

# 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.