Parliamentary Joint Committee on Corporations and Financial Services

Whistleblower Protections

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Executive Summary

Effective whistleblowing provides an essential service in fostering integrity and accountability while deterring and exposing misconduct, fraud and corruption. A recent analysis of whistleblower protections across G20 countries found Australia's laws to be comprehensive for the public sector, but lacking in the private sector. However, the Moss Review of the *Public Interest Disclosure Act 2013* (PID Act) identified many flaws and areas for reform of the PID Act. Evidence to the inquiry, as well as consideration of existing laws, indicates that whistleblower protections remain largely theoretical with little practical effect in either the public or private sectors. This is due, in large part, to the near impossibility under current laws of:

- protecting whistleblowers from reprisals (i.e. from retaliatory action);
- holding those responsible for reprisals to account;
- effectively investigating alleged reprisals; and
- whistleblowers being able to seek redress for reprisals.

Another significant issue identified by the committee is the fragmented nature of whistleblower legislation. In particular, significant inconsistencies exist not only between various pieces of Commonwealth public and private sector whistleblower legislation, but also across the various pieces of legislation that apply to different parts of the private sector. The committee has made a number of recommendations to address these issues based on a detailed comparison of three separate Acts.

The committee has recommended separate public and private whistleblower protection legislation. However, the committee recognises that it would be the preference of Labor and Green committee members that a single Act be proceeded with in the first instance.

The committee's work on this inquiry was greatly assisted by a substantial body of academic work over the past two decades on whistleblower protections. The committee has used the best practice guidelines set out in the *Breaking the Silence* report as a systematic basis for conducting its inquiry and structuring this report. The table overleaf summarises the best practice criteria for whistleblowing legislation and the areas where the committee is recommending reforms.

One of the committee's main recommendations is the establishment of a Whistleblower Protection Authority (to be housed within a single body or an existing body) that can support whistleblowers, assess and prioritise the treatment of whistleblowing allegations, conduct investigations of reprisals, and oversight the implementation of the whistleblower regime for both the public and private sectors.

The committee notes the Moss review recommendation to ensure that the whistleblower regime is focussed on serious misconduct such as fraud and corruption. The committee considers that, for whistleblowing associated with serious misconduct, it is likely that reprisals would be a form of corrupt conduct (that is, dishonest or unethical or criminal conduct to obtain personal benefit by a person entrusted with a

position of authority). It is therefore the committee's view (assuming that the Moss Review recommendations are implemented) that the most appropriate body to house the Whistleblower Protection Authority is a body that has a demonstrated track record in identifying and investigating corruption and bringing those responsible to account.

Best practice criteria for legislation and recommendations for reform

Best Practice Criteria for Whistleblowing Legislation		**Summary of reforms recommended by the committee** (see Chapter 4 for further detail)
1	Broad coverage of organisations	Broaden to cover the private sector, and ensure consistency by bringing all private sector legislation into a single Act.
2	Broad definition of reportable wrongdoing	Broaden the private sector definition of disclosable conduct to a breach of any Commonwealth, state or territory law.
3	Broad definition of whistleblowers	Provide protections for both former and current staff that could make a disclosure, or are suspected of making a disclosure. Provide appropriate protection for recipients of disclosures and those required to take action in relation to disclosures.
4	Range of internal / regulatory reporting channels	Adopt a tiered approach comprising: (i) internal disclosure; (ii) regulatory disclosure; and (iii) external disclosure (in appropriate circumstances). Protect internal disclosures in the private sector, including in registered organisations.
5	External reporting channels (third party / public)	
6	Thresholds for protection	Align thresholds for protection across the public and private sectors.
7	Provision and protections for anonymous reporting	Allow for anonymous disclosures across the public and private sectors.
8	Confidentiality protected	Protect the confidentiality of the disclosures and the whistleblower's identity.
9	Internal disclosure procedures required	An appropriate body to set and promote standards for internal disclosure procedures in the private sector.
10	Broad protections against retaliation	Align the public and private sector with the protections, remedies and sanctions for reprisals in the *Fair Work Registered Organisations Act 2009.*
11	Comprehensive remedies for retaliation	
12	Sanctions for retaliators	

13	Oversight authority	Establish a Whistleblower's Protection Authority (to be housed within a single body or an existing body) that has as its priority to support whistleblowers, that has the power to investigate reprisals, and that will oversight the implementation of the whistleblower regime.
14	Transparent use of legislation	Annual reports to Parliament for both the public and private sectors in consistent format to facilitate comparison.

Recommendations

Consistency of whistleblower protections across sectors

Recommendation 3.1

3.60 The committee recommends that:

- **Commonwealth public sector whistleblowing legislation remain in a single updated Act, redrafted in parallel with the private sector Act;**
- **Commonwealth private sector whistleblowing legislation (including tax) be brought together into a single Act;**
- **The Government examine options (including the approach taken in the *Privacy Act 1988*) for ensuring ongoing alignment between the public and private sector whistleblowing protections, potentially including both in a single Act; and**
- **The Commonwealth, states and territories harmonise whistleblowing legislation across Australia.**

Disclosable conduct

Recommendation 5.1

5.31 The committee recommends that, in implementing the Moss Review recommendation regarding employment related matters care is taken to ensure that:

- **allegations of reprisal action taken against a person that has made a public interest disclosure can still be dealt with under a Whistleblowing Protection Act; and**
- **data is gathered and assessed in a national database on the proportion of disclosures that are personal employment related, but that this not have to occur before any legislative changes are made as recommended in this report.**

Recommendation 5.2

5.48 The committee recommends, in relation to whistleblower protections for the private sector, including the corporate and not-for-profit sectors, that disclosable conduct be defined to include:

- **a contravention of any law of the Commonwealth; or**
- **any law of a state, or a territory where:**
  - **the disclosure relates to the employer of the whistleblower and the employer is an entity covered by the *Fair Work Act 2009*; or**
  - **the disclosure relates to a constitutional corporation; and**
- **any breach of an industry code or professional standard that has force in**

law or is prescribed in regulations under a Whistleblowing Protection Act;

- **but not where the disclosure relates to a breach of law by the public service of a state or territory.**

Recommendation 5.3

5.51 The committee recommends that the government examine whether the Commonwealth has the constitutional power to include additional lower thresholds for disclosable conduct that would adequately protect whistleblowers such as those involved in scandals in the financial service sector in recent years.

Definition of whistleblowers and thresholds for protection

Recommendation 6.1

6.19 The committee recommends that section 69 of the *Public Interest Disclosure Act 2013* be amended to make it explicit that former public officials, as well as current and former contractors to the Australian Public Service, are able to make public interest disclosures.

Recommendation 6.2

6.23 The committee recommends that all private sector whistleblower protection legislation include protections for current and former staff, contractors and volunteers.

Recommendation 6.3

6.30 The committee recommends that protections in both the public and private sector be made consistent for threats or actual reprisals against people who:

- **have made a disclosure;**
- **propose to make a disclosure;**
- **could make a disclosure but do not propose to; or**
- **may be suspected of making, proposing to make, or be capable of making, a disclosure, even if they do not make a disclosure.**

Recommendation 6.4

6.35 The committee recommends that protections for recipients of disclosures in both the public and private sectors be made consistent, and cover the performance of any and all functions required of recipients or others required to take action in relation to disclosures, without regard to their motivations.

Recommendation 6.5

6.43 The committee recommends that an inquiry be conducted by either a parliamentary committee or the Australian Small Business and Family Enterprise Ombudsman into protections for reprisals against businesses where whistleblowers in those businesses make public interest disclosures about disclosable conduct by larger businesses.

Recommendation 6.6

6.60 The committee recommends that:

- **the 'good faith' test not be a requirement for protections under whistleblowing protection legislation; and**
- **a person be required to have a reasonable belief of the existence of disclosable conduct to receive protections under a Whistleblowing Protection Act.**

Anonymity of whistleblowers

Recommendation 7.1

7.24 The committee recommends that private sector whistleblowing legislation (including legislation covering corporations and registered organisations) explicitly allow, and provide protections for, anonymous disclosures consistent with public sector legislation.

Recommendation 7.2

7.28 The committee recommends that continuity of protection be made explicit in a consistent way for both the public and private sector whistleblowing protection legislation.

Recommendation 7.3

7.45 The committee recommends that protections for confidentiality be unified across the public and private sectors (including registered organisations), bringing together the best features of the *Public Interest Disclosure Act 2013* (such as sections 20 and 21) and other Acts, including offences for:

- **disclosure or use of identifying information or information likely to lead to the identification of the discloser; and**
- **protection of the identity of disclosers in courts or tribunals.**

Internal, regulatory, and external reporting channels

Recommendation 8.1

8.10 The committee recommends that whistleblower protections be extended to internal disclosures within the private sector, to include:

- **any person within the management chain for the whistleblower within the whistleblower's employer;**
- **any current officer of the company, or that company's Australian or ultimate parent; and**
- **any person specified in a policy published and distributed by an employer (or principal) of the whistleblower.**

Recommendation 8.2

8.19 The committee recommends that a Whistleblowing Protection Act should provide consistent whistleblower protections for regulatory disclosures from the public and private sectors.

Disclosures to Australian Law Enforcement Agencies

Recommendation 8.3

8.20 The committee recommends that where a whistleblower discloses a protected matter to an Australian law enforcement agency, that agency must provide regular updates to the whistleblower as to whether or not it is pursuing the matter, including where it transfers the matter to another law enforcement agency, in which case obligations to keep the whistleblower informed are transferred to that agency. However, nothing that would prejudice an investigation is required to be disclosed.

Recommendation 8.4

8.21 The committee recommends that Australian law enforcement agencies should be required to pass on whistleblower disclosures to whichever appropriate agency is to progress the disclosure. The whistleblower does not need to do this, if they have complied with the disclosure requirements of the Act.

External disclosures

Recommendation 8.5

8.43 The committee recommends that the existing whistleblower protections for external disclosures in the *Public Interest Disclosure Act 2013* be simplified (including a more objective test) and extended to disclosures to a registered organisation, a federal Member of Parliament or their office, and be included in a Whistleblowing Protection Act, except the provisions relating to intelligence functions which should continue to apply to the public sector only.

Recommendation 8.6

8.44 The committee recommends that if a disclosure of disclosable conduct has been made to an Australian law enforcement agency and after a reasonable time, no steps have been taken by that or any other agency (excluding where the whistleblower has elected to make an anonymous disclosure) whistleblowing protections shall apply if the same disclosure is subsequently made to the media if they have complied with the disclosure requirements of the Act.

Protection, remedies and sanctions for reprisals

Recommendation 10.1

10.38 The committee recommends that the *Fair Work (Registered Organisations) Act 2009* be amended to separate the grounds for civil and criminal liability.

Recommendation 10.2

10.39 The committee recommends that a Whistleblowing Protection Act reflect whistleblower protections, remedies and sanctions for reprisals in the *Fair Work (Registered Organisations) Act 2009*, including:

- **protection from harassment, harm including psychological harm and damage to property or reputation;**
- **remedies for exemplary damages;**
- **sanctions including civil penalties; and**
- **separating the grounds for criminal and civil liability.**

Recommendation 10.3

10.42 The committee recommends that current provisions in section 14 of the *Public Interest Disclosure Act 2013*, which clarify the options for courts/tribunals in apportioning liability for compensation between individuals and organisations, extend to apply to the private sector.

Reward system

Recommendation 11.1

11.58 The committee recommends that following the imposition of a penalty against a wrongdoer by a Court (or other body that may impose such a penalty), a whistleblower protection body (such as that recommended in Chapter 12) or prescribed law enforcement agencies may give a 'reward' to any relevant whistleblower.

Recommendation 11.2

11.59 The committee recommends that such a reward should be determined within such body's absolute discretion within a legislated range of percentages of the penalty imposed by the Court (or other body imposing the penalty) against the whistleblower's employer (or principal) in relation to the matters raised by the whistleblower or uncovered as a result of an investigation instigated from the whistleblowing and where the specific percentage allocated will be determined by the body taking into account stated relevant factors, such as:

- **the degree to which the whistleblower's information led to the imposition of the penalty;**
- **the timeliness with which the disclosure was made;**

- **whether there was an appropriate and accessible internal whistleblowing procedure within the company that the whistleblower felt comfortable to access without reprisal;**
- **whether the whistleblower disclosed the protected matter to the media without disclosing the matter to an Australian law enforcement agency or did, but did not provide the agency with adequate time to investigate the issue before disclosing to the media;**
- **whether adverse action was taken against the whistleblower by their employer;**
- **whether the whistleblower received any penalty or exemplary damages (but not compensation) in connection to any adverse action connected with the disclosure; and**
- **any involvement by the whistleblower in the conduct for which the penalty was imposed, noting that immunity from prosecution, seeking a reduced penalty against the whistleblower etc. is dealt with by separate processes and that a reward would be regarded as a proceed of crime, if the whistleblower had been involved in criminal conduct (i.e. immunity or reduced penalty, not the reward is the benefit and incentive).**

Whistleblower Protection Authority

Recommendation 12.1

12.84 The committee recommends that a one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors as follows:

- **a Whistleblower Protection Authority be established in an appropriate existing body;**
- **a Whistleblower Protection Authority be prescribed as an investigative agency with power to investigate criminal reprisals and make recommendations to the Australian Federal Police or a prosecutorial body and non-criminal reprisals against whistleblowers;**
- **a Whistleblower Protection Authority have power to investigate and oversight any investigation of a non-criminal reprisal undertaken by a regulator or public sector agency;**
- **a Whistleblower Protection Authority be prescribed to take non-criminal matters to the workplace tribunals or courts on behalf of whistleblowers or on the authority's own motion to remedy reprisals or detrimental outcomes in appropriate cases;**
- **any other necessary legislative changes are made to ensure that a Whistleblower Protection Authority is able to investigate non-criminal reprisals, including providing it with appropriate powers to obtain the necessary information;**

- **that the public sector whistleblower protection oversight functions be moved from the Commonwealth Ombudsman to the Whistleblower Protection Authority;**
- **that the Whistleblower Protection Authority, in consultation with relevant law enforcement agencies, approve the payment of a wage replacement commensurate to the whistleblower's current salary to a whistleblower suffering adverse action or reprisals; and**
- **that the Whistleblower Protection Authority have the oversight functions for the private sector excluding the functions relating to the Inspector-General of Intelligence and Security.**

Recommendation 12.2

12.85 The committee recommends that where a whistleblower is the subject of reprisals from their current employer, or a subsequent employer/principal due to their whistleblowing, the Whistleblower Protection Authority be authorized, after consulting with relevant law enforcement agencies to which the conduct relates, to pay a replacement wage commensurate to the whistleblower's current salary as an advance of reasonably projected compensation until the resolution of any compensation or adverse action claim brought by the whistleblower (where such advance payment would be repaid to the Whistleblower Protection Authority from such compensation if awarded).

Recommendation 12.3

12.87 The committee recommends that, if the Government implements legislation as per the Moss Review recommendation 6, that a Whistleblowing Protection Act should include consistent whistleblower protection between the public and private sectors and include reprisals within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.

Recommendation 12.4

12.88 The committee recommends that a Whistleblowing Protection Act include specific requirements for the investigation of disclosures and reprisals that are consistent with the present *Public Interest Disclosure Act 2013* and the *Fair Work (Registered Organisations) Act 2009*.

Recommendation 12.5

12.91 The committee recommends that the public and private sector whistleblower legislation include consistent provisions that allow civil proceedings and remedies to be pursued if a criminal case is not pursued.

Recommendation 12.6

12.94 The committee recommends that the compensation obtainable by a whistleblower through a tribunal system be uncapped.

Recommendation 12.7

12.100 The committee recommends that the Whistleblower Protection Authority be given powers to set standards for internal disclosure procedures in the public sector (where internal disclosure should be mandated before external disclosures are permitted) and private sector (which may include mandatory internal disclosures in organisations above a prescribed size and recommended approaches for others).

Recommendation 12.8

12.104 The committee recommends that the Whistleblower Protection Authority provide annual reports to Parliament, and that the information on the public and private sectors be closely aligned in format and content to facilitate comparison.

Recommendation 12.9

12.106 The committee recommends that provisions that override confidentiality clauses in employer-employee agreements or settlements be made consistent in public and private sector whistleblower legislation (including maintenance of public sector security and intelligence exceptions).

Recommendation 12.10

12.107 The committee recommends that it be made explicit in a Whistleblowing Protection Act that nothing in the legislation allows for or permits a breach of legal professional privilege.

Recommendation 12.11

12.110 The committee recommends that there be a statutory requirement for a post-implementation review of the new whistleblower legislation, within a prescribed time.

Abbreviations

ABA	Australian Bankers' Association
ACCA	Association of Corporate Counsel Australia
ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
Action plan	Australia's First Open Government National Action Plan 2016–18
AFP	Australian Federal Police
AICD	Australian Institute of Company Directors
AIST	Australian Institute of Superannuation Trustees
ALA	Australian Lawyers Alliance
APRA	Australian Prudential Regulation Authority
APSC	Australian Public Service Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
Best Practice Criteria	Best practice criteria for whistleblowing legislation, Wolfe, Worth, Dreyfus, and Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws,* September 2014, p. 3.
Breaking the Silence	Wolfe, Worth, Dreyfus, and Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws,* September 2014.
CC Act	*Competition and Consumer Act 2010*
CFTC	US Commodity Futures Trading Commission
CLERP	Corporate Law Economics Reform Program
CLERP Bill	Corporate Law Economics Reform Program (CLERP) (Audit Reform and Corporate Disclosure) Bill 2003
Corporations Act	*Corporations Act 2001*
FCA	UK Financial Conduct Authority

FPA	Financial Planning Association of Australia
FSU	Finance Sector Union
FW Act	*Fair Work Act 2009*
FWRO Act	*Fair Work (Registered Organisations) Act 2009*
G20	The Group of Twenty (G20) is an international forum for the governments and central bank governors from 20 major economies.
G20 Compendium	C20 Compendium of best practices and guiding principles for whistleblower protection legislation
GIA	Governance Institute of Australia
IBACC	International Bar Association Anti-Corruption Committee
IGIS	Inspector-General of Intelligence and Security
IRS	US Internal Revenue Service
Law Council	Law Council of Australia
MEAA	Media, Entertainment & Arts Alliance
Moss Review	Review of the *Public Interest Disclosure Act 2013*, July 2016
OECD	Organisation for Economic Co-operation and Development
PID Act	*Public Interest Disclosure Act 2013*
PID Bill	Public Interest Disclosure Bill 2013
PRA	Bank of England Prudential Regulation Authority
ROC	Registered Organisations Commission
Senate Select Committee	Senate Select Committee on Public Interest Disclosures
the committee	Parliamentary Joint Committee on Corporations and Financial Services
the Treasury	Department of the Treasury
US-SEC	US Securities Exchange Commission

Chapter 1
Introduction

Duties of the Committee

1.1 The Parliamentary Joint Committee on Corporations and Financial Services (the committee) is established by Part 14 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act). Section 243 of the ASIC Act sets out the Parliamentary Committee's duties as follows:

(a) to inquire into, and report to both Houses on:

(i) activities of ASIC or the [Takeovers] Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of the corporations legislation (other than the excluded provisions); or

(iii) the operation of any other law of the Commonwealth, or any law of a State or Territory, that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); or

(iv) the operation of any foreign business law, or of any other law of a foreign country, that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.[1]

1 ASIC Act 2001, s. 243.

Terms of reference

1.2 On 30 November 2016, the Senate referred an inquiry into whistleblower protections to the committee for report by 30 June 2017. The terms of reference are as follows:

(a) the development and implementation in the corporate, public and not-for-profit sectors of whistleblower protections, taking into account the substance and detail of that contained in the *Fair Work (Registered Organisations) Act 2009* (FWRO Act) passed by the Parliament in November 2016;

(b) the types of wrongdoing to which a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors should apply;

(c) the most effective ways of integrating whistleblower protection requirements for the corporate, public and not-for-profit sectors into Commonwealth law;

(d) compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America;

(e) 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;

(f) the definition of detrimental action and reprisal, and the interaction between and, if necessary, separation of criminal and civil liability;

(g) 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;

(h) the obligations on independent regulatory and law enforcement agencies to ensure the proper protection of whistleblowers and investigation of whistleblower disclosures;

(i) the circumstances in which public interest disclosures to third parties or the media should attract protection;

(j) any other matters relating to the enhancement of protections and the type and availability of remedies for whistleblowers in the corporate, not-for-profit and public sectors; and

(k) any related matters.[2]

2 *Journals of the Senate*, No. 22, 30 November 2016, p. 714.

Conduct of the inquiry

1.3 The committee advertised the inquiry on its webpage and invited submissions from a range of relevant stakeholders. The committee set a closing date for submissions of 10 February 2017. On 14 June and 15 August 2017, the Senate agreed to extensions of the reporting date to 17 August and 14 September 2017 respectively.[3]

Submissions

1.4 The committee received 75 submissions as detailed in Appendix 1. The committee also received additional information including answers to a series of questions taken on notice by witnesses.

Confidential material

1.5 While the committee prefers to receive evidence in public, the committee received a substantial number of confidential accounts from whistleblowers. Many of these accounts reveal that whistleblowers are reporting that they have suffered serious reprisals. Many have left their field of employment while others harbour deep-seated fears for their employment and livelihoods.

1.6 Some whistleblowers informed the committee that they have suffered reprisals as a result of past contact with parliamentary committees. Other submitters noted that their matter was still under investigation or consideration by a court or tribunal. The committee therefore chose quite deliberately not to name or retell stories and case studies in this report in order to protect the identity of whistleblowers.

1.7 On 15 December 2016 (the inquiry was referred on 30 November 2016) the committee resolved to inform submitters via the inquiry website that:

> The committee welcomes accounts that may identify widespread issues and make recommendations regarding whistleblower protections. The committee is not able to receive or investigate whistleblower allegations. If you make adverse comment about people in your submission, the committee may reject such evidence or offer a right of reply.

1.8 While the committee informed submitters that it was not able to investigate or seek to resolve individual matters, it was clear from some of the correspondence that several submitters expected the committee to publicise their personal accounts. This was not the committee's role. However, the committee considered carefully all material received, and these personal accounts helped inform the committee of particular issues that need to be addressed and, by extension, assisted the committee in formulating recommendations.

Hearings

1.9 The committee held five public hearings in Brisbane on 23 February 2017, Melbourne on 27 April 2017, and Canberra on 28 April, 31 May, and 15 June 2017. A list of witnesses who gave evidence at the public hearings is detailed in Appendix 2.

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3 *Journals of the Senate*, No. 43, 14 June 2017, p. 1410, No. 53, 15 August 2017, p. 1709.

Structure of the report

1.10 The report structure is set out below. While each chapter covers relatively discrete topics, a range of best practice criteria (summarised in chapter two on page 22) inform the different chapter topics.

Table 1.1: Structure of this report

Chapter	Contents	Best practice criteria covered
1	Introduction	
2	Background and context for whistleblower protections	
3	Consistency of whistleblowing protections across different sectors in Australia.	1
4	Comparison of whistleblower legislation against best practice criteria for whistleblowing legislation	All
5	Disclosable conduct	2
6	Definition of whistleblowers; and thresholds for protection	3, 6
7	Provision for anonymous reporting, continuity of protection and protecting confidentiality	7, 8
8	Internal and external reporting channels	4, 5
9	Members of Parliament	5
10	Protection, remedies and sanctions for reprisals	10, 11, 12
11	Reward system	
12	Oversight authority, transparent use of legislation and requirements for internal disclosure procedures	9, 13, 14

Acknowledgements

1.11 The committee thanks all those who assisted with the inquiry, especially the witnesses who put in extra time and effort to answer written questions on notice and provide further valuable feedback to the committee as it gathered evidence.

Notes on references

1.12 References and pages numbers for the committee Hansard are to the proof Hansard.

Chapter 2
Background

Introduction

2.1 This chapter provides the context for the current inquiry. It begins by summarising the arguments put to the committee on the value and importance of establishing effective whistleblower protections. It then notes the current legislative framework that applies to the public sector, to registered organisations, and to the corporate sector. This is followed by an overview of various whistleblower inquiries that have occurred in Australia since the early 1990s and the development of whistleblower legislation during that period. The following section sets out some of the international developments in whistleblower protection legislation as part of greater global moves to tackle corruption. The chapter finishes with an analysis of Australia's current whistleblower protection legislation as measured against specific best practice criteria.

Context—why whistleblowing is important

2.2 The key arguments for establishing effective whistleblower protections are essentially based on a view put by numerous submitters and witnesses that whistleblowing was critical in fostering a culture of transparency, accountability, and integrity. For example, Ms Serene Lillywhite, Chief Executive Officer, Transparency International indicated that:

- whistleblower protection is integral to fostering transparency, promoting integrity and detecting misconduct;
- protecting whistleblowers promotes a culture of accountability and integrity in both the public and private institutions; and
- whistleblowing empowers citizens against corruption and encourages the reporting of misconduct, fraud and corruption.[1]

2.3 Mr Jordan Thomas pointed out that whistleblowers perform a vital service to both markets and organisations because:

- they force us to focus on our failings;
- they challenge our ideals; and
- they show the limits of law enforcement authorities, self-regulatory organisations, and corporate compliance programs.[2]

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1 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard,* 27 April 2017, p. 2.

2 Mr Jordan Thomas, *Submission 70*, p. 2.

2.4 As discussed below, several submitters and witnesses argued that a strong whistleblower culture would have a positive transformative impact on organisations by helping to drive organisational change from within.

2.5 For example, the Australian Institute of Company Directors (AICD) argued that boards and directors have a critical role to play in establishing and promoting a corporate culture that supports disclosure of wrongdoing:

> …a speak-up culture within organisations. And this is very much an issue that is top of mind for Australian directors and is very much raised in the forums and committees with our members that we work with. We believe the regulation of whistleblowing has a significant impact, as well, on that culture of disclosure. The inadequacies in the current system limit the ability of corporates, directors and whistleblowers to play their part in ensuring the compliance of organisations with the law as a whole.[3]

2.6 Dr Simon Longstaff, Executive Director of the Ethics Centre argued that it would be useful to draw a distinction between the reporting of wrong doing as an ordinary regular practice and whistleblowing as a more extraordinary event. The Ethics Centre argued for creating cultures in which it is entirely normal for a person to spot a discrepancy between what the organisation says it stands for and what it is actually doing, or to spot some element of risk either to the corporation or to other people who have a legitimate interest in the corporation's conduct. Viewed in this light, the Ethics Centre suggested that whistleblowing should be seen as an extraordinary event where a person is required to go outside the bounds of the organisation and its normal channels in order to raise serious concerns about some aspect of the corporation's conduct, or somebody associated with that corporation.[4]

2.7 In a similar vein, Mr Warren Day, Senior Executive Leader from the Australian Securities and Investments Commission (ASIC) argued that a good organisational culture should reduce the need for whistleblowers and that the presence of a whistleblower indicated a failure of organisational culture and compliance systems.[5]

2.8 Likewise, Mr Phil Ware, Member of the Association of Corporate Counsel Australia took the view that whistleblower protection legislation should be designed to encourage proactive internal compliance procedures:

> The regulatory goal should not so much be a more effective framework for corporate whistleblowing which is focused on punishment of offenders, which is lagging and punitive, let alone the windfall enrichment of whistleblowers and their lawyers via bounties in circumstances where they are immune from costs. The regulatory goal, rather, should be improving

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3 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 23.

4 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, p. 7.

5 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 66.

> the effectiveness of internal compliance cultures. This is leading, proactive and preventive.[6]

2.9 Mr Joshua Bornstein, Director/Principal from Maurice Blackburn Lawyers informed the committee of his concerns about sub-standard corporate governance in Australia:

> I think there is a fundamental problem in Australian business culture, which is that its corporate governance standards are poor. This malaise feeds I think also into our political, legislative and regulatory culture. There have been countless scandals in our banking and finance sector in the last decade involving illegal and improper conduct. Many thousands of consumers, including vulnerable retirees, have been ripped off. Wage and superannuation fraud is now, in my experience, at an unprecedented level, particularly impacting low-paid and vulnerable employees right across the private sector. Bribery scandals regularly dog Australian companies trading overseas, and company tax compliance in this country is a rolling scandal.[7]

2.10 Mr Thomas asserted that corporations serve a necessary social purpose but can also cause great harm. He was of the view that encouraging those who know of wrongdoing in the workplace to speak out is essential to protecting the innocent victims of such misconduct.[8]

2.11 However, Mr Thomas also pointed out that being a corporate whistleblower is rarely easy or glamorous and can often involve great risk for the person speaking out. Mr Thomas explained why reprisals occur even when it is not in the corporation's best interest:

> In agency theory it is recognized that there is an inherent potential for conflict between the interests of an entity and the interests of its agents – the ones who act for the company. So while a 'company' may logically have an interest in acting legally and ethically, and in encouraging its employees to report misconduct without fear of retaliation, its managers and officers, as agents, may not share this corporate interest…The 'corporation' may have no interest in harming the whistleblower, but the corporation can only act through its agents. History, and countless surveys and media stories, consistently show that those agents can and do retaliate against corporate whistleblowers.[9]

2.12 Ms Julia Angrisano, National Secretary from the Financial Sector Union (FSU) informed the committee that the feedback it received from its member surveys indicates that workers lack trust in the current frameworks and policies across the industry because they have experienced, seen or heard practices that suggest a

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6 Mr Phil Ware, Member, Association of Corporate Counsel Australia, *Committee Hansard*, 27 April 2017, p. 32.

7 Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 42.

8 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017).

9 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017).

significant gap between policy and practice for whistleblowers. The FSU gave some examples of the feedback that it had received:

> When we asked the reason for not accessing whistleblower policies, many of our members told us that it is made very clear to them that they should not rock the boat by calling out bad behaviours or that the system rewards people who do what they are told. Often, they talk to us about the fact that their pay system sometimes rewards them for selling an insurance policy or another financial product that is worse than the current policy, but that is the framework that they operate within.[10]

> Our members contact us feeling like they have seen something or they have heard something, but they are too scared to raise it, because they have seen it happen in other circumstances where people just simply lose their jobs or move on to another department or are isolated.[11]

2.13 The Australian Federal Police (AFP) informed the committee that whistleblowers are important in detecting serious financial crime that is often sophisticated, well concealed, and part of a culture of cover-up. The AFP noted that due to the complex nature of serious financial crime there is often a low risk of discovery by regulators and law enforcement unless whistleblowers are supported in coming forward. The sorts of matters where whistleblowers may inform investigations include foreign bribery, serious tax crime, identity crime, corporate and government corruption matters and serious fraud offences. The AFP argued that:

> If people are discouraged from coming forward to regulators or law enforcement due to lack of protections for their safety, protection from legal action and the personal and financial impacts of disclosing company information, there may be no case to prosecute. Where people do come forward, but are not willing to give evidence, due to lack of protection for anonymity, law enforcement may not have sufficient evidence to prosecute. This may not be fixed solely by enhancing protections as court procedures can only go so far in protecting witness identity.

> Whether or not improved whistleblower protections would encourage people to come forward and disclose wrongdoing would depend on how the system is framed, and whether the public has the confidence that the system can ensure any protections.[12]

2.14 The Governance Institute of Australia (GIA) argued that whistleblowing has a critical role to play in identifying and stopping misconduct in the corporate sector, but it is only one aspect of companies' overall programs to ensure compliance with regulation and to prevent and detect misconduct:

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10 Ms Julia Angrisano, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 28 April 2017, p. 9.

11 Ms Julia Angrisano, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 28 April 2017, p. 12.

12 Australian Federal Police, *Answers to questions on notice*, 28 April 2017 (received 19 May 2017).

> Whilst we do not consider that misconduct and illegal activity is endemic within Australian companies, our members' experience is that whistleblowing usually occurs when other avenues that already exist have been exhausted or failed. Again, we note our support for significant reforms in this area.[13]

2.15 The International Bar Association Anti-Corruption Committee (IBACC) argued that, from the submissions to this inquiry, it appeared that those who blow the whistle outside of the public sector do so at their own risk and at their own peril:

> There have been numerous reports, inquiries and research done over the years that have looked at this question, and yet still the messenger and the message are attacked, and the underlying conduct seems not to be addressed or, if it is addressed, it is addressed privately and out of the public spotlight.[14]

> Protections in the private sector have generally been non-existent…Whistleblowers face a large number of severe sanctions on and processes of adverse consequences for them. They are real, they are emotional and financial, and they can affect people for many years thereafter, when all they were doing, invariably, was their job, by reporting something that they observed to the company by which they were employed, and they, in turn, became the target of an attack—from the company or from those engaging in the behaviour—to suppress it.[15]

2.16 The Law Council of Australia (Law Council) considered whistleblower protection reform to be urgent. However, the Law Council cautioned that piecemeal regulation would be insufficient, and that careful policy analysis was necessary to ensure that regulation led to genuine behavioural and structural change.[16]

2.17 The AICD argued that legislative reform that took account of best practice indicators could lead to substantial improvements in Australia's corporate whistleblowing framework, particularly given the current anaemic framework.[17]

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13 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 25.

14 Mr Robert Wyld, Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 28 April 2017, p. 14.

15 Mr Robert Wyld, Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 28 April 2017, p. 14.

16 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

17 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

Public interest disclosure

2.18 Whistleblowing is often technically referred to as public interest disclosure. Whistleblowers play a critical role in identifying and preventing misconduct. Legislative protections have existed for public sector whistleblowers in most Australian states and territories since the 1990s. Protections for private sector whistleblowers were not legislated until 2004.[18]

Commonwealth public sector

2.19 The *Public Interest Disclosure Act 2013* (PID Act) is intended to promote the integrity and accountability of the Commonwealth public sector by:

- encouraging and facilitating the making of disclosures of wrongdoing by public officials;
- ensuring that public officials who make protected disclosures are supported and protected from adverse consequences relating to the making of a disclosure; and
- ensuring that disclosures are properly investigated and dealt with.[19]

Registered organisations

2.20 In November 2016, the Parliament passed amendments to the FWRO Act which strengthened whistleblower protections for people who report corruption or misconduct in unions and employer organisations. The amendments provide protections to whistleblowers who disclose information about contraventions of the law, including current and former officers, employees, members and contractors of organisations.[20] Amendments that were introduced by the Senate and passed both Houses include:

- defining what constitutes a reprisal;
- civil remedies against reprisals;
- awarding of costs against vexatious proceedings;
- civil penalties for reprisals;
- criminal offences for reprisals;
- that protections have effects despite other Commonwealth laws;
- provisions for the investigation and handling of disclosures;
- time limits for investigations;

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18 Senate Economics Reference Committee, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*, Issues Paper, April 2016, p. 2.

19 Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act 2013*, April 2016, p. 2.

20 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 7.

- disclosures to enforcement agencies; and
- protection of witnesses.[21]

Corporate whistleblowing

2.21 Current protections for whistleblower disclosures in the corporate sector are contained in Part 9.4AAA of the *Corporations Act 2001* (Corporations Act) which was introduced as part of a range of corporate legislative reforms in 2004. Those protections:

- confer statutory immunity on the whistleblower from civil or criminal liability for making the disclosure;
- constrain employer rights to enforce a contract remedy against the whistleblower (including any contractual right to terminate employment) arising as a result of the disclosure;
- prohibit victimisation of the whistleblower;
- confer a right on the whistleblower to seek compensation if damage is suffered as a result of victimisation; and
- prohibit revelation of the whistleblower's identity or the information disclosed by the whistleblower with limited exceptions.[22]

2.22 For public interest disclosures concerning misconduct or an improper state of affairs or circumstances affecting the institutions supervised by the Australian Prudential Regulation Authority (APRA), whistleblower protections in the following acts may apply:

- the *Banking Act* 1959;
- the *Insurance Act* 1973;
- the *Life Insurance Act* 1995; and
- the *Superannuation Industry (Supervision) Act 1993*.[23]

Previous inquiries and reviews

2.23 In 2005, the Parliamentary Library published a research note on whistleblowing in Australia. The library noted that whistleblower protections became a significant issue in the late 1980s and early 1990s when inquiries identified that the common law was unable to provide employees with a right to disclose information about the workplace and protection from reprisals. Following those inquiries, all

21 FWRO Act, Part 4A.

22 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 4.

23 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 5.

Australian states and the Australian Capital Territory (ACT) adopted some form of public interest disclosure protection legislation.[24]

2.24 In 1991, the Gibbs committee review of Commonwealth Criminal Law recommended that catch-all secrecy provisions should be replaced with provisions limiting penal sanction for the unauthorised disclosure of official information to specific categories required for the effective functioning of government, such as defence and foreign affairs. The Gibbs committee concluded that appropriate protections should be provided for disclosure of other information in the public sector.[25]

2.25 In 1991, the Senate Standing Committee on Finance and Public Administration concluded that the Commonwealth Ombudsman has often been unsuccessful in resolving major and complex complaints and made the following observations in relation to whistleblower protections:

> Perceived failings were that the Ombudsman's investigations were ineffectual, that there was no power to resolve any serious deficiencies which might have been detected or to protect complainants effectively and that members of the Ombudsman's staff were too close to the public servants they were sent to investigate.[26]

2.26 This led the committee to make the following conclusions and suggestions:

> …that the Ombudsman should be responsible at least for filtering whistleblowing complaints or redirecting them if appropriate to another agency. In some cases it would be necessary for the Ombudsman to undertake a full investigation into a whistleblowing allegation.
>
> To deal with whistleblowing allegations and to enable the Ombudsman to fulfil a role as an external review body as outlined above, the Committee recommended that the Ombudsman establish a specialist investigation unit within its Office. This new aspect of its operations would also be able to target areas for systemic reform, but its activities would remain separate from the bulk complaint work of the Ombudsman because of the different investigative approach required.[27]

2.27 In 1994, a Senate Select Committee on Public Interest Whistleblowing acknowledged that whistleblowing is a legitimate form of action within a democracy. That committee also indicated that national leadership and education would be required in addition to the legislative changes it recommended, including:

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24 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability … but above all, the truth*, Research Note, February 1995, p. 1.

25 Review of Commonwealth Criminal Law – Final Report, Sir Harry Gibbs (Chairman), December 1991, pp. 335–355.

26 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, December 1991, pp. 67–68.

27 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, December 1991, p. 69.

- the establishment of the public interest disclosure agency to receive disclosures, act as a clearing house, arrange for investigations, ensure protection of whistleblowers, and provide a national education program;
- that legislation cover both the public and private sectors;
- that the states, territories and industry work with the Commonwealth to address areas of Commonwealth constitutional limitations in relation to private sector whistleblowing, including consideration of an industry ombudsman;
- that legislation extend to policing, academic institutions, health care and banking;
- not allowing anonymous disclosures;
- exemption of public interest disclosures from most secrecy provisions;
- that protection of whistleblowers be conditional on correct procedures being followed;
- that victimisation of whistleblowers should be investigated;
- that the subject of whistleblowing be protected in accordance with the principles of natural justice and that false allegations should constitute an offence;
- that Legal Aid should be available to whistleblowers; and
- that a reward system should not be considered.[28]

2.28 In 1995, another Senate Select Committee examined unresolved whistleblower cases. There were also several unsuccessful attempts at a federal level to introduce whistleblower legislation.[29]

2.29 In 2004, this committee considered corporate sector whistleblower protections as part of its inquiry into the Corporate Law Economics Reform Program (CLERP) (Audit Reform and Corporate Disclosure) Bill 2003 (CLERP Bill). At the time the committee noted:

> The latest spate of corporate failures has once again highlighted the problems created by a culture of corporate silence which allows wrongdoing to go undetected. It has raised public awareness of the crucial role that personnel can have in uncovering corporate wrongdoing. Most recent studies into whistleblowing agree that change is needed on two main

28 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. xiii–xxv.

29 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability … but above all, the truth*, Research Note, February 1995, p. 1.

> fronts a cultural shift in attitudes toward whistleblowers and legislative reforms to both encourage and maintain this change.[30]

2.30 The committee considered the whistleblower scheme in the CLERP bill to be 'sketchy in detail', with scant information in the legislation and the Explanatory Memorandum on the obligations of companies to ensure that they have in place a whistleblower scheme.[31]

2.31 The committee made a number of recommendations to offer greater encouragement for whistleblowers to come forward and for companies to investigate wrong doing, including:

- requiring corporations to establish a whistleblower scheme;
- requiring ASIC to publish guidance notes for companies on whistleblower schemes;
- clarifying the application of legislation to employees of contractors;
- replacing the 'good faith' test with 'an honest and reasonable belief';
- requiring that disclosures are about serious matters;
- providing for anonymous disclosures and confidentiality; and
- allowing ASIC to represent the interest of a person who is alleged to have suffered a reprisal.[32]

2.32 In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered public sector whistleblower protections and made recommendations, including:

- the introduction of legislation for public sector whistleblower protections;
- rights for people in the public sector to raise concerns without fear of reprisal;
- a requirement for whistleblowers to act in 'good faith';
- a definition of who is able to be a whistleblower;
- a suggestion for future consideration of whether members of the public may be able to make public interest disclosures;
- that the Commonwealth Ombudsman be the authority for receiving and investigating public interest disclosures and for oversight of the public interest disclosure scheme in the Commonwealth;
- the types of disclosure that should be protected;

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30 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, p. 6.

31 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, p. xxii.

32 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, pp. 14–28.

- that the motive of the whistleblower should not prevent the disclosure from being protected;
- that protection not apply to disclosures that are 'knowingly false';
- that protections include immunity from criminal liability, civil penalties and certain civil actions;
- obligations for agencies to establish whistleblower protection procedures;
- provision for disclosure to the media and Members of Parliament; and
- protection for disclosures to third parties such as legal advisors, professional associations and unions where the disclosure is made for the purpose of seeking advice or assistance.[33]

2.33 In March 2013, the Public Interest Disclosure Bill 2013 (PID Bill) was introduced to the House of Representatives.[34] It sought to make a number of reforms and bring a new act to replace limited whistleblower protections that previously existed in the *Public Service Act 1999*. The PID Bill overlapped with earlier private members Bills on whistleblower protections introduced by Mr Andrew Wilkie MP.[35]

2.34 The House of Representatives Standing Committee on Social Policy and Legal Affairs considered both the PID Bill and Mr Wilkie's Bills. That committee tabled an advisory report in March 2013, recommending that the PID Bill be passed with amendments to clarify continuity of protection, protections for external disclosures and protections from reprisals.[36]

2.35 The Senate Legal and Constitutional Affairs Legislation Committee also examined the provisions of the PID Bill and made recommendations, including:

- adding protections for disclosure to supervisors;
- clarifying provisions for misleading or false claims;
- clarifying requirements for external disclosures; and
- removing a clause that was ineffective in relation to parliamentary privilege.[37]

2.36 In its inquiry into the performance of ASIC, the Senate Economics References Committee made recommendations on whistleblower protections including:

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33 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. xix–xxv.

