Whistleblowers Australia Inc
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"All it needs for evil to flourish is for people of good will to do nothing"- Edmund Burke

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Submission to the
Standing Committee on Social Policy and Legal Affairs
Parliament House, Canberra ACT 2600

On the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* and *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012*

Introduction

Whistleblowers Australia Inc (hereafter 'WBA') is a national voluntary organisation formed initially as Whistleblowers Anonymous in 1991, to help whistleblowers to help themselves and to lobby for the reform of whistleblower protection and related acts.

I am presently one of about five members of WBA nationally, who deal with incoming whistleblower inquiries. I have been doing so since 1994 and still average about three (3) per week. The number of people seeking information and advice *prior* to blowing the whistle is becoming more the norm.

In the period from 1993 whistleblower acts have been enacted in all state and territory jurisdictions. The early acts have since been amended or as

in the ACT, replaced. The ACT legislation, which will come into effect, in February, is generally considered to be the best of the acts to date.

The ACT legislation relies (eg) on ensuring support and protection, requiring public interest disclosures (hereafter 'PIDs') to be investigated and to be investigated to a particular standard, which reflects some of the things that have been learnt over the last 20 years. This Bill is in the same mould, having been drafted essentially by the same person on the back of major research into whistleblowing that was funded in part, by many of the so called 'integrity' agencies.

In the same period many of the federal agencies, for example Defence & Australian Nuclear Science Technology Organisation (ANSTO) have implemented internal whistleblower protection codes, based on existing state legislation.

In our experience the compliant deferring whistleblower mostly remains safe, because when he or she hears nothing back, they don't speak up. But they're scared: scared because the wrongdoing is still going on and scared because it's clear that their agency isn't doing the right thing.

But the, whistleblower, who has something inconvenient or even significant to disclose and won't leave it at that, still routinely suffers serious, often life changing reprisals. That is, in our experience the existing legislation & internal codes mostly don't work and we say, neither will this bill, if left as is.

Consider Mr Dave Reid, the ANSTO whistleblower, who blew the whistle on the cover-up of serious safety breaches in the production of radiopharmaceutical products. Mr Brian Hood, the whistleblower in the RBA bribes scandal, and Peter Fox, the senior police whistleblower, who has exposed institutionalised cover-ups in the Catholic Church & NSW Police. In each instance the relevant institutions at the highest level have apparently chosen to cover-up the wrongdoing and intimidate and harass the whistleblower rather than to investigate the cover-up. Each

whistleblower went to the media to expose the cover-up, once they knew it was on. In our experience these are not isolated incidents: they are simply better known.

2. What's good and what for example, still needs to be done to keep whistleblowers safe & effective?

(a) **Upfront protection**.

This bill will allow the federal jurisdiction to catch up with the best of state and territory legislation, but it will not provide the protection needed to make whistleblowing safe & effective *on the ground*, *in practice*, unless it goes further and compels the agencies to aggressively 'model' best practice openly and in public by (eg) providing protection upfront on the presumption that protection is to be given unless and until proved otherwise.

Submission: the bill should require an agency not to implement any adverse decision, which would have the effect of altering or removing the whistleblower's existing duties, seniority, remuneration or relation to others unless or until a PID is found by a court to have been deliberately misleading and vexatious.

(b) **Making functions & duties clear.**

The language is better and more directed toward establishing its purpose, duties and benchmarks *in the practice* (eg) by 'obliging' an agency to 'ensure' the support and protection of whistleblowers, by making the investigations a 'must' and then, to a particular standard. Just encouraging & facilitating disclosures by putting procedures in place, as radical as that might have seemed in the early nineties, just hasn't got the job done.

It will also ensure a more appropriate framework for legal submission & argument.

(c) **Objects: s.3.**

The stated object or purpose in s.3 of 'strengthening public integrity by obliging an agency to 'ensure' certain things marks a major shift in thinking from the first generation of acts (eg) the NSW act, which is (still) simply to encourage & facilitate disclosures (etc). But it still misses the mark by not identifying the public interest as its primary purpose, and particularly so, given the bills' titles.

Submission: that the object should be 'to promote the public interest by strengthening public integrity, encouraging & facilitating public interest disclosures, ensuring the support & protection of whistleblowers and ensuring the proper investigation of public interest disclosures (hereafter, a 'PID').

(d) **PIDs should be open to any person.**

S.8 defines a PID in terms of it being an 'honest belief held on reasonable grounds' that certain information 'tends to show' 'disclosable information' etc, which (eg) does not relate 'entirely' to a disagreement in policy etc (s8(2)(b). This is sensible and reasonable: but confining the right to make a PID to 'public officials' when outsourcing, government grants, subsidies and bail-outs to private organisations, industry and charities etc have become the norm, is not.

An example, a parent & member of a P & C association became aware that the school principal was running a private educational consultancy from the school. The police wouldn't investigate: the parent had no 'interest' (loss, or standing). It is clearly in the public interest to promote & maintain the integrity of public and privately run schools, in receipt of government grants & subsidies.

