of the PID Act be amended in order to adopt a principles-based approach to regulation.

For these reasons, it is important that the relevant recommendations of the Moss Review be accepted and implemented, but that – for consistency and seamlessness – the revision and redrafting of the PID Act 2013 occur as part of the same legislative package as the new private and not-for-profit sector legislation.

While there is some attractiveness to the idea of one Act encapsulating all sectors, at least three considerations suggest separate legislation remains necessary for the public and private sectors:

- differences in the scope and definition of disclosable conduct that are likely to continue to apply;
- greater guidance and prescription to public sector agencies as to implementation of their responsibilities under the Act, relative to the private sector;
- different oversight agency arrangements.

Even if consistent in many fundamental aspects, it is therefore likely that separate legislation will be required – unlike, for example, the *Privacy Act 1988* which covers most Australian and Norfolk Island Government agencies, all private sector and not-for-profit organisations with an annual turnover of more than $3 million, all private health service providers and some small businesses, but which does using the common Australian Privacy Principles, and a common regulatory agency (Privacy Commissioner / Australian Information Commissioner).

I trust these responses assist the Committee.

Yours sincerely

A J Brown
Professor of Public Policy and Law
Program leader, Public Integrity and Anti-Corruption
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Attachment 1.

Attachment 1

Public Interest Disclosure Act 2010 (Qld):

14 When member of the Legislative Assembly is a proper authority

(1) A member of the Legislative Assembly is a proper authority to whom a person may make any disclosure under section 12 or 13.

(2) However, subsection (1) does not apply to a disclosure if the information that is the subject of the disclosure relates to a judicial officer.

…

34 Referral of disclosure

(1) A member of the Legislative Assembly to whom a public interest disclosure is made under section 14 may refer the disclosure to another public sector entity (the referral entity) if the member considers the referral entity has power to investigate or remedy the conduct or other matter that is the subject of the disclosure.

(2) For the purposes of this Act, the member has no role in investigating the disclosure.

(3) In this section—
public interest disclosure includes a purported public interest disclosure.

35 Legislative Assembly may still deal with disclosure

(1) This Act does not limit the immunities, powers, privileges or rights of the Legislative Assembly or its members or committees in relation to a public interest disclosure made to a member of the Legislative Assembly.

(2) In this section—
committee means a committee of the Legislative Assembly, whether or not a statutory committee.
public interest disclosure includes a purported public interest disclosure.