34 House of Representatives, *Votes and proceedings*, No. 160, 21 March 2013, p. 2198.

35 Parliamentary Library, *Bill Digest*, No. 125, 3 June 2013, pp. 3–6.

36 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report, Public Interest Disclosure (Whistleblower Protection) Bill 2012, Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012, Public Interest Disclosure Bill 2013*, May 2013, p. xi.

37 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, p. vii.

- broadening the definition of whistleblowers and scope of relevant information;
- protecting the identity of whistleblowers and anonymous disclosers;
- a review of Australia's framework for protecting corporate whistleblowers drawing on the 2009 Treasury options paper as appropriate;
- changes to requirements for whistleblowers to act in good faith; and
- remedies for whistleblowers who are disadvantaged and consequences for those taking reprisals against whistleblowers.[38]

2.37 The Senate Economics References Committee also published an issues paper on corporate whistleblowing as part of its inquiry into scrutiny of financial advice which lapsed at the end of the 44th Parliament.[39] The committee invited submitters to the current inquiry to comment on the issues paper.

2.38 In October 2016 the government released the 'Moss Review' of the effectiveness and operation of the PID Act. The Moss Review found that:

- the PID Act had only been partially successful partly due to its recent implementation and ineffective operation of the framework;
- the mechanisms under the PID Act which facilitate investigation of wrongdoing were overly complex; and
- the categories of disclosable conduct were too broad and should be focussed on the most serious integrity risks.[40]

2.39 The Moss Review made recommendations including:

- strengthening the ability of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security (IGIS) to scrutinise and monitor the decisions of agencies, and increasing the number of investigative agencies;
- a greater focus on significant wrongdoing and expanding the grounds for external disclosure; and
- redrafting the PID Act using a principles-based approach and better protections for witnesses and whistleblowers.[41]

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38 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 224–225.

39 Senate Economics References Committee, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*, issues paper, April 2016.

40 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 15.

41 Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 7–8.

2.40 In December 2016, *Australia's First Open Government National Action Plan 2016–18* (the action plan) was finalised. The action plan includes a commitment to improve whistleblower protections in the tax and corporate sectors as follows:

> Australia will ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector.[42]
>
> We will do this by improving whistle-blower protections for people who disclose information about tax misconduct to the Australian Taxation Office. We will also pursue reforms to whistle-blower protections in the corporate sector, with consultation on options to strengthen and harmonise these protections with those in the public sector.[43]

2.41 As part of the action plan the government committed to examining the Registered Organisations Commission (ROC) whistle-blower amendments with the objective of applying those amendments to the corporate and public sectors:

> The Government has committed to supporting a Parliamentary inquiry (Inquiry) to examine the Registered Organisations Commission whistle-blower amendments with the objective of implementing the substance and detail of those amendments to achieve an equal or better whistle-blower protection and compensation regime in the corporate and public sectors.[44]

2.42 The timetable for government action set out in the action plan is shown in Table 2.1 below.

2.43 In December 2016, the government established a review of tax and corporate whistleblower protections in Australia. A consultation paper was released and submissions were due by 10 February 2017.[45]

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42 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 14.

43 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 14.

44 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, pp. 16–17.

45 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. vii.

Table 2.1: Timetable for National Action Plan whistleblower commitments

Milestone	End date
Establish Parliamentary inquiry.	30 June 2017
Treasury to release a public consultation paper covering both tax whistle-blower protections and options to strengthen and harmonise corporate whistle-blower protections with those in the public sector.	March 2017
(i) Development and public exposure of draft legislation for tax whistle-blower protections (informed by consultation). (ii) Recommendation to Government on reforms to strengthen and harmonise whistle-blower protections in the corporate sector with those in the public sector (informed by consultation).	July 2017
Finalise and introduce legislation for tax whistle-blower protections.	December 2017
Introduce legislation to establish greater protections for whistle-blowers in the corporate sector, with a parliamentary vote no later than 30 June 2018.	By 30 June 2018

Source: Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 16.

International developments

2.44 This section sets out some of the international developments in whistleblower protection legislation as part of greater global moves to tackle corruption.

2.45 The international legal framework has been strengthened to combat corruption and establish effective whistleblower protection laws as part of an effective anti-corruption framework. Whistleblower protection requirements have been introduced in the following ways:

- the United Nations Convention against Corruption;
- the 2009 Organisation for Economic Co-operation and Development (OECD) Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation);
- the 1998 OECD Recommendation on Improving Ethical Conduct in Public Service;
- the Council of Europe Civil and Criminal Law Conventions on Corruption;
- the Inter-American Convention against Corruption; and

- the African Union Convention on Preventing and Combating Corruption.[46]

2.46 In 2010, the G20[47] established an Anti-Corruption Working Group in recognition of the significant negative impact of corruption on economic growth, trade, and development. In November 2011, the G20 agreed to support the compendium of best practices and guiding principles for whistleblower protection legislation (G20 Compendium), prepared by the OECD.[48]

2.47 The G20 Compendium underscored the critical importance of promoting and protecting whistleblowers in order to deter, detect and combat fraud and corruption:

> Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, can also help authorities monitor compliance and detect violations of anti-corruption laws. Providing effective protection for whistleblowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It also helps businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.[49]

2.48 The G20 Compendium identified the following specific features of whistleblower protection mechanisms:

(a) definitions and scope:

  (i) whistleblowing definition;

  (ii) good faith and reasonable grounds requirements;

  (iii) scope of coverage of persons afforded protection; and

  (iv) scope of subject matter or protected disclosures;

(b) mechanisms for protection:

  (i) protection against retaliation;

  (ii) criminal and civil liability;

  (iii) anonymity and confidentiality; and

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46 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, pp. 4–5.

47 The Group of Twenty (G20) is an international forum for the governments and central bank governors from 20 major economies.

48 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, p. 1.

49 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, pp. 1, 4.

(iv) burden of proof lowering in relation to retaliation;

(c) reporting procedures and mechanisms:

(i) channels for reporting;

(ii) hotlines; and

(iii) use of incentives to encourage reporting;

(d) enforcement mechanisms:

(i) oversight of enforcement authorities;

(ii) availability of judicial review; and

(iii) remedies and sanctions for retaliation; and

(e) awareness-raising and evaluation mechanisms.[50]

2.49 At the Brisbane G20 Leaders' Summit in November 2014, the G20 leaders recognised the need to take concrete, practical action on corruption and endorsed the *2015–16 G20 Anti-Corruption Implementation Plan*. The plan noted that:

> The G20 has already recognised the significance of this issue by adopting the *G20 Guiding Principles for Legislation on the Protection of Whistleblowers.* The G20 now has the opportunity to build on this valuable work and ensure all G20 countries implement comprehensive and effective protections for whistleblowers in both the public and private sectors, ensuring G20 countries lead by example.[51]

2.50 The specific deliverable agreed by the G20 in relation to whistleblowers was:

> G20 countries will conduct a self-assessment of their whistleblowers protection frameworks in both the public and private sectors, with reference to the OECD *Study on G20 Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, and consider next steps.[52]

2.51 The *2017–18 G20 Anti-Corruption Action Plan* continued its support for whistleblower protections, noting that:

> Encouraging the reporting of suspected actions of corruption is critical to deterring and detecting it. We will promote this goal, including reviewing our progress in implementing legislative and institutional protections for whistle-blowers.[53]

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50 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, pp. 7–14.

51 G20 Leaders' Communique, Brisbane Summit, 15–16 November 2014, pp. 2–3; G20, *2015–16 G20 Anti-Corruption Implementation Plan*, pp. 4–5.

52 G20, *2015–16 G20 Anti-Corruption Implementation Plan*, p. 4.

53 G20, *2017–18 G20 Anti-Corruption Action Plan*, p. 2.

Analysis of international and Australia's whistleblower protections

2.52 The whistleblower protections in G20 countries were analysed in 2014 against principles for best practice set out in Table 2.2 below. Australia's laws, were found to be comprehensive for the public sector, but lacking when compared to international best practice for the private sector as shown in Tables 2.3 and 2.4 below. The review suggested that in the private sector the scope of wrongdoing covered is ill-defined, anonymous complaints are not protected, there are no requirements for internal company procedures, compensation rights are ill-defined, and there is no oversight agency responsible for whistleblower protection.[54]

2.53 In May 2017, Professor Brown and his colleagues reported on their survey on the strength of organisational whistleblowing processes and procedures in Australia which was conducted as part of the *Whistling While They Work 2* research project. The survey's 699 respondents covered 10 public sector jurisdictions, five private industry groups and four not-for-profit sector groups. The analysis examined the self-reported presence of: incident reporting and tracking, support strategies for staff, risk assessment processes for reprisals, dedicated support staff and remediation processes.[55]

2.54 The results which are summarised in Table 2.4 show that even when trying hard to encourage their staff to report integrity challenges, there is much that organisations can do to ensure whistleblowing processes are robust. The report also noted the following:

> In particular, under the current state of guidance and incentives, most sectors are finding it difficult to realise their own goals of having processes which provide strong staff support and protection.
>
> The results highlight that efforts towards strong processes for ensuring support and protection can and should be enhanced, across all sectors and in individual sectors.
>
> Importantly, while size of organisation is a significant factor in the strength of processes, sectoral differences remain irrespective of size. This indicates that regulatory environment, oversight, operating conditions, professionalization, skills and industry leadership are also critical factors.[56]

54 Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, pp. 24–25.

55 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. i.

56 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. iv.

Table 2.2: Summary of best practice criteria for whistleblowing legislation.

	Criterion	Description
1	Broad coverage of organisations	Comprehensive coverage of organisations in the sector (e.g. few or no'carve-outs')
2	Broad definition of reportable wrongdoing	Broad definition of reportable wrongdoing that harms or threatens the public interest (e.g. including corruption, financial misconduct and other legal, regulatory and ethical breaches)
3	Broad definition of whistleblowers	Broad definition of '[whistleblowers' whose disclosures are protected (e.g. including employees, contractors, volunteers and other insiders)
4	Range of internal / regulatory reporting channels	Full range of internal (i.e. organisational) and regulatory agency reporting channels
5	External reporting channels (third party / public)	Protection extends to same disclosures made publicly or to third parties (external disclosures e.g. to media, NGOs, labour unions, members of Parliament) if justified or necessitated by the circumstances
6	Thresholds for protection	Workable thresholds for protection (e.g. honest and reasonable belief of wrongdoing, including protection for 'honest mistakes'; and no protection for knowingly false disclosures or information**)**
7	Provision and protections for anonymous reporting	Protections extend to disclosures made anonymously by ensuring that a discloser (a) has the opportunity to report anonymously and (b) is protected if later identified
8	Confidentiality protected	Protections include requirements for confidentiality of disclosures
9	Internal disclosure procedures required	Comprehensive requirements for organisations to have internal disclosure procedures (e.g. including requirements to establish reporting channels, to have internal investigation procedures, and to have procedures for supporting and protecting internal whistleblowers from point of disclosure)
10	Broad protections against retaliation	Protections apply to a wide range of retaliatory actions and detrimental outcomes (e.g. relief from legal liability, protection from prosecution, direct reprisals, adverse employment action, harassment)
11	Comprehensive remedies for retaliation	Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action (e.g. compensation rights, injunctive relief; with realistic burden on employers or other reprisors to demonstrate detrimental action was not related to disclosure)
12	Sanctions for retaliators	Reasonable criminal, and/or disciplinary sanctions against those responsible for retaliation
13	Oversight authority	Oversight by an independent whistleblower investigation / complaints authority or tribunal
14	Transparent use of legislation	Requirements for transparency and accountability on use of the legislation (e.g. annual public reporting, and provisions that override confidentiality clauses in employer-employee settlements)

Source: Wolfe, Worth, Dreyfus, and Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws*, October 2015, p. 6.

Tables 2.3 Strengths and weaknesses in G20 country public sector whistleblower protections laws

Rating 1 Very / quite comprehensive 2 Somewhat / partially comprehensive 3 Absent / not at all comprehensive

		S. Ar	Mex	Tur	Arg	Rus	It	Ger	Brz	Jpn	Indo	S.Af	Fra	Chn	India	Kor	UK	Can	US	Aus	Tot '3'
		Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	
9	Internal disclosure procedures	3	3	3	3	2	3	3	3	3	3	3	3	2	3	3	3	1	2	1	14
7	Anonymity	3	3	3	2	3	3	2	3	3	3	3	3	2	3	3	3	3	1	1	14
5	External reporting channels (third party / public)	3	3	3	3	3	2	3	2	2	3	1	3	3	3	3	2	2	2	2	11
14	Transparency	3	3	3	3	3	3	3	3	3	3	2	2	3	2	1	2	1	1	1	11
13	Oversight	3	2	3	3	3	3	3	3	3	2	3	2	3	1	1	3	1	1	1	11
8	Confidentiality	3	3	2	2	3	1	3	2	3	3	3	3	2	1	1	2	1	1	1	8
12	Sanctions	3	2	2	2	3	3	3	3	3	2	3	2	2	2	1	2	1	1	1	7
11	Remedies	2	3	3	3	3	3	2	3	2	3	1	2	2	2	1	1	1	2	2	7
6	Thresholds	3	3	3	3	3	2	2	2	1	2	2	2	2	1	2	1	1	1	1	5
2	Wrongdoing	3	3	3	3	2	2	3	2	1	2	1	2	1	2	1	1	1	1	1	5
10	Breadth of retaliation	3	3	2	3	3	1	2	2	1	2	2	2	2	1	1	1	1	1	1	4
1	Coverage	3	3	3	3	2	1	1	2	1	2	1	2	1	1	1	2	2	1	2	4
3	Definition of whistleblowers	3	2	2	2	2	3	3	2	2	2	2	2	1	1	1	2	2	1	1	3
4	Reporting channels (internal & regulatory)	3	3	2	2	2	2	2	2	2	2	2	2	2	2	1	1	2	1	1	2

Source: Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 6.

Table 2.4 Strengths and weaknesses in G20 private sector whistleblower protections laws

Rating 1 Very / quite comprehensive 2 Somewhat / partially comprehensive 3 Absent / not at all comprehensive

		Rus	It	Can	S.Ar	India	Mex	Brz	Arg	Aus	Ger	Tur	Indon	Jpn	Chn	Fra	S.Afr	Kor	UK	US	Tot '3'
		Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	
7	Anonymity	3	3	3	3	3	3	3	2	3	2	3	3	3	2	3	3	3	3	1	15
9	Internal disclosure procedures	3	3	3	3	2	3	2	3	3	3	3	3	3	2	3	2	3	3	2	14
14	Transparency	3	3	3	3	3	3	3	3	3	3	3	3	3	3	2	2	1	2	1	14
5	External reporting channels (third party / public)	3	3	3	3	3	3	2	3	3	3	3	3	2	3	2	1	3	2	2	13
13	Oversight	3	3	3	3	3	2	3	3	3	3	3	2	3	2	2	3	1	3	1	13
8	Confidentiality	3	3	3	3	3	3	2	2	2	3	2	3	3	2	3	3	1	2	1	11
12	Sanctions	3	3	3	3	3	2	3	2	3	3	2	2	3	3	2	3	1	2	1	11
11	Remedies	3	3	3	2	3	3	3	3	2	2	3	3	2	3	2	1	1	1	2	10
1	Coverage	3	3	3	3	3	3	3	3	2	3	3	2	1	2	2	1	1	2	1	10
2	Wrongdoing	3	3	3	3	3	3	3	3	3	2	3	2	1	2	2	1	1	1	1	10
6	Thresholds	3	3	3	3	3	3	3	3	2	2	3	2	1	2	2	2	2	1	1	9
10	Breadth of retaliation	3	3	2	3	3	3	3	3	3	2	2	2	1	3	2	2	1	1	1	9
3	Definition of whistleblowers	3	3	3	3	3	3	2	2	3	3	2	2	1	1	2	1	2	1	1	8
4	Reporting channels (internal & regulatory)	3	2	3	3	3	3	3	2	2	3	2	2	2	2	1	1	2	1	1	7

Source: Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 7.

Table 2.5: Strength of whistleblowing processes by sector & jurisdiction / industry

Sector	Jurisdiction/Industry		Total score		Incident tracking	Support strategy	Risk assessment	Dedicated support	Remed-iation	
			Mean [a]	*Rank*	*Rank*	*Rank*	*Rank*	*Rank*	*Rank*	N
		All organisations	5.66							699
Public	Aust	Commonwealth government	6.95	***1***	*1*	*1*	*1*	*9*	*2*	26
Public	Aust	Queensland government	6.59	***2***	*2*	*4*	*6*	*1*	*4*	54
Public	Aust	New South Wales government	6.37	***3***	*=3*	*5*	*3*	*7*	*7*	86
Public	Aust	South Australia government	6.36	***4***	*=3*	*3*	*=4*	*4*	*8*	47
Public	Aust	Victoria government	6.32	***5***	*5*	*2*	*=4*	*2*	*12*	58
Public	Aust	Western Australia government	6.13	***6***	*6*	*6*	*7*	*=5*	*6*	61
Private	Aust	Finance & insurance	5.71	***7***	*=7*	*7*	*8*	*3*	*9*	53
Public	Aust	Australian Capital Territory government	5.67	***8***	*11*	*=16*	*2*	*12*	*1*	7
NFP	Aust	Health care & social assistance	5.21	***9***	*10*	*=8*	*9*	*11*	*11*	66
Private	Aust	Other private industry	5.11	***10***	*=7*	*=8*	*12*	*10*	*10*	28
Public	Aust	Northern Territory government	4.92	***11***	*=7*	*13*	*16*	*13*	*3*	12
Public	Aust	Tasmania government	4.70	***12***	*15*	*12*	*15*	*=5*	*16*	20
Private	Aust	Professional, technical, administrative etc services	4.67	***=13***	*=12*	*11*	*11*	*15*	*15*	13
NFP	Aust	Arts, recreation, accommodation, food & hospitality	4.67	***=13***	*=16*	*15*	*=13*	*8*	*13*	16
Private	Aust	Agriculture, forestry, fishing, mining & construction	4.44	***15***	*=12*	*14*	*10*	*16*	*17*	19
NFP	Aust	Other NFP industry	4.15	***16***	*=16*	*10*	*=13*	*18*	*18*	18
Private	Aust	Manufacturing, wholesale & retail trade	4.02	***17***	*=12*	*=16*	*17*	*17*	*14*	35
NFP	Aust	Education & training	3.89	***18***	*18*	*18*	*18*	*14*	*5*	15

[a] range (min-max score) = .00 – 10.00. NB: colours denote range/rank

Source: A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. ii.

2.55 The results of the survey analysis indicate:

- significant efforts by public and private sector organisations to improve whistleblower protections;
- the higher relative strength of whistleblower processes in the public sector compared to the private sector;
- that larger organisations appear to have stronger processes;
- that the finance and insurance industry group appear to have stronger processes than some other sectors;
- the comparative weakness of local government processes, relative to central government, in all jurisdictions other than Victoria; and
- the need for clearer guidance, and either statutory or industry requirements, or incentives, across key areas of whistleblowing processes especially for the private and not-for-profit sectors.[57]

2.56 The authors note that the stronger public sector results (compared to the private sector) are consistent with stronger legislation over a period of time and the international history of more comprehensive research into public sector

57 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, pp. 6, 13–18.

whistleblowing processes over private sector ones.[58] However the results also show significant variations between public sector jurisdictions which raise questions about the difference in those frameworks and their implementation.[59]

2.57 The report also concluded that legislative reforms such as the implementation of the PID Act, led to a significant improvement in the Commonwealth whistleblowing processes, which are now among the strongest in Australia. The report notes for example that:

> Commonwealth agency heads came under a direct statutory responsibility to take 'reasonable steps… to protect public officials who belong to the agency from detriment, or threats of detriment' relating to disclosures.
>
> …the two jurisdictions who scored most strongly for risk assessment – the Commonwealth and ACT – are the only jurisdictions where, by statute, agencies are required to have processes for assessing risks that reprisals may be taken against the persons who make those disclosures.[60]

2.58 The following chapters focus on the evidence the committee has received arguing for and against a range of potential reforms to whistleblower protections.

58 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. 14.

59 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. 14.

60 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, pp. 14–15.

Chapter 3

Consistency across sectors

3.1 This chapter examines evidence put to the committee on the need for consistency of whistleblower protections in Australia. After summarising the whistleblower legislation that is currently in place, the fragmentation and areas of inconsistency in the legislation are then discussed. Suggestions put to the committee are then considered along with possible limitations including the need for flexibility in some areas and potential constitutional limitations.

Legislation currently in place that relates to whistleblowers

3.2 This section lists the legislation that relates to whistleblowers. While not exhaustive, the list below indicates there may be over 20 different statutes relating to whistleblower protection at a federal, state and territory level, as well as the protections that may apply to informants in the law enforcement sector. The following public sector legislation applies to whistleblowers in Australia:

- PID Act;
- *Public Interest Disclosure Act 2012* (ACT);
- *Public Interest Disclosure Act 2008* (NT);
- *Public Interest Disclosures Act 1994* (NSW);
- *Public Interest Disclosure Act 2010* (QLD);
- *Whistleblowers Protection Act 1993* (SA);
- *Public Sector Act 2009* (SA);
- *Public Interest Disclosures Act 2002* (TAS);
- *Protected Disclosure Act 2012* (VIC); and
- *Public Interest Disclosure Act 2003* (WA).[1]

3.3 At the Commonwealth level alone there are already six statutes covering private sector whistleblowing in Australia:

- *Banking Act 1959*;
- *Life Insurance Act 1995*;
- *Superannuation Industry (Supervision) Act 1993*;
- *Insurance Act 1973;*
- Part 9.4AAA of the Corporations Act; and
- Part 4A of the FWRO Act.[2]

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1 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

3.4 The Law Council also identified other legislation which may protect whistleblowing activities including:

- legislation directed at official corruption, such as:
  - *Independent Commission Against Corruption Act 1998* (NSW);
  - *Commissions of Inquiry Act 1950* (QLD);
  - *Corruption and Crime Commission Act 2003* (WA); and
- public administration legislation, such as:
  - *Public Service Act 1999* (Cth);
  - *Public Sector Management Act 1994* (ACT);
  - *Whistleblowers Protection Act 1994* (QLD); and
  - *State Service Act 2000* (TAS).[3]

Fragmentation of, and inconsistencies in, current legislation

3.5 Several submitters and witnesses drew the committee's attention to the fragmented and inconsistent nature of current whistleblower protection legislation in Australia. These submitters pointed, firstly, to the difficulties that can arise for both whistleblowers and businesses from a fragmented legislative approach, and secondly, to the potential benefits for both whistleblowers and businesses of a more coherent and consistent legislative approach.[4] For example, the AICD argued:

> The effect of this fragmentation makes the framework difficult for whistleblowers to access, interpret and rely on, and for businesses to understand their obligations.
>
> There is a significantly broader range of corporate misconduct that should be incorporated into one cohesive framework, thereby extending protections further and creating greater opportunity for information about corporate wrongdoing to come to light.[5]

2 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

3 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

4 See, for example, DLA Piper, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017); Australian Institute of Company Directors, *Submission 53*, pp. 4–5; Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 17; Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 60.

5 Australian Institute of Company Directors, *Submission 53*, p. 4.

3.6 Similarly, the Law Council argued that the current system failed to provide clarity and consistency for either whistleblowers or business, and failed to provide safety for whistleblowers.[6]

3.7 The Law Council also drew attention to inconsistencies in Australia's public and private sector whistleblower protections, including:

- the limited protections that appear to be available for tax whistleblowers;[7]
- the protections that typically apply at a state level to disclosures about wrongdoing by members of parliament, ministerial advisers or the judiciary that do not attract protections at a federal level;
- the protections that apply at a federal level to public servants who blow the whistle to the media that may incur liability to criminal or disciplinary actions in some states; and
- the lack of protections for disclosures about wrongdoing by an intelligence agency or intelligence operations.[8]

3.8 The Law Council also pointed to various shortcomings under current statutory protections for corporate whistleblowers enacted in 2004 and contained in the Corporations Act, such as the criteria that need to be met in order for a person to qualify for whistleblower protections, including in regard to who can make a disclosure and to whom:

> These criteria can give rise to significant gaps in protection; for example, anonymous whistleblowers are not protected, and disclosures made under the Corporations Act can only be made regarding corporate law, not tax or any other law.[9]

3.9 The committee also heard from regulators about issues arising from whistleblower protections currently being located in different Acts. For example, the Australia Competition and Consumer Commission (ACCC) informed the committee that it had concerns about the number of different whistleblower protections schemes at the Commonwealth level, noting that at least five schemes have been used by whistleblowers in recent years to bring issues to the ACCC.[10]

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6 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 17.

7 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

8 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017); Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws*, September 2015, pp. 7, 26–28.

9 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

10 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 60.

3.10 Mr Warren Day, Senior Executive Leader from ASIC noted that the whistleblower protection provisions under the Corporations Act, the FWRO Act and the proposed provisions for tax whistleblowers do not necessarily align. Yet, Mr Day pointed out that it is entirely possible that circumstances could arise where reportable conduct could relate to two or three separate pieces of legislation that had inconsistent criteria for disclosable conduct and related protections.[11]

Inconsistencies in whistleblowing processes and practice

3.11 Legislation provides the foundation for many other aspects including whistleblowing process and practice. As set out in Chapter 2 of this report, in May 2017 Professor A J Brown and his colleagues reported on their survey on the strength of organisational whistleblowing processes and procedures in Australia which was conducted as part of the *Whistling While They Work 2* research project. Table 3.5 summarises the results.

Table 3.1: Strength of whistleblowing processes by sector & jurisdiction / industry

Sector	Jurisdiction/Industry		Total score		Incident tracking	Support strategy	Risk assessment	Dedicated support	Remed-iation	
			Mean [a]	*Rank*	*Rank*	*Rank*	*Rank*	*Rank*	*Rank*	N
		All organisations	5.66							699
Public	Aust	Commonwealth government	6.95	***1***	*1*	*1*	*1*	*9*	*2*	26
Public	Aust	Queensland government	6.59	***2***	*2*	*4*	*6*	*1*	*4*	54
Public	Aust	New South Wales government	6.37	***3***	*=3*	*5*	*3*	*7*	*7*	86
Public	Aust	South Australia government	6.36	***4***	*=3*	*3*	*=4*	*4*	*8*	47
Public	Aust	Victoria government	6.32	***5***	*5*	*2*	*=4*	*2*	*12*	58
Public	Aust	Western Australia government	6.13	***6***	*6*	*6*	*7*	*=5*	*6*	61
Private	Aust	Finance & insurance	5.71	***7***	*=7*	*7*	*8*	*3*	*9*	53
Public	Aust	Australian Capital Territory government	5.67	***8***	*11*	*=16*	*2*	*12*	*1*	7
NFP	Aust	Health care & social assistance	5.21	***9***	*10*	*=8*	*9*	*11*	*11*	66
Private	Aust	Other private industry	5.11	***10***	*=7*	*=8*	*12*	*10*	*10*	28
Public	Aust	Northern Territory government	4.92	***11***	*=7*	*13*	*16*	*13*	*3*	12
Public	Aust	Tasmania government	4.70	***12***	*15*	*12*	*15*	*=5*	*16*	20
Private	Aust	Professional, technical, administrative etc services	4.67	***=13***	*=12*	*11*	*11*	*15*	*15*	13
NFP	Aust	Arts, recreation, accommodation, food & hospitality	4.67	***=13***	*=16*	*15*	*=13*	*8*	*13*	16
Private	Aust	Agriculture, forestry, fishing, mining & construction	4.44	***15***	*=12*	*14*	*10*	*16*	*17*	19
NFP	Aust	Other NFP industry	4.15	***16***	*=16*	*10*	*=13*	*18*	*18*	18
Private	Aust	Manufacturing, wholesale & retail trade	4.02	***17***	*=12*	*=16*	*17*	*17*	*14*	35
NFP	Aust	Education & training	3.89	***18***	*18*	*16*	*18*	*14*	*5*	15

[a] range (min-max score) = **.00 – 10.00.** NB: colours denote range/rank

Source: A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – Analysis from Australia*, May 2017, p. ii.

3.12 The results of the survey identify a great deal of variation in the strength of whistleblowing processes across industry sectors as shown in Table 3.5. While many things will contribute to inconsistencies in whistleblowing processes across organisations, the task of achieving consistency is made much harder if the underlying legislation is fragmented and inconsistent.

11 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, pp. 60–61.

Achieving consistency across sectors

3.13 In December 2016, *Australia's First Open Government National Action Plan 2016–18* was finalised. The government's action plan includes a commitment to harmonise public and private whistleblower protections:

> Australia will ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector.
>
> We will do this by improving whistle-blower protections for people who disclose information about tax misconduct to the Australian Taxation Office. We will also pursue reforms to whistle-blower protections in the corporate sector, with consultation on options to strengthen and harmonise these protections with those in the public sector.[12]

A single private sector Act

3.14 There was broad agreement amongst witnesses on the need for a single whistleblower protections Act to cover the private sector, with many submitters and witnesses noting that this would be of benefit to both potential whistleblowers and businesses.

3.15 The ACCC was in favour of a single, comprehensive national whistleblower scheme.[13] Likewise, ASIC also argued for a single piece of legislation that applies more universally.[14]

3.16 Professor A J Brown informed the committee that Australia had more scope to move to a single Act than some other countries:

> From a business regulatory point of view, we are in a position where we can do that, whereas the United States cannot because there is no federal employment law governing business in effect in the United States. However, obviously in Australia, especially since Work Choices and under the current Fair Work type regime that we enjoy, it means that the Commonwealth is in a position to legislate comprehensively for all corporations and all employers who are corporations and employees of corporations.[15]

3.17 Noting that whistleblower protections in the United States currently span 47 different pieces of legislation, Professor Brown pointed out that the limited progress on corporate sector whistleblowing protections in Australia to date meant

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12 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 14.

13 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 60.

14 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 69.

15 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 20.

that Australia still has an opportunity to combine whistleblower protection legislation for the private sector into a single Act.[16]

3.18 Dr Vivienne Brand informed the committee that the current whistleblower protections in Part 9.4AAA of the Corporations Act are inadequate, and as a consequence, rarely used. Dr Brand therefore supported ASIC's suggestion of a single, essentially, private sector whistleblowing Act, noting that future reviews could always recommend the incorporation of additional elements in the legislation.[17]

3.19 Nevertheless, in terms of combining whistleblower protections for the private sector into a single Act, Dr Brand and Dr Sulette Lombard indicated that there would need to be amendments to a range of provisions to ensure synchronisation between the FWRO Act protections and the corporate regulatory regime. For example, in relation to persons who may make an application, the categories specifically mentioned in the FWRO Act whistleblower protections would not necessarily be appropriate in the context of corporate whistleblowing.[18]

3.20 Professor Brown set out a potential path for bringing the private (including tax) and not-for-profit sectors into a single piece of whistleblower protections legislation, based on the corporations power as well as other heads of power:

> (1) the main framework;
>
> (2) categories of disclosable wrongdoing;
>
> (3) investigative and regulatory agencies involved (including ASIC, the Australian Charities and Not-for-profits Commission, ACCC, APRA, Environment Australia, ROC, the Australian Taxation Office, 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.[19]

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16 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, pp. 20–21.

17 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 55.

18 Dr Vivienne Brand and Dr Sulette Lombard, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017).

19 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (Received 15 June 2017).

3.21 The AICD was of the view that a single standalone Act for the private sector would be of benefit to both potential whistleblowers and businesses. The AICD argued that a whistleblower cannot be expected to be an expert on the Corporations Act and that they should not have to consult a piece of legislation before they make a report. If a whistleblower is a witness of serious corporate wrongdoing, they should feel confident in making a disclosure to their company or to an appropriate regulator, without fear that it might fall outside the definition because of a technicality.[20]

3.22 DLA Piper noted that a single corporate sector Act would provide whistleblowers with increased certainty and ensure a more consistent approach to the handling and investigation of disclosures. DLA Piper suggested that it would be preferable to have all whistleblower protection laws, insofar as they relate to the corporate sector, within a single Act.[21]

3.23 The GIA also supported broadly based standalone legislation for whistleblower protections:

> The institute is very supportive of the provisions in the Public Interest Disclosure Act serving as a starting point for standalone whistleblowing legislation applying to the private sector, particularly the wide coverage of the misconduct it covers and the disclosers it applies to. Provisions affected by the Fair Work (Registered Organisations) Amendment Act in relation to whistleblowers should also be considered. The institute is very much in favour of standalone legislation rather than recommending multiple reforms to multiple pieces of legislation.[22]

3.24 The Australian Institute of Superannuation Trustees (AIST) supported the use of the principles in the *Breaking the Silence Report*[23] in new stand-alone legislation to replace whistleblower provisions across several private sector Acts and the charity sector. The AIST also informed the committee that:

> We would support one piece of national legislation that covers the field. It would certainly make it easier for whistleblowers to understand what their rights and obligations are. Also, as one piece of legislation is amended, others are not necessarily, so there could be differences in standards. As people move between industries, they may not be aware of what the possibilities are for making disclosures and what the different protections might be that are offered.[24]

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20 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 27; Ms Louise Petschler, General Manager, Advocacy, AICD, *Committee Hansard*, 28 April 2017, p. 28.

21 DLA Piper, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017).

22 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 24.

23 Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws*, October 2015.

24 Ms Eva Scheerlinck, Chief Executive Officer, Australian Institute of Superannuation Trustees, *Committee Hansard*, 27 April 2017, pp. 22–23.

3.25 The Media, Entertainment & Arts Alliance (MEAA) also supported consolidated public and private sector whistleblower legislation.[25]

3.26 Ms Serene Lillywhite, Chief Executive Officer of Transparency International argued that there should be flexibility within a private sector legislative scheme to account for differences in the size and nature of private sector organisations because the size of the corporation may impact on the level of protection that can be provided:

> So there needs to be some flexibility with regard to considering the level of protection that may be required and the process of reporting that may be required. That depends on the size and scope of the corporate entity and depends on where within the supply chain or the value chain of the business the alleged misconduct has taken place. All of those things may be important considerations in terms of designing a mechanism to ensure there is some flexibility to bring about a response that is appropriate for the misconduct that has been reported.[26]

3.27 Dr Simon Longstaff, Executive Director of the Ethics Centre also argued for some flexibility for the private sector and did not support legislation that would set out precise measures that corporations had to employ in addressing whistleblowing issues.[27]

A single Act for the public and private sectors

3.28 While there was general agreement amongst submitters and witnesses on the need to harmonise, as far as possible, whistleblower protection provisions across the public and private sectors, several witnesses pointed to the need to take account of the differences between public and private sector organisations in designing legislative approaches, as well as recognising areas where the current public sector provisions could be improved to meet best practice criteria.

3.29 By contrast, the IBACC informed the committee that in its view there should be one Commonwealth statute covering the field for private and not-for-profit sector whistleblower protections:

> The [IBACC] strongly believes that it is desirable for consistency and for transparency across the private and not-for-profit sectors that the whistleblower protection laws should be consistent and the same. It would, in the [IBACC]'s opinion, be detrimental to the success of any reforms if different protection regimes applied to different sectors in the country or in different industry sectors. That position is only likely to highlight a risk that a genuine whistleblower may, depending upon the conduct in question, fail

25 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

26 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 3.

27 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, p. 7.

> to be properly protected if he or she does not fit neatly into a narrow, industry or sector focused definition.[28]

3.30 Ms Rebecca Maslen-Stannage, Chair of the Corporations Committee, Law Council told the committee that the Law Council supported harmonised reforms to whistleblower protections. The Law Council saw that there would be value in combining public and private sector legislation into a single Act in order to maintain consistency between the two sectors:

> …the Law Council supports harmonised reforms to other existing whistleblower protections such as improved protections for public sector whistleblowers as well as those contained in the Corporations Act either by amendment to each relevant act or by introduction of overarching whistleblower legislation.[29]

3.31 Importantly, the Law Council also stressed the importance of harmonising federal, state, and territory laws:

> More broadly, the Law Council considers it is vital that any regime introduced is uniform across the board, with a view to having states and territories adopting a similar or parallel approach through collaboration with the Council of Australian Governments and that it be built on a sound foundation of the culture of corporate compliance, as is already promoted by relevant provisions of the criminal code. Perhaps to highlight the key points in our submission, the Law Council's view is that the laws should be uniform in structure and operation, applying across all contexts and sectors. The law should apply to any whistleblower without regard to narrow specifications of relationship to the entity in question.[30]

3.32 ASIC Commissioner, Mr John Price, told the committee that while ASIC considered it desirable to align whistleblowing approaches across the not-for-profit, public and corporate sectors, there might be some benefit in having slightly different approaches between the public and private sectors to account for the different nature of the organisations that operate in those sectors.[31]

3.33 Ms Lillywhite from Transparency International noted that in order to harmonise public and private sector whistleblower protections, it would be necessary to reform the public sector protections first:

> …we note that given improvements to that act are required to meet international best practice, and the need for greater flexibility in the implementation of protection across the private and not-for-profit sectors,

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28 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017 (received 18 May 2017).

29 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

30 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

31 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 60.

> we believe this harmonisation objective is unlikely to be useful, at least in the short-term.[32]
>
> …the existing public sector protection is not at a high enough standard and is not robust enough. So we would not want to harmonise with something we believe is not yet at best practice standards.[33]

3.34 Transparency International also argued that the public sector should be subjected to higher levels of accountability and therefore there may need to be differences between the public and private sector acts:

> TI [Transparency International] Australia considers that as a general principle a one-size-fits-all approach designed to work for the public sector—even when that is brought up to a higher standard—should not necessarily be imposed on the private and not-for-profit sectors. It is our view that public officials have a heightened responsibility to uphold the principles of transparency and accountability.[34]

3.35 DLA Piper argued that public and private sector whistleblower legislative regimes should remain separate but be harmonised where appropriate:

> In principle, we are in favour of harmonisation of whistleblower provisions across the public, corporate and not-for-profit sectors. Harmonisation has the benefit of reducing confusion and increasing confidence for whistleblowers, these sectors and regulators…we consider that there are provisions of the ROC amendments which could be usefully adapted for the corporate sector.[35]

3.36 DLA Piper also suggested that the details of internal whistleblower programs could be left to guides developed and provided by regulators:

> We have suggested, instead, that it would be beneficial for ASIC, and, indeed, other regulators, to offer regulatory guidelines which offer best practice principles which internal programs could reflect. They could also be incentivised by an offering of a reduction in liability in circumstances where internal programs do in fact reflect such features, and perhaps other conditions as well.[36]

3.37 With respect to a single piece of whistleblower legislation for *both* the public and private sectors, Dr Lombard noted that corporate behaviour can be influenced in a number of ways through statutory disclosure requirements that would not necessarily operate in the same way in the public sector. She therefore expressed concern that a

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32 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, pp. 1–2.

33 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 4.

34 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 2.

35 DLA Piper, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017).

36 Ms Rani John, Partner, DLA Piper Australia, *Committee Hansard*, 27 April 2017, p. 10.

single whistleblowing Act may struggle to cope with the differences between public and private sector entities:[37]

> It would be necessary for it to have to be framed in broader terms than you would be able to do for particular sectors. Once again, it comes down to the drafting and paying careful attention to what you actually want to achieve by the legislation. In my view, it is all about making sure that people with information come forward. If you adopt that as a central focus and build the regulation around that, hopefully it could succeed.[38]

3.38 Likewise, Dr Brand informed the committee that she considered it would not be appropriate to try to combine public and private sector whistleblower protections into a single Act:

> As nice as it would be to have an office of the whistleblower and one act, and we are done, I do not think it works that way. The corporations power will get you a fair part of the way with the big money, with the corporations which do the things that cost the economy a lot of money. And there will be other powers that might get you there with other things like the fair work amendments. It probably will not be a beautiful neat system but then our regulatory system for corporations already is not and for most things is not.[39]

3.39 Similarly, Professor Brown indicated that it is really important to articulate the principles that should be common across the public and private sectors, while noting that areas of difference may include thresholds and requirements for procedures that would be imposed on the private sector. Professor Brown also argued for:

> …a high level of consistency and with both of them being clear on when they are relying on the Fair Work Act and the existing employment and civil remedies for enforcement of the legislation. I think there is a real need for the government to look at making sure that its reform of the Public Interest Disclosure Act and the new legislation are as consistent as possible, but I do suspect that they are going to still end up being two pieces of legislation.[40]

3.40 The AFP was of the view that while consistency across sectors is desirable, whistleblowing in a public sector context raises separate issues requiring specific consideration. The AFP suggested that any harmonisation of whistleblower protections at a Commonwealth level should take into account the relationships

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37 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, pp. 54–55.

38 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 55.

39 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 53.

40 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 4.

between regulatory and criminal misconduct, and the need to support interagency partnerships so wrongdoing can be addressed in the most appropriate manner.[41]

3.41 The AFP also informed the committee that the Criminal Code applies to the public, private and not-for-profit sectors equally:

> From a law enforcement investigative perspective, the AFP is not concerned with the type of sector in which wrongdoing occurs, or whether it is committed by an individual, corporation or not-for-profit body. The AFP is only concerned as to the type of wrongdoing which has been committed: that is, whether it involves a breach of Commonwealth criminal law. As noted above, the AFP's priorities relate to complex, transnational, serious and organised crime, and include serious financial crime.[42]

Constitutional limitations

3.42 One of the issues that arose during the inquiry concerned the extent of the Commonwealth's power to legislate for whistleblower protections across the private sector.

3.43 The Parliamentary Library summarised potential constitutional limitations on the Federal Parliament in a research note on whistleblowing in Australia:

> The Federal Parliament lacks a general power to implement comprehensive whistleblower legislation covering the public and private sectors. However, the Federal Parliament has used its constitutional powers to provide for whistleblower protection mechanisms in specific areas. For example, it used its corporations power (paragraph 51(xx) of the Constitution) to legislate a framework to encourage whistleblowing in relation to suspected breaches of the Corporations Act. This legislation applies to any 'constitutional corporation', that is, any incorporated body.
>
> To reach unincorporated associations including charities, which otherwise are under state jurisdiction, the Commonwealth could, for example, use the taxation power (paragraph 51(ii) of the Constitution). With respect to charities, the government could prescribe that tax exemptions may only be available if internal whistleblower protection standards such as AS 8004 are established, or if the charity became part of an external whistleblowing scheme.[43]

3.44 The Parliamentary Library research note suggested that comprehensive and fully uniform legislation would require either cooperation between the states to enact uniform legislation or the referral of power from the states to the Commonwealth under paragraph 51(xxxvii) of the Constitution.[44]

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41 Australian Federal Police, *Submission 43*, pp. 4–5.