Another example, a senior buyer in a large retail chain knew that the other senior buyers were operating a scam & taking a cut of the payments made for goods coming in from Hong Kong. The whistleblower went to the CEO. The CEO realized the whistleblower did not know he was in on the deal. The CEO covered his back & got rid of the whistleblower. The

whistleblower went to police. The police declined to investigate: the whistleblower had no interest (loss, or standing). The rort inflated the price of goods to the public, facilitated tax fraud and its investigation was clearly in the public's interest.

Another example, the government had to clean up a serious oil spill in harbour waters. The public outcry was immediate. Fish died and fishing & swimming was banned. The second engineer on a container ship knew that the discharge had been a deliberate decision. He had no interest (loss, standing) and no protection to encourage him to come forward.

These examples are based on the information I've received from private sector whistleblowers.

The public interest lies as much in promoting & maintaining integrity in private organisations, as it does in public organisations. We urge you to think long and hard on the examples given above, and perhaps the most persuasive of all, the asbestos, James Hardie fraud.

Note: opening up the protections in this bill to 'any person' would not be breaking new ground. Queensland allows any 'person' to blow the whistle, about a public-sector threat of harm to a disabled person or to the environment and Victoria, South Australia and Western Australia allow any 'person' to make a public-interest disclosure about wrongdoing in the public sector.

Submission: the federal government should be building on what we already know and opening up protection to 'any person' who makes a disclosure in the public's interest so as to apply (eg) to disclosures made to any integrity agency including the AFP, ACCC and ASIC.

(e) **Concealing or engaged in concealing….(etc).**

S.9 gathers together the usual and now the more recently accepted culprits, like disclosures that concern public health & safety and the

environment etc, which is good. But the list should and must include 'cover-ups'.

Once upon a time a whistleblower's claim that the most senior management was covering up wrongdoing would have been brushed aside, with the only question being whether s/he was mad, bad or both. But not anymore: the AWB, RBA note printing, Catholic Church & police scandals have brought society firmly to the realisation that a cover-up, often at the highest level, is the preferred option when faced with the threat of exposure.

Submission: S9(2) should list conduct that *conceals, or is engaged in for the purpose of concealing wrongdoing, otherwise known as a 'cover-up'* as corrupt conduct.

(f) **Modelling best practice, openly and in public.**

S.19 deals with action to be taken on receipt of a PID. It states that the agency 'must' do certain things, which is good, but it should also ensure that the agency aggressively 'models' best practice openly and in public.

Submission: the guidelines under s19(2) should require the agency to publicly list (notify) the investigation of a PID (like a court does a claim). The agency need only warn that conduct affecting the honest & impartial exercise of investigating officers may be treated as corrupt conduct under s.9(2)(a).

In this way the PID managers & investigators would have to 'walk the talk', by making themselves publicly accountable, both individually and as a representative of the agency. And the whistleblowers, who until now have been wrongly encouraged, even intimidated into believing that their safety lies only in or is conditional on continuing secrecy, would be able to enjoy the support of their colleagues as they should, so long as their conduct did not affect the honest & impartial exercise of investigating officers.

It would maintain a sense of openness, & give the community the confidence that the agency *will* be bound by its own rules, in the public's interest.

In summary, keeping the making of a PID secret or confidential is counter productive, because it is unnecessary, when all of the parties can be warned as a matter of general practice, that doing or saying anything that might adversely influence or affect the investigation would be punishable at law. The investigators should be directly warned that theirs is a much higher responsibility. Disclosers should be assured that staying out in the open is the best policy and it will over time, become a mark of the agencies' confidence that it can protect the whistleblower.

(g) **Conduct of investigations**. The setting of standards (S.19) is a good thing and long overdue, but the bill could be improved.

Submission: the investigative agency should make the reasons for its final decision publicly available on its website within one month of the date of decision (including a decision not to investigate) (s.27).

(h) **Keeping the discloser informed.**
Sections 29 -30, which require that the *discloser*, as well as the ombudsman and IGIS 'must' be kept informed in a regular way recognises the mistakes of the past and is to be commended. It makes the agency accountable to the discloser (etc) as it should, and it keeps *everyone* on their toes, doing the right thing, for the right reasons.

(i) **Making disclosures to third parties: Part 5, ss.31-33.**
The two grounds upon which a PID may be made to a third party are essential, reasonable and practical, as they should push the agency into getting the right issue investigated in a timely and proper way. That is, the PID: not the whistleblower.

The inclusion of s.31(2) is particularly welcome. I can see how a third party could work to focus the agency mind on having to deal with the

problem it has exposed, and particularly in cases of public harm due to environmental or radioactive contamination, rather than wasting time, wrangling over whether the PID should have been made to an agency first. It rightly puts the public's interest ahead of others.

