

## 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.<sup>1</sup>

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.<sup>2</sup>

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.**

| <b>Best Practice Criteria for Whistleblowing Legislation</b><br>Ratings (1 = Very / quite comprehensive, 2 = Somewhat / partially comprehensive, 3 = Absent / not at all comprehensive) |  |   | <b>Performance of whistleblowing legislation against best practice criteria</b><br>Green = very / quite comprehensive<br>Yellow = somewhat / partially comprehensive<br>Red = absent / not at all comprehensive |   |   |  |
|---|--|---|---|---|---|--|
| Criterion   |  | Description   | Rating (public/private)   | <i>Public Interest Disclosure Act 2013</i>  | <i>Fair Work (Registered Organisations) Act 2009</i>  | <i>Corporations Act 2001</i>   |
| 1   | <b>Broad coverage of organisations</b>           | 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   | <b>Broad definition of reportable wrongdoing</b> | 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 <i>Competition and Consumer Act 2010</i> , or offence against a law of the Commonwealth. | Section 1317AA(1d) – provides for contravention of a provision of the corporations legislation.                              |
| 3   | <b>Broad definition of whistleblowers</b>        | 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. |

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|   |   | other insiders).   |     |  |  |   |
| 4 | <b>Range of internal / regulatory reporting channels</b>  | Full range of internal (i.e. organisational) and regulatory agency reporting channels.   | 1/2 | Section 26 – An authorised internal recipient or any supervisor<br>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 | <b>External reporting channels (third party / public)</b> | 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.<br>May disclose to a legal practitioner to seek legal advice.<br>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 | <b>Thresholds for protection</b>                          | Workable <b>thresholds for protection</b> (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.  |

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| 7 | <b>Provision and protections for anonymous reporting</b> | 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.<br><br>The December 2016 amendment deleted the requirement for name to be provided.   | Section 1317AA(1c) – requires the whistleblower to disclose their name.  |
| 8 | <b>Confidentiality protected</b>                         | Protections include requirements for confidentiality of disclosures.  | 1/2 | Section 20 – provides offences for use or disclosure of identifying information.<br>Section 21 – protects discloser's identity in courts or tribunals.<br>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:<br>- disclosing information disclosed in the disclosure;<br>- the identity of the discloser;<br>- information likely to lead to the identification of the discloser. |
| 9 | <b>Internal disclosure procedures required</b>           | 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.   |

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| 10 | <b>Broad protections against retaliation</b>  | 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.<br>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.<br>Section 337BA – Protection from reprisals, including dismissal, injury, alteration of position, discrimination, harassment, harm including psychological harm and damage to property or reputation. | Section 1317AB – Protection from legal liability and contract termination.   |
| 11 | <b>Comprehensive remedies for retaliation</b> | 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<br>Section 15 – Injunctions and apologies<br>Section 16 – Reinstatement<br>Section 18 – Costs only if vexatious<br>No reverse onus<br>Section 14 allows for a court to require both an individual reprisor and the organisation to pay compensation. | Section 337BB – Compensation<br>Injunctions<br>Apologies<br>Reinstatement<br>Exemplary damages<br>Section 337BC – Costs only if vexatious<br>No reverse onus  | Section 1317AD – Compensation<br>The Act does not appear to provide for:<br>Injunctions<br>Apologies<br>Reinstatement<br>Exemplary Damages<br>Costs only if vexatious<br>Note: civil remedies are ONLY available if a criminal offence of reprisal is shown to have been taken.<br>No reverse onus |
| 12 | <b>Sanctions for retaliators</b>              | Criminal, and/or disciplinary sanctions against those responsible for retaliation.   | 1/3 | Section 19 – Offences<br>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<br>Section 337BE Criminal offences  | Section 1317AC prohibits victimisation including detriment and threats and includes a criminal offence.  |

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| 13 | <b>Oversight authority</b>            | Oversight by an independent whistleblower investigation / complaints authority or tribunal.   | 1/3 | <p>Section 50A – The Ombudsman must be informed of decisions not to investigate.</p> <p>Section 52 – The Ombudsman may extend time limits.</p> <p>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.</p> <p>However, no tribunal option, only court action is available.</p> | 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 | <b>Transparent use of legislation</b> | 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 | <p>Section 76 – The Ombudsman must prepare annual reports to Parliament.</p> <p>Section 10 – May provide protection from confidentiality clauses.</p>  | 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.

| <b>Potential additional areas for reform</b> (The first column indicates which best practice criteria these reforms could apply to) |  |  |     |   |   |  |
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|   | <b>Protection for those handling disclosures</b> | 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 disclosures or people responsible for taking action on disclosures.  | The Act does not appear to provide explicit protection for recipients of disclosures or people responsible for taking action on disclosures.   |
|   | <b>Protection for suspected whistleblowers</b>   | 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.  |
|   | <b>Continuity of protection</b>                  | 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. |
|   | <b>Protections for suppliers and customers</b>   | 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.