42 Australian Federal Police, *Submission 43*, p. 6.

43 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability … but above all, the truth*, Research Note, February 1995, p. 2.

44 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability … but above all, the truth*, Research Note, February 1995, p. 2.

3.45 In 1994 the Senate Select Committee on Public Interest Whistleblowing encouraged the states, territories and industry to work with the Commonwealth to address areas of Commonwealth constitutional limitations in relation to private sector whistleblowing, including consideration of an industry ombudsman.[45]

3.46 The 1994 Select Committee received information from the Attorney-General's Department that the Commonwealth Parliament could legislate to protect whistleblowers under the following heads of power in the *Commonwealth of Australia Constitution Act 1900*:

> Section 51(xx), the corporations power, would support a law which empowered a Commonwealth body to investigate and report on the activities of a foreign, trading or financial corporation;
>
> Section 61, the executive power, would support a law in respect of whistleblowing which relates to breaches of a Commonwealth law, and Section 51(xx), the express incidental power, would support laws giving the Commonwealth body the requisite investigative and reporting powers.[46]

3.47 Dr Brand advocated using the corporations power because the vast majority of Australian businesses are run through a corporation. Dr Brand also suggested that:

> You might then go via other heads of power for any gaps that are left. But if you divide whistleblowing regulation into private versus public—and we would say put not-for-profit somewhere in the corporate power basket but that does get messy because of the lack of constitutional support—then you have pretty much taken care of it, I think.[47]

3.48 The Law Council argued that whistleblower legislation should be as broad as possible in its coverage and:

- if gaps arise due to constitutional limitations, there may need to be complementary laws across the Commonwealth, states and territories; and
- the legislation should be uniform and the approach across the Commonwealth, states and territories should be parallel.[48]

3.49 The Law Council provided further suggestions for establishing an appropriate constitutional basis for whistleblower protections:

> Generally the constitutional basis for whistleblower laws will be the head of power that underpins the principle legislation, on the basis that such laws are reasonable incidental to the primary law. The Commonwealth can go

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45 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, p. xvi.

46 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. 133–134.

47 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 53.

48 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

> into the legislation that provides the relevant offence in respect of which the whistle in being blown. Hence for corporations it would go into the Corporations Law and be supported by the heads of power that support that law, namely the corporations' power and the referral of power by the States.[49]

Committee view

3.50 The vast majority of the evidence to the committee strongly supported greater consistency and harmonisation across public and private sector whistleblower protection legislation, including combining all private and not-for-profit sector whistleblower protection legislation into a single Act.

3.51 While some submitters argued that the public sector should be subject to a greater degree of accountability, the committee notes that following the privatisation of services previously provided by the public sector, as well as the greater use of outsourcing, the private sector now plays a significant role in providing public services and these privately-provided services should have appropriate accountability.

3.52 To this end, the committee considers that there is much to be gained from consistent and harmonised whistleblower legislation, including:

- keeping the process simple for whistleblowers and avoiding whistleblowers being repeatedly referred from one body to another;
- ensuring that businesses which provide public services directly or through contracts to public sector bodies are not subjected to inconsistent legislation;
- reducing regulatory compliance burdens on business; and
- making it easier and more efficient for the body of legislation to be maintained into the future.

3.53 The weight of evidence to this inquiry did not favour combining public and private whistleblower protections into a single Act. The committee is not averse to further exploration of appropriate ways to combine public and private sector legislation into a single Act. On balance, however, the committee considers that the Commonwealth public sector whistleblower protections should be retained in a separate single Act at the present juncture.

3.54 There was broad support for a single Act to capture all private sector whistleblower protections, with submitters and witnesses pointing out that this would not only provide a much clearer framework for whistleblowers and businesses alike, but would also reduce regulatory compliance burdens on business.

3.55 In this regard, the committee notes that, in a previous Parliament, it endorsed the creation of a single piece of whistleblower legislation for the private sector that would be consistent with public sector whistleblower protection schemes:

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49 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

> Indeed the longer term solution may be found in the development of a more comprehensive body of whistleblower protection law that would constitute a distinct and separate piece of legislation standing outside the Corporations Act and consistent with the public interest disclosure legislation enacted in the various states.[50]

3.56 The committee therefore reiterates its continuing support for a single Act to combine all private sector whistleblower protections.

3.57 Furthermore, the committee notes the evidence presented in this chapter indicates that it may be constitutionally possible for a single Act to combine all private sector whistleblower protection, even if multiple heads of power are needed.

3.58 While the committee considers it preferable to have separate whistleblower protection legislation for the public and private sectors, the committee recommends that the government explore mechanisms to ensure the ongoing consistency between the public and private sectors, including examining the potential to maintain both public and private sector whistleblower protections in a single Act. In this regard, the committee notes the example of the *Privacy Act 1988*, which sets out the Australian Privacy Principles that apply to Australian 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.[51]

3.59 The committee considers that many of the best practice criteria for whistleblower protections could be aligned across the public and private sectors, while for other criteria the principles could be the same, but the details may need to differ. The committee has set out some suggestions for each best practice criterion in Table 3.2 below.

Recommendation 3.1

3.60 The committee recommends that:

- **Commonwealth public sector whistleblowing legislation remain in a single updated Act, redrafted in parallel with the private sector Act;**
- **Commonwealth private sector whistleblowing legislation (including tax) be brought together into a single Act;**
- **The Government examine options (including the approach taken in the *Privacy Act 1988*) for ensuring ongoing alignment between the public and private sector whistleblowing protections, potentially including both in a single Act; and**
- **The Commonwealth, states and territories harmonise whistleblowing legislation across Australia.**

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50 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, p. xxii.

51 Office of the Australian Information Commissioner, *Australian Privacy Principles*, https://www.oaic.gov.au/privacy-law/privacy-act/australian-privacy-principles, accessed 24 May 2017).

3.61 The following provides an explanation for reading table 3.2:

- Column 1 sets out the best practice criteria for whistleblowing legislation;
- Column 2 indicates the best practice criteria where the amended public sector legislation and the new private sector legislation could be aligned; and
- Column 3 indicates the particular aspects of the best practice criteria where the new private sector legislation would differ from that in the public sector.

Table 3.2: Potential differences similarities between new public and private sector legislation.

Best Practice Criteria for Whistleblowing Legislation		***Could be the same***	***Private sector differences***
1	Broad coverage of organisations	No	Privacy Act definitions
2	Broad definition of reportable wrongdoing	No	Limit to a breach of a Commonwealth or state or territory law.
3	Broad definition of whistleblowers	No	Take account of different organisational structures and regulatory arrangements.
4	Range of internal / regulatory reporting channels	No	Take account of different organisational structures and regulatory arrangements.
5	External reporting channels (third party / public)	Yes	
6	Thresholds for protection	Yes	
7	Provision and protections for anonymous reporting	Yes	
8	Confidentiality protected	Yes	
9	Internal disclosure procedures required	No	Requirements are appropriate for the private sector.
10	Broad protections against retaliation	Yes	
11	Comprehensive remedies for retaliation	Yes	
12	Sanctions for retaliators	Yes	
13	Oversight authority	Yes	Different oversight authority for public and private sectors.
14	Transparent use of legislation	Yes	Likely to require different reporting arrangements involving regulators.

Chapter 4

Comparison of whistleblower protections

4.1 This chapter uses the best practice criteria for whistleblowing legislation set out in the Breaking the Silence report to provide a high-level comparison of the whistleblower protections for the public sector, registered organisations and corporations.[1]

4.2 The best practice criteria from the Breaking the Silence report provide an opportunity to conduct systematic comparison of whistleblower protection legislation. Noting the 20 plus statutes identified in Chapter 3 and the advantages to be gained from consistency, the committee has chosen to compare the whistleblower protections in the following Acts, because they illuminate the main areas of focus for this inquiry:

- the PID Act;
- the FWRO Act; and
- the Corporations Act.

4.3 This chapter provides a comparison summary created by the committee in tabulated form as Table 4.1. Table 4.1 compares the PID Act, the FWRO Act, and the Corporations Act against the 14 best practice criteria identified in the Breaking the Silence report. The basis of the comparison between the PID Act and Corporations Act whistleblower protections shown in columns one to four is drawn from the Breaking the Silence report.

4.4 Column four of Table 4.1 provides a comparative rating between the PID Act and the Corporations Act based on the Breaking the Silence Report:

- 1 equals very / quite comprehensive;
- 2 equals somewhat / partially comprehensive; and
- 3 equals absent / not at all comprehensive.[2]

4.5 The additional comparisons and information (including the more recent FWRO Act whistleblower protections developed after the Breaking the Silence report) shown in the last three columns are based on evidence received by the committee during the inquiry and the committee's understanding of the above three Acts.

4.6 The colours used in the last three columns compare the performance of the PID Act, the FWRO Act, and the Corporations Act against the respective criteria:

- Green indicates very / quite comprehensive;
- Yellow indicates somewhat / partially comprehensive; and

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1 Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, pp. 6–7.

2 Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, pp. 6–7.

- Red indicates absent / not at all comprehensive.

4.7 The committee acknowledges that the comparisons and the information in Table 4.1 represent a high level summary, and the committee recognises that future legislative change may improve on the details of the provisions.

4.8 In addition to a comparison against the best practice criteria, a number of other potential areas for reform are included in the last section of Table 4.1.

4.9 The committee's recommendations for reform based on Table 4.1 are set out in subsequent chapters.

Table 4.1: Comparison of whistleblower protection legislation.

Best Practice Criteria for Whistleblowing Legislation Ratings (1 = Very / quite comprehensive, 2 = Somewhat / partially comprehensive, 3 = Absent / not at all comprehensive)				**Performance of whistleblowing legislation against best practice criteria** Green = very / quite comprehensive Yellow = somewhat / partially comprehensive Red = absent / not at all comprehensive		
Criterion		**Description**	**Rating (public/ private)**	***Public Interest Disclosure Act 2013***	***Fair Work (Registered Organisations) Act 2009***	***Corporations Act 2001***
1	**Broad coverage of organisations**	Comprehensive coverage of organisations in the sector (e.g. few or no 'carve-outs').	2/2	Sections 29 – 33, 71 – 72 – Excludes wrong doing by members of Parliament, ministerial staff or the judiciary, intelligence.	Section 337A – Registered organisations.	Section 1317AA(1a) – provides for disclosures about companies.
2	**Broad definition of reportable wrongdoing**	Broad definition of reportable wrongdoing that harms or threatens the public interest (e.g. including corruption, financial misconduct and other legal, regulatory and ethical breaches).	1/3	Section 29 – covers 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.	Section 6 – contraventions of the FWRO Act, Fair Work Act or the *Competition and Consumer Act 2010*, or offence against a law of the Commonwealth.	Section 1317AA(1d) – provides for contravention of a provision of the corporations legislation.
3	**Broad definition of whistleblowers**	Broad definition of 'whistleblowers' whose disclosures are protected (e.g. including employees, contractors, volunteers and	1/3	Sections 7, 26(1)(a), 69 – by current or former individual public official (including contractors, subcontractors and their staff).	Section 337A(1) – current and former officers, employees, members of the organisations and its contractors.	Section 1317AA(1a) only provides for current officers, employees of a company or a contractor s or a contractor's employees.

		other insiders).				
4	**Range of internal / regulatory reporting channels**	Full range of internal (i.e. organisational) and regulatory agency reporting channels.	1/2	Section 26 – An authorised internal recipient or any supervisor Section 34: 'authorised internal recipient' includes authorised officers in an agency, but also includes any regulators i.e. Ombudsman/IGIS or any 'investigative agency' with the power to investigate the disclosure.	Section 337A(1b) – does not appear to provide protection for disclosures within a registered organisation, but does allow disclosure to a regulator.	Section 1317AA(1b) – allows the disclosure to be made to an authorised officer, a director, secretary or senior manager of the company, the company's auditor or member of an audit team or ASIC.
5	**External reporting channels (third party / public)**	Protection extends to same disclosures made publicly or to third parties (external disclosures e.g. to media, NGOs, labour unions, Parliament members) if justified or necessitated by the circumstances.	2/3	Section 26 – Any person other than a foreign public official. May disclose to a legal practitioner to seek legal advice. However, aspects of intelligence are excluded.	Section 337A(1b) – does not appear to provide protection for external disclosures, except to a lawyer to assist with advice and submission to a regulator.	Section 1317AA – does not appear to provide for external disclosures.
6	**Thresholds for protection**	Workable **thresholds for protection** (e.g. honest and reasonable belief of wrongdoing, including protection for 'honest mistakes'; and no protection for knowingly false disclosures or information**).**	1/2	Section 26 – discloser believes on reasonable grounds that the information tends to show one or more instances of disclosable conduct. Other provisions also apply.	Section 337A(1c, 3c) – The discloser has reasonable grounds to suspect that the information indicates one or more instances of disclosable conduct.	Section 1317AA(1d, 1e) – requires the discloser to make the disclosure in good faith and with reasonable grounds to suspect.

7	**Provision and protections for anonymous reporting**	Protections extend to disclosures made anonymously by ensuring that a discloser (a) has the opportunity to report anonymously and (b) is protected if later identified.	2/3	Section 28(2) – provides for anonymous disclosure.	The FWRO Act does not appear to explicitly provide for anonymous disclosures. The December 2016 amendment deleted the requirement for name to be provided.	Section 1317AA(1c) – requires the whistleblower to disclose their name.
8	**Confidentiality protected**	Protections include requirements for confidentiality of disclosures.	1/2	Section 20 – provides offences for use or disclosure of identifying information. Section 21 – protects discloser's identity in courts or tribunals. Section 65 provides offences for use or disclosure of identifying information	The FWRO Act does not appear to explicitly provide for the subsequent protection of the whistleblowers identity.	Section 1317AE – provides offences for: - disclosing information disclosed in the disclosure; - the identity of the discloser; - information likely to lead to the identification of the discloser.
9	**Internal disclosure procedures required**	Comprehensive requirements for organisations to have internal disclosure procedures (including requirements to establish reporting channels, to have internal investigation procedures, and to have procedures for supporting and protecting internal whistleblowers from point of disclosure).	1/3	Sections 58–62 – requires the establishment of procedures for facilitating and dealing with PIDs, including assessment of risks of reprisals, confidentiality of investigations, protection of whistleblowers.	The FWRO Act does not appear to require registered organisations to have internal disclosure procedures, aside from investigation procedures by a Director who is an authorised official. Requirements for reporting channels and procedures for supporting and protecting internal whistleblowers appear to be absent.	The Corporations Act does not appear to provide explicit requirements.

10	**Broad protections against retaliation**	Protections apply to a wide range of retaliatory actions and detrimental outcomes (e.g. relief from legal liability, protection from prosecution, direct reprisals, adverse employment action, harassment).	1/3	Sections 9–12 – Protection from legal liability, contractual remedies, and privilege from defamation. Section 13 – Protection from reprisals including dismissal, injury, alteration of position and discrimination.	Section 337B – Protection from legal liability, contractual remedies, and privilege from defamation. Section 337BA – Protection from reprisals, including dismissal, injury, alteration of position, discrimination, harassment, harm including psychological harm and damage to property or reputation.	Section1317AB – Protection from legal liability and contract termination.
11	**Comprehensive remedies for retaliation**	Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action (e.g. compensation rights, injunctive relief; with realistic burden on employers or other reprisors to demonstrate detrimental action was not related to disclosure).	2/2	Section 14 – Compensation Section 15 – Injunctions and apologies Section 16 – Reinstatement Section 18 – Costs only if vexatious No reverse onus Section 14 allows for a court to require both an individual reprisor and the organisation to pay compensation.	Section 337BB – Compensation Injunctions Apologies Reinstatement Exemplary damages Section 337BC – Costs only if vexatious No reverse onus	Section 1317AD – Compensation The Act does not appear to provide for: Injunctions Apologies Reinstatement Exemplary Damages Costs only if vexatious Note: civil remedies are ONLY available if a criminal offence of reprisal is shown to have been taken. No reverse onus
12	**Sanctions for retaliators**	Criminal, and/or disciplinary sanctions against those responsible for retaliation.	1/3	Section 19 – Offences No Civil penalties, but sections 14, 15 and 16 provide that a person may still be held liable for taking reprisal action.	Section 337BD – Civil penalties Section 337BE Criminal offences	Section 1317AC prohibits victimisation including detriment and threats and includes a criminal offence.

13	**Oversight authority**	Oversight by an independent whistleblower investigation / complaints authority or tribunal.	1/3	Section 50A – The Ombudsman must be informed of decisions not to investigate. Section 52 – The Ombudsman may extend time limits. Section 62 – The Ombudsman must provide assistance in relation to the operation of the Act, conduct education and awareness. Section 74 – The Ombudsman may set standards. However, no tribunal option, only court action is available.	Sections 337CA, 337CB provide for the Registered Organisations Commission to conduct investigations and extend time limits. It is unclear whether tribunal function is available or whether matters can only be pursued through the courts.	While ASIC has investigative powers and has established an Office of the Whistleblower, the Act does not appear to provide for further oversight functions or a tribunal.
14	**Transparent use of legislation**	Requirements for transparency and accountability on use of the legislation (e.g. annual public reporting, and provisions that override confidentiality clauses in employer-employee settlements).	1/3	Section 76 – The Ombudsman must prepare annual reports to Parliament. Section 10 – May provide protection from confidentiality clauses.	The Act does not appear to have explicit requirements for annual reporting in relation to whistleblower protections. Section 337B – May provide protection from confidentiality clauses.	The Act does not appear to have explicit requirements for annual reporting in relation to whistleblower protections. Section 1317AB(1) – May provide protection from confidentiality clauses.

Sources: Columns 1–4: Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, pp. 6–7; Columns 5–7 represent the committee's analysis of PID Act, FWRO Act and Corporations Act.

Potential additional areas for reform (The first column indicates which best practice criteria these reforms could apply to)						
	Protection for those handling disclosures	Internal recipients or staff required to take action in respect of a disclosure are protected for carrying out their duties in relation to the disclosure.	N/A	The Act does not appear to provide explicit protection for recipients of disclosures or people responsible for taking action on disclosures. Sections 78(1) and 65(2) provide limited protection.	The Act does not appear to provide explicit protection for recipients of disclsoures or people responsible for taking action on disclosures.	The Act does not appear to provide explicit protection for recipients of disclsoures or people responsible for taking action on disclosures.
	Protection for suspected whistleblowers	People suspected of being whistleblowers are protected from reprisals.	N/A	Section 13(1b) protects people suspected of making or proposing to make a public interest disclosure.	Section 337BA(1b) protects people suspected of making or proposing to make a public interest disclosure.	Section 1317AC – may protect against threats, but not actual detriment to person who may make a disclosure that would qualify for protection.
	Continuity of protection	Protections remain in effect even if the conduct disclosed is subsequently determined to fall outside the definition of disclosable conduct.	N/A	This is implicit in s.26 threshold i.e. provided the discloser believes on reasonable grounds that the information tended to show disclosable conduct, then it is a public interest disclosure (and protections apply) even if it is later determined that there was no disclosable conduct. However, it could be made more explicit.	Section 337A(1)(c) threshold, provided discloser had 'reasonable grounds to suspect that the information indicates one or more instances of disclosable conduct' then protections apply, irrespective of what is shown. However, could be made more explicit.	Section 1317AA(1)(d) 'has reasonable grounds to suspect that the information indicates' that the company or an individual 'has, or may have, contravened a provision of the Corporations legislation'. However, could be made more explicit.
	Protections for suppliers and customers	Protections extending beyond individuals to businesses that may be suppliers or customers.	N/A	The Act only appears to protect individuals.	The Act only appears to protect individuals.	The Act only appears to protect individuals.

Sources: The above columns represent the committee's analysis of PID Act, FWRO Act and Corporations Act.

Chapter 5
Definition of disclosable conduct

5.1 This chapter considers various definitions of disclosable conduct. It begins by comparing the current definitions across the PID Act, the FWRO Act and the Corporations Act. It then examines potential reforms for the public and private sectors.

Current arrangements

5.2 The definition of disclosable conduct in whistleblower legislation currently varies between the PID Act (public sector regime), the regime under the FWRO Act, and other private sector legislation such as the Corporations Act.

5.3 For example, under the Corporations Act, disclosable conduct is limited to contraventions of a provision of the corporations legislation.[1] The recent additions of the whistleblower protections to the FWRO Act provide a much broader definition of disclosable conduct than exists elsewhere in the private sector. Section 6 of the FWRO Act defines disclosable conduct as an act or omission that:

(a) contravenes, or may contravene, a provision of the FWRO Act, the FW Act) or the CC Act; or

(b) constitutes, or may constitute, an offence against a law of the Commonwealth.[2]

5.4 To be eligible for protection, a whistleblower would have to satisfy subsection 337A(1c) of the FWRO Act by having reasonable grounds to suspect that disclosable conduct as defined in section 6 had occurred. As a result, whistleblowing that does not meet the threshold set out in section 6 is not afforded protection.

5.5 By contrast, the PID Act includes several provisions that set a lower threshold for disclosable conduct, including: contraventions of a Commonwealth, state, or territory law, corruption, abuse of public trust, wastage of public resources and danger to health, safety or the environment.[3]

5.6 To assist consideration of potential reforms to definitions of disclosable conduct, the committee examined the definitions of disclosable conduct in the PID, FWRO and Corporations Acts against the seven levels set out in Table 5.1.

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1 Corporations Act, section 1317AA(d).

2 FWRO Act, section 6.

3 PID Act, section 29.

Table 5.1: Potential definitions for disclosable conduct ranging from narrowest definitions at the top to the broadest definitions at the bottom of the table

Possible levels for definitions of disclosable conduct	**Responsibility for conducting investigations**	**PID Act** Section 29	**FWRO Act** Section 6	**Corporations Act** Section 1317AA(d)
1) May be a Commonwealth Criminal offence	AFP only	Yes	Yes	Contravention of Corporations Act only
2) May be a Commonwealth Civil offence	AFP and the Commonwealth regulatory agencies responsible for that Act	Yes	Yes	Contravention of Corporations Act only
3) May contravene a Commonwealth law	Commonwealth regulatory agencies responsible for relevant Acts	Yes	FWRO Act, Fair Work Act or Competition and Consumer Act	Contravention of Corporations Act only
4) May contravene a Commonwealth, state or territory law	AFP, state and territory police and the Commonwealth, state and territory regulatory agencies responsible for that Act	Yes		
5) Breaches of registered or mandatory professional standards and codes of conduct	Regulators and bodies responsible for standards and codes of conduct	Yes		
6) Breaches of voluntary professional standards and codes of conduct	Bodies responsible for standards and codes of conduct	N/A		
7) Broad range of criteria including maladministration, corruption, abuse of public trust, wastage, danger to health, safety or the environment	Organisation and regulators	Yes		

Note: The shaded rows indicate the level of disclosable conduct that the committee is recommending should apply to all private sector organisations or businesses that are subject to the *Privacy Act 1988.* Source: Acts as indicated in the table.

5.7 Table 5.1 shows the very broad coverage of the PID Act as well as the broader coverage of the FWRO Act when compared to the Corporations Act. An important question for the committee was where the threshold for disclosable conduct should be set in order to target the most serious integrity risks. The following section summarises information on disclosures that have been made under current laws.

Types of disclosures that have been made

5.8 This section summarises the types of disclosure that have been received under the PID Act and the Corporations Act. As the FWRO Act whistleblower protections only came into effect in May 2017, statistics for that are not yet available.

5.9 The Ombudsman's 2015–2016 Annual Report provides information (shown in Table 5.2) on the types of conduct that has been disclosed under the PID Act. The figures indicate that 33 per cent of disclosures relate to a breach of a Commonwealth, state or territory law and that the remaining 67 per cent cover a broad range of disclosures, many of which are below the threshold of contravening a law.[4]

Table 5.2: Types of public sector disclosable conduct reported in 2015–2016

Type of disclosable conduct	Number of Instances (%)
Contravention of a law of the Commonwealth, state or territory	232 (33%)
Conduct that may result in disciplinary action	170 (24%)
Maladministration	137 (19%)
Wastage of Commonwealth resources (including money and property)	45 (6%)
Conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons	36 (5%)
Conduct engaged in for the purpose of corruption	25 (4%)
Abuse of public office	21 (3%)
Perversion of the course of justice	16 (2%)
Abuse of public trust	14 (2%)
Other (conduct in a foreign country that contravenes a law; fabrication, falsification, plagiarism or deception in relation to scientific research; and conduct that endangers, or risks endangering the environment)	11 (2%)
Total	707 (100%)

Source: Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 73.

4 Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 73.

5.10 Of the 612 disclosures under the PID Act, decisions were taken not to investigate 145 (23 per cent) disclosures. The reasons for not undertaking investigations include:

- the information does not concern serious disclosable conduct (37 per cent);
- the conduct has been or is already being investigated (27 per cent);
- the discloser does not wish an investigation to be pursued (eight per cent); and
- the disclosure was frivolous or vexatious (three per cent).[5]

5.11 The Moss Review noted that between 2013 and 2015, 1080 disclosures were made, of which a number of instances identified significant wrongdoing, such as:

> - inappropriate pressure from an organisation's CEO to falsify financial reporting;
> - allegations of corruption within departments and portfolio bodies, including 'kick backs' for using preferred suppliers;
> - serious criminality, including drug trafficking and theft of departmental IT equipment; and
> - systemic patterns of wrongdoing amongst a group of public officials posted together, such as allocating responsibilities to untrained staff, consumption of alcohol while on duty, and fraudulently recording hours.[6]

5.12 ASIC's annual reports provide statistics on public interest disclosures received by ASIC under the Corporations Act. In 2015–2016 ASIC received 146 disclosures. After preliminary inquiries, 80 per cent of disclosures were assessed as requiring no further action, often due to insufficient evidence (36 per cent) or other investigations or processes already being underway (35 per cent).[7]

5.13 In its submission ASIC provided further detail, covering the period from February 2014 to June 2016, as shown in Figure 5.3 below. The most common type of disclosure was about corporate governance (72 per cent), which includes insolvency matters, insolvency practitioner misconduct, contractual issues, and directors' duties.[8]

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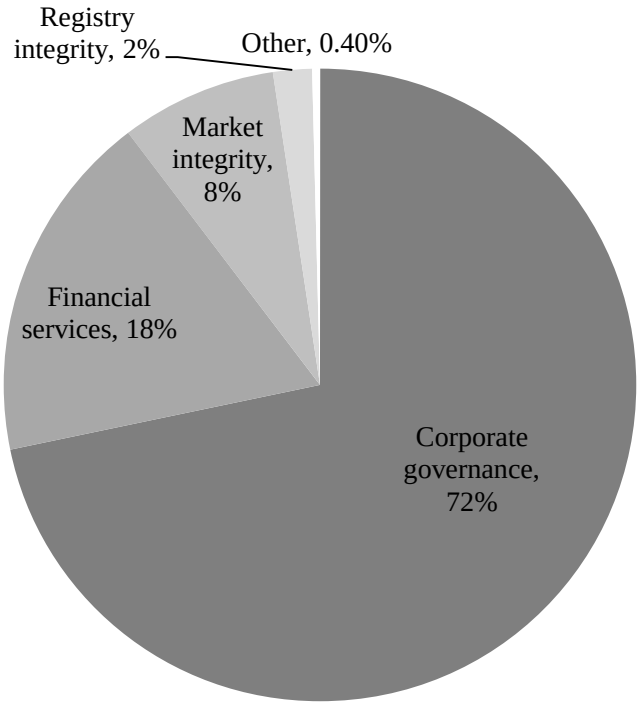
5 Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 75.

6 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30.

7 Australian Securities and Investments Commission, *Annual Report 2015–2016*, p. 96; Australian Securities and Investments Commission, *Submission 51*, p. 12.

8 Australian Securities and Investments Commission, *Submission 51*, p. 11.

Figure 5.3: Types of whistleblower reports received by ASIC



Source: ASIC, *Submission 51*, p. 11.

Public sector

5.14 This section discusses potential reforms to the threshold for disclosable conduct in the public sector.

Disclosures about personal employment related matters

5.15 An area of concern with the PID Act as currently drafted is an apparent over-representation of minor personal employment related matters that may be better dealt with through dispute resolution or merits review mechanisms rather than being treated as a public interest disclosure.

5.16 For example, in its 2014–2015 Annual Report, the Commonwealth Ombudsman stated that enquiries to the Ombudsman indicate:

> Enquiries to our office indicate an over-representation of PIDs that are about conduct relating to relatively minor personal grievance matters, many of which are employment related and/or have already been through other processes available to the discloser.
>
> The Commonwealth PID scheme is not alone in this regard as other Australian PID oversight bodies have observed a similar trend with schemes in other jurisdictions.[9]

9 Commonwealth Ombudsman, *Annual Report 2015–2016*, p. 78.

The Moss Review

5.17 A statutory review of the PID Act conducted by Mr Philip Moss (Moss Review) in 2016 was, amongst other things, tasked with considering 'the breadth of disclosable conduct covered by the Act, including whether disclosures about personal employment-related grievances should receive protection under the Act'.[10]

5.18 In examining this matter, the Moss Review found that:

> Submissions received from agencies noted that the overwhelming majority of disclosures concerned issues like workplace bullying and harassment, forms of disrespect from colleagues or managers, or minor allegations of wrongdoing.[11]

5.19 However, the Moss Review also noted that it is difficult to identify clearly within the Commonwealth Ombudsman's annual report what proportion of disclosures primarily relate to interpersonal conflicts at work or a personal employment-related grievance.[12]

5.20 Furthermore, the Ombudsman's Annual Report indicates that in 2013–2014, 38 per cent of the 223 investigations conducted across the Commonwealth public sector, concerned disclosures about an employment or code of conduct related matter, which can be investigated under the *Public Service Act 1999* or the FW Act.[13]

5.21 The Moss Review argued that the PID Act was ill-suited as a mechanism for resolving conflict over minor personal employment-related matters:

> The PID Act does not provide resolution for grievances, and the allocation and investigation process (which, under the statutory framework, may take up to 104 days to complete in total and longer if the Commonwealth Ombudsman or the IGIS grants the agency an extension) can prolong the discloser's exposure to the situation that they have reported.[14]
>
> …the PID Act's processes and procedures are not well adapted to resolving allegations of less serious disclosable conduct. For example, the extensive protections against reprisal and secrecy offences can have an adverse effect upon best practice conflict-management solutions that emphasise alternative dispute resolution or merits review processes, rather than formal investigation.[15]

5.22 As a consequence, the Moss Review concluded that the PID Act threshold should be targeted at the most serious integrity risks, such as fraud, serious

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10 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 2.

11 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30.

12 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30, see for example submissions to the review from the AFP, APSC, Department of Defence, and Department of Immigration and Border Protection.

13 Commonwealth Ombudsman, *Annual Report 2013–2014*, p. 73.

14 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 31.

15 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 30.

misconduct or corrupt conduct. The Moss Review advocated that solely personal employment related grievances should be excluded from the PID Act unless they relate to systemic issues or reprisals.[16]

5.23 However, the Moss Review added an important caveat to the above finding by recognising that there are cases where a personal employment matter is bound up with a matter that may properly be the subject of a public interest disclosure. In these circumstances, the Moss Review found that the public interest matter should still qualify for disclosure under the PID Act:

> These amendments will need to ensure that in cases when a disclosure that includes both an element of personal employment-related grievance, as well as an element of other wrongdoing, the latter element could still be the subject of a PID.[17]

5.24 Alternative approaches to dealing with the issue of minor personal employment matters were put forward to the Moss Review. For example, some submitters to that review recommended the inclusion of a public interest criterion for a disclosure to be accepted as a public interest disclosure.[18]

The powers of the Commonwealth Ombudsman

5.25 One of the areas where there appears to be a misconception amongst some submitters to this inquiry relates to the powers of the Commonwealth Ombudsman under the PID Act.

5.26 Under the PID Act the Commonwealth Ombudsman is included in the definition of an 'investigative agency'.[19] However, the Commonwealth Ombudsman noted that it is not authorised to investigate action taken with respect to a person's employment in an agency or prescribed authority:

> This limits the Ombudsman's capacity to comprehensively review how agencies deal with public interest disclosures about most employment-related conduct. In such cases, the Ombudsman can generally only investigate whether agencies applied the procedural requirements of the PID Act in dealing with the disclosure. The Ombudsman is precluded from investigating and/or forming a view about the adequacy or outcome of the agency's investigation of the substantive disclosure.[20]

16 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 30–32.

17 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 32.

18 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, see for example submissions to the review from the Department of Defence, Department of Immigration and Border Protection.

19 PID Act, section 8.

20 Commonwealth Ombudsman, *Submission 15 to the Moss Review of the Public Interest Disclosure Act 2013 (Cth)*, March 2016, p. 13.

5.27 The committee notes that section 22 of the PID Act already provides for a public interest disclosure to be treated as a workplace right under the FW Act. The Commonwealth Ombudsman noted that:

> This gives an employee access to the Fair Work Commission for remedies in the case of adverse action by their employer linked to them having made a public interest disclosure.[21]

Committee view

5.28 Given the findings of the Moss Review, the committee considers it important to ensure that any changes to whistleblower protections remain focussed on the most serious integrity risks.

5.29 However, the committee remains concerned that the most likely forms of reprisal are employment related. Therefore any amendments should ensure that employment related reprisals can still be dealt with under the PID Act.

5.30 In addition, the lack of clear information on what proportion of disclosures are actually related to personal employment matters is of concern. The committee considers the data should be collected and assessed before any legislative changes are made.

Recommendation 5.1

5.31 The committee recommends that, in implementing the Moss Review recommendation regarding employment related matters care is taken to ensure that:

- **allegations of reprisal action taken against a person that has made a public interest disclosure can still be dealt with under a Whistleblowing Protection Act; and**
- **data is gathered and assessed in a national database on the proportion of disclosures that are personal employment related, but that this not have to occur before any legislative changes are made as recommended in this report.**

Private sector

Definition of disclosable conduct in the private sector

5.32 This section summarises evidence provided to the committee on the definition of disclosable conduct for the private sector. In brief, the majority of submitters that addressed this matter argued that the current definition of disclosable conduct in the private sector should be broadened. At a minimum, these submitters argued that disclosable conduct under any proposed legislation for the private sector should include potential breaches of any Commonwealth, state or territory law.

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21 Commonwealth Ombudsman, *Submission 15 to the Moss Review of the Public Interest Disclosure Act 2013 (Cth)*, March 2016, p. 14.

5.33 For example, the ACCC argued for disclosable conduct to include potential breaches of a Commonwealth, state or territory law.[22]

5.34 The AICD suggested that the definition of disclosable conduct should be extended in the context of corporate entities to include:

- contraventions of the Corporations Act; and
- offences against any Commonwealth, state or territory law.[23]

5.35 The AICD explained that the reason it considers disclosable conduct should be as broad as any Commonwealth or state or territory law is that a whistleblower cannot be expected to be an expert on the Corporations Act and that they should not have to consult a piece of legislation before they make a report:

> If a whistleblower is a witness of serious corporate wrongdoing, they should feel confident in making a disclosure to their company or to an appropriate regulator, without fear that it might fall outside the definition because of a technicality.[24]

5.36 Several submitters were of the view that private sector whistleblowing legislation should include, in some form, the law of foreign countries within the definition of disclosable conduct. The GIA favoured broadening the definition of disclosable conduct to include 'conduct that contravenes a law of the Commonwealth, a state or a territory', as well as some conduct that contravenes foreign laws.[25] Similarly, the AICD suggested that disclosable conduct include offences against the law of a foreign country that is also in force in Australia.[26]

5.37 A key concern for several submitters and witnesses was the potential inability of the proposed legislation to encourage the disclosure of significant wrongdoing that was clearly unethical and harmed consumers, but was not necessarily illegal, if the definition of disclosable conduct was restricted to breaches of any Commonwealth, state or territory law.

5.38 For example, ASIC suggested that the scope of information protected by the whistleblowing provisions in the Corporations Act should be broadened to cover any misconduct that ASIC may investigate.[27]

5.39 Similarly, Mr Dennis Gentilin pointed out that the definition of disclosable conduct would need to include unethical but not necessarily illegal behaviour if the

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22 Australian Competition and Consumer Commission, *Answers to questions on notice*, 27 April 2017, (received 19 May 2017).

23 Australian Institute of Company Directors, *Submission 53*, p. 5.

24 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 27.

25 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 24.

26 Australian Institute of Company Directors, *Submission 53*, p. 5.

27 Australian Securities and Investments Commission, *Submission 51*, p. 18.

disclosure of the conduct unearthed in recent financial scandals is to be protected by private sector whistleblowing legislation:

> …my understanding is that a disclosure must relate to conduct that '(a) contravenes, or may contravene, a provision of this Act, the Fair Work Act or the Competition and Consumer Act 2010; or (b) constitutes, or may constitute, an offence against a law of the Commonwealth.' My concern is that this is not sufficiently broad.[28]

> In many instances whistleblowers expose wrongdoing that is clearly unethical but not necessarily illegal or in contravention of the aforementioned Acts. The recent events at CommInsure provides one example of this. Although the wrongdoing in that organisation clearly caused hardship to consumers and was unethical, a recent investigation by ASIC did not find any of the conduct to be illegal. If possible legislation must also protect whistleblowers in these types of scenarios.[29]

5.40 The AIST argued for the definition of disclosable conduct to include actual or suspected contravention of applicable statutory provisions, or a law of the Commonwealth, fraud, gross mismanagement, and financial misconduct including misappropriation of funds.[30]

5.41 Professor A J Brown identified the definition of disclosable conduct as the most important reform priority. He argued that the private sector definition of disclosable conduct needed to encompass ethics if whistleblower protections were to cover the corporations and financial services issues which have attracted the attention of the committee during this and previous parliaments.[31]

5.42 Professor Brown was of the view that the definition of disclosable conduct in the FWRO Act would substantially increase the likelihood that protection could be offered to whistleblowers involved in recent scandals in the financial services sector. However, he noted that while breaches of the law might be suspected, the evidence may only emerge after disclosures have been made based on breaches of professional standards, operating procedures or ethical standards.[32]

5.43 Professor Brown also considered that there were unlikely to be any constitutional limitations to broadening the definition of disclosable conduct, provided that the definition:

> …can be safely characterised as laws with respect to the proper governance of corporations (i.e. 'constitutional corporations' under section 51(xx) of

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28 Mr Denis Gentilin, *Answers to questions on notice*, 28 April 2017 (received 12 May 2017).

29 Mr Denis Gentilin, *Answers to questions on notice*, 28 April 2017 (received 12 May 2017).

30 Australian Institute of Superannuation Trustees, *Submission 24*, p. 12.

31 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 1.

32 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

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.[33]

Low level and personal employment-related matters

5.44 As with the public sector, concerns were expressed about designing a scheme for the private sector with sufficient care so that solely personal employment-related matters did not unnecessarily become the subject of public interest disclosures.

5.45 For example, Ms Louise Petschler, General Manager of Advocacy for the AICD pointed out that a whistleblowing framework within an organisation would likely capture a broad range of lower-level matters such as employee-manager disputes, and employment grievances. She therefore suggested that internal whistleblower procedures would need to be set up so that disclosures which met the criteria were dealt with, while lower-level matters and personal employment grievances were managed appropriately.[34]

Committee view

5.46 The vast majority of the evidence to the committee from a broad range of submitters and witnesses argued that the current private sector definitions of disclosable conduct are too narrow for the effective identification of misconduct and protection of whistleblowers.

5.47 Based on the evidence before it, the committee considers that there is support for the definition of private sector disclosable conduct to be broadened to include any contravention of a law of the Commonwealth or the states or territories where:

- the disclosure relates to the employer of the whistleblower and the employer is an entity covered by the FW Act; or
- the disclosure relates to a constitutional corporation;
- but not where the disclosure relates to a breach of law by the public service of a state or territory; and
- further, disclosable conduct should also include any breach of an industry code that has force in law or is prescribed in regulations under a Whistleblowing Protection Act.

Recommendation 5.2

5.48 The committee recommends, in relation to whistleblower protections for the private sector, including the corporate and not-for-profit sectors, that disclosable conduct be defined to include:

33 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

34 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 27.

- **a contravention of any law of the Commonwealth; or**
- **any law of a state, or a territory where:**
  - **the disclosure relates to the employer of the whistleblower and the employer is an entity covered by the *Fair Work Act 2009*; or**
  - **the disclosure relates to a constitutional corporation; and**
- **any breach of an industry code or professional standard that has force in law or is prescribed in regulations under a Whistleblowing Protection Act;**
- **but not where the disclosure relates to a breach of law by the public service of a state or territory.**

5.49 While noting that the above definition of disclosable conduct is broader than current definitions for the private sector in most cases, the committee is concerned that the definition recommended above may still be insufficient to provide protection to whistleblowers who may be involved in disclosing conduct similar to that revealed in many of the financial sector scandals in recent years.

5.50 The committee therefore recommends that the government examine the feasibility of broadening the above definition of disclosable conduct. The committee notes, however, that within the scope of its own inquiry, it has had a limited capacity to examine the constitutional capacity of the Commonwealth to legislate beyond any breach of a law of the Commonwealth, states or territories.

Recommendation 5.3

5.51 The committee recommends that the government examine whether the Commonwealth has the constitutional power to include additional lower thresholds for disclosable conduct that would adequately protect whistleblowers such as those involved in scandals in the financial service sector in recent years.

Chapter 6

Definition of whistleblowers and thresholds for protection

6.1 This chapter discusses the committee's consideration of public and private sector legislation against the best practice criteria for a broad definition of a whistleblower, and thresholds for protection. This section also covers four issues that have come to the committee's attention during the inquiry that are not formally included in the best practice criteria, however, they are closely related to them:

- protections for suspected whistleblowers;
- protections for suppliers and customers;
- protections for those handling disclosures; and
- continuity of protection.

Broad definition of a whistleblower

6.2 There is a significant disparity between the PID, FWRO and Corporations Acts as to who qualifies as a whistleblower under the current definitions.