(j) **Obligations of agencies: Part 6.**

The use of language such as 'must' and 'ensure' and the provisions for future prevention, disciplining wrongdoers and the remediation of loss caused by detrimental action responds to and strikes the right balance, given the very public failures of the last 20 years.

But experience shows it won't happen in practice, without there being a dedicated whistleblower protection agency to do the heavy lifting (see below).

(j) **Consequential bill in relation to Fair Work & other acts**.

Whistleblowers Australia supports the consequential amendments to the Fair Work & Ombudsman's acts: it is an obvious and sensible step, which (eg) harnesses the adverse action provisions under the Fair Work Act.

Submission: The bill should be extended to apply to:
1. the Australian Federal Police to remove any confusion that protections apply, such as has arisen in NSW in relation to the disclosures made by senior police officer, Peter Fox under the Police Service Act and,
2. section 70 of the federal criminal code (which makes the disclosure of unauthorised information a criminal act), by exempting PIDs from its operation, so as to avoid there being another 'Alan Kessing' disaster (Customs, airport security & drug trafficking).

What is missing entirely?

This bill does not address the relative power of the agency as opposed to that of the whistleblower and unless and until it does you'll just be ignoring the elephant in the room.

No action and or 'cover-ups' happen, because there is no one with similar power to push the issue, leaving the agency to secretly put its own interests ahead of the public's interest in getting the problem fixed.

Just as the whistleblower (in effect) stands in the shoes of the public, when s/he exposes wrongdoing, so should a stand alone protective agency, in ensuring that the whistleblower is kept safe & treated with dignity and respect. Without balancing relative power and opportunity in this way, we can expect the experience of the last 20 years to continue.

That experience is that agencies tend to become easily conflicted. They can't face the music and deal with the wrongdoing **and** protect the whistleblower, unless the last is not their choice. Weasel words, inaction and or cover-ups and reprisals mostly win the day. This is not a recipe for strengthening public integrity.

The solution is obvious and simple: ensure that the agency that investigates the PID is not ever the agency that investigates, protects & takes action over reprisals. That is, remove the potential for a conflict of interests, by *institutionally* putting the public's interest in whistleblower protection ahead of an agency's self interest, good or bad.

Remove the temptation to hide the wrongdoing away, with weasel words and a re-structure: because self interest will win every time and particularly, if you have the power and the will to work in secrecy to corrupt others through their fears, and ambitions. This much, we all know.

Submission: Amend the bill to create a separate whistleblower protection agency or public interest disclosure agency ('PIDA') to ensure that a whistleblower is kept safe & treated with dignity and respect.

A PIDA for the protection & support of whistleblowers should have the following functions:

- Investigation of claims of reprisals;
- Provision of support, advice and representation for the PID discloser in relation to Part 7 protections;
- Review of the investigation & findings of particular PID on it own volition or an application for review;
- Maintain Part 8 oversight functions,
- Drive the implementation of procedures to model best practice and
- Adopt Part 6 functions as they apply to reprisal actions.
- **Note** that the PIDA would not investigate PIDs de novo, which would remain the province of the agencies so listed.

This change would also tend to lessen the aggressively adversarial approach adopted by too many of the agencies and it is one, which is more likely to ensure an outcome consistent with the objects of this bill than the present draft.

Whistleblowers Australia has been pushing for a stand alone PIDA at state and federal levels, since the early nineties. We suggest that the time is ripe for the federal parliament to lead in this way at this time.

This bill is stated to have no financial impact. If the parliament is not disposed to find the money on this occasion to fund a new stand alone PIDA it could achieve the same thing as an interim measure by giving the Ombudsman & IGIS the functions set out above.

Submission: Insert a further Part in the bill to provide for a 'qui tam' action or US style false claims act (or this could be separate legislation)

I ask you to consider the losses arising out of the major scandals over the last decade concerning the AWB, the RBA note printing companies, private health care providers and drug trafficking by senior police, and the lost

opportunities to recoup those losses had there been a US style false claims act in place at the time.

I can only bring what is known publicly to your notice and that's surely enough, but the AFP should be well placed to be able to quantify the losses foregone through lost opportunity.

If we'd had a US style false claims act in place now, (eg) Brian Hood in the RBA scandal would've been able to bring a false claim as a 'relator' on behalf of the RBA & the Government for three times the amount of the bribes paid.

If the RBA took over the action, Brian Hood would've only been able to claim up to 15 % of the award, with the Government collecting up to twice the amount paid in bribes. If Brian Hood ran the action, he would've been entitled to claim up to 30% of the award. Most actions settle out of court.

On my research the US experience has had very positive outcomes. It is apparently the single most effective fraud control strategy in the US. It recoups billions for the government each year and society has warmed to and protected whistleblowing as it should. This parliament should not take a conservative approach: it should learn from the US experience over nearly (30) years and legislate for false claims on the widest possible grounds.

Yours faithfully,

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Thank a whistleblower on July 30 - International Whistleblowers Day!
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