

House Standing Committee on Social Policy and Legal Affairs

Inquiry into Public Interest Disclosure (Whistleblowing Protection) Bill 2012
and the Public Interest Disclosure (Whistleblower Protection)

(Consequential Amendments) Bill 2012

Dr Kim Sawyer

April 5, 2013

Submission

I have read the Public Interest Disclosure (Whistleblowing Protection) Bill 2013. I testified before the Senate Committee Inquiry into Public Interest Whistleblowing in 1994, and before the Senate Committee which looked at unresolved cases in 1995; and before the House Legal and Constitutional Affairs Committee (Dreyfus Committee) inquiry in 2008. My comments on the proposed bill are necessarily brief.

1. The proposed legislation is over-focussed on defining terms such as public official, public disclosure, agencies (including the integrity agency), detrimental actions and general penalties. This is an old approach to whistleblowing protection, excessively prescriptive and bureaucratic and likely to be as ineffective as other legislative attempts in the last twenty years.
2. Whistleblowers need a new approach, and there is substantial evidence as to what the approach should be. This approach is based on the following
 - a. Incentivising integrity, that is, framing incentives to blow the whistle.
 - b. Transferring the onus of proof away from the whistleblower.
 - c. Integrating anti- corruption and whistleblowing.
 - d. Measuring the costs and benefits of whistleblowing.
 - e. Prescribing exact penalties for retaliation against whistleblowers.
 - f. Establishing legislation which is a deterrent against corruption.

3. There is only one type of legislation which has been shown to satisfy these objectives. It is the US False Claims Act, a market based approach to whistleblowing, which allows whistleblowers to litigate on behalf of the Commonwealth. The False Claims Act in the last twenty years has accounted for two-thirds of US government fraud recovered, in total more than \$30 billion; and is estimated to have deterred more than a hundred billion dollars of fraud. It is a cost efficient Act; the US government is recovering \$15 for every \$1 invested in false claims investigations and prosecutions. The False Claims Act, which is a Federal Act, has now been adopted by 29 US states, by the Internal Revenue Service, and by the Securities Exchange Commission.

 4. There is no point in Australia simply legislating on a model that was appropriate in 1994. We now must legislate for the future, by establishing our own False Claims Act legislation, in conjunction with appropriate provisions for an integrity agency.

 5. I have attached to this submission my recent paper *Lincoln's Law: An Analysis of An Australian False Claims Act*, which discusses what type of legislation is required and the likely benefits of that legislation.
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Dr Kim Sawyer

Attachment: *Lincoln's Law: An Analysis of An Australian False Claims Act*