6.3 For the public sector, the PID Act defines a whistleblower through the following clauses:

- section 7 provides for protecting public officials and former public officials from adverse consequences of disclosing information that, in the public interest, should be disclosed;
- section 26 provides that a public interest disclosure can be made by a person who is, or has been, a public official; and
- section 69 of the PID Act sets out 20 categories of public officials and the agencies to which they belong.[1]

6.4 However, the definition of a public official in subsection 69(1) of the PID Act does not appear to align clearly with the definitions set out in sections 7 and 26. The committee discusses this further in the committee view at 6.58 and 6.59, and makes a recommendation on this matter in recommendation 6.1.

6.5 For registered organisations the FWRO Act provides the following explicit definition of a whistleblower in Part 4A Division 1, subsection 337A(1):

> (a) the discloser is one of the following:
>
> (i) an officer or former officer of an organisation, or of a branch of an organisation;
>
> (ii) an employee or former employee of an organisation, or of a branch of an organisation;

1 PID Act.

(iii) a member or former member of an organisation, or of a branch of an organisation;

(iv) a person who has or had a contract for the supply of services or goods to, or any other transaction with, an organisation or a branch of an organisation;

(v) a person who has or had a contract for the supply of services or goods to, or any other transaction with, an officer or employee of an organisation or of a branch of an organisation who is or was acting on behalf of the organisation or branch;

(vi) an officer, former officer, employee or former employee of a person referred to in subparagraph (iv) or (v).[2]

6.6 In contrast to the above two Acts, the Corporations Act has a much narrower definition that does not include former staff and others. Subsection 1317AA(1) states:

(a) the discloser is:

(i) an officer of a company; or

(ii) an employee of a company; or

(iii) a person who has a contract for the supply of services or goods to a company; or

(iv) an employee of a person who has a contract for the supply of services or goods to a company.[3]

Statistics on who has blown the whistle

6.7 The annual reports of the Commonwealth Ombudsman provide information on the types of disclosers who made public interest disclosures as shown in Table 6.1. Similar data was not available for the corporate and registered organisations sectors.

Table 6.1: Types of disclosers in the public sector

	2013–2014	2014–2015	2015–2016
Current public officials	79%	72%	59%
Former public officials	7%	8%	9%
Contracted service providers	3%	2%	19%
Deemed to be a public official under section 70 of the PID Act	11%	18%	13%

Source: Commonwealth Ombudsman Annual Reports 2013–2014, p. 75; 2014–2015, p. 69, [NOTE: contractors are listed in a separate note in the text]; 2015–2016, p. 74.

2 FWRO Act.

3 Corporations Act.

6.8 Table 6.1 indicates that contracted service providers can be a significant source of disclosures. Given the significant overlap between the public and private sectors, for example when public sector agencies out-source particular services to private contractors, it will be important to ensure consistency between public and private sector whistleblower protections (see below and the discussion in Chapter 3).

6.9 The following sections cover particular areas in which the protections for whistleblowers could be broadened and clarified, and areas where those protections could be harmonised between the public and private sectors.

Former staff, former contractors, and others

6.10 In the public sector, Table 6.1 shows that former public officials contributed seven to nine per cent of disclosures in the first three years of the operation of the PID Act. This highlights the importance of ensuring that:

- the PID Act is unambiguous that it applies to former public officials; and
- private sector whistleblower definitions also explicitly provide for former staff of various kinds (including contractors) to be afforded protection.

6.11 The committee received evidence from witnesses supporting the inclusion of former staff in whistleblower protections. For example, Mr Warren Day, Senior Executive Leader, ASIC told the committee that former staff were a valuable source of information on wrongdoing:

> …some of the better information that we have received has come from former employees.[4]

6.12 However, ASIC Commissioner, Mr John Price warned the committee that as things currently stand, former employees are not afforded any protection under the Corporations Act if they blow the whistle on a former employer:

> The most obvious example is former employees. It may well be a situation that an employee decides, as a result of the experience they have had with a company and their concern about the wrongdoing, the best thing for them to do is seek other employment. As soon as you do that, you are outside the existing test in the Corporations Act.[5]

6.13 Ms Rani John, a partner at DLA Piper, supported expanding the definition of whistleblowers to include a company's former employees, directors and officers, service providers, accountants and auditors, unpaid workers, contractors and business partners. She told the committee that such a legislative change would be both positive and appropriate.[6]

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4 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 69.

5 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 69.

6 Ms Rani John, Partner, DLA Piper, *Committee Hansard*, 27 April 2017, p. 11.

6.14 The Australian Council of Trade Unions (ACTU) noted that the systems that apply to the public and corporate sectors operate on the assumption that whistleblowers are insiders, including employees and contract workers. Mr Trevor Clarke from ACTU informed the committee it was vital that former employees gained whistleblower protections under the Corporations Act:

> Certainly, a large amount of what we know about worker exploitation comes from those sources. That can expose employees to reprisals at the workplace level and to reputational damage. That can impair their employability in their chosen industry. In the case of former employees, they have absolutely no protection under the Corporations Act framework. We strongly believe that needs to change.[7]

6.15 Ms Maureen McGrath, Chair of the Legislative Review Committee, the GIA argued for an even broader definition of whistleblowers to include any person who makes a disclosure of alleged corporate wrongdoing. The GIA suggested that the test for qualifying should be connected not to the capacity in which the discloser has access to information but rather to the information itself and the honest and reasonable belief in the genuineness of that information.[8]

Committee view

6.16 The committee notes that subsection 7(1a) in the Division 3 overview and subsection 26(1a) of the PID Act provide that former public officials are able to make public interest disclosures.

6.17 However, the definition of a 'public official' in subsection 69(1) of the PID Act uses the following description: 'Agency to which the public official belongs'. The committee considers that such a definition has the potential to create uncertainty as to whether a former public official who no longer 'belongs' to an agency is covered by the PID Act. While the committee accepts the principle that legislation should be read holistically, the current definition in subsection 69(1) appears to introduce unnecessary ambiguity. The committee considers that it would be possible to provide much greater clarity by amending the definition in subsection 69(1) and using words such as: 'Agency to which the public official currently belongs or formerly belonged'.

6.18 The committee is also of the view that the protections of public officials be extended to those operating as contractors to public sector agencies.

Recommendation 6.1

6.19 The committee recommends that section 69 of the *Public Interest Disclosure Act 2013* be amended to make it explicit that former public officials, as well as current and former contractors to the Australian Public Service, are able to make public interest disclosures.

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7 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 27 April 2017, p. 16.

8 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 24.

6.20 Evidence to the committee from a range of witnesses strongly supported changing the current definitions of who can be a whistleblower under private sector legislation to include former staff and former contractors. These persons currently receive no protection under the Corporations Act. Furthermore, as the corporate regulator pointed out, some of their most valuable information comes from former employees.

6.21 In light of the evidence received, the committee is strongly of the view that it would be appropriate for all private sector whistleblower protections (including the Corporations Act) to apply to former staff, current and former contractors, and current and former volunteers.

6.22 Furthermore, with respect to the discussions regarding consistency in Chapter 3, the committee considers that the public and private sector protection for former staff and others could be aligned, with appropriate categories of people to be specified for each sector.

Recommendation 6.2

6.23 The committee recommends that all private sector whistleblower protection legislation include protections for current and former staff, contractors and volunteers.

Protections for suspected whistleblowers

6.24 The committee also heard evidence that whistleblower protection legislation may also need to contain provisions that would protect persons that have been subjected to reprisals on suspicion of their being a whistleblower, but who may not in fact have made a disclosure or even intended to do so.

6.25 For example, ASIC drew the committee's attention to the following scenario:

> You can see a scenario where there are two people working side by side. One is actually the whistleblower and the other one knows nothing about what is going on, but they work in the same place. The second person is completely oblivious to what is going on. Management come down from on high and think there is a leak and are really concerned they have a whistleblower and want to take harmful action against both employees. We would say that the second employee, the person who is oblivious to what is going on, is just as victimised as the first person, even though they are not the whistleblower.[9]

6.26 The committee notes that the three Acts it is considering have some provisions relating to such protections:

9 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 67.

- paragraph 13(1)(b) of the PID Act provides protection for someone who has made or proposes to make a public interest disclosure, as well as a person who is suspected of making a public interest disclosure;
- subsection 337BA(1b) of the FWRO Act provides protection for someone who has made, may have made, proposes to make or could make a public interest disclosure; and
- subsection 1317AC(2cii) of the Corporations Act provides some protections against reprisals.[10]

6.27 For offences for reprisals under section 19 of the PID Act it is not necessary to prove that a person made, may have made, or intended to make, a disclosure. Similar provisions in the FWRO Act apply to both civil and criminal penalties.[11]

Committee view

6.28 On the evidence provided by the corporate regulator, the committee considers that there is potential for reprisal action to be taken against an unwitting non-whistleblower in the private sector.

6.29 In light of the above, the committee considers that the provisions in both the public and private sectors could be improved to be consistent and ensure that they cover threats to, and actual reprisals against, people who:

- have made a disclosure;
- propose to make a disclosure;
- could make a disclosure but do not propose to; or
- may be suspected of making, proposing to make, or be capable of making a disclosure, even if they do not in fact make a disclosure.

Recommendation 6.3

6.30 The committee recommends that protections in both the public and private sector be made consistent for threats or actual reprisals against people who:

- **have made a disclosure;**
- **propose to make a disclosure;**
- **could make a disclosure but do not propose to; or**
- **may be suspected of making, proposing to make, or be capable of making, a disclosure, even if they do not make a disclosure.**

10 PID Act, FWRO Act, Corporations Act.

11 PID Act, FWRO Act, sections 337BD–337BE.

Protections for those handling disclosures

6.31 Another area that came to the committee's attention during the inquiry was the potential vulnerability of recipients of disclosures in some cases. For example, if a person makes a disclosure to their supervisor who is a low to mid-level manager in an organisation, the recipient may also be a in a vulnerable position. Equally, the person tasked with handling the disclosure such as an authorised officer or an investigation officer may be at risk of being targeted because they are investigating, or even considering investigating, a disclosure about a senior public official. Such officers may not have sufficient power within the organisation to deal with the disclosure effectively and may also be at risk of reprisals from those alleged to have engaged in disclosable conduct. In fact, such a recipient may face a dilemma: on the one hand wanting to do the right thing with the disclosure and assist the discloser, and at the same time being aware that their career could be destroyed by reprisals if they take the action which may be required of them under whistleblower legislation.

Committee view

6.32 The committee considers that the situation described above represents a potential impediment to effective whistleblower protections. In the committee's view, there is limited value in protecting the discloser if the recipient or others required to take action are either placed in a vulnerable position, or have a reasonable apprehension that they may be placed in a vulnerable position, by actual or potential reprisals emanating from those in more senior or more powerful positions.

6.33 It is not clear to the committee that the FWRO Act and the Corporations Act provide any protections for recipients or others required to take action in relation to disclosures. The PID Act includes some limited protections in subsection 78(1) relating to performing functions required under the PID Act. However, the committee notes that this protection posits a 'good faith' threshold for protection, which is a requirement that has been widely criticised as falling far short of international best practice (see the discussion later in this chapter in the section on 'thresholds for protection' starting at 6.44).

6.34 The committee considers that adequate protection for recipients should be developed for both the public and private sectors in a consistent fashion. The committee considers that the protection should apply for the performance of the functions of recipients or others required to take action in relation to disclosures without regard to their motivation.

Recommendation 6.4

6.35 The committee recommends that protections for recipients of disclosures in both the public and private sectors be made consistent, and cover the performance of any and all functions required of recipients or others required to take action in relation to disclosures, without regard to their motivations.

Protections for suppliers and customers

6.36 During the inquiry it came to the committee's attention that existing whistleblower protections largely focus on protecting individuals and that there were very little, if any, protections for businesses that may suffer reprisals. For example, a small to medium business operating as a supplier to, or customer of, a much larger business could suffer reprisals if one of its employees made disclosures about the conduct of the larger business.

6.37 The ACCC provided some relevant examples to the committee during the inquiry. The first case involved businesses with supply arrangements to Coles:

> We had a case against Coles which was a case in which we alleged unconscionable conduct by Coles. We said that they had acted unconscionably in withholding money from their suppliers without their consent, when they had no contractual right to do so. We experienced significant difficulty and delay during our investigation, due in part to the lack of adequate whistleblower protections under the Competition and Consumer Act.[12]

> There were a number of suppliers who refused to provide affidavit evidence—that is, court evidence—for fear that it would jeopardise their commercial relationship with Coles, and frankly we had no way of giving them any comfort that their relationship would not be jeopardised.[13]

6.38 The second example provided by the ACCC involved businesses with supply arrangements to Woolworths:

> …the Mind the Gap case. This was the case in which the judge said that it was not unconscionable for Woolworths to say to suppliers, 'You must pay us the difference between our profit expectations and the profits we're actually receiving, even though we have no contractual right to receive that.' So that was not unconscionable according to Justice Yates. In part, he made it clear that his view was formed because he did not have evidence about the broader circumstances of the dealings with suppliers. We did not produce evidence of the broader dealings with suppliers because we felt we needed to respect the commercial positions of the suppliers by not parading them before the court and putting them at risk of losing their business with Woolworths.[14]

Committee view

6.39 The committee notes that in both the cases discussed above there was a lack of appropriate protections for both the individuals and the businesses concerned. The committee considers that the enhanced whistleblower protections recommended

12 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Consumer and Competition Commission, *Committee Hansard*, 27 April 2017, p. 61.

13 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Consumer and Competition Commission, *Committee Hansard*, 27 April 2017, p. 61.

14 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Consumer and Competition Commission, *Committee Hansard*, 27 April 2017, p. 62.

in this report could provide appropriate protections to the individuals. However, there would still be limited or no protection from reprisals for the businesses, particularly small to medium businesses that have supply arrangements with a much larger and more powerful apex business.

6.40 While the above examples involved suppliers being vulnerable to reprisals, the committee notes that other small businesses, for example a retail franchise, or a customer business in the utilities sector, may also be vulnerable to reprisal action taken by a much larger business. Apart from in the case of the principal-contractor relationship, a Whistleblower Protection Act would not apply to one business whistleblowing on another business.

6.41 The committee has not had the opportunity during this inquiry to adequately investigate protections for reprisals against businesses and the relationship to competition and consumer law, or the functions of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). Apart from in the case of the principal-contractor relationship, a Whistleblower Protection Act would not apply to one business whistleblowing on another business.

6.42 In light of the evidence received from the ACCC, however, the committee considers that such matters are worthy of an inquiry by the Parliament or the ASBFEO.

Recommendation 6.5

6.43 The committee recommends that an inquiry be conducted by either a parliamentary committee or the Australian Small Business and Family Enterprise Ombudsman into protections for reprisals against businesses where whistleblowers in those businesses make public interest disclosures about disclosable conduct by larger businesses.

Thresholds for protection

6.44 This section discusses the committee's consideration of the best practice criterion on thresholds for protection and how those thresholds vary across existing whistleblower protection legislation.

6.45 In addition to the disclosures being required to contain disclosable conduct as discussed in Chapter 5, each of the following three Acts includes a test for whether the discloser is genuine, as follows:

- the PID Act (section 26): the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct;[15]
- the FWRO Act (in Part 4A Division 1, subsections 337A(1c) and (3c)): the discloser has reasonable grounds to suspect that the information indicates one or more instances of disclosable conduct by:

15 PID Act, section 26.

- the organisation or a branch of the organisation; or
- an officer or employee of the organisation or of a branch of the organisation;[16]

- the Corporations Act (subsections 1317AA(1d) and (1e)):
  - the discloser has reasonable grounds to suspect that the information indicates that:
    - (i) the company has, or may have, contravened a provision of the Corporations legislation; or
    - (ii) an officer or employee of the company has, or may have, contravened a provision of the Corporations legislation; and
  - the discloser makes the disclosure in good faith.[17]

6.46 The main difference between the three Acts is the extra 'good faith' test in the Corporations Act.

Evidence received by the committee

6.47 Some submitters informed the committee that they supported the 'good faith' test remaining in legislation. For example the Financial Planning Association of Australia (FPA) supported the 'good faith' requirement and argued that individual whistleblowers do not usually have the legal knowledge to relate the suspicious activity to the relevant legal requirements. The FPA suggested that it is therefore unreasonable to require an individual to determine if suspected wrongdoing has occurred.[18]

6.48 However, the majority of submitters supported removing the 'good faith' test.[19]

6.49 Clayton Utz informed the committee that it considered the 'good faith' requirement to be an onerous and ambiguous burden placed on whistleblowers which should be removed. While noting that the 'good faith' requirement was originally inserted as a safeguard against vexatious claims, Clayton Utz argued that subsection 1317AA(1d) of the Corporations Act, which provides that the whistleblower must

16 FWRO Act, subsections 337A(1c) and (3c).

17 Corporations Act, subsections 1317AA(1d) and (1e).

18 Financial Planning Association of Australia, *Submission 57*, p. 10; see also FSU, *Submission 10*, p. 6.

19 Clayton Utz, *Submission 4*, pp. 8–9; DLA Piper, *Submission 8*, p. 2; Dr Vivienne Brand and Dr Sulette Lombard, *Submission 14*, p. 4; International Bar Association Anti-Corruption Committee, *Submission 62*, p. 6; Mr Richard Wilkins, *Submission 61*, p. 4; Australian Lawyers Alliance, *Submission 58*, p. 14; Media, Entertain & Arts Alliance, *Submission 55*, p. 7; Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 68; Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Submission 23*, Attachment 2, p. 4.

have 'reasonable grounds to suspect' a contravention, is an adequate safeguard against vexatious claims.

6.50 Clayton Utz also stated:

> The 'good faith' test is dependent on the whistleblower's motive which is an irrelevant consideration. It is in the public interest for information about corporate misconduct to be disclosed, regardless of the whistleblower's motive. It should be the veracity of a claim, not the intent behind it which determines whether a whistleblower receives protection.[20]

6.51 DLA Piper also argued for the removal of the 'good faith' requirement, informing the committee that the 'good faith' requirement has the potential to deny protection to whistleblowers who otherwise make qualifying disclosures because they have multiple motives for doing so.[21] DLA Piper supported the introduction of a requirement that one of the following conditions be met in order for a disclosure to qualify for protection:

- the person making the disclosure holds an honest and reasonable belief that the disclosure shows presumed wrongdoing (the subjective test); or
- the disclosure does show, or tends to show, proscribed wrongdoing, irrespective of the person's belief (objective test).[22]

6.52 The AICD supported replacing the 'good faith' requirement[23] with the alternative requirements suggested by the Senate Economics Reference Committee inquiry into the performance of ASIC, which would require that, to be protected, a disclosure:

- is based on an honest belief, on reasonable grounds, that the information disclosed shows or tends to show wrongdoing; or
- shows or tends to show wrongdoing, on an objective test, regardless of what the whistleblower believes.[24]

6.53 The Australian Lawyers Alliance (Lawyers Alliance) argued that there should be no requirement that disclosures be made in 'good faith', as long as the individual making the disclosure has reasonable grounds on which to believe that the information disclosed is true and indicates that disclosable conduct has taken place. The Lawyers Alliance suggested that the motivation of the discloser is not material to whether disclosable conduct has taken place, and even disclosures made in the absence of good faith can reveal important conduct that needs to be remedied.[25]

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20 Clayton Utz, *Submission 4*, pp. 8–9.

21 DLA Piper, *Submission 8*, p. 7.

22 DLA Piper, *Submission 8*, p. 8.

23 Australian Institute of Company Directors, *Submission 53*, pp. 6–8.

24 Senate Economics References Committee, *Review of Performance of the Australia Securities and Investments Commission*¸ June 2014, p. 225.

25 Australian Lawyers Alliance, *Submission 58*, p. 14.

6.54 The GIA pointed out that replacing the 'good faith' requirement with a requirement that a disclosure is based on an honest belief on reasonable grounds would be clearer to potential whistleblowers:

> The term 'honest and reasonable' could assist in clarifying that the emphasis is on the genuineness of the belief in the information being disclosed and not the motive for making such a disclosure. We also consider that the term 'honest and reasonable' is one which whistleblowers are better able to understand.[26]

6.55 ASIC indicated that it would be comfortable with a threshold based on 'honest belief' or 'reasonable grounds'.[27] Mr Day, Senior Executive Leader, ASIC informed the committee that the 'good faith' test is counter-productive and ASIC no longer applies it:

> Effectively in a way, we are ignoring that good faith test in the way that we look at that legislation now. I am the first to admit that I think it got in the way of some of our deliberations five years ago or so because we found ourselves probably unnecessarily being caught up with this quandary of: is this person making a disclosure to us and has it been done in good faith? I think we are now in a position where we say: 'We do not care. They have made a disclosure to us. We will treat them as a whistleblower, we will honour that information'.[28]

6.56 Professor A J Brown argued that the 'good faith' threshold requirement is out of date and inconsistent with the approach taken by Australia's public sector whistleblowing legislation, as well as best practice legislative approaches elsewhere, including the UK.[29] Professor Brown noted that in the UK:

> …the issue of 'good faith' is reduced to a consideration when the quantum of damages for compensation for a whistleblower is considered i.e. if an employer can show 'bad faith', then the damages may be reduced by up to 25 per cent.[30]

6.57 Professor Brown further explained that the 'good faith' requirement may be counter-productive because it is likely to deter people from making a disclosure:

> Motives are notoriously difficult to identify and may well change in the process of reporting, for example, when an internal disclosure is ignored or results in the worker suffering reprisals. Because it is such a subjective and open-ended requirement, the likely effect of a good faith test is negative —

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26 Governance Institute of Australia, *Submission 54*, p. 8.

27 Mr Andrew Fawcett, Senior Executive Leader, Strategic Policy, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 68.

28 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 68.

29 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Submission 23*, Attachment 2, p. 4.

30 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Submission 23*, Attachment 2, p. 4.

> that workers simply choose not to report their suspicions about wrongdoing, because they are unsure whether or how this test would be applied to their circumstances.[31]
>
> The proper tests are simply whether the disclosure is based on an honest belief, on reasonable grounds, that the information shows or tends to show defined wrongdoing.[32]

Committee view

6.58 The committee notes that at least two previous inquiries, including one by this committee, have recommended that the 'good faith' requirement be removed from the Corporations Act:

- In 2004, the committee examined the CLERP Bill which proposed the introduction of the corporate sector whistleblower protections. The committee recommended removing the 'good faith' requirement, arguing that the protections should be based on the premise that 'the veracity of the disclosure is the overriding consideration and the motives of the informant should not cloud the matter. The public interest lies in the disclosure of the truth.'[33]
- In 2014, the Senate Economics References Committee recommended that it be removed, arguing that the 'good faith' requirement serves as an unnecessary impediment to whistleblowing.[34]

6.59 The committee considers that the weight of evidence before it strongly makes the case for removing the 'good faith' requirement. In terms of best practice criteria, the committee considers that this amendment would allow the thresholds for protection to be further aligned and made consistent across the public and private sectors.

Recommendation 6.6

6.60 The committee recommends that:

- **the 'good faith' test not be a requirement for protections under whistleblowing protection legislation; and**
- **a person be required to have a reasonable belief of the existence of disclosable conduct to receive protections under a Whistleblowing Protection Act.**

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31 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Submission 23,* Attachment 2, p. 4.

32 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Submission 23,* Attachment 2, p. 4.

33 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003,* 4 June 2004, p. 21.

34 Senate Economics References Committee, *Review of Performance of the Australia Securities and Investments Commission*¸ June 2014, pp. 223–225.

Chapter 7

Anonymity of whistleblowers

7.1 This chapter discusses the committee's consideration of public and private sector legislation for the following best practice criteria:

- provision and protections for anonymous reporting; and
- protection of the confidentiality of disclosers and disclosures.

Provisions and protections for anonymous reporting

7.2 This section compares current legislation against the best practice criterion on anonymous disclosures. The section also covers statistics on anonymous disclosures as well as evidence put to the committee during the inquiry.

7.3 Existing legislation has varying arrangements in relation to anonymous disclosures:

- subsection 28(2) of the PID Act explicitly states that a public interest disclosure may be made anonymously;[1]
- the FWRO Act does not appear to explicitly provide for anonymous disclosures. However, the December 2016 amendments deleted the requirements for a name to be provided by repealing subsection 337A(c);[2] and
- subsection 1317AA(1c) of the Corporations Act includes an explicit requirement for whistleblowers to disclose their name when making a disclosure.[3]

Statistics on anonymous disclosures

7.4 A significant number of disclosures made under the PID Act are likely to be anonymous. Table 6.1 (in Chapter 6) indicates that a significant proportion of disclosures (11–18 per cent) are received from people deemed to be public officials. The Commonwealth Ombudsman noted that deemed public officials include anonymous disclosers or individuals who have inside information through their close connection with an agency or public official:

> A significant proportion of those 'deemed' public officials are likely to have made anonymous disclosures, and the deeming decision would have been based on the fact that the person receiving the disclosure could not confirm whether the person was in fact a public official.[4]

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1 PID Act.

2 Fair Work (Registered Organisations) Amendment Bill 2014, *Schedule of amendments made by the Senate*, 230H, NXT-DHJP (6) [Sheet 7997].

3 Corporations Act.

4 *Commonwealth Ombudsman,* Annual Report 2015–2016, p. 74; Annual Report 2014–2015, p. 69.

7.5 While similar information is not available in the private sector, research has indicated that 76 per cent of organisations, including 79 per cent of private sector businesses, responded that they accepted anonymous wrongdoing concerns:

> This was especially true of large organisations (92.5%) where anonymity is more feasible, as against small organisations (60.7%). Not-for-profits were least likely to accept anonymous concerns (60.9%).
>
> …private sector protections such as Part 9.4AAA of the *Corporations Act 2001* (Cth) require the reporter to first identify themselves. These results suggest such restrictions are widely out of step with corporate practices and preferences.[5]

7.6 Dr Olivia Dixon reported similar findings from her research on corporate sector codes of conduct, which indicated that:

> In acknowledging that providing anonymous reporting may facilitate whistleblowing, over 65 per cent of companies allow for it. However, over 25 per cent of companies expressly discourage anonymous reporting on the basis that it will make investigation much more difficult.[6]

7.7 KPMG operates a whistleblower hotline service which provides whistleblowers with the option of being anonymous or providing their contact details. In 2016, 80 per cent of the whistleblowers who contacted the KPMG hotline elected to be anonymous. KPMG noted that this includes a proportion of whistleblowers who agreed to provide contact details to KPMG, whilst remaining anonymous to their employer.[7]

Evidence received on anonymous disclosures

7.8 Some submitters supported the requirement for a whistleblower to provide their name to a regulator.[8] Clayton Utz noted that there are practical difficulties in applying protections to whistleblowers who disclose anonymously and that anonymous disclosures are typically more difficult to investigate.[9]

7.9 The Law Council argued that whistleblowers should disclose their identity to the regulatory authority and be contactable at a later stage if required, provided that confidentiality arrangements are put in place to protect the whistleblower's identity from the company. The Law Council suggested that if adequate confidentiality

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5 A J Brown, Neriza Dozo, Peter Roberts, *Whistleblowing Processes & Procedures: An Australian & New Zealand Snapshot, Preliminary Results, Whistling While They Work 2, Survey of Organisational Processes & Procedures*, November 2016, pp. 1, 13.

6 Dr Oliva Dixon, *Submission 31, Honesty without fear? Whistleblower anti-retaliation protections in corporate codes of conduct*, Melbourne University Law Review, 2016, Volume 40, p. 197.

7 KPMG, *Submission 49*, p. 19.

8 Clayton Utz, *Submission 4*, p. 8; FSU, *Submission 10*, p. 6; Law Council of Australia, *Submission 52*, p. 12.

9 Clayton Utz, *Submission 4*, p. 8.

protections are in place, whistleblowers may feel more comfortable disclosing their identity.[10]

7.10 Dr Dixon indicated that courts have warned that the prejudice that whistleblowers may face upon disclosure of their identity should not be underestimated. Dr Dixon suggested, however, that evidence with respect to anonymity is mixed:

> Some studies have found that there is 'scant evidence that anonymity promotes whistle-blowing', while others find that individuals are more likely to voice dissenting views if offered anonymity.[11]

7.11 The Fund Raising Institute of Australia indicated that its complaint handling process does not currently provide for 'anonymous' reporting of breaches of its self-regulatory Code. Instead, a complainant is expected to participate in any hearing of the matter.[12]

7.12 The AIST informed the committee that it does not oppose broadening the whistleblower protection provisions to also cover anonymous disclosures. However the AIST noted that:

> Anonymous disclosures can potentially limit the ability of parties who receive disclosures to investigate the matter thoroughly as they are unable to consult the discloser and this limitation should be considered as part of any future reform. Furthermore, anonymous disclosures limit the evidentiary testing of information as the original discloser may be unable to provide further evidence of the disclosed conduct.[13]

Support for allowing anonymous disclosures

7.13 However, there was generally much stronger support, including from law enforcement agencies and regulators, for allowing whistleblowers to disclose anonymously as discussed below.[14]

7.14 The AFP noted that for whistleblowers to provide information which law enforcement can use to commence or progress an investigation, an inability to maintain anonymity results in exposure to threats of reprisal, whether legal or physical

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10 Law Council of Australia, *Submission 52*, p. 12.

11 Dr Oliva Dixon, *Submission 31, Honesty without fear? Whistleblower anti-retaliation protections in corporate codes of conduct*, Melbourne University Law Review, 2016, Volume 40, p. 196.

12 Fund Raising Institute of Australia, *Submission 27*, p. 4.

13 Australian Institute of Superannuation Trustees, *Submission 24*, pp. 3, 15.

14 Clifford Chance, *Submission 9*, pp. 6–8; Dr Vivienne Brand and Dr Sulette Lombard, *Submission 14*, p. 4; Mr Denis Gentilin, *Submission 19*, p. 10; Deloitte, *Submission 37*, pp. 1, 4; ACTU, *Submission 40*, p. 1; Australian Bankers Association, *Submission 48*, p. 3; KPMG, *Submission 49*, pp. 3 Australian Council of Superannuation Investors, *Submission 50*, p. 2; Australia Institute of Company Directors, *Submission 53*, p. 8; Financial Planning Association of Australia, *Submission 57*, p. 5; Mr Richard Wilkins, *Submission 61*, p. 5; International Bar Association Anti-Corruption Committee, *Submission 62*, p. 5.

in nature. The AFP argued that this has been a clear factor discouraging potential whistleblowers from cooperating with police. In the AFP's experience, protective regimes used by law enforcement in other criminal investigative contexts have proven less effective for investigations into corporate crime because the potential whistleblower jeopardises their current employment and future career prospects.[15]

7.15 ASIC Commissioner, Mr John Price, supported extending whistleblower protections to anonymous disclosures and ensuring that a whistleblower's identity should be the subject of absolute confidentiality.[16]

7.16 Professor A J Brown informed the committee that providing for anonymous disclosures is now standard in the Australian public sector whistleblowing legislation, and international principles. Professor Brown argued that:

> This stands in contrast to Part 9.4AAA which deters disclosures by making it clear that a whistleblower is only protected if they identify themselves (equivalent to a message that people should only disclose if prepared to paint a target on themselves).
>
> The protection of anonymous disclosures does not raise practical difficulties, since the protections and other obligations are only triggered if or when the identity of the whistleblower is subsequently revealed, and confirmed to be within the statutory definition above. The Committee should recommend amendment to extend the protections to all disclosures by such persons, irrespective of whether they initially identify themselves.[17]

7.17 Mr Joshua Bornstein, Director, Maurice Blackburn Lawyers argued that whistleblowers, other than those who make vexatious disclosures, should be protected from retaliation and have the option of anonymity.[18]

7.18 The GIA was in favour of allowing anonymous reporting and suggested to the committee that:

- a whistleblower should qualify for protection at the point they disclose their identity or their identity becomes known, but that protection should extend retrospectively to the point of that disclosure; and
- a company should be subject to the requirement to protect a whistleblower's anonymity in the event that a whistleblower has made disclosure to the company on an anonymous basis.[19]

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15 Australian Federal Police, *Submission 43*, p. 9.

16 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 59.

17 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Submission 23*, Attachment 2, p. 4.

18 Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, pp 42–43.

19 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 25.

7.19 The Association of Corporate Counsel Australia (ACCA) informed the committee that many organisations across the public, corporate and not-for-profit sectors currently have anonymous hotlines for those who wish to report on organisational wrongdoing. The ACCA argued that these have been an effective deterrent in organisational wrongdoing and allow organisations to evaluate the legitimacy of a complaint. The ACCA suggested that rather than setting definitive obligations for private sector organisations, perhaps there should be non-mandatory guidelines for establishing anonymous hotlines.[20]

7.20 Deloitte noted the importance of independent hotlines in providing a mechanism for anonymous disclosures:

> In our experience there is a potential risk in situations where whistleblowers who wish to remain anonymous are placed in direct communication with their employer, because of the potential to inadvertently identify themselves. This risk can be overcome if intermediaries such as external party service providers are used to appropriately check such communications and redact identifying material.[21]

Committee view

7.21 In 2004, this committee examined the CLERP Bill which proposed the introduction of the corporate sector whistleblower protections. In that inquiry the committee recommended allowing for anonymous disclosures.[22]

7.22 The weight of evidence that the committee has received in this inquiry is strongly in favour of allowing and protecting anonymous disclosures in the private sector. In fact, some of the evidence the committee received indicates that private sector codes of conduct and implementation of whistleblower schemes in the corporate sector are already allowing and protecting anonymous disclosures. In addition, evidence from the public sector indicates that significant numbers of disclosures are made anonymously.

7.23 In light of the above, the committee considers that providing for anonymous disclosures in the private sector would mean that another best practice criterion could sensibly be aligned between the public and private sectors, thereby enabling greater legislative consistency.

Recommendation 7.1

7.24 The committee recommends that private sector whistleblowing legislation (including legislation covering corporations and registered organisations) explicitly allow, and provide protections for, anonymous disclosures consistent with public sector legislation.

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20 Association of Corporate Counsel Australia, *Submission 35*, p. 5.

21 Deloitte, *Submission 37*, p. 4.

22 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, p. 24.

Continuity of protection

7.25 Another issue that came to the committee's attention during the inquiry was the continuity of protection. Consider the following scenario. If a whistleblower makes a disclosure that is assessed as meeting the criteria for disclosable conduct and the threshold for protection, a question arises as to whether the whistleblower would still attract the relevant protections if an investigation, court, or tribunal subsequently found that the conduct disclosed was not disclosable conduct.

7.26 Professor Brown informed the committee that it is likely that continuity of protection is implicitly provided for in the PID Act (section 26), FWRO Act (paragraph 337A(1)(c), and the Corporations Act section 1317AA(1)(d).[23]

Committee view

7.27 The committee considers that while a finding of no disclosable conduct may de-escalate the issues to some extent for the whistleblower, significant risks of reprisal may remain in many cases. The committee is therefore recommending that continuity of protection be made explicit in a consistent way for both the public and private sector whistleblower protection legislation.

Recommendation 7.2

7.28 The committee recommends that continuity of protection be made explicit in a consistent way for both the public and private sector whistleblowing protection legislation.

Protections for confidentiality

7.29 This section summarises the committee's consideration of best practice criteria on protecting the confidentiality of disclosures. The three Acts that the committee is considering have quite different provisions.

7.30 The PID Act has provisions which provide offences for the use or disclosure of identifying information (section 20) with some exceptions in subsection 20(3), and the protection of the identity of disclosers in courts or tribunals (section 21):

> **20 Use or disclosure of identifying information**
>
> *Disclosure of identifying information*
>
> (1) A person (the *first person*) commits an offence if:
>
> (a) another person (the second person) has made a public interest disclosure; and
>
> (b) the first person discloses information (identifying information) that:

23 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Correspondence to the committee*, 30 May 2017.

(i) was obtained by any person in that person's capacity as a public official; and

(ii) is likely to enable the identification of the second person as a person who has made a public interest disclosure; and

(c) the disclosure is to a person other than the second person.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

(2) A person (the first person) commits an offence if the person uses identifying information.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.[24]

21 Identifying information not to be disclosed etc. to courts or tribunals

A person who is, or has been, a public official is not to be required:

(a) to disclose to a court or tribunal identifying information that the person has obtained; or

(b) to produce to a court or tribunal a document containing identifying information that the person has obtained;

except where it is necessary to do so for the purposes of giving effect to this Act.[25]

7.31 The FWRO Act does not appear to explicitly provide for protecting the confidentiality of the disclosure or the discloser.[26]

7.32 The Corporations Act does not appear to protect the identity of whistleblowers in courts and tribunals, however, section 1317AE provides offences for disclosing:

- the information disclosed in the qualifying disclosure;
- the identity of the discloser; or
- the information that is likely to lead to the identification of the discloser.[27]

7.33 During its consideration of the CLERP Bill to establish the whistleblower protections in the Corporations Act in 2004, the committee made the following observations:

> The Committee believes that the confidentiality provisions in any whistleblower scheme are central to building public trust in the system and to preserving its integrity. Any doubts about the protection of the identity of a whistleblower should be clarified in the legislation which should provide a guarantee of anonymity. Again while the Explanatory Memorandum offers some advice on this matter in regard to privacy concerns with

24 PID Act, section 20.

25 PID Act, section 21.

26 FWRO Act, Part 4A.

27 Corporations Act, section 1317AE.

> disclosures to ASIC, there is no mention of such safeguards with disclosures made within an entity. The Committee would like assurances from the Government that there are adequate safeguards in the proposed legislation for the protection of confidentiality and that they are expressly stated.[28]

7.34 In 2004, the committee went on to recommend that a provision be inserted in the proposed whistleblowing scheme that expressly provides confidentiality protection to persons making protected disclosures to ASIC or making such disclosures to the designated authorities within a company. The committee also recommended that similar provisions should be inserted to protect the rights of persons who are the subject of a disclosure.[29]

Support for the protection of confidentiality

7.35 There was broad support amongst submitters for protecting the confidentiality of disclosures and disclosers.[30]

7.36 The Queensland Ombudsman informed the committee that preserving confidentiality is a key element in protecting a whistleblower from reprisals, by minimising those persons who have access to information which may identify the whistleblower.[31]

7.37 The Australian Bankers' Association (ABA) informed the committee that it's guiding principles for whistleblower protections include provisions to make sure the identity of the whistleblower and the details of the investigation are kept confidential.[32]

7.38 The ACCC argued for specific protections for information or documents that disclose the identity of whistleblowers as part of a whistleblower regime under the CC Act.[33]

7.39 KPMG submitted that the identity of the whistleblower and any information given that may reveal their identity should be subject to confidentiality (including in matters before the courts) with only limited exceptions.[34]

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28 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, June 2004, p. 25.

29 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, June 2004, p. 25.

30 Dr Vivienne Brand & Dr Sulette Lombard, *Submission 14*, p. 2; Clifford Chance, *Submission 9*, p. 6; Australian Competition and Consumer Commission, *Submission 12*, p. 3; Media, Entertainment & Arts Alliance, *Submission 55*, p. 8; Uniting Church in Australia, *Submission 56*, pp. 6, 10.

31 Queensland Ombudsman, *Submission 13*, p. 4.

32 Australian Bankers' Association, *Submission 48*, p. 3.

33 Australian Competition and Consumer Commission, *Submission 12*, p. 3.

34 KPMG, *Submission 49*, p. 11.

7.40 ASIC noted that for the proposed tax whistleblower scheme, the identity of a whistleblower, and the disclosure of any information which is capable of revealing their identity, could be subject to an absolute requirement of confidentiality. ASIC also advocated that:

> …the new whistleblowing legislation should clearly outline the circumstances under which regulators should be able to resist an application for the production of documents that may reveal a whistleblower's identity.
>
> This would prohibit the release of any information by anyone to anyone, including to a court or tribunal, unless the whistleblower gives informed consent to the release of their identity or the revelation is necessary to avert imminent danger to public health or safety, to prevent violation of any criminal law, or to enable the whistleblower to secure compensation for reprisals.[35]

7.41 Dr Dixon reported findings from her research on corporate sector codes of conduct, which indicated that:

> A vast majority of the Codes state that some or all reports will be treated confidentially; with a substantial number including carve outs for investigation or as required by law.[36]

7.42 However, Dr Dixon also pointed to a loophole in the Corporations Act which may result in the potential breaching of confidentiality:

> Only 27.7 per cent state that a report will be kept confidential in the absence of consent of the whistleblower, a requirement under the Corporations Act. This may be due to the loophole which currently exists, whereby a third party who receives information with the whistleblower's consent is not subject to the same confidentiality requirements as the person who initially received the information.[37]

Committee view

7.43 The committee considers that the weight of evidence put forward in this inquiry is in favour of effective requirements for protecting the confidentiality of whistleblowers and their disclosures. The committee notes its previous 2004 recommendation (discussed above) supporting confidentiality for whistleblowers. The committee considers that while some protections in the private sector exist in the Corporations Act, they could be improved to make them consistent with the PID Act. Such protections should also be made explicit for registered organisations if registered organisations are not covered by a single Act covering the whole private sector.

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35 Australian Securities and Investments Commission, *Submission 51,* pp. 5, 20, 21.

36 Dr Oliva Dixon, *Submission 31, Honesty without fear? Whistleblower anti-retaliation protections in corporate codes of conduct*, Melbourne University Law Review, 2016, Volume 40, pp. 196–197.

37 Dr Oliva Dixon, *Submission 31, Honesty without fear? Whistleblower anti-retaliation protections in corporate codes of conduct*, Melbourne University Law Review, 2016, Volume 40, pp. 196–197.

7.44 In particular, the committee recommends adapting sections 20 and 21 of the PID Act for inclusion in a Whistleblowing Protection Act which would strengthen the protections for confidentiality in the private sector and prevent a private sector employee from being identified in court or tribunal hearings, as is currently the case in the public sector.

Recommendation 7.3

7.45 The committee recommends that protections for confidentiality be unified across the public and private sectors (including registered organisations), bringing together the best features of the *Public Interest Disclosure Act 2013* (such as sections 20 and 21) and other Acts, including offences for:

- **disclosure or use of identifying information or information likely to lead to the identification of the discloser; and**
- **protection of the identity of disclosers in courts or tribunals.**

Chapter 8

Internal, regulatory, and external reporting channels

8.1 This chapter discusses the committee's consideration of public and private sector legislation against the best practice criteria for internal, regulatory, and external disclosures. Disclosures to Members of Parliament are not part of the best practice criteria and are discussed in the next chapter.

