Senator Rex Patrick's Dissenting Report

Perfect if the enemy of the good, but this ain't even good

Introduction

1.1 The committee recognises in its report that:

> …a minority of contributors continue to believe that the bill is inadequate, suggesting that passing the bill as it stands would mean that nothing more would be done and that it would be an opportunity lost, while some like the Law Council seemed to suggest that it would be better to withdraw the bill altogether and 'get it right'. Most however, do suggest that the bill should be passed acknowledging that the bill is an improvement on current arrangements, and is at the very least a good step towards reform.

I understand that perfect can be the enemy of the good, but this Bill ain't even good (yet). It is ambiguous and confusing and the provisions as they currently stand do not effectively protect whistleblowers, nor are they sufficiently workable for companies that will be subject to them.

1.2 The Bill fails both the public and the whistleblower. If it is to deal effectively with protecting those who have or who are revealing corporate misconduct, such as in the Commonwealth Bank of Australia 's (CBA's) financial planning arm in 2008 (Jeff Morris), Securency (James Shelton), CBA's Intelligent Deposit Machines and the recent and ongoing revelations from the Banking Royal Commission, the Bill must be amended.

1.3 I thank the Secretariat for its hard work in capturing and aggregating the views of those people and entities that provided input to the inquiry and I also thank the Committee for their time. Unfortunately the Committee, after undertaking an extensive amount of work, recommends the passage of a Bill which it knows, and acknowledges, is not what it should be

1.4 In particular, it is disappointing that the Committee does not see that proceeding with this Bill, as is, is in unnecessary but direct conflict with recommendations of the unanimous 2017 inquiry on this topic by the Parliamentary Joint Committee on Corporations and Financial Services. To do so is also inconsistent with the Government's commitments in this area made to the Senate, the NXT and Senator Hinch by Minister Cash in November 2016 (See Appendix 5 to the PJC Report). This Bill can be made much more consistent with those recommendations and those commitments, and it should be.

For the Avoidance of Doubt

1.5 Whistleblowers aren't always good people; but more often than not they are the best people. They do what they do with integrity and courage and at great risk to themselves.

1.6 As Jeff Morris, a whistleblower and hero, stated to the Committee:

> The first thing I'd like to convey is that whistleblowers are human beings. They're human beings taking on massive corporate machines, and it's a very unequal contest. It's the classic case of flesh against steel, and it almost always ends badly. Whistleblowers' health suffers; their finances and their family suffer.

1.7 The Parliament should recognise this and protect them with strong and unambiguous laws. These proposed laws lack these characteristics. The Parliament needs to send a signal to 'bad apple' individuals and/or corporations that there is every likelihood that they are being watched by a colleague or worker, respectively, empowered by legislation that is comprehensive and won't tolerate challenges to any embedded nuances.

1.8 There must be minimum doubt in the statute's language and application. Without this we will end up seeing poorly resourced whistleblowers battling it out in the courts against highly resourced companies over the meaning and intent. If lawyers and judges are needed to sort out the interpretation on each and every occasion, we haven't done our job properly.

1.9 This Bill has to be amended so that there is no doubt as to a corporation's responsibility to encourage and facilitate whistleblowers, to protect them, and in the event they fail in this duty then they will have to properly compensate them.

Necessary Improvements

1.10 To avoid overburdening organisations with a whistleblower training requirement for a broad range of low level managers, the Bill should be amended to make clear that a disclosure can be made to any person in a position of responsibility but then limit 'eligible recipients' to senior managers.

Recommendation 1

1.11 A whistleblower should be able to make a disclosure to any person of responsibility within an organisation but limit 'eligible recipients' to senior managers.

Recommendation 2

1.12 A whistleblower should be able to make a disclosure to an internal auditor.

1.13 Whistleblowing is not about individual personal, employment or workplace grievances. To not explicitly exclude these grievances risks making implementation of the laws unworkable.

Recommendation 3

1.14 Disclosures that are *only* individual personal, employment or workplace grievances should not protected under this Act (unless they are a grievance raised under the civil remedy or victimisation provisions at s1317AC, AD) and this should be stated explicitly.