8.2 One of the simplest ways of describing the various reporting channels is to classify them into a tiered reporting system. However, the terminology used to describe the tiers has the potential to create confusion if not clearly defined. The definitions used in this report are those that align with best practice principles. While the arguments in favour of the principles are set out in the subsequent paragraph by Professor A J Brown, at this juncture it is useful to define the three tiers of the classification system described below:

- internal disclosure refers to reporting within an organisation;
- regulatory disclosure refers to reporting to a regulator (regulatory disclosure is not treated as an external disclosure under this classification system); and
- external disclosure refers to reports made to third parties such as the media, non-government organisations, and labour unions.

8.3 Professor Brown argued that research and best practice legislative design principles indicate that a disclosure regime should include 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…wherever a competent regulator exists to receive and deal with the disclosure, and an internal disclosure was (i) unsafe/unviable, (ii) inappropriate because the organisation was unlikely to act on the matter, or likely to do worse, e.g. destroy evidence or victimise others, or (iii) made but did not lead to satisfactory action;
>
> c) Third party (including media) disclosures where (i) neither internal or regulatory disclosure channels were available or safe, or (ii) an internal or…regulatory disclosure was made, which did not lead to satisfactory action; or (iii) some emergency circumstances exist to justify a disclosure to third parties or the media, without first making either an internal or regulatory disclosure.[1]

8.4 The best practice criteria in the Breaking the Silence report suggests that a three-tiered disclosure system should include clear external disclosure channels for whistleblowers to contact the media, Members of Parliament, non-government

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1 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

organisations and labour unions where necessary. The report also noted many G20 countries fall short on this criterion.[2]

8.5 Evidence to this inquiry was strongly in favour of whistleblower protections being made consistently available across the public, private and not-for-profit sectors for the first two tiers, namely internal and regulatory disclosures. However, different views were expressed about whether whistleblower protections should apply to external disclosures made to third parties such as the media. This evidence is discussed after the section below which sets out the current legislative framework.

Reporting channels in current legislation

8.6 This section compares current legislation against the best practice criteria on internal, regulatory and external disclosures. Table 8.1 below compares the PID Act, the FWRO Act, and the Corporations Act across three elements of a tiered system of disclosure that provides for internal, regulatory and external reporting channels.

Table 8.1: Internal, regulatory, and external reporting channels

Disclosure / Reporting Channels	**PID Act** Section 26	**FWRO Act** Subsection 337A(1b)	**Corporations Act** Subsection 1317AA(1b)
Internal	To a supervisor or an authorised internal recipient	No protection	The company's auditors. A director, secretary or senior manager of the company. A person authorised by the company to receive disclosures.
Regulatory	The agency that the disclosable conduct relates to, or the agency the discloser belongs to. The Commonwealth Ombudsman if the discloser has reasonable grounds. An investigative agency. IGIS.	The Registered Organisations Commission. The Fair Work Commission. The Australian Building and Construction Commissioner. An Australian Building and Construction Inspector. The Fair Work Ombudsman.	ASIC
External	To any person other than a foreign public official, (subject to criteria).	No protection	No protection

Sources: PID Act, FWRO Act, Corporations Act.

2 Simon Wolfe, Mark Worth, Sulette Freyfus, A J Brown, *Breaking the Silence, Strengths and Weaknesses in G20 Whistleblower Protection Laws*, Final Report, October 2015, p. 3.

Internal disclosures

8.7 The committee observes that one of the main differences in terms of best practice criteria across the three Acts is the silence of the FWRO Act on internal disclosures within registered organisations. The committee notes that prior to the December 2016 amendments, the FWRO Act was also silent on internal disclosures within registered organisations.[3]

8.8 The ACTU considered that protection should be available to persons from the moment they make a disclosure internally (if they choose to do so). It should not be necessary to make a formal complaint, either to a regulator or externally, in order to trigger whistleblower protections.[4]

Committee view

8.9 The committee considers that the lack of protection for disclosures within registered organisations is a significant gap in the legislation when compared to the best practice criteria and other legislation including the PID Act and the Corporations Act. Such a gap should be rectified. The committee suggests that, regardless of whether a single private sector whistleblower protection Act is implemented, internal disclosers within registered organisations should be provided with protection.

Recommendation 8.1

8.10 The committee recommends that whistleblower protections be extended to internal disclosures within the private sector, to include:

- **any person within the management chain for the whistleblower within the whistleblower's employer;**
- **any current officer of the company, or that company's Australian or ultimate parent; and**
- **any person specified in a policy published and distributed by an employer (or principal) of the whistleblower.**

Regulatory disclosures

8.11 As noted earlier, there was broad support for the consistent extension of protections for regulatory disclosures across the private sector. While most submitters and witnesses agreed that it would be preferable to encourage internal reporting in the first instance, it was generally recognised that providing protection for regulatory disclosures would have the additional benefit of incentivising organisations in the private sector to ensure their internal reporting procedures and practices were best practice.

8.12 KPMG suggested that while the whistleblower system should encourage the use of internal reporting mechanisms, it is appropriate for whistleblowers to be able to

3 FWO Act, Part 4A, Division 1, subsection 337A(1b).

4 Australian Council of Trade Unions, *Submission 40*, p. 1.

disclose direct to the regulator. KPMG also supported a tiered system and argued that it would:

- allow disclosure to wider classes of people in extenuating circumstances, or if the initial disclosure has not been acted upon;
- provide greater incentive for Australian corporates to act quickly and decisively on internal reports, if they know that wider disclosure can be made; and
- allow whistleblowers to report to the company's external hotline (if there is one in place), followed by, if necessary, the relevant external authority.[5]

8.13 The AICD supported whistleblowers being able to disclose to a regulator at the same time as, or before, disclosing to a company. However, the AICD considered that if wrongdoing is to be disclosed to third parties, it should only be in the context of serious wrongdoing. The AICD also noted that a well-functioning tiered system of disclosure will assist in ensuring that minor matters, including those solely related to employment grievances, are not inappropriately disclosed to third parties.[6]

8.14 The IBACC indicated that while it favours a corporate whistleblower making a disclosure internally within a company in the first instance, any whistleblower should not be excluded from a right to make a disclosure externally to any relevant government agency (if the allegations concern criminal conduct or contravention of a law) before, at the same time as, or after, any internal disclosure.[7]

Committee view

8.15 The bulk of the evidence put to the committee supported extending protections consistently across the private sector for regulatory disclosures. Furthermore, many submitters and witnesses were of the view that consistent whistleblower protections for regulatory disclosures would act as an additional incentive for organisations in the private and not-for-profit sectors to ensure that their internal reporting procedures and practices met best-practice criteria as a means of encouraging internal reporting.

8.16 The committee recognises that there are currently no protections available under the FWRO Act or Corporations Act for whistleblowers who make disclosures to immediate supervisors or line managers, except in specific circumstances (i.e. the supervisor is a director, auditor, senior manager, etc.). A Whistleblowing Protection Act should make it explicit that internal disclosures within the private sector can be made to any person within the management chain. Further, disclosures should be protected where they are made to any officer within the whistleblower's employing company or its Australian or ultimate parent company.

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5 KPMG, *Submission 49*, p. 20.

6 Australian Institute of Company Directors, *Submission 53*, pp. 11–12; Ms Louise Petschler, General Manager, Advocacy, Australian institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 23.

7 International Bar Association Anti-Corruption Committee, *Submission 62*, p. 6.

8.17 Recognising that the three Acts currently appear to provide for disclosures to regulators, the committee supports retaining and extending regulatory disclosures to the private sector more generally.

8.18 The committee also notes that the existence of private sector regulators with investigative powers makes regulatory disclosure more feasible in the private sector than the public sector. As discussed in Chapter 12, there are limitations on the ability of the Commonwealth Ombudsman to conduct substantive investigations into disclosures and alleged reprisals against whistleblowers that have occurred in Commonwealth public sector departments and agencies.

Recommendation 8.2

8.19 The committee recommends that a Whistleblowing Protection Act should provide consistent whistleblower protections for regulatory disclosures from the public and private sectors.

Disclosures to Australian Law Enforcement Agencies

Recommendation 8.3

8.20 The committee recommends that where a whistleblower discloses a protected matter to an Australian law enforcement agency, that agency must provide regular updates to the whistleblower as to whether or not it is pursuing the matter, including where it transfers the matter to another law enforcement agency, in which case obligations to keep the whistleblower informed are transferred to that agency. However, nothing that would prejudice an investigation is required to be disclosed.

Recommendation 8.4

8.21 The committee recommends that Australian law enforcement agencies should be required to pass on whistleblower disclosures to whichever appropriate agency is to progress the disclosure. The whistleblower does not need to do this, if they have complied with the disclosure requirements of the Act.

External disclosures

8.22 The other significant observation from Table 8.1 is that there is no protection for external disclosures under the FWRO Act and the Corporations Act.

8.23 Research indicates that there are major differences between organisations in the public, private, and not-for-profit sectors when it comes to awareness of external reporting options:

- external ombudsmen, integrity or regulatory agencies were identified as an available reporting channel by:
    - 94.7 per cent of public sector organisations;
    - 55.7 per cent of not-for-profits; and

- 44.7 per cent of private business;

- media and journalists were identified as available 'if necessary' by:
  - 23.8 per cent of public sector organisations;
  - 5.2 per cent of not-for-profits; and
  - 4.0 per cent of private business.[8]

8.24 The remainder of this section examines the evidence received by the committee on external disclosures.

8.25 Professor Brown argued that any system of whistleblower protections should maximise the ability of whistleblowers to make internal disclosures in the first instance, followed by the ability to make a regulatory disclosure. However, he was of the view that in circumstances where it is reasonable to go to the media, then those disclosures should also attract protection.[9]

8.26 The Law Council submitted that whistleblower protections should only apply to disclosures made to entities that have 'an obligation to treat that information confidentially'. The Law Council was of the view that 'information disclosed by whistleblowers in an emergency should be to the relevant regulator or an oversight agency'.[10]

8.27 The Law Council did not support extending whistleblower protections to external disclosures made to third parties including the media:

> …the Law Council does not consider that the whistleblower protections should be available to whistleblowers who disclose information to third parties such as the media or Members of Parliament. There are few controls imposed or enforced in relation to the ways in which the media use information provided by the public…there is no obligation on the part of the media to maintain confidentiality and protect the whistleblower's identity. Nor can the media protect the whistleblower from any retaliation which may arise as a result of the media's portrayal of the information disclosed. Further, the media does not have a duty to remain impartial or ensure the information is credible and substantiated before publicising it.[11]

8.28 The GIA suggested that legislation should not provide protection for an employee disclosing to the media:

> We are of the view that disclosures to the media should not be legally sanctioned in legislation, as the media has no legal powers to investigate

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8 A J Brown, Nerisa Dozo, Peter Roberts, *Whistleblowing Processes & Procedures, An Australian & New Zealand Snapshot, Preliminary Results: Whistling While They Work Two, Survey of Organisational Procedures & Processes 2016*, November 2016, p. 11.

9 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 3.

10 Law Council of Australia, *Submission 52*, p. 14.

11 Law Council of Australia, *Submission 52*, p. 26.

> but does have the capacity to express an opinion on a matter that has not yet been tested. Disclosure to the media and media opinion on the matter could also prejudice an ongoing investigation.[12]

8.29 By contrast, the Australian Lawyers Alliance submitted that if the discloser has a well-founded concern that their disclosure will not be acted on with sufficient urgency, which might arise where the disclosure relates to the activities of the individual or department that would be receiving the complaint, for example, it may be unreasonable to require internal disclosure before external disclosure can be permitted.[13]

8.30 The Ethics Centre argued that in circumstances where an employer fails to make it safe and reasonable for an employee to report wrongdoing using internal mechanisms, it should be allowable for an employee to make a disclosure to an external party, especially if the whistleblower reasonably believes that:

(a) there is a risk to safety or wellbeing;

(b) the relevant conduct is criminal in nature; and

(c) the report is made to a third party that acts for the public interest.[14]

8.31 The Community and Public Sector Union submitted that external public disclosure should only occur in particular circumstances, including that the alleged misconduct is serious and that internal avenues have been exhausted.[15]

Criteria for external disclosures

8.32 As noted above, of the three Acts, only the PID Act explicitly provides protections for external disclosures. The PID Act includes the following criteria for external disclosures:

> (a) The information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct.
>
> (b) On a previous occasion, the discloser made an internal disclosure of information that consisted of, or included, the information now disclosed.
>
> (c) Any of the following apply:
>
> (i) a disclosure investigation relating to the internal disclosure was conducted under Part 3, and the discloser believes on reasonable grounds that the investigation was inadequate;
>
> (ii) a disclosure investigation relating to the internal disclosure was conducted (whether or not under Part 3), and the discloser believes on

12 Governance Institute of Australia, *Submission 54*, p. 12.

13 Australia Lawyers Alliance, *Submissions 58*, p. 20.

14 The Ethics Centre, *Submission 11*, p. 5.

15 Community and Public Sector Union, *Submission 30*, p. 2.

reasonable grounds that the response to the investigation was inadequate;

(iii) this Act requires an investigation relating to the internal disclosure to be conducted under Part 3, and that investigation has not been completed within the time limit under section 52.

(e) The disclosure is not, on balance, contrary to the public interest.

(f) No more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct.

(h) The information does not consist of, or include, intelligence information.

(i) None of the conduct with which the disclosure is concerned relates to an intelligence agency.[16]

8.33 Professor Brown was of the view that the current provisions in the PID Act regarding external disclosure were 'fairly subjective'. He therefore suggested that, in order to ensure greater clarity for whistleblowers, the test should be 'refined' if it was going to be applied to the private sector.[17]

8.34 Young Liberty Victoria noted that the PID Act requires a whistleblower to be satisfied that an external disclosure is in the public interest having regard to a lengthy list of factors that must be considered and weighed against each other. Young Liberty Victoria suggested that such provisions should be repealed and argued that these requirements for making an external disclosure are highly complex and create a significant and disproportionate barrier to public disclosure.[18]

8.35 In its consideration of external disclosures, the Moss Review noted that submissions and online survey responses criticised the external emergency disclosure criteria as confusing and hard to apply in practice. However, there being only a few occasions in which disclosers had sought the protections of the PID Act for external disclosures, it was not possible for the Moss Review to draw firm conclusions about the success of the provisions. The Moss Review went on to recommend:

> That the external and emergency disclosure provisions be considered in a future review of the PID Act, when further evidence about how they are being used is available.
>
> That the PID Act be amended to include situations when an Authorised Officer failed to allocate an internal PID, or a supervisor failed to report information they received about disclosable conduct to an Authorised Officer, as grounds for external disclosure.[19]

16 PID Act, section 26.

17 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, pp. 3–4.

18 Young Liberty Victoria, *Submission 41*, p. 4.

19 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 38–39.

Committee view

8.36 In reviewing external disclosures and reporting channels, the key questions for the committee were:

- whether the PID Act criteria for external disclosures are appropriate and effective; and
- what criteria should apply if protections were to be extended to external disclosures in the private sector.

8.37 While recognising the limited examples of external disclosures under the PID Act as identified by the Moss Review, the committee supports the Moss Review recommendation to include a more objective test for the grounds for external disclosures under the PID Act.

8.38 The committee notes the Moss Review recommendation that consideration of other changes be deferred until more data is available. However, the committee is mindful that the complexity of the provisions may be inhibiting external disclosures and, by extension, the further data that would be relied on for any future consideration of external disclosure may not be forthcoming.

8.39 The committee considers the lack of protections for external reporting in the private sector to be a significant gap in the whistleblower protection legislation. Nevertheless, the committee considers that it would be prudent to begin with a cautious approach, including appropriate checks and balances. Once data is available on the operation of the criteria for external reporting provisions, then it may be appropriate to consider whether there is scope for relaxing some of the criteria.

8.40 A Whistleblower Protection Act should maximize the ability of a whistleblower to, in the first instance, make an internal disclosure and then a regulatory disclosure. Failing this, a disclosure should be made to an authorised external recipient. However, in instances where it is reasonable to make a public third party disclosure (i.e. to the media), protection should be afforded to the whistleblower.

8.41 The committee considers that the instances where it may be reasonable to make a third party disclosure are limited to situations where:

- there is a risk of serious harm or death; or
- a disclosure in the public interest has been made to an Australian law enforcement agency and, after a reasonable length of time, no action has been taken by the agency.

8.42 Noting that it supports the Moss Review in recommending a more objective test for external disclosures under the PID Act, the committee considers that, in order to provide consistency for whistleblowers and businesses, the external disclosure provisions across the private sector should be aligned with the PID Act, except for the provisions relating to intelligence functions.

Recommendation 8.5

8.43 The committee recommends that the existing whistleblower protections for external disclosures in the *Public Interest Disclosure Act 2013* be simplified (including a more objective test) and extended to disclosures to a registered organisation, a federal Member of Parliament or their office, and be included in a Whistleblowing Protection Act, except the provisions relating to intelligence functions which should continue to apply to the public sector only.

Recommendation 8.6

8.44 The committee recommends that if a disclosure of disclosable conduct has been made to an Australian law enforcement agency and after a reasonable time, no steps have been taken by that or any other agency (excluding where the whistleblower has elected to make an anonymous disclosure) whistleblowing protections shall apply if the same disclosure is subsequently made to the media if they have complied with the disclosure requirements of the Act.

Chapter 9

Members of Parliament

9.1 Since the impetus for reforming whistleblower protections in the 1990s, the relationship between legislated whistleblower protections, the law of parliamentary privilege, and Members of Parliament has been of interest.

9.2 This chapter summarises the work of previous parliamentary committees and the committee's own consideration of the following areas:

- disclosures about Members of Parliament;
- disclosures by Members of Parliament;
- disclosures to Members of Parliament;
- disclosures to parliamentary committees; and
- disclosures about, to and by staff of Members of Parliament.

9.3 For simplicity, unless otherwise specified, this report will refer collectively to Senators and Members of the House of Representatives as Members of Parliament.

Background

9.4 This section provides an overview of previous inquiries and reviews of whistleblower protections and is divided into four time frames: 1994; 2009; 2012–2013; and 2016–2017.

1994

9.5 In 1994 a Senate Select Committee on Public Interest Disclosures (Senate Select Committee) examined the potential involvement of the Parliament and Members of Parliament in whistleblowing. The Senate Select Committee considered suggestions including a parliamentary joint committee to oversee a whistleblower agency and a parliamentary commissioner. The Senate Select Committee also noted a proposal to allow for disclosures to a parliamentary committee, where the parliamentary committee had already undertaken an inquiry into a related matter.[1] The Senate Select Committee noted that in 1994, the Senate Finance and Public Administration Committee considered that such a proposal would be undesirable:

> …a parliamentary inquiry into a whistleblowing episode can easily elevate the status and significance of the episode above any level that could be justified on its merits. Parliamentary committees, in any case, have no power to rectify any malpractice they might find. To the extent that parliamentary involvement would be desirable in a whistleblowing episode,

1 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. 33–34.

> it would best take the form of a committee review of a report on the episode by an independent body.[2]

9.6 The Senate Select Committee recommended the involvement of Members of Parliament to a board to oversee a whistleblower protection agency:

> Parliamentary involvement should be included by the appointment of a Senator and Member of the House of Representatives. The Member should be a government nominee and the Senator a non-government nominee or alternatively the Parliamentary members should include a government and non-government nominee.
>
> Members of the Board should be appointed for a period of three years, with eligibility for reappointment to a second term only.[3]

2009

9.7 Following a broadly based inquiry into public sector whistleblower protections, in 2009 the House of Representatives Standing Committee on Legal and Constitutional Affairs, recommended that:

- Members of Parliament be included as a category of alternative authorised recipients of public interest disclosures;
- if Members of Parliament become authorised recipients of public interest disclosures, the Australian Government propose amendments to the Standing Orders of the House of Representatives and the Senate, advising Members of Parliament to exercise care to avoid inappropriate influence of investigations and public identification on whistleblowers and alleged wrongdoers;
- the Public Interest Disclosure Bill provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*;
- parliamentary staff be included in the definition of people who are entitled to make a protected disclosure as a 'public official'; and
- the Commonwealth Ombudsman be the authorised authority for receiving and investigating public interest disclosures made by employees under the *Members of Parliament (Staff) Act 1994*.[4]

9.8 In making those recommendations that committee noted that:

> The privilege of freedom of speech in Parliament and the protection of communications between citizens and Members of Parliament is a

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2 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, p. 111.

3 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. 113–114.

4 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. xx–xxv.

> fundamental feature of Parliamentary democracy in Australia and is enshrined to some extent in the *Parliamentary Privileges Act 1987*. It is not the intention of the Committee that public interest disclosure legislation interfere with this important democratic feature.[5]

9.9 The House of Representatives Standing Committee on Legal and Constitutional Affairs also noted that it is not common for legislation in other jurisdictions to include parliamentarians as authorised recipients of public interest disclosures. However, some examples include:

- *Whistleblowers Protection Act 1994* (Qld);
- *Whistleblowers Protection Act 1993* (SA);
- *Protected Disclosures Act 1994*, (NSW); and
- *Protected Disclosures Act 2000* (New Zealand).[6]

2012–2013

9.10 In March 2013, the Public Interest Disclosure Bill 2013 (PID bill) was introduced to the House of Representatives.[7] The House of Representatives Standing Committee on Social Policy and Legal Affairs considered both the PID bill and Mr Andrew Wilkie's private member bills. That committee tabled an advisory report in March 2013, recommending that the PID bill be passed.[8] That committee also noted that:

- Mr Wilkie's bills proposed to extend whistleblower protections to disclosures:
  - about misconduct by Members of Parliament;
  - by Members of Parliament and their staff; and
- under the PID bill Members of Parliament and their staff are not considered to be public officials.[9]

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5 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 165.

6 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 157.

7 House of Representatives, *Votes and Proceedings*, No. 160, 21 March 2013, p. 2198.

8 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report, Public Interest Disclosure (Whistleblower Protection) Bill 2012, Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012, Public Interest Disclosure Bill 2013*, May 2013, p. xi.

9 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report, Public Interest Disclosure (Whistleblower Protection) Bill 2012, Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012, Public Interest Disclosure Bill 2013*, May 2013, pp. 19–20, 49.

9.11 The Senate Standing Committee for the Scrutiny of Bills raised a number of questions about the PID bill, but did not draw attention to any matters related to the bill's application to Members of Parliament.[10]

9.12 The Senate Legal and Constitutional Affairs Legislation Committee considered the provisions of the PID bill including the impact on Members of Parliament and their staff. That committee noted that the definition of 'public official' in the bill did not include Members of Parliament or their staff and therefore:

- Members of Parliament and their staff would be unable to make public interest disclosures; and
- their behaviour or conduct could not be the subject of a public interest disclosure pursuant to the legislation.[11]

9.13 While a number of submitters to that inquiry argued for the inclusion of Members of Parliament and their staff, that committee also noted views from the then government that the appropriate supervision of Members of Parliament is by the Parliament.[12]

9.14 Following a recommendation of the 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs, the PID bill included clause 81 which attempted to clarify that clause 26 did not affect the power privileges and immunities of Parliament.[13] After considering a range of views and clarifying that the advice to the 2009 inquiry from the former Clerk of the Senate and the acting Clerk of the House of Representatives related to 'express statutory provisions', the committee recommended removing clause 81 from the Bill (which did not contain an express provision),[14] following advice from the Clerk of the Senate:

> [I]f the powers, privileges and immunities of the Houses, their committees and members are to be altered or modified, an express statutory declaration is required. If there is no such change to those powers, privileges and immunities, then it is simply not necessary to state that they are unaffected.
>
> …the Senate should be cautious about letting through any provision that could foster the potential limitation of its powers, privileges and immunities

10 Senate Standing Committee for the Scrutiny of Bills, *Sixth report of 2013,* 19 June 2013, pp. 225–230; *Alert Digest No. 5 of 2013,* pp. 79–81; *Alert Digest No. 6 of 2013,* pp. 67–68.

11 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, pp. 25–26.

12 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, pp. 5, 27–28.

13 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, p. 28.

14 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, pp. 28–30, 35.

> by implied rather than direct means. Such a stance is consistent with section 49 of the Constitution.[15]

9.15 Clause 81 was removed from the PID bill before it was passed and became the PID Act.[16]

2016–2017

9.16 In October 2016 the government released the Moss Review of the effectiveness and operation of the PID Act. The Moss Review noted that while the PID Act is not intended to capture allegations of wrongdoing by, or about, Members of Parliament, some submissions to the review cast doubt upon whether the legislation has achieved this intention. The submissions suggested that Ministers exercising statutory powers may be public officials under the PID Act, and people employed under the *Members of Parliament (Staff) Act 1984* could be contracted service providers. The Moss Review went on to argue that:

> While the actions of Ministers 'with which a person disagrees' are explicitly excluded from the meaning of disclosable conduct (s.31(b)(i)), this provision is too narrowly drafted to exclude Ministers or staff members from the operation of the PID Act entirely.[17]

9.17 The Moss Review also noted that the Commonwealth is the only jurisdiction in Australia which intends to exclude scrutiny of Members of Parliament and/or their staff members from similar legislation.[18] The Moss Review noted that:

> The Review considers that members of Parliament and their staff members require robust scrutiny. Their role within the Parliament and Australia's system of government relies upon their integrity and accountability to the people of Australia for the decisions they make. While the existing institutions to scrutinise wrongdoing by members of Parliament and their staff have extensive powers, they are also inherently politicised and rarely used without sustained public media coverage. For Ministerial staff, the political nature of their role is reflected within the Code of Conduct for Ministerial Staff which explicitly notes that any sanctions will only be imposed after consultation with the relevant Minister by the Prime Minister's Chief of Staff. The employment of other staff members relies upon the satisfaction of the parliamentarian they serve for their continued tenure. The rigour or otherwise of these arrangements is ultimately a matter for the Parliament.[19]

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15 Dr Rosemary Laing, Clerk of the Senate, *Submission 1 to the Inquiry into the Public Interest Disclosure Bill 2013 [Provisions]*, Senate Legal and Constitutional Affairs Legislation Committee, June 2013, pp. 5, 7.

16 PID Act, p. 78.

17 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 62.

18 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 62.

19 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 63.

9.18 The Moss Review recommended that:

- the PID Act be amended to clarify that its provisions do not apply to reports about alleged wrongdoing by Members of Parliament and their staff, or allegations made by them; and
- consideration be given to extending the application of the PID Act to Members of Parliament or their staff if an independent body with the power to scrutinise their conduct is created.[20]

9.19 In December 2016 the Treasury consultation paper on its review of tax and corporate whistleblower protections in Australia sought the views of stakeholders on, amongst other things, whether:

- whistleblowers should be allowed to make a disclosure to Members of Parliament, and what criteria should apply; and
- whether tax whistleblowers should only be protected for disclosure to the Australian Tax Office and not to other external parties including Members of Parliament.[21]

9.20 At the time of drafting this report, Treasury had not published the submissions or an outcome from the consultation process.

The current inquiry

9.21 In this inquiry evidence that the committee received, insofar as it mentioned Members of Parliament, was about disclosures to Members of Parliament with a small number of comments on disclosures about Members of Parliament.[22] Therefore, in this section the committee will summarise the evidence it received about disclosures to Members of Parliament, but notes that, in order to clearly understand the potential interplay between whistleblower protection laws and parliaments, it is useful to distinguish between the following:

- disclosures by Members of Parliament;
- disclosures about wrong doing by Members of Parliament;
- disclosures to parliamentary committees; and
- disclosures about, to and by staff of Members of Parliament.

20 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 63.

21 Treasury, consultation paper, *Review of tax and corporate whistleblower protections in Australia*, December 2016, pp. 23, 35.

22 See for example: Maurice Blackburn Lawyers, *Submission 69*, p. 5.

Evidence received about disclosures to Members of Parliament

9.22 Some submitters and witnesses supported protection for disclosures to Members of Parliament.[23]

9.23 When asked about disclosures to Members of Parliament, Dr Brand told the committee that having 'a good clearing house advisory service offered through an office of the whistleblower' should obviate much of the need for whistleblowers to go to third parties such as Members of Parliament.[24]

9.24 The GIA did not support extending whistleblower protections for disclosures to Members of Parliament.[25] The GIA explained:

> Parliamentarians have the benefit of [parliamentary] privilege which allows them to publicise whistleblower disclosures with no risk of defamation to themselves. However, such actions may unfairly prejudice any subsequent investigation into the whistleblower disclosures.[26]

9.25 DLA Piper held a similar view and noted that Members of Parliament do not have the same capacity to conduct investigations as regulators.[27]

9.26 The Law Council informed the committee that on balance it considers that:

- disclosures to third parties such as Members of Parliament should not be protected under the proposed reforms; and
- entities to which disclosures may be made should only include those which will treat the information confidentially.[28]

9.27 As discussed earlier, the advice of the former Clerk of the Senate to the 2013 Senate Legal and Constitutional Affairs inquiry appeared to settle the uncertainty relating to application of the PID Act to disclosures to Members of Parliament.[29] However, the committee notes that this inquiry has received further suggestions for changes and is also considering private sector whistleblower protections.

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23 Whistleblowers Australia, *Submission 59*, p. 4; Mr Richard Wilkins, Submission 61, p. 4; Mr Howard Whitton, Director, The Ethicos Group, *Committee Hansard*, 23 February 2017, p. 14; Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 45.

24 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 53.

25 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 25, 30.

26 Governance Institute of Australia, *Submission 54*, p. 12.

27 DLA Piper, *Submission 8*, pp 4–5.

28 Law Council of Australia, *Submission 52*, pp. 13, 26.

29 Dr Rosemary Laing, Clerk of the Senate, *Submission 1 to the Inquiry into the Public Interest Disclosure Bill 2013 [Provisions]*, Senate Legal and Constitutional Affairs Legislation Committee, June 2013, pp. 5, 7.

The committee therefore sought further advice from the Clerks of the Senate and the House of Representatives.

Advice from the Clerks

9.28 In order to give prominence and easy future access to the submissions by the Clerks on the relationship between whistleblower protections and Parliamentary Privilege, the committee includes key excerpts from both submissions in the sections below and provides the complete submissions in Appendices 3 and 4 of this report.

Clerk of the House of Representatives

9.29 Mr David Elder, Clerk of the House of Representatives, provided the following advice to the committee:

> **Disclosures about wrongdoing-four interactions**
>
> I am supposing that the disclosures you refer to relate to wrongdoing in the sense of 'disclosable conduct' within s.29 of the PID Act and not to personal or professional disagreements and not matters that could appropriately be dealt with in a less formal or public way.
>
> **1. Disclosures about wrongdoing by Members of Parliament or their staff**
>
> It is clear from debate during the passage of the PID Act that parliament itself is seen as the most appropriate venue for allegations about any such wrongdoing. If a disclosure of wrongdoing were made about a Member, I would expect it would most likely be made by another Member who ensured that it fell within 'proceedings in Parliament', as discussed above, and that he or she complied with House rules and practices when making the disclosure. I would also expect that disclosures about wrongdoing by staff of Members would be made at least in the first instance to the employing Member. Ministerial staff are subject to a Code of Conduct for Ministerial Staff.
>
> **2. Disclosures by Members of Parliament or their staff**
>
> If a disclosure of wrongdoing were to be made publicly by a Member, I would expect the Member who wanted to enjoy the protection of parliamentary privilege, to ensure that it fell within 'proceedings in Parliament', as discussed above, and that he or she complied with House rules and practices when making the disclosure. I would also expect a staff member of a Member to pass on to the Member disclosures that had been made and in doing so to seek as far as possible to bring the disclosure within 'proceedings in Parliament'. It is possible although unlikely that a Member or staff member could fall within the category of 'public official' by being former staff of agencies covered by the PID Act and bring a disclosure within the terms of a public interest disclosure under s.26 of the Act. If so I expect they would make an internal disclosure to an appropriate person in their former agency, and if necessary an external disclosure or emergency disclosure to any person other than a foreign public official. If seeking to rely on the protections of the PID Act, the Member or staff member would need to comply with the PID Act.

3. Disclosures to Members of Parliament or their staff

In making disclosures to a Member or their staff, a person may or may not fall within the protection of the umbrella of 'proceedings in Parliament' depending on the circumstances surrounding the communication. As already noted, what is encompassed by 'proceedings in Parliament' and, in particular, what is ' or purposes of or incidental to' the transacting of the business of a House or committee is not entirely clear. If the allegations were serious, it may be that a Member would endeavour to ensure the disclosures fell with the umbrella of 'proceedings in Parliament.

4. Disclosures to parliamentary committees

During their inquiries, House committees and joint committees sometimes receive submissions and oral evidence from people who include allegations about perceived wrongdoing of Commonwealth government departments and agencies and staff. The protection of absolute privilege applies to such submissions and to such evidence in accordance with the provisions of the Parliamentary Privileges Act. House standing orders 236 (power to call for witnesses and documents), 242 (publication of evidence), and 256 (witnesses entitled to protection) may also be relevant to disclosures of wrongdoing to committees.

Section 12 of the Parliamentary Privileges Act provides that a person shall not, by fraud, intimidation, force or threat, ... or by other improper means, influence another person in respect of any evidence given or to be given, or induce another person to refrain from giving any such evidence. So, in addition to the immunity available in respect of evidence that falls within 'proceedings in Parliament', this statutory offence provision complements the protections available to witnesses who might make disclosures to parliamentary committees.[14]

Future: the implications of including Members as authorised recipients of disclosures and the subject of public interest disclosures.

The Committee would be aware of some criticisms surrounding the omission of Members in particular, but also their staff, from coverage of the PID Act as recipients of disclosures and the subject of disclosures.

The inclusion of Members and Senators as authorised recipients of disclosures would increase the number of people to whom disclosures could be made and acknowledge their role as representatives. I am not sure that Members necessarily would consider they have the requisite resources to undertake such a significant role in addition to their existing responsibilities. The PID Act is complex and its requirements are rigorous. Members do not have the stable, institutional resources enjoyed by other agencies included in the Act. They also operate in an environment that is founded on freedom of speech and political difference and it may be difficult to maintain and be seen to maintain necessary confidentiality and to avoid perceptions that political considerations could have an influence on disclosures and the way they were treated.

In his Review of the PID Act, Mr [Philip] Moss AM noted that the Commonwealth is the only Australian jurisdiction to exclude scrutiny of members and their staff from similar legislation and compared the range of

> provisions relating to Members and staff in other jurisdictions. Mr Moss considers that allegations of wrongdoing by or about members or their staff should be scrutinised by Parliament, for example through the House Standing Committee of Privileges and Members' Interests and the Senate Standing Committee of Privileges. He also notes submissions were made about the incomplete exclusion of members and their staff, with Ministers exercising statutory powers possibly being considered to be public officials, and MOPS Act staff possibly being considered to be contracted service providers and has called for clarification.
>
> While Mr Moss considers that members and their staff should be subject to robust scrutiny, he also notes the likelihood of politicisation and extensive media coverage that would follow alleged wrongdoing. Mr Moss recommends that the Act be amended to make clear that it does not apply to reports about alleged wrongdoing by Senators, Members and their staff, or allegations made by them. He also recommends that consideration be given to extending the application of the PID Act to members or their staff if an independent body with the power to scrutinise their conduct is created.
>
> My view is that, at present, issues relating to the conduct of members, unless they amount to criminal conduct, are best dealt with by the Parliament, and the relevant House to supervise, in particular through the relevant Privileges committee. The continued oversight of members' conduct by parliament would perhaps be considered to be more effective if Members and Senators were subject to a Code of Conduct. I draw the Committee's attention to the Discussion Paper presented on 23 November 2011 following the House of Representatives Standing Committee of Privileges and Members' Interests inquiry into a Draft Code of Conduct for Members of Parliament. With respect to members' staff, I agree that their role is substantially different from other staff in the public sector and so I consider that, for now, it is not appropriate for them to be covered by the PID Act as recipients of disclosures or as the subjects of disclosures.[30]

Advice from the Clerk of the Senate

9.30 Mr Richard Pye, Clerk of the Senate, provided the following advice to the committee:

> Senate Clerks have previously made submissions on proposals for "public interest disclosure" schemes. For instance, in December 2008, Harry Evans submitted to a House of Representatives committee inquiry that he considered it "appropriate that members of the Parliament be authorised recipients of public interest disclosures". Similarly, in my view, there is no obstacle to including, in a properly-designed scheme, mechanisms for disclosures about, by or to members (or their staff), provided the distinction between privilege law and the whistleblowers protection regime is maintained.

30 Mr David Elder, Clerk of the House of Representatives, *Submission 75*. See appendix 4 of this report.

I make the following observations about maintaining that distinction in different situations.

Disclosures by or about members

If it is intended that the regime include disclosures by or about members (and their staff), then conduct which forms part of parliamentary proceedings should be carved out of the definition of disclosable matters, to preserve the operation of the privilege law.

Generally, participants in parliamentary proceedings are protected by privilege law in two ways. The first involves the use of the contempt powers of the two Houses, whose purpose is to protect the ability of the Houses, their committees and members to carry out their functions without improper interference. For instance, the Senate may determine that conduct which obstructs or impedes its work, or that of its members, amounts to a contempt — that is, an offence against the Senate — and may punish a person for undertaking such conduct. It would be highly undesirable to limit or interfere with the powers of the two Houses to deal with such matters by overlaying a statutory disclosure scheme in relation to those proceedings.

The other way participants may be protected by parliamentary privilege is by a legal immunity descended from Article 9 of the Bill of Rights, 1688. Parliamentary privilege in this sense is an evidentiary rule that prevents "proceedings in Parliament" from being used in courts or tribunals for prohibited purposes; traditionally, for the purposes of "questioning or impeaching" those proceedings. Both of those terms are defined in section 16 of the *Parliamentary Privileges Act 1987*. This prohibition sits at the core of parliamentary freedom of speech. It protects parliamentary proceedings from external interference. Again, it would be highly undesirable to undermine this protection by constraining the operation of those provisions.

In relation to conduct other than in connection with parliamentary proceedings, no doubt an appropriate regime for disclosures about members and their staff could be devised. For instance, in his Public Interest Disclosure Bill 2007 [2008], former Senator Andrew Murray proposed that the Presiding Officers of the Commonwealth Parliament be authorised to receive disclosures about members of their respective Houses.

In relation to disclosures by members, provided such disclosures are made in accordance with the process prescribed by the statute, there is no reason for disclosures by members and their staff to be handled differently than disclosures made by others.

Disclosures to members

If members are to be designated as authorised recipients in a statutory disclosure scheme, their roles and responsibilities must be adequately defined by the statute in a manner which does not affect (or derogate from) the law of parliamentary privilege, as explicated by the Parliamentary Privileges Act. In this regard, Harry Evans submitted to the House Legal and Constitutional Affairs Committee in 2008:

It is important that this aspect of parliamentary privilege be left to operate in conjunction with, and unaffected by, any statutory regime for public interest disclosures to members of Parliament. The ability of citizens to communicate with their parliamentary representatives, and the capacity of those representatives to receive information from citizens, should not be restricted, inadvertently or otherwise, by a statutory public interest disclosure regime.

There are several points to note about privilege and a statutory disclosure regime working together.

First, a non-derogation clause may be appropriate, although this would depend on the design of the statute. In this regard I note that, in its report on the Public Interest Disclosure Bill 2013, the Legal and Constitutional Affairs Legislation Committee endorsed the advice of the then Clerk of the Senate, Dr Rosemary Laing, that a non-derogation clause is necessary and appropriate only where a statute expressly provides for disclosures to be made to members, as such a provision may otherwise be interpreted to modify, alter or affect the powers, privileges and immunities of the Houses or their members [see paragraphs 3.21–3.24, under the heading *Clause 81 and preservation of parliamentary privilege*].

Secondly, it is useful to keep in mind that different roles and protections may co-exist. For instance, as noted above, former Senator Murray's bill would have authorised the Presiding Officers to receive disclosures about members of their respective Houses. The Presiding Officers' powers, functions and responsibilities here – like those of other authorised recipients – would initially be those specified in the statute under which the regime is to operate. That is, they would be administrative, rather than parliamentary, in nature. If a Presiding Officer subsequently put such a disclosure before their House, or a parliamentary committee, the usual protections of parliamentary privilege would apply, and the matters would be dealt with in accordance with the procedures of the House. Similarly, the powers, functions and responsibilities of other members, if designated as authorised recipients, would initially be those specified in the statute, but any subsequent use of disclosures in connection with parliamentary proceedings would attract absolute privilege. In those circumstances, a person making a disclosure may receive both the protections adhering under the statute and the protection of privilege.

Finally, it may be appropriate for addition considerations to apply before members were authorised to receive disclosures. For instance, former Senator Murray's bill provided a mechanism for members to receive “external disclosures” only in specified exceptional circumstances, including where “internal disclosures” to proper authorities (e.g., heads of affected agencies) had not been adequately dealt with. This would be a matter for consideration in developing the policy detail.

Disclosures to parliamentary committees

The difficulty of maintaining the distinction between privilege and other statutory protections where parliamentary committees are involved militates against their inclusion as authorised recipients. Nevertheless, as noted above, the Presiding Officers and other members of parliament in receipt of

> disclosures may initiate the reference of disclosures to committees, or otherwise raise them in parliamentary proceedings. In those circumstances, persons making disclosures may be protected both under the statute and by parliamentary privilege.
>
> No doubt there would also be a role for Senate committees in overseeing any proposed statutory regime, particularly where an authority is charged with administering the disclosure regime.
>
> **Conclusion**
>
> Notwithstanding my view that privilege law and statutory whistleblowers protection regime may co-exist, the complexities of defining and maintaining the distinctions between them should not be underestimated. No doubt there will be opportunities to address these matters in more detail if and when relevant legislation is put before the Parliament.[31]

Committee view

9.31 The committee notes that while some submitters supported extending whistleblower protections to disclosures made to Members of Parliament, several strong arguments were made against pursuing this course of action.

9.32 In particular, the committee notes that parliamentary privilege affords parliamentarians the ability to publicise whistleblower disclosures with no risk of defamation action being taken against the parliamentarian. At the same time, however, such publicity may prejudice any subsequent investigation into the whistleblower disclosures, as well as potentially leading to the exposure of the whistleblower's identity.

9.33 In this regard, the committee also notes the argument that Members of Parliament do not have the same capacity as regulators to investigate matters, and furthermore, that it is not the function of parliamentary committees to seek to resolve matters.

9.34 Noting the evidence from the Clerks of both Houses of Parliament, the committee draws attention to the inherent complexities that would arise in trying to draw and maintain the distinction between privilege law and a statutory whistleblower protection scheme. Being cogniscent of these complexities, the committee is cautious about suggesting any change that might constrain either the understanding or the operation of parliamentary privilege.

9.35 Noting the recommendations of the Moss Review and the findings of the 2009 inquiry into whistleblowing conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Committee recommends that consideration be given to extend the application of whistleblower protections to federal Members of Parliament and their staff if an independent body with powers to scrutinise them is created.

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31 Mr Richard Pye, Clerk of the Senate, *Submission 74*. See appendix 3 of this report.

9.36 The committee also considers that external disclosures should be protected if they are made to a federal Member of Parliament or their staff (see Chapter 8).

Chapter 10

Protections, remedies and sanctions for reprisals

10.1 This chapter summarises the committee's consideration of the best practice criteria on protections, remedies and sanctions for reprisals.

10.2 The committee has deliberately separated its consideration of remedies from reward and bounty systems which are considered in the next chapter. Reward and bounty systems are not part of the best practice criteria. In addition, the committee considers that remedies, including compensation, should be determined by the level of detriment suffered by the whistleblower and that a whistleblower should be able to be fully remediated for simply doing the right thing, without needing to have a financial motive.

Current legislation

10.3 Table 10.1 below sets out the best practice criteria for protections, remedies and sanctions for reprisals.

Table 10.1: Best practice criteria for protections, remedies and sanctions for reprisals

10	Broad protections against retaliation	Protections apply to a wide range of retaliatory actions and detrimental outcomes (e.g. relief from legal liability, protection from prosecution, direct reprisals, adverse employment action and harassment).
11	Comprehensive remedies for retaliation	Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action (e.g. compensation rights, injunctive relief; with realistic burden on employers or other reprisors to demonstrate detrimental action was *not* related to disclosure).
12	Sanctions for retaliators	Reasonable criminal and/or disciplinary sanctions against those responsible for retaliation.

Source: Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 6.

10.4 The Breaking the Silence report found both public and private sector remedies were deficient. In particular, the remedies in the Corporations Act were singled out as being 'ill-defined' when compared to the best practice criteria.[1] The protections, remedies, and sanctions for reprisals in current whistleblower protection legislation are summarised in Table 10.2 below.

1 Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, pp. 26–27.

Table 10.2: Protections, remedies, and sanctions for reprisals.

Best Practice Criteria for Whistleblowing Legislation	*Public Interest Disclosure Act 2013*	*Fair Work (Registered Organisations) Act 2009*	*Corporations Act 2001*
Broad protections against retaliation	Sections 9–12 – Protection from legal liability, contractual remedies, and privilege from defamation. Section 13 – Protection from reprisals including dismissal, injury, alteration of position and discrimination.	Section 337B – Protection from legal liability, contractual remedies, and privilege from defamation. Section 337BA – protection from reprisals, including dismissal, injury, alteration of position, discrimination, harassment, harm including psychological harm and damage to property or reputation.	Section1317AB – Protection from legal liability, contract termination.
Comprehensive remedies for retaliation	Section 14 – Compensation Section 15 – Injunctions and apologies Section 16 – Reinstatement Section 18 – Costs only if vexatious No reverse onus Section 14 allows for a court to require both an individual reprisor and the organisation to pay compensation.	Section 337 BB – Compensation Injunctions Apologies Reinstatement Exemplary damages Section 337BC – Costs only if vexatious No reverse onus	Section 1317AD – Compensation only The Act does not appear to provide for: Injunctions Apologies Reinstatement Exemplary Damages. Costs only if vexatious Note: civil remedies are ONLY available if a criminal offence of reprisal is shown to have been taken. No reverse onus
Sanctions for retaliators	Section 19 – Offences No Civil penalties, but sections 14, 15 and 16 provide that a person may still be held liable for taking reprisal action.	Section 337BD – Civil penalties Section 337BE Criminal offences	Section 1317AC prohibits victimisation including detriment and threats.

Key: White = strongest protections; Mid grey = weaker protections; Dark grey = weakest protections.

Source: Table 10.2 represents the committee's analysis of Acts and relevant sections as listed in the table and Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 6.

10.5 Of the three Acts considered in Table 10.2, the Corporations Act has the weakest protections. While the public sector protections in the PID Act are stronger, some deficiencies remain, including the definition of reprisals, the absence of provisions for exemplary damages, and a lack of civil penalties.

10.6 The FWRO Act whistleblower protections are the strongest and as amended in December 2016 provide enhanced remedies through:

- a broader definition of reprisals which add: harassment or intimidation, physical or psychological harm or injury, and damage to a person's property or reputation;
- the potential for a court to make orders relating to: compensation, injunctions, apologies, reinstatement, and exemplary damages;
- different arrangements for remedies, including the potential for other parties to make applications on behalf of the whistleblower; and
- civil penalties that are decoupled from criminal offences.[2]

Evidence received during the inquiry

10.7 This section summarises views put to the committee by witnesses and submitters on the definitions of, and remedies and sanctions for, reprisals.

Definition of reprisals

10.8 Noting the FWRO Act enables a whistleblower who has made a protected disclosure to seek a remedy if they have suffered from a reprisal action, Associate Professor Kath Hall supported the broader definition of reprisals contained in the FWRO Act:

> 'Reprisal' is very broadly defined…as a series of behaviours but that can be connected to either a protected disclosure or even the suspicion that a protected disclosure may be made.[3]

10.9 Likewise, Mr Denis Gentilin supported the broad reprisal and whistleblower compensation arrangements in the FWRO Act:

> Having reviewed the amendments, my layperson view is that they unquestionably provide recourse for whistleblowers who experience inferior outcomes. Not only do they give the courts the ability to award compensation, but the definition of what constitutes reprisal is broad.[4]
>
> …it is also possible that the amendments as currently drafted will have the desired effect and motivate managers to invest in programs and processes that both encourage speaking up within their organisations and promote positive outcomes for whistleblowers. As executives and directors learn that their organisations could be liable if they fail to appropriately look after those who raise concerns, there is every likelihood this will drive increased focus.[5]

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2 FWRO Act, sections 337BA–337BE.

3 Associate Professor Kath Hall, Deputy Director (Law), Transnational Research Institute on Corruption, Australian National University, *Committee Hansard*, 23 February 2017, p. 27.

4 Mr Denis Gentilin, Answers to questions on notice, 28 April 2017 (received 12 May 2017).

5 Mr Denis Gentilin, Answers to questions on notice, 28 April 2017 (received 12 May 2017).

10.10 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, supported the broader definition of reprisals and argued that deliberate reprisals against public interest whistleblowers should be criminal. However, she was also of the view that civil remedies should be made available that are accessible, equitable, predictable, and low-cost whenever a whistleblower suffers personally including in their employment.[6]

Remedies

10.11 ASIC recommended overhauling the compensation arrangements for reprisals so whistleblowers are confident they will not be disadvantaged as a result of disclosing corporate wrongdoing. ASIC suggested it is vital to:

- clearly define 'reprisal' and 'detriment' and the nature of the damages for which a whistleblower may make a compensation claim (which should not be capped); and to
- ensure cost protection for whistleblowers (unless a claim has been made vexatiously).[7]

10.12 ASIC also suggested considering the following options for securing compensation for a whistleblower if the corporation involved became insolvent. Consistent with current practice, the whistleblower would become an unsecured creditor. Alternatively, the Commonwealth could make the compensation payment to the claimant in the first instance. The payment could then be offset from penalties obtained as a result of actions by the regulator generally. The compensation payment would become a debt to the Commonwealth, standing in the shoes of the claimant as an unsecured creditor.[8] Mr Warren Day, Senior Executive Leader, ASIC suggested there could be initial funding from government to set that fund up until it could be funded through penalties.[9]

10.13 Professor A J Brown also noted that it could be advantageous to establish a way to fund compensation in a situation where the company responsible for reprisals is bankrupt.[10]

10.14 Mr Matthew Chesher, Director Legal and Policy, MEAA informed the committee that it supports the creation of a protected fund, where a proportion of funds from successful prosecutions and settlements are preserved to support

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6 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 2; Transparency International, *Answers to questions on notice*, 11 April 2017 (received 17 May 2017).

7 Australian Securities and Investments Commission, *Submission 51*, pp. 5, 22.

8 Australian Securities and Investments Commission, *Submission 51*, p. 24.

9 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 64.

10 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, pp. 5–6.

whistleblowers whose future employment is unviable due to their disclosing conduct.[11]

10.15 Mr Chesher also suggested that the objective of compensation should be support for actual loss. He supported a methodology to ensure that people do not suffer financial detriment,[12] and suggested the following approach:

> I believe that it would need to be a statutory office holder making that kind of determination. There would need to be some evidence of loss or prejudice. You would imagine that a whistleblower who is subject to discrimination could bring it to a regulator's attention in order to seek their assistance.[13]

10.16 Mr Gentilin argued that legislative change was necessary to improve the financial compensation arrangements for whistleblowers:

> In the worst-case scenarios, the costs associated with whistleblowing, both financial and emotional, are enormous. At a minimum, the legislation should provide coverage for the financial costs, and, what is more, when an organisation has failed to create an environment that is supportive of positive whistleblowing outcomes, it should be made liable for these costs. The compensation should be generous and not be associated with any caveats that potentially make it refundable.[14]

10.17 Ms Julia Angrisano, national secretary of the FSU, informed the committee that compensation should be available to those who use whistleblower protections to expose unethical behaviour or corporate misconduct. Where an employee can demonstrate financial disadvantage, the compensation should recompense them and the compensation should include loss of future earnings.[15]

10.18 Ms Louise Petschler, General Manager, Advocacy, AICD advocated increasing the amount of compensation and the ease with which whistleblowers can access and apply for compensation if they have suffered some form of financial loss because of disclosing the alleged misconduct.[16]

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11 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

12 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

13 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 29.

14 Mr Dennis Gentilin, private capacity, *Committee Hansard*, 28 April 2017, p. 1.

15 Ms Julia Angrisano, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 28 April 2017, p. 9.

16 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 26.

Remedies under the FWRO Act

10.19 Mr Howard Whitton, director of the Ethicos Group, supported the compensation arrangements set out in the FWRO whistleblower protections.[17]

10.20 Transparency International welcomed the other whistleblower remedies set out in the FWRO Act including exemplary damages and protecting whistleblowers against respondents' costs.[18]

10.21 Associate Professor Hall argued that the FWRO Act protections strike a good balance:

> [T]he court is not required to make any of the orders if there is the belief or suspicion that the disclosure by the whistleblower is not any part of the reason for the reprisal. So the burden of proof for the whistleblower and the obligations in terms of the organisation are, in my opinion, much better balanced.[19]

10.22 Professor Brown informed the committee that Section 337BB of the FWRO Act creates an important new basis for more effective remedies by recognising the need to address foreseeable dangers and 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.[20]

Sanctions

10.23 One of the issues that arose during the inquiry was the interaction between civil remedies and the offence provisions relating to reprisal activity and how they vary across the three Acts.

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17 Mr Howard Whitton, Director, The Ethicos Group, *Committee Hansard*, 23 February 2017, p. 15.

18 Transparency International, *Answers to questions on notice*, 11 April 2017 (received 17 May 2017).

19 Associate Professor Kath Hall, Deputy Director (Law), Transnational Research Institute on Corruption, Australian National University, *Committee Hansard*, 23 February 2017, p. 27.

20 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

10.24 Under section 19A of the PID Act, a person can claim civil remedies in relation to the taking of a reprisal (or the threat to take a reprisal) in addition to, or separate from, a prosecution for a criminal offence. Similarly, under section 337BF of the FWRO Act, a person may seek civil remedies even if a prosecution for a criminal offence against section 337BE in relation to the reprisal or threat has not been brought, or cannot be brought.[21]

10.25 By contrast, Professor Brown identified serious shortcomings in the current whistleblower protections under the Corporations Act because they require that a criminal offence is shown to have occurred:

> This is a uniquely Australian problem. No country in the world has criminalised reprisals against whistleblowers the way that we have since the 1990s, so no other country has created the problem for itself of then trying to figure out how to provide civil compensation remedies for the same reprisals if, in fact, they have already been identified as criminal.[22]

10.26 In addition, Professor Brown explained that the FWRO Act whistleblower protections have other significant advantages over current corporate whistleblower protections because the FWRO provisions include liability for a failure in the duty to support and protect a whistleblower:

> …the thing that the Fair Work (Registered Organisations) Act does, though, for the first time is actually to say that civil liability can be attracted where there is a failure on the part of somebody to fulfil a duty to either protect or support, or to control others who are likely to undertake a reprisal, so it does shift the ground significantly in a positive direction. That is an issue on which there has now been some positive movement, but the ultimate solution on this is something that really needs to be worked through.[23]

10.27 However, Professor Brown suggested that the way reprisals are defined in the FWRO Act whistleblower protections could be further improved:

> 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.[24]

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21 PID Act; FWRO Act.

22 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 28.

23 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 28.

24 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

10.28 Transparency International supported Professor Brown's suggestion for untangling the civil and criminal aspects of reprisal and detriment:

> …further legislative steps should be taken to separate the criminal offence of reprisal from the breadth of circumstances that should give rise to employment or civil remedies for detrimental outcomes. Employment and civil remedies need to be available where anyone fails in their duty to support and protect a whistleblower, or to prevent or restrain detrimental outcomes, including detriment which may be unintended but could and should have been foreseen. This is distinct from a 'reprisal', which carries implications of intent or knowledge that an act or omission would result in detrimental impacts, as direct punishment or retaliation for the disclosure.[25]

Liability for paying compensation

10.29 There was some support for increasing the penalties on companies that retaliate against whistleblowers in any way,[26] as well as arguments that a company that has potentially harassed or victimised the whistleblower is the party that should pay when compensation is awarded.[27]

10.30 With respect to the apportioning of liability for compensation payments relating to reprisals in the Commonwealth public sector, section 14 of the PID Act sets out the options for courts to require both individuals and organisations to be liable for compensation. In other words, it appears that section 14 of the PID Act allows a court to determine the relative attribution of liability between the organisation and the individual or individuals that took the reprisal action.[28]

10.31 Professor Brown was of the view that an approach similar to section 14 in the PID Act could be usefully replicated in legislation for the private sector.[29]

10.32 If an approach similar to section 14 in the PID Act was replicated in legislation for the private sector, it may address the 'agency problem' identified by Mr Thomas (see chapter 2). To recap, the 'agency problem' relates to a situation where an organisation implements best practice procedures around whistleblowing, and yet one or more of its employees takes reprisal action against a whistleblower, primarily because the goals and incentives (and disincentives) faced by the organisation and its employees may not necessarily align.

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25 Transparency International, *Answers to questions on notice*, 27 April 2017 (received 17 May 2017).

26 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors *Committee Hansard*, 28 April 2017, p. 26.

27 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 64.

28 PID Act.

29 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

Committee view

10.33 As shown in Table 10.2, evidence to the inquiry drew attention to significant inconsistencies in the current whistleblower protections across the PID Act, FWRO Act, and Corporations Act with respect to the protections, remedies and sanctions available under the respective pieces of legislation.

10.34 The committee notes that the protections, remedies and sanctions in the FWRO Act were some of the most significant reforms made to the FWRO Act in December 2016 (see 10.6). The committee further notes that there was broad support for the reforms that have been made to the FWRO Act.

10.35 By contrast, witnesses drew attention to the paucity of protections and remedies under the Corporations Act as well as the shortcomings in the legislation that make it extremely difficult to prove that a reprisal has occurred. The committee also notes there was strong support for improving the compensation provisions.

10.36 The committee considers that the evidence to the inquiry makes a strong case for extending the reforms in the FWRO Act to both the public sector and the rest of the private sector. The committee considers that this would be a sensible approach that would align legislation with best practice and have the further advantage of harmonising the provisions for protections, remedies and sanctions across the public and private sectors.

10.37 The committee also considers that the separation of the grounds for criminal and civil liability is an important reform that would draw a distinction between the criminal offence of reprisal and the wide range of circumstances that would give rise to employment or civil remedies for detrimental outcomes. This would make it easier for a whistleblower (or whistleblowers) to gain civil remedies, and would 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.

Recommendation 10.1

10.38 The committee recommends that the *Fair Work (Registered Organisations) Act 2009* be amended to separate the grounds for civil and criminal liability.

Recommendation 10.2

10.39 The committee recommends that a Whistleblowing Protection Act reflect whistleblower protections, remedies and sanctions for reprisals in the *Fair Work (Registered Organisations) Act 2009*, including:

- **protection from harassment, harm including psychological harm and damage to property or reputation;**
- **remedies for exemplary damages;**
- **sanctions including civil penalties; and**
- **separating the grounds for criminal and civil liability.**

10.40 As noted above, a particular advantage of the PID Act is section 14, which provides clarity on options for courts to require both individuals and organisations to be liable for compensation. The committee considers that there would be value in extending such provisions to the private sector, including corporations and registered organisations.

10.41 As with many of the reforms that the committee is recommending, this would provide greater consistency between the relevant provisions across the public and private sector legislation. Furthermore, the committee is of the view that a case in the corporate sector where an individual was held personally liable, to a greater or lesser extent, for compensation would be of value to private sector organisations. This is because it would likely address an aspect of the 'agency problem' by having a significant deterrent effect on individuals considering taking reprisal action against other whistleblowers in the future.

Recommendation 10.3

10.42 The committee recommends that current provisions in section 14 of the *Public Interest Disclosure Act 2013*, which clarify the options for courts/tribunals in apportioning liability for compensation between individuals and organisations, extend to apply to the private sector.

Chapter 11
Reward system

Introduction

11.1 The committee considered whether reward and bounty systems such as those used in the United States (US), Canada and parts of Europe, would be appropriate for Australia. As noted in the previous chapter, the committee deliberately separated its consideration of reward and bounty systems from compensation because the committee considers that the nature and amount of compensation should be determined by the detriment suffered by the whistleblower.

11.2 This chapter begins with a brief overview of reward and bounty systems that exist in other countries. This is followed by a summary of the arguments put to the committee about the possible introduction of a reward or bounty system in Australia.

11.3 Professor A J Brown encouraged the committee to consider the advantages and disadvantages of bounty systems as part of the overall approach to whistleblowing:

> Certainly the common ground should be that we need to look at more serious remedies, in general, for compensation, for damage done, or for the risk of damage, for detrimental action. But I think it would be good if the committee seriously considers and has a look at what role bounty-type arrangements might play, not necessarily as a straight copy of the US arrangements, and the reasons for not creating perverse incentives and artificial legal services markets—that is, creating a whistleblowing industry. We have to look seriously at what is perverse and what is attractive out of those sorts of options.[1]

11.4 However, the key aspect for Professor Brown was working out a means to recognise the high value of the information that a whistleblower might be able to provide:

> To my mind, the issue is not really whether we go down the road of bounties or rewards for individual whistleblowers but how we recognise that whistleblowers provide information of incredibly high value. That value then manifests very often in the recovery of fraud lost and in the imposition of justifiable penalties for wrongdoing of a whole variety of kinds.[2]

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1 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 31.

2 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 31.

Bounty systems in other jurisdictions

11.5 The following sections provide a brief outline of several jurisdictions, some of which, such as the US, have implemented bounty systems and some of which, such as the United Kingdom (UK), have decided against them.

United States

11.6 The US has whistleblower bounty programs that incentivize reporting of securities, commodities, and tax violations, and fraud against the government. The whistleblower program for securities is operated by the United States Securities and Exchange Commission (US-SEC), the corporate regulator which, in general terms, performs a similar role to ASIC. The US-SEC Whistleblower Program (also called the Dodd-Frank Whistleblower Program) was founded on three core principles:

- the ability to report anonymously;
- enhanced employment protections; and
- the potential to receive monetary rewards.[3]

11.7 Section 21F of the US *Securities Exchange Act 1934*, as amended by the US *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, directs the US-SEC to make monetary awards to whistleblowers who provide information that leads to successful US-SEC enforcement actions with monetary sanctions over $1 million. Awards are required to be made in an amount equal to 10 per cent to 30 per cent of the monetary sanctions. To ensure that whistleblower payments would not diminish the amount of recovery for victims of securities law violations, Congress established a separate fund, called the Investor Protection Fund, out of which eligible whistleblowers are paid.[4]

11.8 Since the Dodd-Frank Whistleblower Program's first full year in 2012, the US-SEC has awarded more than US $111 million to 34 whistleblowers whose information assisted in bringing successful enforcement actions. Those enforcement actions included US $584 million in financial sanctions, including disgorgement of US $346 million of ill-gotten gains and interest.[5]

11.9 Other US whistleblower programs with bounty systems include:

- the US Commodity Futures Trading Commission (CFTC);[6]
- the US Internal Revenue Service (IRS);[7]

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3 Mr Jordan Thomas, *Submission 70*, pp. 3–4.

4 US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 4.

5 US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 10.

6 US Commodity Futures Trading Commission, Whistleblower program, https://www.whistleblower.gov/ (accessed 15 May 2017).

- the US Department of Justice under the US False Claims Act.[8]

11.10 Mr Jordan Thomas explained to the committee how the two different types of bounty systems work in the United States. One system involves a person actively filing a case on behalf of the government:

> One is a regime based upon the False Claims Act—sometimes called the 'qui tam' laws. People file a case under seal. Then the government joins or does not join, but the person is acting in the place of the government. And that has existed since the time of Abraham Lincoln. It is particularly strong where the government has weaker resources or where there is so much misconduct in this area that the government would benefit by having the additional support that exists in private bar.[9]

11.11 The other system typically involves the whistleblower providing a tip-off to the relevant regulator:

> The other regime is typified by the SEC, the CFTC and IRS programs where a whistleblower is, essentially, what we call a '911 caller'. They are, essentially, providing a tip. They are providing supporting information, but only the agency has the discretion to investigate and prosecute the case.[10]

United Kingdom

11.12 This section sets out some of the reasoning put forward by financial regulators in the UK regarding decisions not to introduce a bounty system for whistleblowers.

11.13 In 2013, the UK Department for Business, Innovation and Skills ran a consultation process on a UK whistleblower framework, including financial incentives for whistleblowers.[11] The government response indicated that the government did not believe that incentives should be introduced.[12] Associated with that process, in July 2014, the UK Financial Conduct Authority (FCA) and Bank of England Prudential Regulation Authority (PRA) informed the UK Treasury Select Committee that:

(a) Incentives in the US benefit only the small number of whistleblowers whose information leads directly to successful enforcement action

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7 US Internal Revenue Service, *Whistleblower – informant award*, https://www.irs.gov/uac/whistleblower-informant-award (accessed 15 May 2017).

8 US Department of Justice, *Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Years 2016*, https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016 (accessed 15 May 2017).

9 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

10 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

11 UK Department for Business Innovation & Skills, *The whistleblowing framework call for evidence*, July 2013, p. 16.

12 UK Department for Business Innovation & Skills, *Government Response to The whistleblowing framework call for evidence*, June 2014, p. 20.

resulting in the imposition of fines. They provide nothing for the vast majority of whistleblowers.

(b) There is as yet no empirical evidence of incentives leading to an increase in the number or quality of disclosures received by the regulators.

(c) Introducing incentives has been accompanied by a complex, and therefore costly, governance structure.

(d) The incentives system has also generated significant legal fees for both whistleblowers and firms, although many whistleblowers are represented on a contingency basis (no award, no fee).

(e) Incentives offered by regulators could undermine the introduction and maintenance by firms of effective internal whistleblowing mechanisms.[13]

11.14 The FCA and PRA also noted that bounty systems may create the following moral or other hazards:

- malicious reporting or entrapment;
- the whistleblower's conflict of interests potentially weakening prosecution cases in court;
- inconsistency with the regulators' expectations of firms;
- the need for qualification criteria; and
- perceptions of large rewards for undertaking a public duty.[14]

Other bounty systems

11.15 In mid-2016, the Ontario Securities Commission launched its Office of the Whistleblower and its Whistleblower Program policy, which includes a bounty system. Whistleblowers who report information that leads to monetary sanctions of $1 million or more may be eligible for a financial award of up to $5 million.[15] Dr Sulette Lombard, Academic, Flinders Law School, informed the committee that the bounty system differs significantly from the US system, firstly, because it is capped, and secondly, because it is restricted to whistleblowing in respect of securities offences, and is therefore narrowly focussed.[16]

11.16 In South Korea, whistleblowers who contribute directly to increasing or recovering government revenues can receive between four and 20 per cent of these

13 UK Financial Conduct Authority and the Prudential Regulation Authority, *Financial incentives for whistleblowers*, July 2014, pp. 2, 3.

14 UK Financial Conduct Authority and the Prudential Regulation Authority, *Financial incentives for whistleblowers*, July 2014, p. 3.

15 Ontario Securities Commission, OSC policy 15-601, *Whistleblower Program*, July 2016, pp. 1, 11.

16 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

funds, with an upper limit of US $2 million. Whistleblowers who serve the public interest or institutional improvement can receive up to US $100,000:

> As of May 2014 the largest reward paid was US $400,000 from a case in which a construction company was paid US $5.4 million for sewage pipelines that it did not build. Eleven people faced imprisonment and fines, and the US $5.4 million was recovered.[17]

11.17 Some limited reward systems have either been proposed or implemented in some European jurisdictions. For example, in Italy, a commission for the prevention of corruption established around 2012 made recommendations including issuing rewards in return for useful disclosures.[18] In 2003, the Lithuanian government passed a resolution to reward people for exposing financial crimes.[19] In Hungary anti-trust law qualifies whistleblowers for up to 1 per cent of the fine collected from the employer capped at around €160,000.[20]

Arguments for a reward system in Australia

11.18 This section summarises arguments that were put to the committee in support of a bounty system for whistleblowers in Australia.

11.19 Dr Vivienne Brand and Dr Lombard argued in favour of a reward based system, indicating to the committee that bounties could be a game changer in the Australian corporate sector:

> …any reform the committee considers ought to take into account the potential for some form of financial incentive, reward or compensation—a spectrum of those sorts of options—to really shift the level of whistleblowing activity.[21]

> …we are strong proponents of financial rewards for whistleblowing, recognising that that is just part of a bigger picture and that it will not be the answer to all the issues that have been addressed, but that a holistic view is important.[22]

11.20 Mr Jordan Thomas argued in favour of a bounty system suggesting that it can be relatively low risk and low cost for the government because the government only

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17 Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 54.

18 Transparency International, *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU*, 2013, p. 55.

19 Transparency International, *Whistleblowing in Europe Legal Protections for Whistleblowers in the EU*, 2013, p. 59.

20 Department for Business Innovation & Skills, *The whistleblowing framework call for evidence*, July 2013, p. 16.

21 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

22 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

pays a reward if the enforcement action is successful. Mr Thomas noted that before the whistleblower program regulators had to build a number of cases from the ground up, whereas now regulators are able to be much more targeted and efficient in looking at potential wrongdoing.[23] Mr Thomas also set out areas in which the US programs had been successful:

> …the American experience tells us that governments offering incentives for corporate whistleblowers to report misconduct really does work. First, surveys show that more than 80% employees, continue to report internally first —an important sign of a healthy corporate environment. Second, after the establishment of the SEC Whistleblower Program, many companies invested more time and resources in strengthening their internal reporting and compliance programs to encourage their employees to report internally, rather than externally. Third, attorneys, accountants, compliance professionals and other gatekeepers have reported being empowered because they now can argue that failure to do the right thing or invest more in their compliance and integrity programs will result in external reporting. Fourth, more organizations are self-reporting to law enforcement and regulatory organizations because the probability of detection associated with external reporting incentives is much higher than ever before. Finally, the success of American whistleblower programs has had a positive deterrent impact by discouraging potential wrongdoers from engaging in wrongdoing.[24]

11.21 Mr Thomas set out further arguments for a whistleblowing reward system:

> • Employees owe a duty to employers, but have many other important duties including to their company's shareholders and fellow citizens.
>
> • The public compensating whistleblowers does not create corrupt companies, but allowing wrongdoers to get away with crimes because knowledgeable employees and culpable corporations remain silent surely does.
>
> • Australia's primary focus should be on the real harm caused to real people through corporate wrong doing.
>
> • Whistleblowing works: it ferrets out crime, leads to reform of corrupt corporate cultures, and protects innocent victims from corporate harm.
>
> • The option of whistleblowing to the government can and does promote more robust internal corporate compliance and speak up programs.
>
> • Establishing impossibly subjective eligibility standards will ensure that corporate whistleblowers remain silent.

23 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 6.

24 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017), pp. 9–10.

> • Since whistleblowers often pay a heavy price for speaking up, Australia should compensate these courageous individuals for the hardships they experience.[25]

11.22 Both Mr Thomas and Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers noted that in Australia there are precedents for non-rewards based incentives for reporting violations of law in Australia. For example, under the ACCC's amnesty program, individuals and entities that are culpable for illegal cartel activities are entitled to amnesty from prosecution if they are the first to report the violations to regulatory authorities.[26] The ACCC provided further detail on how its immunity policy works, including noting that it is a policy rather than legislation:

> The main incentive, in fact almost the only incentive, that we offer is immunity, but that only applies to people who are involved in cartels. So it is actually quite narrow—a lot of the things that we investigate are not cartels—and it is only if you are involved.[27]
>
> Our immunity policy is not done under the statute. It is a policy, so it sits together with the Commonwealth prosecution policy.[28]
>
> The immunity policy is multilateral conduct; it helps to get a person to self-report. There might be two or three people. If one of those is encouraged to come in, that opens up the rest of the case.[29]

11.23 Mr Bornstein argued that the reason why a bounty system sits uncomfortably with our culture is because there is far too much acceptance of lax standards of corporate governance. He suggested that those who benefit from tax evasion, bribery and wage fraud have much to fear from whistleblower incentives:

> Those incentives undermine the levers that those wrongdoers use to try and prevent exposure. Companies who try to stop whistleblowing use the carrot and the stick with their workforces. It can be a financial incentive and it can be the threat of being expelled or punished or excluded from the organisation. The only effective way to overcome big threats and big money is to offer proportionate incentives and protection to the whistleblower, ensure that their disclosure is dealt with quickly and effectively, and provide adequate compensation.[30]

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25 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017), p. 2.

26 Mr Jordan Thomas, *Submission 70*, p. 3; Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, pp. 42–43.

27 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 71.

28 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 65.

29 Mr Ian Lawrence, Director, Law Reform and Competition Advocacy, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 71.

30 Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 43.

11.24 The IBACC was in favour of a bounty system as part of a broader improvement to a compensation scheme. However, the IBACC acknowledged that while the majority of submissions supported substantially improved compensation rights, many submitters were more hesitant, if not hostile, towards the notion of rewarding the voluntary disclosure of corporate or not-for-profit misconduct.

> The [IBACC] respects the differences of views in terms of the introduction of a reward system. It would mark a major innovation and change in the Australian legal landscape. That, of itself, is no reason not to do it. The [IBACC] remains of the opinion, as expressed in its Submission, that an independent rewards system, supporting a reformed compensation scheme, is a desirable reform in Australia for the benefit of those in the community to stand up to report misconduct.[31]

11.25 While Professor Brown supported the careful introduction of reward systems, he noted that it would be important to ensure consistency across all sectors and regulatory areas. Importantly, however, Professor Brown also drew attention to the need for significantly higher penalties that would then allow for both greater compensation for individual whistleblowers and increased funds to support the functions of a whistleblower protection agency.[32]

Arguments against a reward system

11.26 This section summarises some of the many arguments put to the committee during the inquiry against a reward system in Australia. While many submitters and witnesses focussed on the ethical implications of a bounty system and the potential for perverse incentives to produce counter-productive outcomes, other submitters focussed on the practical concerns that a bounty system would raise.

11.27 Ms Serene Lillywhite, Chief Executive Officer of Transparency International, did not support a US style bounty system for whistleblowers because, in her view, the US system does not provide all the necessary protections and may in fact preclude whistleblowers from accessing other remedies:

> It may provide some form of compensation…but it is still not necessarily meeting all the issues in terms of providing adequate whistleblower protections.
>
> The other point that I think still requires some consideration is whether the introduction of a bounty system, for want of a better word, would potentially preclude a whistleblower from seeking other forms of civil remedy or civil justice. Would there be the requirement, for example, that

31 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017, (received 18 May 2017).

32 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 5.

> by accepting a bounty you effectively forego your right to other forms of natural justice?[33]

11.28 Similarly, Mr Gentilin was cautious about a bounty system and argued that other measures would be more beneficial in protecting whistleblowers:

> I am not supportive of a bounty system similar to the one currently in place in the US. This is not to suggest that the US bounty system has not been successful. If one looks at it purely through the lens of increased disclosures, an argument could be made in favour of a bounty system. However, this inquiry has been launched under the banner of increasing whistleblower protections. I believe there are more effective ways to achieve this than through the introduction of a bounty system.[34]

11.29 Ms Rebecca Maslen-Stannage, Chair of the Corporations Committee, Law Council, told the committee that the Law Council did not support a bounty system which risked setting up perverse incentives, and preferred a compensation system instead. The Law Council argued that getting the legislative settings right was the key to reducing the incidence of victimisation so that whistleblowers would feel safe to report wrongdoing internally and seek to change an organisation from within.[35]

11.30 Mr Warren Day, Senior Executive Leader, ASIC noted that in ASIC's experience, the majority of whistleblowers who contact the regulator are motivated by altruism.[36] He also raised serious practical considerations that could arise from the application of a bounty system:

> You can see a scenario where there are two people working side by side. One is actually the whistleblower and the other one knows nothing about what is going on, but they work in the same place. The second person is completely oblivious to what is going on. Management come down from on high and think there is a leak and are really concerned they have a whistleblower and want to take harmful action against both employees. We would say that the second employee, the person who is oblivious to what is going on, is just as victimised as the first person, even though they are not the whistleblower. This is something we want to point out.
>
> Where we see a circumstance that people have been victimised on the basis that they are potentially a whistleblower—they have been victimised because of that—we think there needs to be some way for that to be

33 Ms Serene Lillywhite, Chief Executive Officer, Transparency International Australia, *Committee Hansard*, 27 April 2017, p. 6.

34 Mr Dennis Gentilin, private capacity, *Committee Hansard*, 28 April 2017, p. 1.

35 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 19.

36 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 67.

> considered as well, whereas, with a rewards scheme, it is only the person who has actually put the information there who is considered.[37]

11.31 In light of the potentially unfair distribution of a bounty in the scenario set out above, ASIC pointed out that a compensation system has the advantage of potentially providing resources to a broad range of whistleblowers, whereas a reward based system only assists a small proportion of whistleblowers who are associated with cases leading to a successful prosecution and large fines.[38]

11.32 The Institute of Internal Auditors told the committee that it did not support a bounty system and that rewarding whistleblowers should not be encouraged:

> …whether the whistleblower comes from the ranks of internal audit or not, one must ponder how paying someone for doing the right thing can restore a healthy culture.
>
> [The Institute of Internal Auditors] Australia agrees with that position and does not agree with the US position where whistleblowers can be rewarded with part of the moneys recoverable. [39]

11.33 Similarly, Dr Simon Longstaff from the Ethics Centre did not support incentives for people to disclose wrongdoing and argued that incentives would be inconsistent with the duty to act in good faith for the benefit of an employer or in the public interest:

> I think, two wrongs do not make a right, and the fact that there are incentives in some environments to do wrong does not mean that they should matter, because it is the nature of the incentive itself that corrupts the underlying relationship which ought to motivate people to come forward, and the solution in this case is to provide adequate protections for individuals who have exhausted the internal mechanisms for raising their concerns, which should be, ideally, in place.[40]

11.34 Dr Longstaff also argued that the ends do not justify the means, and that instead of looking at bounty systems, the focus should instead be on remedying the situation which leads to people suffering detriment:

> We should not have people losing their jobs. We should not have people who are subject to some kind of reprisal, even in the broad terms which have been talked about here today. That is what we need to fix, rather than just compensate people for a failure to address the underlying problem itself. I just do not think that it is a healthy situation for society at large or for people in organisations—whether it is the public sector or the private

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37 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 67.

38 Australian Securities and Investments Commission, *Submission 51*, p. 22.

39 Mr Peter Jones, Chief Executive Officer, Institute of Internal Auditors, *Committee Hansard*, 27April 2017, p. 33.

40 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, p. 4.

> sector—to have people raising concerns motivated, principally, by the prospect of some reward as a result of having done so. It should be a matter of duty that one acts from, and that should be underpinning the relationship in this area.[41]

11.35 Mr Matthew Chesher, Director Legal and Policy, MEAA did not support a scheme such as the Dodd-Frank legislation in the US. He argued that there should be no incentive for a person to disclose, beyond restoring or maintaining the position that they held, in a financial sense, prior to a disclosure having taken place.[42]

11.36 Mr Trevor Clarke, Director, Industrial and Legal from the ACTU was cautious about a US style incentive system for whistleblowers, arguing that it would be a sad day if all enforcement processes were based on the idea that you get something out of it rather than do it because it is the right thing to do. He suggested instead that the relevant regulator could be given some discretion to allocate, on compassionate grounds, a percentage of a fine to a whistleblower.[43]

11.37 With respect to the public sector, the Queensland Ombudsman argued that a bounty system is not consistent with the duties and responsibilities of a public servant to receive a reward for disclosing information about wrongdoing. The reporting of wrongdoing is integral to the ethical obligations of persons in public sector employment.[44]

11.38 Some submitters and witnesses also drew attention to the perverse incentives and counter-productive outcomes that a bounty system may engender.

11.39 For example, Dr Brand and Dr Lombard from Flinders University raised ethical concerns relating to the temptation for whistleblowers to hold information longer to increase their reward under a bounty system.[45]

11.40 Mr Lucas Ryan, Senior Policy Advisor, AICD outlined similar concerns:

> Firstly, if there were an opportunity for whistleblowers to receive some sort of financial reward from their disclosure, there may be a perverse incentive for whistleblowers to sit on information and to wait for wrongdoing to grow to a greater extent, so that when they made their disclosure with the hope of receiving a bounty the extent of their reward is greater. As I said moments ago, the purpose of the framework should be to try to encourage whistleblowers who want to raise instances of corporate wrongdoing in the hope that they are corrected. People who do that should always want to go to the company in the first instance and see that happen as soon as possible.

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41 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, pp. 6, 8.

42 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

43 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 27 April 2017, p. 18.

44 Queensland Ombudsman, *Submission 13*, p. 3.

45 Dr Vivienne Brand and Dr Sulette Lombard, *Submission 14*, p. 3.

> But, if there is an opportunity for them to make more money by watching corporate wrongdoing spiral out of control, there is a significant hazard in that.[46]

11.41 Mr Ryan also pointed out that financial rewards may encourage whistleblowers to access information about a company by illegitimate means. He indicated that the AICD had heard of such scenarios occurring in the US.[47]

11.42 In addition, Mr Gentilin warned that a bounty system might not produce more useful information, but might instead merely result in more meritless disclosures:

> My view of the bounty system—if our goal is to increase the number of disclosures and tips, then I say go for it. You will get an increased number of disclosures. My question is: will it encourage people to make meritless disclosures? That is the risk you run. Any time you are put an incentive scheme in place in any walk of life, there are intended and unintended consequences. You have to be prepared for both.[48]

11.43 The committee also heard that in the US, some corporations had started to try to evade the bounty systems by putting contract conditions on employees banning them from participating in bounty systems. The US-SEC has pursued cases against those contract arrangements:

> One is an overly broad confidentiality agreement, which does not say—in many cases—you cannot go to the cops, but it is so broadly written that that would be an natural interpretation. The second thing is notice provisions—something that would require people, if they have contact with law enforcement authorities or regulators, to notify their organisations. That has a chilling effect on people. In the US, because you could report anonymously, that actually violates the law. The third area that we see is in broad labour provisions that say that, 'You agree that you won't make a claim or receive any money for reporting wrongdoing against the organisation,' which undermines the regimes within the US.[49]

Third party legal interests

11.44 Evidence to the committee also indicated that the bounty system in the US had provided enough of a financial incentive to create a legal services market for whistleblowers.[50]

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46 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard,* 28 April 2017, p. 29.

47 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard,* 28 April 2017, p. 29.

48 Mr Dennis Gentilin, private capacity, *Committee Hansard*, 28 April 2017, p. 7.

49 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

50 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard,* 23 February 2017, p. 26.

11.45 Some submitters and witnesses were concerned by the potential for third party interests to be seeking to profit from whistleblower bounty systems by offering legal and other services to whistleblowers. The Institute of Internal Auditors had concerns about the US bounty system and argued that:

> All that it has done is create a market for increased litigation and litigation funders. It is our view that the courts in Australia have sufficient latitude to compensate individuals commensurate with the damages incurred, and [Institute of Internal Auditors] Australia would not support the proposition of financially rewarding whistleblowers as occurs in the US.[51]

> Evidence in the US shows—you have the False Claims Act, the Dodd-Frank Act and a plethora of state legislation covering whistleblowers, and it has created a whole market where lawyers are profiting out of this and basically ambulance chasing. I do not think we really need that in Australia. I think that would be the last place you would want to go.[52]

11.46 Clayton Utz also argued that a bounty system may lead to a litigation culture perpetuated by litigation funders which may put a strain on court and regulator resources and businesses that would have to defend the actions.[53]

11.47 By contrast, Mr Bornstein from Maurice Blackburn had a different view. He argued that a bounty system would counterbalance the pernicious effect of third parties profiting from wage fraud schemes and tax evasions schemes. Mr Bornstein also argued that the law currently protects against vexatious claims:

> The law does this already; if you bring a vexatious claim under the Fair Work Act then you might get a costs order against you. So, if you impose a threshold—that it cannot be vexatious—then you eliminate a lot of the froth and bubble that is generated when people talk about adopting the US model of having incentives.[54]

Timing of the introduction of a reward system

11.48 Some submitters and witnesses discussed whether it may be appropriate to reconsider a reward or bounty system at another time.

11.49 The AICD noted that there are some challenges with the operation of the US whistleblower bounty system and that the US bounty system was put in place sometime after other whistleblower protections were established:[55]

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51 Mr Peter Jones, Chief Executive Officer, Institute of Internal Auditors, *Committee Hansard*, 27 April 2017, p. 33.

52 Mr Tony Rasman, Public Affairs Managers, Institute of Internal Auditors, *Committee Hansard*, 27 April 2017, p. 34.

53 Clayton Utz, *Submission 4*, pp. 3–4.

54 Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 45.