1.15 The ‘emergency disclosure’ threshold in 1317AAD(c) is so high as to not capture any historical Australian whistleblower cases. It is a ‘Clayton’s’ provision.

1.16 The Bill must be modified to allow for external disclosures that, as a minimum, meet the ‘Jeff Morris’ and/or ‘James Shelton’ test – as recommended by the Parliamentary Joint Committee.

Recommendation 4

1.17 If a disclosure of disclosable conduct has been made to a prescribed authority 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 a journalist if they have complied with the disclosure requirements of the Act.

Recommendation 5

1.18 A ‘reasonable time’ for emergency disclosures should then be defined.

Recommendation 6

1.19 The emergency disclosure protections should extend to only as much information as is necessary to have the emergency disclosure acted upon.

1.20 There was general agreement amongst contributors to the Inquiry that the bill involved state of mind issues for civil remedies, but disagreement as to whether this issue was negated by reverse onus of proof in respect of this state of mind. There is no good reason to leave confusion and ambiguity in the legislation.

Recommendation 7

1.21 Belief or suspicion requirement in s1317AD(1)(b)&(c)must be removed and replaced with a more general test that does not hinge on state of mind.

Recommendation 8

1.22 ‘Victimising conduct’ in s1317AD(1)(a) must be removed and replaced with ‘detrimental conduct’.

1.23 The bases for civil relief must include a failure by the organisation to fulfil a duty to support or protect the whistleblower, as already supported by the Government in 2016 in respect of the *Fair Work (Registered Organisations) Act 2009* and its commitments to the Senate and the public.

Recommendation 9

1.24 Conduct giving rise to remedies in s 1317AD(1) must explicitly include a failure to fulfil ‘a duty to support or protect the second person in relation to a disclosure they made and detriment was caused to the second person as a result of the failure of the first person in part or whole to fulfil that duty.’ Section 1317AD(2)(c) must be modified in similar duty related terms.

Recommendation 10

1.25 Guidance must be provided to a court that 'duty to support or protect' includes responsibility to fulfil organisation's commitments under a s1317AI(5)(c) policy or any similar policy, and any applicable guidance or standards. This guidance can be added as a new subsection to s1317AD

Recommendation 11

1.26 The 'due diligence defence' in s1317AE(3) must be made consistent with the duty to support or protect and reduced to a mandatory or relevant consideration when deciding orders, so that the issue of whether or the extent to which the duty was fulfilled is considered, but is no longer a total defence.

1.27 A more robust onus of proof, consistent with international best practice as recognised by the OECD, Transparency International, and the submissions of Professors Brown (Australia), Devine (USA) and Lewis (UK), must be laid out for compensation and other remedies:

Recommendation 12

1.28 A claimant should be required to show:

a) they made a disclosure to which the Act applies;

b) they suffered detriment within the meaning of the Act (not simply a 'suggestion' of a 'reasonable possibility' that they have suffered detriment, as proposed); and

c) prima facie, either that the fact of their disclosure could have been a contributing factor in the detrimental act or omission (meaning any factor, which alone or in connection with other factors, tended to affect in any way the outcome); or, as above, the respondent was under a duty to provide support or take action in order to prevent, limit, avoid, or restrain others in respect of such detrimental outcomes resulting from the whistleblowing;

If the claimant burden is met, then the respondent is required to demonstrate by clear and convincing evidence (meaning, it must be highly probable or reasonably certain) that:

a) The respondent would have taken the same action in relation to the claimant, in the absence of the disclosure issue, for independent and legitimate reasons;

b) A significant step had already been taken toward implementing that course of action prior to the disclosure issue arising; and

c) All duties to support and protect the claimant in respect of their whistleblowing were discharged, or that none of the detriment suffered could possibly have been prevented by the proper and reasonable fulfilment of those duties.

Committee Recommendations

1.29 I support Recommendations 1 and 2 of the Committee's recommendations.

Senator Rex Patrick
Senator for South Australia