55 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

> … Firstly, they have a different cultural context to us. They have a previous whistleblowing act that introduced similar protections that we are contemplating with ours.[56]
>
> Secondly, they have a strong history of qui tam provisions, which previously operated under American law that we do not have here in Australia. The AICD is particularly concerned about some of the moral hazards that arise from a bounty scheme. That is not to say that in five years, 10 years time or whenever we review the system, if it has not gone far enough, they might be hazards we are willing to take. But in the short-term, our view is that there is enough scope to improve the whistleblowing framework now that we do not need to contemplate entertaining those moral hazards.[57]

11.50 The AICD suggested reconsidering a bounty system after other measures have been given a chance to work:

> Our suggestion is that the types of improvements that we have outlined in our submission—and we believe the genuine focus of boards and corporates to improve practices—supported by a better regulatory environment, will materially shift that conversation and the experience within Australia. Our suggestion, then, is: why don't we do that, and have a look at bounties as part of a post-implementation review, which, as a matter of good practice, we think is something we should be doing with all substantive reforms in a relatively short period.[58]

Limitations of a bounty system based on existing low penalty regime

11.51 ASIC suggested that there is benefit in deferring the consideration of a rewards system until more comprehensive whistleblowing reform has been implemented, and in particular the operation of a new compensation regime has been assessed. ASIC also noted that this would also allow time for higher monetary penalties to be introduced.[59]

> Despite the fact that some countries have already adopted a rewards system to encourage the reporting of corporate wrongdoing, ASIC does not consider that a rewards system that is dependent on successful prosecution and the level of penalties imposed would be effective in Australia at this time (generally, in other jurisdictions, the reward payments are calculated as a proportion of the penalty imposed).[60]

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56 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

57 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

58 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 26.

59 Australian Securities and Investments Commission, *Submission 51*, p. 25.

60 Australian Securities and Investments Commission, *Submission 51*, p. 25.

11.52 Dr Lombard also argued that a bounty system may not work in Australia because the penalties for corporate wrong doing are much smaller than the US in many cases and a portion of the fine may not necessarily be attractive.[61]

Previous parliamentary inquiries did not support a bounty system

11.53 The committee notes the findings of three previous parliamentary inquiries which did not support financial reward or bounty systems:

- In 1989, the House of Representatives Legal and Constitutional Affairs Committee rejected any suggestion that a system of rewards or bounties be introduced in Australia concluding that such a system was incompatible with accepted principles and practice within Australian society.[62]
- In 1994, the Senate Select Committee on Public Interest Whistleblowing recommended that a reward system should not be considered because it would be contrary to the purpose of a scheme which should encourage the development of appropriate ethical standards.[63]
- In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into public sector whistleblower protections considered reward and bounty systems. That committee concluded that:

  > …recognising whistleblowers where they have made a contribution to the integrity of public administration sends an important message about the value of an open pro-disclosure culture. Agency heads should actively consider recognising whistleblowers within their organisation through their own existing rewards and recognition programs.[64]

Committee view

11.54 The committee has considered the experiences of other jurisdictions with whistleblower financial reward and bounty systems. The committee notes that reward systems exist in a number of jurisdictions similar to Australia, including the US and Canada. To date, reward or bounty systems have not been taken up by Australian states or territories.[65]

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61 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 52.

62 House of Representatives Legal and Constitutional Affairs Committee, *Fair shares for all: Insider trading in Australia*, October 1989, p. 45.

63 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. xiii–xxv, 228.

64 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 86.

65 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 May 2017 (received 15 Jun 2017).

11.55 The committee acknowledges that there were strong arguments put forward by both proponents and opponents of financial reward and bounty systems. However, it considers that a reward system would motivate whistleblowers to come forward with high quality information. This information would otherwise be difficult to obtain. The committee considers that a reward system will motivate companies to improve internal whistleblower reporting systems and to deal more proactively with illegal behavior.

11.56 The committee also acknowledges that the submissions that did not support a reward system in Australia focused primarily on the US style Dodd-Frank bounty system, which provide uncapped rewards to whistleblowers and have a broad focus. The arguments presented against a reward system center largely around the concern that it would establish unethical incentives to whistleblow.

11.57 The reward system proposed by the committee would place a cap on the reward being paid to a whistleblower, be reflective of the information that is disclosed and be determined against a number of criteria so as to mitigate against perceived negative consequences of a US style bounty system.

Recommendation 11.1

11.58 The committee recommends that following the imposition of a penalty against a wrongdoer by a Court (or other body that may impose such a penalty), a whistleblower protection body (such as that recommended in Chapter 12) or prescribed law enforcement agencies may give a 'reward' to any relevant whistleblower.

Recommendation 11.2

11.59 The committee recommends that such a reward should be determined within such body's absolute discretion within a legislated range of percentages of the penalty imposed by the Court (or other body imposing the penalty) against the whistleblower's employer (or principal) in relation to the matters raised by the whistleblower or uncovered as a result of an investigation instigated from the whistleblowing and where the specific percentage allocated will be determined by the body taking into account stated relevant factors, such as:

- **the degree to which the whistleblower's information led to the imposition of the penalty;**
- **the timeliness with which the disclosure was made;**
- **whether there was an appropriate and accessible internal whistleblowing procedure within the company that the whistleblower felt comfortable to access without reprisal;**
- **whether the whistleblower disclosed the protected matter to the media without disclosing the matter to an Australian law enforcement agency or did, but did not provide the agency with adequate time to investigate the issue before disclosing to the media;**
- **whether adverse action was taken against the whistleblower by their employer;**

- **whether the whistleblower received any penalty or exemplary damages (but not compensation) in connection to any adverse action connected with the disclosure; and**
- **any involvement by the whistleblower in the conduct for which the penalty was imposed, noting that immunity from prosecution, seeking a reduced penalty against the whistleblower etc. is dealt with by separate processes and that a reward would be regarded as a proceed of crime, if the whistleblower had been involved in criminal conduct (i.e. immunity or reduced penalty, not the reward is the benefit and incentive).**

Chapter 12

Whistleblower Protection Authority

12.1 This chapter discusses the committee's consideration of the best practice criterion for an oversight authority to provide oversight by an independent whistleblower investigation/complaints authority or tribunal. The best practice criteria on transparent use of legislation and requirements for internal disclosure procedures are also discussed at the end of the chapter.

Previous consideration by committees

12.2 Previous parliamentary inquiries have considered the establishment of an oversight authority or national public interest disclosure agency. In 1994, the Senate Select Committee on Public Interest Whistleblowing recommended the establishment of a public interest disclosure agency to receive disclosures, act as a clearing house, arrange for investigations, ensure protection of whistleblowers, and provide a national education program.[1]

12.3 In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into public sector whistleblower protections recommended that the Commonwealth Ombudsman be the oversight and integrity agency for whistleblowing with the following responsibilities:

- general administration of the Act under the Minister;
- set standards for the investigation, reconsideration, review and reporting of public interest disclosures;
- approve public interest disclosure procedures proposed by agencies;
- refer public interest disclosures to other appropriate agencies;
- receive referrals of public interest disclosures and conduct investigations or reviews where appropriate;
- provide assistance to agencies in implementing the public interest disclosure system including;
    - providing assistance to employees within the public sector in promoting awareness of the system through educational activities;
    - providing an anonymous and confidential advice line; and
    - receiving data on the use and performance of the public interest disclosure system and report to Parliament.[2]

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1 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. xv–xix.

2 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. xxiv.

Current arrangements

Public sector

12.4 The PID Act sets out the functions of the Ombudsman in relation to public interest disclosures, including:

- acting as an investigative agency and authorised internal recipient under the PID Act;
- investigating disclosures under the PID Act or using separate powers under the *Ombudsman Act 1976*;
- assisting principal officers, authorised officers, public officials and former public officials in relation to the operation of the PID Act;
- conducting educational and awareness programs relating to the PID Act for agencies, public officials and former public officials;
- assisting the Inspector-General of Intelligence and Security in relation to the performance of its function under the PID Act;
- determining standards relating to:
    - procedures for dealing with disclosures;
    - the conduct of investigations and the preparation of investigation reports;
    - reporting on the operation of the PID Act within agencies;
- receiving notices from agencies relating to the allocation of disclosures and decisions not to investigate disclosures;
- approving extensions for time limits of investigations and informing the discloser; and
- preparation of an annual report.[3]

12.5 In addition, the way a disclosure is allocated or investigated, or the allocation or investigation decision, may be the subject of a complaint under the *Ombudsman Act 1976*.[4] In addition the Ombudsman may also investigate actions using its own motion powers.[5]

Private sector

12.6 In the private sector there is no agency performing the equivalent independent functions that the Ombudsman performs for the public sector. However, some of the functions are required of agencies such as approving extensions to time limits by the ROC and annual reporting on investigations.[6]

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3 PID Act, sections 8, 34, 44, 49, 50A, 52, 58, 62, 73, 76.

4 *Ombudsman Act 1976*, sections 5, 5A.

5 *Ombudsman Act 1976*, subsection 5(1)b.

6 FWRO Act, sections 337CB, 329FC.

Evidence received by the committee

Oversight body

12.7 This section sets out the evidence put to the committee in support of the creation of an independent oversight agency. However, different witnesses emphasised different aspects of what they considered to be the key role and functions of an oversight agency.

12.8 Mr John Price, ASIC Commissioner, recommended that any new whistleblowing regime should be supported by an independent oversight agency.[7] GIA recommended that there be a stand-alone office of the whistleblower to be the advocate for whistleblowers.[8]

12.9 Ms Rani John, Partner, DLA Piper was also of the view that creating an independent whistleblower agency would remove a potential conflict of interest that might arise if a regulator that had carriage of a matter disclosed by a whistleblower was also given the responsibility of being a whistleblower oversight agency. [9]

12.10 Similarly, Ms Eva Scheerlinck, Chief Executive Officer, AIST, also saw the benefit in having a whistleblower agency that was separate from existing regulators, as well as having an agency with a name that is recognisable in the community.[10]

12.11 The IBACC argued that there should be an independent agency established, or a statutory office created, with clear statutory rights and powers to act on behalf of whistleblowers. The IBACC further suggested that there should be one independent agency, not separate bodies or commissions focusing on discrete sectors or industries.[11] The IBACC suggested that such a body needs to be properly funded and resourced, to act as the clearing house for whistleblower complaints and to act as applicant in any court proceedings.[12]

12.12 Dr Vivienne Brand and Dr Sulette Lombard supported the notion of a centralised whistleblowing clearing-house to remove the challenges faced by potential whistleblowers in determining to whom, how and when they should blow the whistle.

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7 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 60.

8 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 25.

9 Ms Rani John, Partner, DLA Piper Australia, *Committee Hansard*, 27 April 2017, pp. 12–13.

10 Ms Eva Scheerlinck, Chief Executive Officer, Australian Institute of Superannuation Trustees, *Committee Hansard*, 27 April 2017, p. 24.

11 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017, (received 18 May 2017).

12 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017, (received 18 May 2017).

Such an office could provide a central information and advocacy service for whistleblowers in addition to sectoral whistleblowing regulators.[13]

12.13 Ms John from DLA Piper supported the idea of a whistleblower agency to act as a clearing house, deal with vexation claims, and handle other functions:

> I think some people have talked about a 'clearing house' idea, and I see some utility in that sort of structure, particularly if it is looked at as being a place where whistleblowers go regardless of the subject matter of the allegations that they are making…It could be an agency that offers initial advice…that supports whistleblowers should they need to bring action in the event that they are facing some sort of victimisation or retaliation. But the 'clearing house' idea, which is helping the whistleblower or serving as the agency that then directs that allegation to the appropriate agency—or sends it in the appropriate direction—which relieves the whistleblower of the burden of trying to legally characterise the nature of the wrongdoing that they think that they have encountered, is, I think, a useful idea.[14]

12.14 The ACTU was of the view that a central agency with a corruption prevention focus would be the ideal body to which disclosures could be made.[15]

12.15 Ms Eva Scheerlinck indicated that the AIST would consider supporting the creation of a national anticorruption body or a specific body with the responsibility of looking at whistleblower disclosures. She argued that such a body would provide the incentives and trust that is necessary for potential whistleblowers to make disclosures.[16]

12.16 Mr Matthew Chesher informed the committee that the MEAA supported the establishment of a statutory office or a public interest disclosure panel with broad-based membership to investigate whistleblower claims, as whistleblowers do not presently have an advocate and a body that they can trust.[17]

12.17 Mr Jordan Thomas informed the committee that the confidence that the public has in the relevant enforcement agency determines how frequently they will use it, because if people do not believe the organisation will aggressively investigate and prosecute the tip, they will not expose themselves to that risk.[18]

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13 Dr Vivienne Brand and Dr Sulette Lombard, *Answers to questions on notice*, 27 April 2017, (received 18 May 2017).

14 Ms Rani John, Partner, DLA Piper Australia, *Committee Hansard,* 27 April 2017, pp. 10–11.

15 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 27 April 2017, p. 16.

16 Ms Eva Scheerlinck, Chief Executive Officer, Australian Institute of Superannuation Trustees, *Committee Hansard*, 27 April 2017, p. 21.

17 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

18 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

12.18 Mr Thomas also drew the committee's attention to some examples in the US in which enforcement action had been taken in relation to reprisals against a whistleblower. The first case involved the sacking of a whistleblower:

> The Commission [SEC] brought a first-of-its-kind enforcement action in September 2016, when it brought a stand-alone whistleblower retaliation case against casino-gaming company, International Game Technology (IGT). The company agreed to pay a half million dollar penalty for firing an employee with several years of positive performance reviews because the employee had reported to senior management and the SEC that the company's financial statements might be distorted. As this case demonstrates, strong enforcement of the anti-retaliation protections is a critical component of the SEC's whistleblower program.[19]

12.19 The second case involved a company trying to prevent an employee from blowing the whistle by threatening them with a large financial penalty:

> In September 2016, the Commission [SEC] filed an action against Anheuser-Busch InBev SA/NV, in which the company agreed to settle charges that it violated Exchange Act Rule 21F-17(a), among other violations, by entering into a separation agreement that stopped an employee from continuing to voluntarily communicate with the SEC due to a substantial financial penalty that would be imposed for violating strict non-disclosure terms. As this case demonstrates, companies simply cannot impede their employees' ability to report wrongdoing to the agency through threats of financial punishment.[20]

12.20 Ms Julia Angrisano explained that the FSU supports the creation of an independent statutory body empowered to receive, investigate and determine all matters relating to whistleblower disclosure and protections because the FSU does not have confidence in the current internal whistleblowing regimes within the finance industry. She argued that the ability for employees to lodge their disclosures with an independent external party will encourage more employees to report unethical and unlawful behaviours.[21]

12.21 Transparency International argued that the task of oversighting effective whistleblower protection in the corporate and not-for-profit sectors is sufficiently specialised and that it is difficult that no existing agency is well placed to undertake the key oversight and implementation roles. Nevertheless, Transparency International recognised that any new whistleblower protection agency would need to be 'well integrated with existing avenues for employment remedies' such as Fair Work

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19 Mr Jordan Thomas, *Submission 70*, Exhibit D, US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 2.

20 Mr Jordan Thomas, *Submission 70*, Exhibit D, US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 2.

21 Ms Julia Angrisano, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 28 April 2017, p. 9.

Australia, the Fair Work Ombudsman, the Federal Circuit Court and workplace health, safety and compensation systems.[22]

12.22 Transparency International suggested that an oversight agency focus on:

- supporting and protecting whistleblowers;
- providing advice to whistleblowers and agencies;
- 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.[23]

12.23 Professor A J Brown drew a clear distinction between investigation and oversight. In his view, the investigative function, that is the investigation of the alleged or actual wrong-doing exposed by whistleblowers, should be undertaken by already-existing regulatory agencies.[24]

12.24 In addition to the existing role of regulators, however, Professor Brown saw a real need for an independent whistleblowing oversight agency that would:

- play an active role in advising whistleblowers, supporting whistleblowers, and making sure that whistleblowers can access legal remedies; and
- provide advice and guidance to companies and entities about what best practice looks like and working with regulatory agencies and investigative agencies to support whistleblowers and ensure the process works effectively.[25]

12.25 In arguing the case for a new independent whistleblowing agency, Professor Brown emphasised that:

- firstly, no existing Commonwealth regulatory agency has a sufficiently broad jurisdiction to take on the support, protection and oversight function on behalf of all regulators; and

22 Transparency International, *Answers to questions on notice*, 11 and 27 April 2017 (received 18 May 2017).

23 Transparency International, *Answers to questions on notice*, 11 April 2017 (received 17 May 2017).

24 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

25 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 15 June 2017, p. 2.

- secondly, it is desirable that the investigative responsibilities of regulators are kept separate from the support and protection responsibilities provided by a new agency.[26]

Tribunals

12.26 This section summarises evidence received by the committee about whistleblower tribunals, including existing tribunals in other countries, and suggestions for a tribunal in Australia.

Examples of whistleblower tribunals

12.27 Professor Brown informed the committee that in the UK, the public interest disclosure regime is fully embedded in the employment relations legislation with a specific avenue for the treatment of public interest disclosures.[27]

12.28 Mr Howard Whitton, Director, The Ethicos Group, provided further information about the advantages of the tribunal approach taken in the UK:

> The one innovation which I thought was worth noting in 1998 was to treat retaliation or workplace reprisal as a workplace matter, which is then put through the workplace tribunals, rather than to criminalise it as we did here, which, I think, raised the bar too high, which was one of the reasons we did not get much action by way of response to retaliation, whereas the British did, and when I last looked at the website of Public Concern at Work, hundreds of cases had been settled through the tribunals, and compensation had been paid. In one case 780,000 pounds was paid to a finance officer who blew the whistle on his parent company in the United States, which was illegally paying secret bonuses to executives.[28]

12.29 Clifford Chance noted that the UK tribunal operates with a reverse burden of proof, once all the necessary elements of a whistleblowing claim are established.[29] However, for employees with less than two years' service, the burden of proof remained with the whistleblower.[30]

12.30 The Breaking the Silence report revealed that the expense of running a whistleblowing case in the UK may lead to many cases settling before going to the employment tribunal. This has resulted in extensive use of 'gagging clauses' whereby a whistleblower accepts a settlement in return for silence. This has occurred despite a

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26 Professor A J Brown, Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

27 Professor A J Brown, Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, pp. 24, 26.

28 Mr Howard Whitton, Director, The Ethicos Group, *Committee Hansard*, 23 February 2017, pp. 9–10.

29 Clifford Chance, *Submission 9*, p. 6.

30 Simon Wolfe, Mark Worth, Sulette Freyfus, A J Brown, *Breaking the Silence, Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 67.

ban on such clauses in the UK public interest disclosure laws. The Breaking the Silence report expressed grave concern about this practice because the use of gag clauses is incompatible with the tenets of disclosing information in the public interest:

> These 'non-disparagement clauses' are counterintuitive to the release of information in the public interest to the public domain and removes the focus on rectifying wrongdoing. In 2013 the Francis Report found: 'non-disparagement clauses are not compatible with the requirements that public service organisations in the healthcare sector, including regulators, should be open and transparent'.[31]

12.31 Canada has a Public Servants Disclosure Protection Tribunal where retaliation victims can seek remedies and compensation. If a person suffers a reprisal, they are required to notify the Integrity Commissioner of Canada within 60 days. If after an investigation, the Commissioner has reasonable grounds to believe that reprisal has occurred, the matter is referred to the Public Servants Disclosure Protection Tribunal. The Tribunal is a quasi-judicial body independent from government and is composed of judges of the Federal Court or a superior court of a province. It can order disciplinary sanctions against those who conducted reprisals.[32] Remedies that could be ordered by the tribunal include:

- a return to duties or reinstatement;
- compensation in lieu of a reinstatement;
- compensation equal to the remuneration lost or to a penalty;
- rescinding of any disciplinary action;
- payment of expenses and financial losses resulting directly from the reprisal; and
- compensation up to $10,000 for pain and suffering.[33]

Suggestions for a tribunal in Australia

12.32 The committee received a range of suggestions for a tribunal in Australia. Most of these submitters and witnesses viewed a tribunal system as less time-consuming and less costly than the court system. However, some submitters pointed out that a tribunal that reviewed a case involving a whistleblower would need to be able to offer a different level of compensation to that typically awarded by tribunals involved in determining matters arising solely from employment legislation.

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31 Simon Wolfe, Mark Worth, Sulette Freyfus, A J Brown, *Breaking the Silence, Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 67.

32 Office of the Public Sector Integrity Commissioner of Canada, *Process for Handling Reprisals*, http://www.psic.gc.ca/eng/reprisal/process-handling-reprisals (accessed 17 May 2017); Public Servants Disclosure Tribunal Canada, http://www.psdpt-tpfd.gc.ca/Home-eng.html (accessed 17 May 2017).

33 Public Servants Disclosure Tribunal Canada, http://www.psdpt-tpfd.gc.ca/MenuBottom/FAQs-eng.html?zoom_highlight=compensation (accessed 17 May 2017).

12.33 Clayton Utz argued in favour of a tribunal observing that currently whistleblowers must bear the significant financial burden of unilaterally enforcing their whistleblower protections in the courts. A tribunal would be a more appropriate forum, as the informal evidentiary rules, reduced time costs and reduced financial expense would better facilitate the progress of claims.[34]

12.34 The Law Council considered that a whistleblower's access to compensation should be accessible and low cost. The Law Council supported a review to ascertain whether a court is the right forum to consider a claim for compensation.[35]

12.35 ASIC noted the importance of establishing a clear pathway for employees and non-employees to make a compensation claim. ASIC indicated that a tribunal could be a new body or an existing tribunal such as the Fair Work Commission or Administrative Appeals Tribunal. ASIC suggested that the tribunal would require similar availability and expertise to the Fair Work Commission. [36]

12.36 Mr Trevor Clarke from the ACTU was of the view that the court system is not very good at fully compensating people for what they may have suffered in making a disclosure in the public interest.[37]

12.37 The MEAA also noted that one of the challenges with court based processes for compensation is that decisions can be appealed through multiple court systems.[38]

12.38 The Queensland Council of Unions argued that in their view, employment related tribunals have only been able to grant limited and inadequate compensation for unfair dismissals. They therefore cautioned against implementing a similarly limited tribunal approach for whistleblowers because it would not encourage potential whistleblowers to speak out.[39]

12.39 Professor Brown suggested that, as well as working closely with regulatory and integrity agencies, a whistleblower oversight 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). Professor Brown noted that this would prevent the need for any new or additional tribunal to be created.[40]

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34 Clayton Utz, *Submission 4*, p. 2.

35 Law Council of Australia, *Submission 52*, p. 16.

36 Australian Securities and Investments Commission, *Submission 51*, pp. 5, 24.

37 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 27 April 2017, pp 18–19.

38 Mr Matthew Chesher, Director, Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 29.

39 Queensland Council of Unions, *Submission 3*, p. 2.

40 Professor A J Brown, Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

Investigation of reprisals

12.40 During the inquiry it came to the committee's attention that there is a significant gap in the capacity for reprisals or workplace retaliation to be investigated in both the public and private sectors. This section summarises the committee's consideration of that gap.

12.41 Before looking at this evidence, however, the committee makes a distinction between two types of investigative functions. The first type of investigation would be into the alleged or actual wrongdoing exposed by a whistleblower. As noted above, the evidence before the committee strongly suggested that, in the private sector, this should continue to be the domain of existing regulators. The second type of investigation would be into alleged or actual reprisals that have been taken against actual or suspected whistleblowers. Evidence relating to the ability to conduct investigations into alleged reprisals is discussed below.

12.42 The Moss Review noted that a reprisal against a discloser is an offence under the PID Act as well as grounds for disclosable conduct (as a breach of Commonwealth law). The Moss Review recommended that the PID Act be amended to continue to include reprisals within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.[41]

12.43 Both the FWRO Act and the Corporations Act contain provisions for reprisals or threats of reprisals. As a result, a reprisal may be a contravention of those Acts and therefore also come within the definition of disclosable conduct.[42]

12.44 A reprisal or threat of reprisal fitting within the definition of disclosable conduct would provide whistleblowers with an important avenue for redress. In particular, both the PID Act and the FWRO Act require disclosure to be investigated if certain criteria are met.[43] As a result, it would appear that both those Acts therefore require disclosures about reprisals to be investigated. However, as is discussed in the next section, other legislation may prevent such investigations from occurring.

12.45 In contrast to the PID Act and the FWRO Act, the Corporations Act does not appear to have a positive requirement to investigate disclosures. ASIC does have the power to investigate contraventions of the Corporations Act. However, ASIC informed the committee that its practice is only to investigate reprisals if that would assist in investigating the primary matter that was the subject of the original disclosure of misconduct.[44]

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41 Recommendation 6, Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 34.

42 FWRO Act, sections 6, 337BE; Corporations Act, Sections 1317AA, 1317AC.

43 PID Act, Division 2; FWRO Act, Division 3.

44 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Regional Commissioner, Victoria, ASIC, *Committee Hansard*, 16 June 2017, p. 60.

The Ombudsman's power to investigate allegations of reprisal in the public sector

12.46 Section 46 of the PID Act indicates that complaints can be made to the Ombudsman about the way a disclosure has been investigated:

> The way a disclosure is investigated (or a refusal to investigate a disclosure) may be the subject of a complaint to the Ombudsman under the *Ombudsman Act 1976*, or (in the case of an intelligence agency) to the IGIS under the *Inspector-General of Intelligence and Security Act 1986*.[45]

12.47 Furthermore, reprisals fall within the definition of disclosable conduct (a reprisal is an offence under the PID Act, and being a breach of any Commonwealth law, would meet the threshold for being disclosable conduct). It appears, therefore, that a complaint to the Ombudsman about the way a disclosure has been investigated could also include a complaint about the way a disclosure about a reprisal has been investigated.

12.48 During the inquiry it came to the committee's attention that whistleblowers had an expectation under the PID Act that the Ombudsman may be able to assist them with investigations into reprisals.

12.49 However, subsection 5(2d) of the *Ombudsman Act 1976* states that the Ombudsman is not authorized to investigate:

> …action taken by anybody or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment, including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person.[46]

12.50 In answers to questions on notice, the Commonwealth Ombudsman confirmed that:

> If a discloser alleges that they are subject to reprisal action, the OCO [Office of the Commonwealth Ombudsman] advises the discloser to use the protections of the PID Act, namely: seek legal advice, contact the police, submit an application to the Federal Court or the Federal Circuit Court or contact the PID risk assessment officer within the agency.
>
> The OCO is not a law enforcement agency, nor can our Office provide a person with available remedies under the PID Act. The OCO does not have the jurisdiction to investigate whether or not reprisal action has occurred.[47]

12.51 This would appear to rule out the Ombudsman investigating any allegation of reprisal or disclosure of an alleged reprisal relating to a person's employment. In others words, the Moss Review finding and recommendation that reprisal be

45 PID Act, Note to section 46.

46 *Ombudsman Act 1976*, subsection 5(2d).

47 Commonwealth Ombudsman, *Answers to questions on notice*, 7 June 2017 (received 22 June 2017).

including in disclosable conduct is unlikely to be effective for any reprisal related to employment.

Committee view

12.52 The following sections present the committee's views on the following matters:

- the investigation of public interest disclosures in the public sector by the Commonwealth Ombudsman;
- the investigation of public interest disclosures in the private sector by regulators;
- the investigation of reprisals;
- a Whistleblower Protection Authority for the public and private sectors;
- consistent investigations of disclosure and reprisals;
- requirements for internal disclosure procedures;
- transparent use of legislation; and
- a statutory post-implementation review

The investigation of public interest disclosures in the public sector by the Commonwealth Ombudsman

12.53 As noted earlier, the committee draws a distinction between the investigation of a public interest disclosure and the investigation of an alleged reprisal arising from a disclosure. The committee begins by considering the ability of the Commonwealth Ombudsman to exercise independent investigative oversight in the Commonwealth public sector into the substance of a public interest disclosure.

12.54 The committee understands that the Ombudsman has the requisite powers to investigate the substance of a disclosure, for example, in cases where the Ombudsman forms the view that there may be of conflict of interest within an agency that may prevent that agency from satisfactorily conducting an investigation, or where the Ombudsman is of the view that the substance of the disclosure merits investigation by the Ombudsman. The Ombudsman indicated that it has investigated the substance of a disclosure in about five per cent of cases.[48]

12.55 Beyond the Ombudsman making a decision as to whether to conduct its own initial investigation into a public interest disclosure, a question arises about how the Ombudsman conducts an investigation into a complaint about the way another agency has handled a public interest disclosure.

12.56 For example, the committee received confidential submissions and correspondence from public sector whistleblowers alleging that, following a whistleblower complaint about an agency's handling of a public interest disclosure,

48 Ms Nicola Dakin, Director, Public Interest Disclosure Team, Integrity Branch, Office of the Commonwealth Ombudsman, *Committee Hansard*, 28 April 2017, p. 50.

the Commonwealth Ombudsman only reviewed how the administrative aspect of the disclosure process was handled by the agency, rather than undertaking an investigation into the substance of the public interest disclosure itself. The committee notes that while an administrative review (including, for example, whether the agency conducted a risk assessment) is a common approach for the Ombudsman, the Ombudsman is not limited to that approach because, if the evidence demonstrated a need, the Ombudsman could undertake an investigation under its own motion powers.[49]

12.57 The committee is concerned that there may be a shortfall in the number of independent public interest disclosure investigations in the Commonwealth public sector. In the committee's view, effective oversight of a public interest disclosure regime in the public sector would include, where necessary, a rigorous investigation into the substance of a public interest disclosure.

The investigation of public interest disclosures in the private sector by regulators

12.58 The process for the substantive investigation of a public interest disclosure in the private sector is necessarily different from that pertaining to the public sector, partly due to the differing nature of the public interest and private interests in the two sectors, and also to the differences between the role of an Ombudsman and the role of a regulator.

12.59 The committee anticipates that under the legislative changes it is proposing for the private sector, a whistleblower would be able to make a protected disclosure internally within their organisation, or directly to the relevant regulator, either simultaneously, subsequent to an internal disclosure, or instead of an internal disclosure. In the case of a disclosure to the relevant regulator, the committee expects that the regulator would investigate the substance of the disclosure and that the whistleblower would be informed of the outcome of the investigation.

The investigation of reprisals

12.60 While the committee has not had the opportunity to gather further data, the committee considers that it is highly likely that a large proportion of reprisals are employment related. As a result, there may, at present, be no mechanism for a whistleblower to have an allegation of reprisal investigated.

12.61 Evidence to the inquiry (including confidential evidence) appears to indicate a misconception amongst whistleblowers about the powers of the Commonwealth Ombudsman with respect to the investigation of reprisals. Having said that, it seems to the committee that, taking the PID Act at face value, a whistleblower could reasonably believe that a reprisal would be investigated by an independent agency, because a reprisal is likely to qualify as disclosable conduct under section 29 of the PID Act. Yet, paragraph 5(2)(d) of the *Ombudsman Act 1976* effectively prevents, for all practical purposes, the Commonwealth Ombudsman from investigating reprisals.

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49 See *Ombudsman Act 1976*, section 5(1)b.

12.62 Part of the difficulty in drawing firm conclusions in this area lies in trying to separate a complaint about the investigation of a disclosure from an allegation that reprisal action associated with the disclosure has also occurred, particularly when other factors such as workplace performance may be contemporaneous with the initial public interest disclosure. Nevertheless, the committee heard from whistleblowers who stated that, having lodged a complaint of reprisal with the Ombudsman, the Ombudsman was only able to refer the allegation back to the agency that had conducted the original investigation into the disclosure, or direct the whistleblower to the Fair Work Commission or the courts.

12.63 The Ombudsman confirmed that its practice is to advise whistleblowers who have suffered reprisal to contact relevant officers in their agency, the police, or seek remedies through the courts. The Ombudsman also indicated that it has referred a disclosure about a reprisal back to the original agency for investigation.[50] In the case of a referral back to the agency that may involve an allegation of reprisal, the committee draws attention, in general terms, to the fact that the Ombudsman would be referring a case back to the same agency that, if the allegation had substance, had failed to adequately protect the whistleblower from reprisal action in the first place.

12.64 The committee was further concerned to discover that when a reprisal allegation is referred back to the original agency for investigation, the Commonwealth Ombudsman does not have any jurisdiction to monitor the agency's investigation of the reprisal.[51]

12.65 It appears, therefore, that the only other avenue currently available to whistleblowers for redress is to pursue their rights under the PID Act in the courts. The Moss Review indicated that compensation provisions are one of the most essential sources of help for whistleblowers. However, the Moss Review noted that the PID Act provisions were yet to be tested in litigation, in spite of 75 per cent of respondents to the Moss Review online survey indicating that they had experienced a reprisal after making a disclosure.[52]

12.66 The Moss Review found that there have been no successful litigations for reprisal actions in the Commonwealth public sector.[53] The committee draws attention to the following excerpt from the Commonwealth Ombudsman's submission to the Moss Review:

> We are not aware of any case where a prosecution has been brought under the PID Act for alleged reprisal action. Nor are we aware of any case where a discloser, or person suspected to be a discloser, has taken civil action in the Federal Court or Federal Circuit Court under any of the reprisal

50 Commonwealth Ombudsman, *Answers to questions on notice*, 7 June 2017 (received 22 June 2017).

51 Commonwealth Ombudsman, *Answers to questions on notice*, 7 June 2017 (received 22 June 2017).

52 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 34.

53 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 57.

> provisions in the PID Act. However, we have received several complaints from disclosers who believe they have suffered reprisal but consider court action beyond their means.[54]

12.67 The committee heard from several whistleblowers who have taken a case of alleged reprisal to the Fair Work Commission or to court. As this juncture, all have been unsuccessful.

12.68 A common theme arising from correspondence to the committee was that whistleblowers not only felt aggrieved by what had happened to them, but that they were also 'deep-pocketed' by their agency in the Fair Work Commission or court process.

12.69 The committee emphasises that it is not the committee's role to seek to draw any conclusion on the merits of particular cases. Nevertheless, it is of great concern to the committee that there is a manifest and systemic power imbalance in the Fair Work Commission or court process between the resources available to an individual and the resources available to a taxpayer-funded public sector agency or department. Furthermore, if a whistleblower has been sacked as a reprisal for their disclosure, it seems unlikely to the committee that they would have the financial resources to attempt litigation.

12.70 In this regard, the committee notes the evidence from Professor Brown who informed the committee that most whistleblowers find the cost of accessing compensation prohibitive:

> One of the things we have learnt from whistleblower compensation provisions internationally, and certainly in Australia, is that in the vast majority of circumstances, no matter what you do to create compensation avenues, they will not get accessed by people who have already been through enough so that it is simpler to just walk away, even though it is highly in the public interest that those compensation avenues actually get triggered not just for the interests of compensation and fairness for the whistleblower but for the purposes of actually changing the way in which everybody handles this and takes it seriously.[55]

12.71 The committee recognises that the existing protections are an important step forward and may provide some incentives for organisations to do the right thing by whistleblowers. However, the committee considers that the lack of a capacity to investigate reprisals, and the obstacles to pursuing redress through the courts, are among the biggest impediments to effective whistleblower protections. Without a mechanism to investigate and seek redress for reprisals, whistleblower protections are only theoretical. Indeed, without a capacity to thoroughly investigate allegations of reprisal, access to appropriate remedies and compensation, and enforcing liability against those who have taken reprisal action, there is no real capacity for

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54 Commonwealth Ombudsman, *Submission to the Moss Review of the Public Interest Disclosure Act 2013 (Cth)*, March 2016, p. 14.

55 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Committee Hansard*, 15 June 2017, p. 4.

whistleblowers to be protected and no way to effectively deter reprisal activity or hold those who have taken reprisal action accountable.

Whistleblower Protection Authority

12.72 The amendments to the whistleblower protections in the FWRO Act indicate a potential approach that could be implemented in the public and private sectors more generally. As noted above, an allegation of reprisal is disclosable conduct under the FWRO Act. Therefore, it appears to the committee that the Fair Work Ombudsman would have the jurisdiction to investigate reprisals in registered organisations, as the Fair Work Ombudsman is able to receive and investigate disclosures under subsection 337A(1b) and section 337CA of the FWRO Act.[56]

12.73 While noting that the Fair Work Ombudsman may be able to investigate an allegation of reprisal taken against a whistleblower in a registered organisation, the committee does not intend to prescribe whether an existing agency, such as the Fair Work Ombudsman, should be tasked with taking on a broader role of investigating allegations of reprisal activity in the private sector more generally. In part, this stems from a recognition that any investigative agency would need to build up the resources and a requisite skills base in order to undertake such a task. Nevertheless, following on from the discussion above, the committee is of the view that an independent body to investigate allegations of reprisals is required in both the Commonwealth public sector and the private sector more broadly. In order for such an arrangement to be effective, the committee notes that attention would need to be given to addressing any carve outs in other legislation that would prevent such an investigative body from using its powers.

12.74 The committee considers that there are several benefits to having an independent body with the power to investigate reprisals, including that it would:

- overcome the current inability to conduct independent investigations of alleged reprisal activity in the public sector;
- avoid reprisal investigations being undertaken by the agency in which the allegation of reprisal occurred;
- be consistent with, and expand, the approach taken for the registered organisations whistleblower protections and provide a consistent approach across the public and private sectors;
- alleviate the lack of specific requirements in the Corporations Act to investigate reprisals; and
- allow ASIC and other regulators to focus their investigations on instances of serious misconduct revealed by whistleblowers in their original disclosure.

12.75 The committee notes that there would need to be appropriate provision for inter-agency information sharing to ensure that:

- investigations can be conducted effectively; and

56 FWRO Act.

- any information regarding the original misconduct identified in the reprisal investigation could be provided to the appropriate regulator.

12.76 The committee is strongly of the view that the capacity to investigate reprisals is an essential ingredient of an effective whistleblower protection system. The committee is therefore recommending that the public and private sector whistleblower legislation include specific requirements for the investigation of reprisals by a designated independent body with the requisite powers.

12.77 As discussed earlier, the committee is mindful that, under the current tribunal system operated by the Fair Work Commission, it is still perfectly possible for a public sector agency, private corporation or registered organisation to deep-pocket an individual whistleblower. It is for this reason that the committee is proposing that the government consider holistically the recommendations made in this chapter including those relating to the ability of a whistleblower protection authority to pursue selected cases relating to workplace retaliation through a tribunal system on behalf of a whistleblower.

12.78 Evidence to the committee also emphasised the vital importance of a recognisable name for any whistleblower protection agency. With this in mind, the committee considers that the name should make it clear that the agency exists to serve whistleblowers as its primary purpose. Assistance to, and oversight of, agencies is therefore a necessary, but secondary, function. For the purposes of this report, the committee has used the name Whistleblower Protection Authority.

12.79 The committee considers that a Whistleblower Protection Authority would need to exercise the following functions:

- provide a clearing house for whistleblowers bringing forward public interest disclosures;
- provide advice and assistance to whistleblowers;
- support and protect whistleblowers, including by:
    - investigating non-criminal reprisals in the public and private sectors; and
    - taking non-criminal matters to the workplace tribunal or courts on behalf of whistleblowers or on the agency's own motion to remedy reprisals or detrimental outcomes in appropriate cases.

12.80 One of the issues that arises in any consideration of a new agency is where that agency sits within the Commonwealth, whether there is an existing framework within which it could be appropriately housed, and also whether such an agency is a 'one-stop-shop', or whether there is some delineation between the public and private sector functions.

12.81 The committee considered alternative approaches with various aspects of whistleblower protections spread across the Commonwealth Ombudsman, another body performing similar oversight functions for the private sector and a further existing or new body to conduct investigations of reprisals. The committee concluded that there were no easy solutions for existing bodies to fill those roles.

12.82 The committee also considered the creation of a one-stop-shop Whistleblower Protection Authority to cover both the public and private sectors. The committee considers that there would be certain efficiencies in consolidating various whistleblower functions in the one organisation. In this case, the committee notes that the whistleblower protection oversight functions for the public sector that currently reside with the Commonwealth Ombudsman would need to be transferred to the new authority.

12.83 With these considerations in mind, the Whistleblower Protection Authority should be established in a suitable existing body.

Recommendation 12.1

12.84 The committee recommends that a one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors as follows:

- **a Whistleblower Protection Authority be established in an appropriate existing body;**
- **a Whistleblower Protection Authority be prescribed as an investigative agency with power to investigate criminal reprisals and make recommendations to the Australian Federal Police or a prosecutorial body and non-criminal reprisals against whistleblowers;**
- **a Whistleblower Protection Authority have power to investigate and oversight any investigation of a non-criminal reprisal undertaken by a regulator or public sector agency;**
- **a Whistleblower Protection Authority be prescribed to take non-criminal matters to the workplace tribunals or courts on behalf of whistleblowers or on the authority's own motion to remedy reprisals or detrimental outcomes in appropriate cases;**
- **any other necessary legislative changes are made to ensure that a Whistleblower Protection Authority is able to investigate non-criminal reprisals, including providing it with appropriate powers to obtain the necessary information;**
- **that the public sector whistleblower protection oversight functions be moved from the Commonwealth Ombudsman to the Whistleblower Protection Authority;**
- **that the Whistleblower Protection Authority, in consultation with relevant law enforcement agencies, approve the payment of a wage replacement commensurate to the whistleblower's current salary to a whistleblower suffering adverse action or reprisal; and**
- **that the Whistleblower Protection Authority have the oversight functions for the private sector excluding the functions relating to the Inspector-General of Intelligence and Security.**

Recommendation 12.2

12.85 The committee recommends that where a whistleblower is the subject of reprisals from their current employer, or a subsequent employer/principal due to their whistleblowing, the Whistleblower Protection Authority be authorized, after consulting with relevant law enforcement agencies to which the conduct relates, to pay a replacement wage commensurate to the whistleblower's current salary as an advance of reasonably projected compensation until the resolution of any compensation or adverse action claim brought by the whistleblower (where such advance payment would be repaid to the Whistleblower Protection Authority from such compensation if awarded).

Consistent investigations of disclosures and reprisals

12.86 As discussed earlier, the committee notes that, by implication, an allegation of reprisal would appear to meet the threshold for disclosable conduct under the PID Act. The committee further notes that the Moss Review recommended including reprisals in the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.[57] In other words, the Moss Review recommended making explicit what is already implicit under the PID Act. The committee considers that if the government were minded to implement recommendation 6 from the Moss Review, it would be appropriate, for the sake of consistency, for the definition of disclosable conduct in private sector whistleblower protections to explicitly include reprisals in the same way.

Recommendation 12.3

12.87 The committee recommends that, if the Government implements legislation as per the Moss Review recommendation 6, that a Whistleblowing Protection Act should include consistent whistleblower protection between the public and private sectors and include reprisals within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.

Recommendation 12.4

12.88 The committee recommends that a Whistleblowing Protection Act include specific requirements for the investigation of disclosures and reprisals that are consistent with the present *Public Interest Disclosure Act 2013* and the *Fair Work (Registered Organisations) Act 2009.*

12.89 Beyond the ability to effectively investigate allegations of reprisal, the committee also recognises the importance of establishing a mechanism that would allow for the equitable determination of reprisal cases.

57 Recommendation 6, Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 34.

12.90 Recognising that there have been no successful cases brought under the PID Act, the committee also acknowledges the argument that prescribing reprisals as a criminal offence under the Corporations Act may have set the bar too high. The committee is of the view that a criminal offence may be appropriate in certain circumstances. Nevertheless, the committee also considers that, as currently provided for in both the PID Act and the FWRO Act,[58] it is vital that a whistleblower should be able to access civil remedies without first needing to prove a criminal case.

Recommendation 12.5

12.91 The committee recommends that the public and private sector whistleblower legislation include consistent provisions that allow civil proceedings and remedies to be pursued if a criminal case is not pursued.

12.92 Related to this, the committee is persuaded by the evidence from Mr Howard Whitton, amongst others, that retaliation or workplace reprisal should be treated as a workplace matter, which would then be dealt with through the workplace tribunal system.[59] The committee considers that such an approach could occur after there has been an investigation by the Whistleblower Protection Authority. The committee also notes its earlier recommendation that the Whistleblower Protection Authority be prescribed to take matters to the workplace tribunal on behalf of whistleblowers or on the authority's own motion to remedy reprisals or detrimental outcomes in appropriate cases.

12.93 Further to this, the committee is of the view that the compensation available to whistleblowers through a tribunal system should be uncapped.

Recommendation 12.6

12.94 The committee recommends that the compensation obtainable by a whistleblower through a tribunal system be uncapped.

Requirements for internal disclosure procedures

12.95 The committee heard evidence from Professor Brown on the importance of the requirements for internal disclosure procedures,[60] particularly given the research indicating the weakness and inconsistency of many of these internal processes and procedures.[61]

12.96 Section 59 of the PID Act sets out the positive obligations on the principal officers of agencies to establish procedures for facilitating and dealing with

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58 PID Act, section 19A; FWRO Act, section 337BF.

59 Mr Howard Whitton, Director, Ethicos Group, *Committee Hansard*, 23 February 2017, pp. 10–11.

60 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 4.

61 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Committee Hansard*, 15 June 2017, p. 1.

disclosures. The committee notes that section 59 of the PID Act is given greater effect by section 74 of the PID Act which relates to internal disclosure procedures. Section 74 of the PID Act provides for the Commonwealth Ombudsman to determine standards for:

- procedures, to be complied with by the principal officers of agencies, for dealing with internal disclosures and possible internal disclosures;
- the conduct of investigations;
- the preparation of reports of investigations; and
- the giving of information and assistance and the keeping of records.[62]

12.97 The committee notes that section 74 of the PID Act is not prescriptive on the detail of the standards. The committee considers that the Whistleblower Protection Authority should have a similar power to set standards for internal disclosure procedures in the private sector, in consultation with the private sector.

12.98 The committee also understands that while a previous Australian standard for whistleblower protections is no longer in force, work is underway to establish a new whistleblower protections standard through the International Standards Organisation and Standards Australia, which may be available in 2020.[63]

12.99 The committee considers that such a standard may have the potential to form the basis of standards set by a Whistleblower Protection Authority in both the public and private sectors. Until such a standard becomes available, the committee considers that it would be appropriate for a Whistleblower Protection Authority to set the standards in the private sector.

Recommendation 12.7

12.100 The committee recommends that the Whistleblower Protection Authority be given powers to set standards for internal disclosure procedures in the public sector (where internal disclosure should be mandated before external disclosures are permitted) and private sector (which may include mandatory internal disclosures in organisations above a prescribed size and recommended approaches for others).

62 PID Act.

63 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Answers to questions on notice*, 24 May 2017 (received 30 May 2017).

Transparent use of legislation

12.101 The committee comments on two aspects of the best practice criterion on the transparent use of legislation: annual reporting, and confidentiality clauses in employer-employee settlements.

Annual reporting

12.102 The Breaking the Silence report notes that the best practice criterion for whistleblower legislation on the transparent use of legislation relates to:

> Requirements for transparency and accountability on use of the legislation (e.g. annual public reporting, and provisions that override confidentiality clauses in employer-employee settlements).[64]

12.103 The committee considers that the Whistleblower Protection Authority recommended above would be well-placed to report annually to Parliament on the effective operation of whistleblower laws in both the public and private sectors. The committee considers that, as part of a single report, it would be appropriate for both the public and private sector aspects of the annual report to be closely aligned in format and content to facilitate comparison of the effectiveness of the two systems.

Recommendation 12.8

12.104 The committee recommends that the Whistleblower Protection Authority provide annual reports to Parliament, and that the information on the public and private sectors be closely aligned in format and content to facilitate comparison.

Confidentiality clauses in employer-employee settlements

12.105 The committee notes that section 10 of the PID Act, subsection 337(B) of the FWRO Act, and subsection 1317AB(1) of the Corporations Act all have various provisions that provide for a public interest disclosure to override confidentiality clauses in employer-employee settlements. The committee considers it appropriate for such provisions to be harmonised across the public and private sectors by taking the best aspects of such provisions from the PID Act, FWRO Act and the Corporations Act.

Recommendation 12.9

12.106 The committee recommends that provisions that override confidentiality clauses in employer-employee agreements or settlements be made consistent in public and private sector whistleblower legislation (including maintenance of public sector security and intelligence exceptions).

Recommendation 12.10

12.107 The committee recommends that it be made explicit in a Whistleblowing Protection Act that nothing in the legislation allows for or permits a breach of legal professional privilege.

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64 Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 6.

Post-implementation review

12.108 The committee considers that, given the substantial changes recommended in this report, it would be appropriate for a post-implementation review to be included as a statutory requirement. The committee notes that the Moss Review of the PID Act provides an appropriate precedent as a post-implementation review was a statutory requirement of the PID Act itself.[65] The committee considers that three years would be an appropriate timeframe for a post-implementation review.

12.109 The committee also notes that while whistleblower protections may appear to increase the regulatory burden on business, if implemented carefully, it would only be a significant burden to businesses with significant misconduct problems and poor reporting cultures. Businesses that have no misconduct and already facilitate good reporting and disclosure will have no burden from whistleblower protections and will be more competitive with those businesses that were previously gaining an unfair advantage through misconduct. The committee considers it would be important for the post implementation review to examine the extent to which whistleblower protections had levelled the field for business with integrity.

Recommendation 12.11

12.110 The committee recommends that there be a statutory requirement for a post-implementation review of the new whistleblower legislation, within a prescribed time.

Mr Steve Irons MP

Chair

65 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 1.

Appendix 1

Submissions, tabled documents and answers to questions on notice received by the Committee

Submissions

1 Name Withheld

2 Name Withheld

3 Queensland Council of Unions

4 Clayton Utz

5 Ms Karen Hutchinson

6 Dr Michael Cole

7 Australian Law Reform Commission

8 DLA Piper Australia

9 Clifford Chance

10 Finance Sector Union of Australia

11 The Ethics Centre

12 Australian Competition and Consumer Commission (ACCC)

13 Office of the Queensland Ombudsman

14 Dr Vivienne Brand & Dr Sulette Lombard

15 Transparency International Australia

16 Mr Spencer Murray

17 Queensland Integrity Commissioner

18 Dr Juliette Overland

19 Mr Dennis Gentilin

20 Professor Anona Armstrong

21 The Institute of Internal Auditors - Australia

22 Mr Peter Bennett

23 Professor A J Brown

24 Australian Institute of Superannuation Trustees

25 Victorian Trades Hall Council

26 Australian Charities and Not-for-profits Commission

27 Fundraising Institute Australia

28 Getnick & Getnick LLP

29 Constantine Cannon LLP

30 Community and Public Sector Union

31 Dr Olivia Dixon

32 The Ethicos Group

33 Independent Commissioner Against Corruption of South Australia

34 Mr Geoff Carpenter

35 Association of Corporate Counsel (ACC) Australia

37 Deloitte

38 Australian Public Service Commission

40 Australian Council of Trade Unions

41 Young Liberty for Law Reform

42 Independent Broad-based Anti-Corruption Commission of Victoria

43 Australian Federal Police

44 Australian Council for International Development

45 Office of the Commonwealth Ombudsman

46 Community Council for Australia

47 Dr David Page

48 Australian Bankers' Association Inc.

49 KPMG

50 Australian Council of Superannuation Investors

51 Australian Securities and Investments Commission

52 Law Council of Australia

53 Australian Institute of Company Directors

54 Governance Institute of Australia

55 Media, Entertainment & Arts Alliance

56 Uniting Church in Australia

57 Financial Planning Association of Australia

58 Australian Lawyers Alliance

59 Whistleblowers Australia

60 Ms Hope Smith

61 Mr Richard Wilkins

62 International Bar Association Anti-Corruption Committee

63 SKINS International Trading AG

65 Name Withheld

66 Mr Jeffrey Morris

67 Mr Phillip Sweeney

68 Queensland Whistleblowers Action Group

69 Maurice Blackburn Lawyers

70 Mr Jordan Thomas

71 Name Withheld

72 Dr Peter Bowden

73 Mr Tony Nikolic, Australian Taxpayers Against Fraud and False Claims

74 Clerk of the Senate

75 Clerk of the House of Representatives

Tabled documents

Australian Securities and Investments Commission: Statement (public hearing, Melbourne, 27 April 2017)

Australian Federal Police: Statement (public hearing, Canberra, 28 April 2017)

Office of the Commonwealth Ombudsman: Statement (public hearing, Canberra, 28 April 2017)

Answers to questions on notice

Australian Securities and Investments Commission: Answers to questions on notice posed 11 April 2017 (received 24 April 2017)

Australian Institute of Company Directors: Answers to questions on notice posed 11 April 2017 (received 21 April 2017)

Governance Institute of Australia: Answers to questions on notice posed 11 April 2017 (received 21 April 2017)

Australian Council of Trade Unions: Answers to questions on notice posed 11 April 2017 (received 24 April 2017)

International Bar Association Anti-Corruption Committee: Answers to questions on notice posed 11 April 2017 (received 24 April 2017)

Finance Sector Union: Answers to questions on notice posed 11 April 2017 (received 24 April 2017)

Office of the Commonwealth Ombudsman: Answers to questions on notice posed 11 April 2017 (received 24 April 2017)

Dr Vivienne Brand & Dr Sulette Lombard: Answers to questions on notice posed 11 April 2017 (received 24 April 2017)

Inspector-General of Taxation: Answers to questions on notice posed 11 April 2017 (received 24 April 2017)

Transparency International Australia: Answers to questions on notice posed 11 April 2017 (received 17 May 2017)

International Bar Association Anti-Corruption Committee: Answers to questions on notice posed 11 April 2017 (received 18 May 2017)

Queensland Integrity Commissioner: Answers to questions on notice from public hearing 23 February 2017 (received 9 March 2017)

Queensland Ombudsman: Answers to questions on notice from public hearing 23 February 2017 (received 15 March 2017)

Transparency International Australia: Answers to questions on notice from public hearing 27 April 2017 (received 17 May 2017)

Inspector-General of Intelligence and Security: Answers to questions on notice from public hearing 27 April 2017 (received 5 May 2017)

Australian Public Service Commission: Answers to questions on notice from public hearing 28 April 2017 (received 15 May 2017)

Mr Dennis Gentilin: Answers to questions on notice from public hearing 28 April 2017 (received 12 May 2017)

Office of the Commonwealth Ombudsman: Answers to questions on notice from public hearing 28 April 2017 (received 15 May 2017)

Department of Employment: Answers to questions on notice from public hearing 28 April 2017 (received 16 May 2017)

Mr Jordan Thomas: Answers to questions on notice from public hearing 27 April 2017 (received 16 May 2017)

Australian Institute of Superannuation Trustees: Answers to questions on notice from public hearing 27 April 2017 (received 17 May 2017)

Australian Institute of Company Directors: Answers to questions on notice from public hearing 28 April 2017 (received 17 May 2017)

Law Council of Australia: Answers to questions on notice from public hearing 28 April 2017 (received 18 May 2017)

Fair Work Ombudsman: Answers to questions on notice posed 5 May 2017 (received 18 May 2017)

Dr Vivienne Brand & Dr Sulette Lombard: Answers to questions on notice from public hearing 27 April 2017 (received 18 May 2017)

DLA Piper Australia: Answers to questions on notice from public hearing 27 April 2017 (received 18 May 2017)

Australian Competition and Consumer Commission: Answers to questions on notice from public hearing 27 April 2017 (received 19 May 2017)

Department of the Prime Minister & Cabinet: Answers to questions on notice from public hearing 28 April 2017 (received 19 May 2017)

Australian Federal Police: Answers to questions on notice from public hearing 28 April 2017 (received 19 May 2017)

The Ethics Centre: Answers to questions on notice from public hearing 27 April 2017 (received 29 May 2017)

Office of the Commonwealth Ombudsman: Answers to questions on notice posed 7 June 2017 (received 22 June 2017)

Professor AJ Brown: Answers to questions on notice posed 24 May 2017 (received 30 May 2017)

Professor AJ Brown: Answers to questions on notice posed 18 and 24 May 2017 (received 15 June 2017)

Appendix 2

Public hearings and witnesses

Brisbane, 23 February 2017

Whistleblowing Information Network

Mr Peter Bennett, Member

Queensland Integrity Commissioner

Mr Richard Bingham

Queensland Ombudsman

Mr Andrew Brown, Deputy Ombudsman

Ms Louise Rosemann, Acting Principal Adviser, Public Interest Disclosures

Griffith University

Professor AJ Brown, Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy

Dr Nerisa Dozo, Survey and Business Manager, Centre for Governance and Public Policy

Dr Sandra Lawrence, Research Fellow, Centre for Governance and Public Policy

Australian National University

Associate Professor Kath Hall, Deputy Director (Law), Transnational Research Institute on Corruption

Queensland Council of Unions

Dr John Martin, Research and Policy Officer

The Ethicos Group

Mr Howard Whitton, Director

Melbourne, 27 April 2017

Australian Competition and Consumer Commission

Mr Marcus Bezzi, Executive General Manager, Competition Enforcement

Mr Ian Lawrence, Director, Law Reform and Competition Advocacy

Office of the Inspector-General of Intelligence and Security

Mr Jake Blight, Deputy Inspector-General

Maurice Blackburn Lawyers

Mr Joshua Bornstein, Director/Principal

Flinders University

Dr Vivienne Brand, Associate Professor, Flinders Law School,

Dr Sulette Lombard, Academic, Flinders Law School

Media, Entertainment & Arts Alliance

Mr Matthew Chesher, Director, Legal and Policy

Australian Council of Trade Unions

Mr Trevor Clarke, Director, Industrial and Legal

Australian Securities and Investments Commission

Mr John Price, Commissioner

Mr Warren Day, Senior Executive Leader, Assessment and Intelligence,

Mr Andrew Fawcett, Senior Executive Leader, Strategic Policy

DLA Piper Australia

Ms Rani John, Partner

Institute of Internal Auditors

Mr Peter Jones, Chief Executive Officer

Mr Tony Rasman, Public Affairs Manager

Association of Corporate Counsel Australia

Ms Tanya Khan, Vice President and Managing Director

Mr Phil Ware, Member

Transparency International Australia

Ms Serena Lillywhite, Chief Executive Officer

Mr Greg Thompson, Non-Executive Director

The Ethics Centre

Dr Simon Longstaff, AO, Executive Director

Australian Institute of Superannuation Trustees

Ms Eva Scheerlinck, Chief Executive Officer

Mr Jacob Sims, Research Officer

Canberra, 28 April 2017

Finance Sector Union of Australia

Ms Julia Angrisano, National Secretary

Department of the Prime Minister and Cabinet

Mr Peter Arnaudo, Assistant Secretary, Honours and Legal Policy

Ms Elizabeth Kelly, Deputy Secretary, Governance

Australian Federal Police

Assistant Commissioner Ray Johnson, National Manager, Reform Culture and Standards

Commander Peter Crozier, Manager, Criminal Assets and Fraud and Anti-Corruption

Detective Superintendent Andrew Smith, Acting Manager, Crime Operations

Mr Brenton Bushby, Acting Manager, Professional Standards

Mrs Elsa Sengstock, Coordinator, Legislation Program

Australian Public Service Commission

Ms Stephanie Foster, Acting Australian Public Service Commissioner

Ms Kerren Crosthwaite, Group Manager, Employment Policy

Department of the Treasury

Mr Murray Crowe, Principal Adviser, Revenue Group

Mr Gregory Wood, Senior Advisor, Base Erosion and Profit Shifting Unit, Corporate and International Tax Division

Ms Kate Mills, Principal Adviser, Financial System Division

Office of the Commonwealth Ombudsman

Ms Doris Gibb, Acting Commonwealth Ombudsman

Ms Erica Welton, Acting Senior Assistant Ombudsman, Integrity Branch

Ms Nicola Dakin, Director, Public Interest Disclosure Team, Integrity Branch

Fair Work Commission

Mr Chris Enright, Executive Director, Regulatory Compliance Branch

Mr Bill Steenson, Senior Legal Adviser, Regulatory Compliance Branch

Fair Work Ombudsman

Mr Mark Scully, Deputy Fair Work Ombudsman

Mr Anthony Fogarty, Acting Executive Director, Policy, Analysis and Reporting

Mr Tom O'Shea, Executive Director, Strategic Engagement and Stakeholder Relations

Department of Employment

Ms Sharon Huender, Director, Framework Policy Branch, Workplace Relations Policy Group

Ms Rachel Volzke, Senior Executive Lawyer, Workplace Relations Legal Group

Law Council of Australia

Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section

Dr Natasha Molt, Senior Legal Adviser

Governance Institute of Australia

Ms Maureen McGrath, Chair, Legislation Review Committee

Australian Institute of Company Directors

Ms Louise Petschler, General Manager, Advocacy

Mr Lucas Ryan, Senior Policy Advisor

International Bar Association

Mr Robert R Wyld, Immediate Past Co-Chair, Anti-Corruption Committee

Mr Dennis Gentilin, Private capacity

Mr Jordan Thomas, Private capacity

Canberra, 31 May 2017

Professor AJ Brown, Private capacity

Canberra, 15 June 2017

Professor AJ Brown, Private capacity

Appendix 3
Submission from the Clerk of the Senate

AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199

CLERK OF THE SENATE

E-mail: clerk.sen@aph.gov.au

D17/41309

21 June 2017

Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

I write in response to your letter, dated 7 June 2017, which I take to be an invitation from the Corporations and Financial Services Committee to provide a submission on aspects of its current inquiry into whistleblower protections.

The catalyst for the inquiry was the adoption of a scheme of protection in relation to the Registered Organisation Commission, together with government undertakings to investigate and, eventually, legislate for broader whistleblower protections across public and corporate sectors. In this regard, the committee's terms of reference contemplate "a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors".

The phrase *whistleblower protections*, here, connotes a regime of procedural and legal protections for persons making disclosures (usually alleging maladministration or wrongdoing), provided those disclosures are made by a prescribed method to an authorised recipient. The committee seeks my views on the interaction between whistleblower protections and parliamentary privilege. My attention is particularly drawn to disclosures *about*, *by* or *to* members of parliament and their staff; and disclosures to parliamentary committees.

Senate Clerks have previously made submissions on proposals for "public interest disclosure" schemes. For instance, in December 2008, Harry Evans submitted to a House of Representatives committee inquiry that he considered it "appropriate that members of the Parliament be authorised recipients of public interest disclosures". Similarly, in my view, there is no obstacle to including, in a properly-designed scheme, mechanisms for disclosures

about, by or to members (or their staff), provided the distinction between privilege law and the whistleblowers protection regime is maintained.

I make the following observations about maintaining that distinction in different situations.

Disclosures by or about members

If it is intended that the regime include disclosures by or about members (and their staff), then conduct which forms part of parliamentary proceedings should be carved out of the definition of disclosable matters, to preserve the operation of the privilege law.

Generally, participants in parliamentary proceedings are protected by privilege law in two ways. The first involves the use of the contempt powers of the two Houses, whose purpose is to protect the ability of the Houses, their committees and members to carry out their functions without improper interference. For instance, the Senate may determine that conduct which obstructs or impedes its work, or that of its members, amounts to a contempt — that is, an offence against the Senate — and may punish a person for undertaking such conduct. It would be highly undesirable to limit or interfere with the powers of the two Houses to deal with such matters by overlaying a statutory disclosure scheme in relation to those proceedings.

The other way participants may be protected by parliamentary privilege is by a legal immunity descended from Article 9 of the Bill of Rights, 1688. Parliamentary privilege in this sense is an evidentiary rule that prevents "proceedings in Parliament" from being used in courts or tribunals for prohibited purposes; traditionally, for the purposes of "questioning or impeaching" those proceedings. Both of those terms are defined in section 16 of the *Parliamentary Privileges Act 1987*. This prohibition sits at the core of parliamentary freedom of speech. It protects parliamentary proceedings from external interference. Again, it would be highly undesirable to undermine this protection by constraining the operation of those provisions.

In relation to conduct other than in connection with parliamentary proceedings, no doubt an appropriate regime for disclosures about members and their staff could be devised. For instance, in his Public Interest Disclosure Bill 2007 [2008], former Senator Andrew Murray proposed that the Presiding Officers of the Commonwealth Parliament be authorised to receive disclosures about members of their respective Houses.

In relation to disclosures by members, provided such disclosures are made in accordance with the process prescribed by the statute, there is no reason for disclosures by members and their staff to be handled differently than disclosures made by others.

Disclosures to members

If members are to be designated as authorised recipients in a statutory disclosure scheme, their roles and responsibilities must be adequately defined by the statute in a manner which does not affect (or derogate from) the law of parliamentary privilege, as explicated by the

Parliamentary Privileges Act. In this regard, Harry Evans submitted to the House Legal and Constitutional Affairs Committee in 2008:

> It is important that this aspect of parliamentary privilege be left to operate in conjunction with, and unaffected by, any statutory regime for public interest disclosures to members of Parliament. The ability of citizens to communicate with their parliamentary representatives, and the capacity of those representatives to receive information from citizens, should not be restricted, inadvertently or otherwise, by a statutory public interest disclosure regime.

There are several points to note about privilege and a statutory disclosure regime working together.

First, a non-derogation clause may be appropriate, although this would depend on the design of the statute. In this regard I note that, in its report on the Public Interest Disclosure Bill 2013, the Legal and Constitutional Affairs Legislation Committee endorsed the advice of the then Clerk of the Senate, Dr Rosemary Laing, that a non-derogation clause is necessary and appropriate only where a statute expressly provides for disclosures to be made to members, as such a provision may otherwise be interpreted to modify, alter or affect the powers, privileges and immunities of the Houses or their members [see paragraphs 3.21–3.24, under the heading *Clause 81 and preservation of parliamentary privilege*].

Secondly, it is useful to keep in mind that different roles and protections may co-exist. For instance, as noted above, former Senator Murray's bill would have authorised the Presiding Officers to receive disclosures about members of their respective Houses. The Presiding Officers' powers, functions and responsibilities here – like those of other authorised recipients – would initially be those specified in the statute under which the regime is to operate. That is, they would be administrative, rather than parliamentary, in nature. If a Presiding Officer subsequently put such a disclosure before their House, or a parliamentary committee, the usual protections of parliamentary privilege would apply, and the matters would be dealt with in accordance with the procedures of the House. Similarly, the powers, functions and responsibilities of other members, if designated as authorised recipients, would initially be those specified in the statute, but any subsequent use of disclosures in connection with parliamentary proceedings would attract absolute privilege. In those circumstances, a person making a disclosure may receive both the protections adhering under the statute and the protection of privilege.

Finally, it may be appropriate for addition considerations to apply before members were authorised to receive disclosures. For instance, former Senator Murray's bill provided a mechanism for members to receive "external disclosures" only in specified exceptional circumstances, including where "internal disclosures" to proper authorities (eg, heads of affected agencies) had not been adequately dealt with. This would be a matter for consideration in developing the policy detail.

Disclosures to parliamentary committees

The difficulty of maintaining the distinction between privilege and other statutory protections where parliamentary committees are involved militates against their inclusion as authorised recipients. Nevertheless, as noted above, the Presiding Officers and other members of parliament in receipt of disclosures may initiate the reference of disclosures to committees, or otherwise raise them in parliamentary proceedings. In those circumstances, persons making disclosures may be protected both under the statute and by parliamentary privilege.

No doubt there would also be a role for Senate committees in overseeing any proposed statutory regime, particularly where an authority is charged with administering the disclosure regime.

Conclusion

Notwithstanding my view that privilege law and statutory whistleblowers protection regime may co-exist, the complexities of defining and maintaining the distinctions between them should not be underestimated. No doubt there will be opportunities to address these matters in more detail if and when relevant legislation is put before the Parliament.

Yours sincerely,

(Richard Pye)

Appendix 4

Submission from the Clerk of the House of Representatives

OFFICE OF THE CLERK OF THE HOUSE

PO Box 6021, Parliament House, Canberra ACT 2600 | Phone: (02) 6277 4111 | Fax: (02) 6277 2006 | Email: clerk.reps@aph.gov.au

Parliamentary Joint Committee on Corporations and Financial Services
Parliament House

INQUIRY INTO WHISTLEBLOWER PROTECTIONS – REQUEST FOR COMMENT

Thank you for your letter of 7 June 2017 in which you passed on the Committee's request for comment on its terms of reference and interaction with the Parliament, parliamentary privilege and the *Parliamentary Privileges Act 1987* (Privileges Act).[1] Given the timeframe for a response I will focus on the application of the *Public Interest Disclosure Act 2013* (PID Act), and the Privileges Act generally in the parliamentary context before I turn to disclosures in respect of the four interactions that you drew to my attention:

1. about wrongdoing by Members of Parliament or their staff
2. by Members of Parliament or their staff
3. to Members of Parliament or their staff; and
4. to parliamentary committees.

I will also refer to the possibility of broadening the coverage of the PID Act in the parliamentary context.

Parliamentary context

General PID Act framework

The PID Act establishes a framework to encourage the reporting and investigation of wrongful conduct (such as fraud, corruption and misconduct) in the Commonwealth public sector by protecting public officials who make disclosures in accordance with its provisions from reprisals. The Act focuses on disclosures being made internally—that is, to a supervisor or agency official appointed to receive disclosures—although in certain circumstances, 'external' and 'emergency' disclosures can be made to persons outside the official's 'home' agency. The PID Act generally does not cover members of Parliament or their staff, although it does draw in Parliamentary Service employees

[1] See Attachment A for extracts of relevant provisions of the Act.

and former employees. Parliamentary Service employees are also bound to comply with the Code of Conduct in s.13 of the *Parliamentary Service Act 1999*, and are subject to the penalties outlined in s.15 for established breaches.

Public officials included in PID Act coverage

The PID Act includes as 'public officials', employees of the Parliamentary Service and former employees[2] but it does not include members of Parliament or their staff employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act). So, members and their MOPS Act employees are not included as a category of authorised recipients of disclosures (although it may be that they could be the recipients of 'external' or 'emergency' disclosures under s.26 of the Act).[3] Nor does the PID Act cover disclosures about wrongdoing by members of Parliament or MOPS Act employees. Their roles were considered to be very distinct from the roles of public sector employees and to fall more appropriately within the sole jurisdiction of parliament.[4]

Parliamentary privilege preserved

Clause 81 of the original Public Interest Disclosure Bill 2013 had provided, for the avoidance of doubt, the Bill did not affect the powers, privileges and immunities of the Senate, House of Representatives, their members and committees, under section 49 of the Constitution, nor the provisions of the Privileges Act. An amendment moved by the Attorney-General during the House's consideration in detail, in June 2013, omitted clause 81. The former Clerk of the Senate, Dr Laing, had argued in her submission of 9 April 2013 that because the bill did not expressly apply to Members and Senators, the inclusion of clause 81 was unnecessary and could lead to confusion if it remained. The Senate's Legal and Constitutional Affairs Committee recommended in its report of June 2013 that the clause be removed.[5]

The history of the PID bill has been so well-canvassed and documented in the Senate Committee's inquiry and report and the inquiries and reports of the House of Representatives Legal and Constitutional Affairs Committee and Social Policy and Legal Affairs Committee[6] that it should be very clear that the PID Act is not intended

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[2] See s.69.

[3] Also, Ministers exercising statutory powers could be considered to be public officials and staff employed under the MOPS Act could be considered to be contracted service providers, and therefore 'public officials', within s.69 of the PID Act.

[4] See, for example, remarks by then Attorney-General, Hon Mark Dreyfus QC MP, summing up the second reading debate, HR Deb. (19.6.2013) 6408. See also the Government Response to the House of Representatives Legal and Constitutional Affairs Committee report on 'Whistleblower Protection: a Comprehensive Scheme for the Commonwealth Public Sector', p.5, responses to Recommendations 3 and 4.

[5] See the Attorney-General's acknowledgment of the Senate Committee recommendation, H.R. Deb (19.6.2013) 6417.

[6] 'Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector', 2009, and 'Advisory report on the Public Interest Disclosure (Whistleblower Protection) Bill 2012', 2013.

to and does not affect provisions of the Parliamentary Privileges Act or the law of parliamentary privilege generally.

I will refer now to the potential application of the Parliamentary Privileges Act and the law of parliamentary privilege generally in relation to disclosures in the parliamentary context, and then to the four interactions that you referred to in your letter.

Possible application of parliamentary privilege to disclosures of alleged wrongdoing

As the Committee would be well aware, the term parliamentary privilege refers to the special rights and immunities that apply to the Houses, their committees and members, and that are essential for the proper operation of the Parliament. The most significant privilege—and the most relevant for present purposes—is the privilege of freedom of speech. The Parliamentary Privileges Act offers some clarification of the nature and extent of the rights and immunities of the Houses inherited by the House through s.49 of the Constitution.

Section 16 provides that members, witnesses who give evidence to parliamentary committees, and others who participate in parliamentary proceedings are protected from civil or criminal action and cannot be examined in court in relation to those proceedings. Also, 'proceedings in Parliament' cannot be impeached or questioned in courts or tribunals.[7] Members and others involved in 'proceedings in Parliament' enjoy absolute privilege from prosecution and legal proceedings in respect of what they say in proceedings in Parliament—provided what they say complies with House practice and rules. Members are still accountable to the House in respect of their statements and actions.[8] These protections, if they apply to disclosures of wrongdoing that would otherwise fall within the PID Act, would appear to offer a substantial degree of comfort to those who make disclosures in the parliamentary context.

The Parliamentary Privileges Act clarifies in s. 16(2), to a degree, the meaning of 'proceedings in Parliament', defining its broad meaning as 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'.. . But interpretation of section 16 by the Courts has been rare. What might be encompassed by the words 'for purposes of or incidental to' the transaction of the business of a House or a committee is not entirely clear and therefore what special immunity—if any—might be available to communications of wrongdoing in these circumstances is unclear. In a decision in the Queensland Court of Appeal it was accepted that certain documents obtained by or provided to a Senator (and related to a subject he had raised in the Senate) did not need to be produced in response to an order because of subsection 16(2).[9]

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[7] See relevant sections at Attachment A.

[8] Absolute privilege provides an extremely broad protection in respect of statements that might otherwise be the subject of legal action or prosecution. Provided that certain conditions are fulfilled, qualified privilege might offer a defence to an action for defamation. See *House of Representatives Practice*, 6 ed., 2012, at pp 735-6 and p. 731

[9] *O'Chee v Rowley* [1997] QCA 401; cited in *House of Representatives Practice*, 6 ed., p. 737.

Also, section 16 has been found to cover documents prepared for Senate committee briefings, with the result that they could not be produced in response to a subpoena.[10] If documents or disclosures are made to a member and then are subsequently used in the transacting of business in a House or committee (such as contributing to debate or asking questions in the House or a committee), there may be some protection available. But, in the case of *Rowley* v *Armstrong* a single Judge of the Supreme Court of Queensland concluded that a person who had communicated a matter to a Senator could not be regarded as participating in 'proceedings in Parliament'.[11] The Senator had apparently used the information in two questions to a Minister and in a debate in the Senate. While the Judge's comments were not central to his decision, and have been contested as not being well founded, they demonstrate that the further interpretation of section 16 could provide greater clarity.

With respect to other communications, *House of Representatives Practice* states: 'Conversations, comments or other communications between Members, or between Members and other persons, which are not part of "proceedings in Parliament" would not be expected to enjoy absolute privilege. … [C]itizens communicating with a Member on matters that have no connection with proceedings in Parliament are not protected.'[12] This could be relevant, for example, to the disclosure by a member to a Minister.

Protection of qualified privilege

A defence of qualified privilege might also be available to actions for defamation against persons communicating information or allegations concerning a Commonwealth department or agency to members when there was no connection with proceedings in Parliament. Broadly that is where there is a duty to pass on the information and an absence of malice in making the disclosure.

Punishment for contempt

The House can treat as a contempt, an act or omission that obstructs or impedes it in the performance of its functions, or obstructs a Member in the discharge of his or her duty, or tends to product such results.[13] It is possible that reprisals against a person who provided information to a Member, or a against a Member who made a disclosure, even where there was no connection with 'proceedings in Parliament',

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[10] *Australian Communications Authority v Bedford* (2006), cited in *House of Representatives Practice* at p.737, where *Odgers' Australian Senate Practice*, 13th edition, p. 60 was also cited.

[11] See [2000] QSC 088, available online at http://archive.sclqld.org.au/qjudgment/2000/QSC00-088.pdf See *Odgers* at p. 59 for discussion of this and other cases.

[12] *House of Representatives Practice*, 6 ed., 2012, p. 737. See also the report of the House of Representatives Standing Committee of Privileges in 2000 on the 'Status of records held by Members of the House of Representatives' and the Committee of Privileges report in 2002, 'Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for Members'.

[13] See *House of Representatives Practice*, 6 ed., 2012, p. 749 for discussion of the powers inherited through section 49 of the Constitution.

could be dealt with as a matter of contempt, although this may be of limited comfort. The requirements of s.4 of the Privileges Act would also need to be met:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Disclosures about wrongdoing—four interactions

I am supposing that the disclosures you refer to relate to wrongdoing in the sense of 'disclosable conduct' within s.29 of the PID Act and not to personal or professional disagreements and not matters that could appropriately be dealt with in a less formal or public way.

1. Disclosures about wrongdoing by Members of Parliament or their staff

It is clear from debate during the passage of the PID Act that parliament itself is seen as the most appropriate venue for allegations about any such wrongdoing. If a disclosure of wrongdoing were made about a Member, I would expect it would most likely be made by another Member who ensured that it fell within 'proceedings in Parliament', as discussed above, and that he or she complied with House rules and practices when making the disclosure. I would also expect that disclosures about wrongdoing by staff of Members would be made at least in the first instance to the employing Member. Ministerial staff are subject to a Code of Conduct for Ministerial Staff.

2. Disclosures by Members of Parliament or their staff

If a disclosure of wrongdoing were to be made publicly by a Member, I would expect the Member who wanted to enjoy the protection of parliamentary privilege, to ensure that it fell within 'proceedings in Parliament', as discussed above, and that he or she complied with House rules and practices when making the disclosure. I would also expect a staff member of a Member to pass on to the Member disclosures that had been made and in doing so to seek as far as possible to bring the disclosure within 'proceedings in Parliament'. It is possible although unlikely that a Member or staff member could fall within the category of 'public official' by being former staff of agencies covered by the PID Act and bring a disclosure within the terms of a public interest disclosure under s.26 of the Act. If so I expect they would make an internal disclosure to an appropriate person in their former agency, and if necessary an external disclosure or emergency disclosure to any person other than a foreign public official. If seeking to rely on the protections of the PID Act, the Member or staff member would need to comply with the PID Act.

3. Disclosures to Members of Parliament or their staff

In making disclosures to a Member or their staff, a person may or may not fall within the protection of the umbrella of 'proceedings in Parliament' depending on the circumstances surrounding the communication. As already noted, what is encompassed by 'proceedings in Parliament' and, in particular, what is 'for purposes of or incidental to' the transacting of the business of a House or committee is not entirely clear. If the allegations were serious, it may be that a Member would endeavour to ensure the disclosures fell with the umbrella of 'proceedings in Parliament.

4. Disclosures to parliamentary committees

During their inquiries, House committees and joint committees sometimes receive submissions and oral evidence from people who include allegations about perceived wrongdoing of Commonwealth government departments and agencies and staff. The protection of absolute privilege applies to such submissions and to such evidence in accordance with the provisions of the Parliamentary Privileges Act. House standing orders 236 (power to call for witnesses and documents), 242 (publication of evidence), and 256 (witnesses entitled to protection) may also be relevant to disclosures of wrongdoing to committees.

Section 12 of the Parliamentary Privileges Act provides that a person shall not, by fraud, intimidation, force or threat, … or by other improper means, influence another person in respect of any evidence given or to be given, or induce another person to refrain from giving any such evidence. So, in addition to the immunity available in respect of evidence that falls within 'proceedings in Parliament', this statutory offence provision complements the protections available to witnesses who might make disclosures to parliamentary committees.[14]

Future: the implications of including Members as authorised recipients of disclosures and the subject of public interest disclosures

The Committee would be aware of some criticisms surrounding the omission of Members in particular, but also their staff, from coverage of the PID Act as recipients of disclosures and the subject of disclosures.

The inclusion of Members and Senators as authorised recipients of disclosures would increase the number of people to whom disclosures could be made and acknowledge their role as representatives. I am not sure that Members necessarily would consider they have the requisite resources to undertake such a significant role in addition to their existing responsibilities. The PID Act is complex and its requirements are rigorous. Members do not have the stable, institutional resources enjoyed by other agencies included in the Act. They also operate in an environment that is founded on freedom of speech and political difference and it may be difficult to maintain and be

[14] Section 16 and see *House of Representatives Practice*, 6 ed., 2012, pp 693-97.

seen to maintain necessary confidentiality and to avoid perceptions that political considerations could have an influence on disclosures and the way they were treated.

In his Review of the PID Act, Mr [Phillip] Moss AM noted that the Commonwealth is the only Australian jurisdiction to exclude scrutiny of members and their staff from similar legislation and compared the range of provisions relating to Members and staff in other jurisdictions. Mr Moss considers that allegations of wrongdoing by or about members or their staff should be scrutinised by Parliament, for example through the House Standing Committee of Privileges and Members' Interests and the Senate Standing Committee of Privileges.[15] He also notes submissions were made about the incomplete exclusion of members and their staff, with Ministers exercising statutory powers possibly being considered to be public officials, and MOPS Act staff possibly being considered to be contracted service providers and has called for clarification.[16]

While Mr Moss considers that members and their staff should be subject to robust scrutiny, he also notes the likelihood of politicisation and extensive media coverage that would follow alleged wrongdoing. Mr Moss recommends that the Act be amended to make clear that it does not apply to reports about alleged wrongdoing by Senators, Members and their staff, or allegations made by them. He also recommends that consideration be given to extending the application of the PID Act to members or their staff if an independent body with the power to scrutinise their conduct is created.[17]

My view is that, at present, issues relating to the conduct of members, unless they amount to criminal conduct, are best dealt with by the Parliament, and the relevant House to supervise, in particular through the relevant Privileges committee. The continued oversight of members' conduct by parliament would perhaps be considered to be more effective if Members and Senators were subject to a Code of Conduct. I draw the Committee's attention to the Discussion Paper presented on 23 November 2011 following the House of Representatives Standing Committee of Privileges and Members' Interests inquiry into a Draft Code of Conduct for Members of Parliament. With respect to members' staff, I agree that their role is substantially different from other staff in the public sector and so I consider that, for now, it is not appropriate for them to be covered by the PID Act as recipients of disclosures or as the subjects of disclosures.

I hope this assists the Committee in its deliberations and, of course, I would be pleased to discuss any of these matters in more detail with the Committee if it wishes.

Yours sincerely,

DAVID ELDER
Clerk of the House

21 June 2017

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[15] 'Independent Review of the *Public Interest Disclosure Act 2013'*, 2016, p. 62.

[16] Pages 62-63.

[17] Recommendations 26 and 27 at p. 63.

Appendix 5

The agreement struck between NXT and the Government during the passage of the Fair Work (Registered Organisations) Amendment Bill 2014

Following the agreement to strengthen and enhance whistleblower protections in the Registered Organisation Commission (ROC) legislation, the Government has agreed to the following:

1) To support a Parliamentary inquiry to examine the ROC whistleblower amendments with the objective of implementing the substance and detail of those amendments to achieve an equal or better whistleblower protection and compensation regime in the corporate and public sectors.

2) To support the Parliamentary inquiry considering, on the basis of mutually agreed terms of reference, matters including but not limited to:

a. Compensation arrangements in whistleblower legislation across different jurisdictions, for example the bounty system used in the United States.

b. The definition of detrimental action and reprisal and the interaction between criminal and civil liability.

c. Issues associated with internal disclosures.

3) That the motion to refer this issue to the Parliamentary Committee will be voted on in the Senate (or if a reference to a Joint Committee by both House of Parliament) by Wednesday 30 November 2016 with a reporting date of 30 June 2017.

4) That following the tabling of the Parliamentary Committee report, if the report recommends adopting stronger whistleblower protections in the corporate and public sectors, the Government will establish an expert advisory panel to expedite the development and drafting of legislation to implement whistleblower reforms in the corporate and public sectors.

5) That legislation will be introduced into the Parliament by December 2017 (subject to any extensions on the Parliamentary inquiry reporting date that may be determined by the Senate) to introduce greater protections for whistleblowers in the corporate and public sectors consistent with the recommendations of the Parliamentary Committee and the expert advisory panel with the proviso that the Government commits to, as a minimum, supporting the substance and detail of the whistleblower protection and compensation regime contained in the ROC legislation.

6) The Government will commit to support enhancements to whistleblower protections and commit to a parliamentary vote on the legislation no later than 30 June 2018.