Submission No 7

REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994

Organisation: Transparency International Australia

Name: The Hon Anthony Whealy QC

Position: Chair

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TRANSPARENCY INTERNATIONAL AUSTRALIA

Affiliate of Transparency International, the Coalition against Corruption

PO Box 2041
Blackburn South Vic 3130
AUSTRALIA

[redacted]
www.transparency.org.au

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The Chair
Committee on the Ombudsman, the Police Integrity Commission
and the Crime Commission
Parliament House
Macquarie Street
Sydney NSW 2000

ombopic@parliament.nsw.gov.au

Review of *Public Interest Disclosures Act 1994*

Transparency International Australia (TIA) welcomes the opportunity to make a submission to the Parliamentary Committee in relation to the Act. TIA is an advocacy body whose area of oversight is to work with government, the public and private sectors to eliminate or reduce the evil of corruption. Our general position paper on 'whistleblowers' is attached. However, our submission will focus only on terms of reference 2b and 2c.
These are:
2b whether the structures in place to support the operation of the public interest disclosures scheme remain appropriate; and
2c the need for further review of the Act.

An Overview

TIA welcomed the 2010 amendments to the Act. However, with the passage of time, it has become apparent that there are weaknesses in the legislation and that this could be reviewed and be the subject of further amendment. Broadly speaking, our submission is as follows:

- Many provisions of the legislation are complicated and lack simplicity. The more technical and complex a particular piece of legislation is, the more likely it will fail to achieve its core purposes.
- In particular, the legislation (as presently framed) fails to provide sufficient protection for whistleblowers.
- TIA believes there is a compelling need to ensure that public authorities have strong systems in place. For example, in the liquor and gaming industries, there is a significant code of behaviour that is enshrined into the legislation. A similar approach could be taken here.

1. The Legislation is Complicated

It will be for others to provide significant detail on this point. However we draw the Committee's attention to the following 'technical areas'.

- Definition of 'Public Official'.
- How to deal with subsidiary agencies? Should these be deemed to be the parent agency?
- Should there be a provision such as Section 70 of the Commonwealth PID Act?
- The 'role reporters' problem. Which provision should apply to provide protection, but prevent bureaucratic overload?

- The extent of the 'contractor' problem (Section 4A (i)) of the Act. Has the 2013 Amendment of the Act resolved this problem? Are sub-contractors covered? Should they be specifically included?
- To whom, given the changing structure in NSW of government agencies, should disclosures be made? Employees may miss out on protection if a disclosure is made to the wrong authority or person. How can this be remedied?
- Reprisals: should there be a requirement for these to be notified to the Ombudsman as soon as they are made? In any event, how do the reprisal provisions operate? Are they effective or do they require amendment? We shall address this in more detail in the next section.

2. Reprisals

TIA submits that there is a compelling need to review Section 20 of the Act. It provides that: 'a person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence'.

In proceedings for an offence, there is a reverse onus placed on the defendant. To avoid liability a defendant must prove 'that the detrimental action was not substantially in reprisal for the person making the public interest disclosure'.

The use of the adverb 'substantially' means in practice that in the majority of cases a defendant may easily discharge the onus placed upon him and escape liability. In most cases, there will have been a history of animosity or conflict in the workplace. It is comparatively easy to sheet home the need for the detrimental action to this history rather than to brand it as an action 'substantially' in reprisal.

The recent case of DPP against Kear provides a good illustration of the point. The ICAC made damning findings against Mr Kear and yet he was acquitted at trial. This was essentially on the basis that he had established the necessary situation under the 'reverse' onus. It is difficult to see, given a history of conflict in the workplace, that the prosecution could ever prove that the 'substantial reason' for the detrimental action was malice or revenge. The court will all too readily equate 'a substantial reason' with 'the substantial reason'. (See Prof. A. J. Brown's paper, 'Public Interest Disclosures Legislation 2006', p.36).

TIA submits that the tests in the ACT or Commonwealth Models ('A Contributing Reason' 'is the reason, or part of the reason' for the act) are preferable to the current test in the NSW Act.

Conclusion

TIA respectfully places this submission before the Committee and asks that it be taken into account. The adequate protection of whistleblowers in our view is fundamental to the exposure of corruption in the public sector. The legislation in question requires regular review and a critical assessment of its operation.

The Hon. Anthony Whealy QC
Chair, Transparency International Australia
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WHISTLEBLOWING

PURPOSE

To ensure public interest whistleblowing is facilitated, protected and acted on in Australia – as a key plank of corruption detection and resilience for organisations and employees alike, across the public, business and civil society sectors.

THE PROBLEM

Whistleblowers (organisational insiders who disclose wrongdoing in or by their organisation, in order to trigger action) play a key role in exposing otherwise unknown acts of corruption. Frequently, when corruption or wrongdoing emerges, it becomes clear that organisations, law enforcement and other regulators could have acted earlier to prevent or deal with it – if people with relevant knowledge had spoken up, to the right people or in the right way, or been listened to when they tried to raise their concerns.

While Australia has been at the forefront of recognising the role of whistleblowing in its public integrity systems, there remain major problems:

- Nationally, legal protections for business and civil society whistleblowers are largely missing
- At federal and state level, key government whistleblower protection legislation remains incomplete or out-of-date
- The effectiveness of existing legislation in delivering remedies for employees who suffer detriment as a result of making a public interest disclosure remains highly uncertain
- Not enough is known about best practice approaches to facilitating and protecting whistleblowing within organisations (especially in the private sector); and
- There is a lack of independent advice and support services for employees who are considering, or who do, blow the whistle on wrongdoing.

HISTORY AND PREVIOUS RECOMMENDATIONS

Article 33 of the UN Convention Against Corruption (2004) emphasises measures to protect any person 'against any unjustified treatment' for reporting facts relevant to corruption. In practice, as TI's experience shows,[1] such facts often come from organisational insiders: whistleblowers.

Since 2010, in their Anti-Corruption Action Plans, G20 leaders have also committed to effective public and private sector whistleblower protection regimes. In 2011, OECD guidance[2] for G20 leaders confirmed that protections need to be available, and action taken, in response to all major types of public interest concerns – from direct evidence of corruption to other wrongdoing, causes of which may also relate to hidden corruption. A comprehensive approach to whistleblower protection is also advocated in TI's *International Principles for Whistleblower Legislation* (2013).[3]

In some respects, Australia's track record in recognising whistleblowing is advanced. Spurred on by the revelations of Queensland's Fitzgerald Inquiry into official corruption (1987-89), state

parliaments began legislating for **public sector whistleblower protection** in 1991. In 2013, following a major parliamentary inquiry,[4] far-reaching federal public sector legislation was also passed with strong support from all political parties: the *Public Interest Disclosure Act* (Cth).

The single largest gap is now lack of comprehensive whistleblower protection in Australia's **business and civil society sectors**.[5]

The relevance to corruption detection is clear: since 2010, whistleblowers have been instrumental in triggering and aiding Australia's first prosecutions for foreign bribery (against Securency Ltd and Note Printing Australia). The OECD's recent review of Australia's foreign bribery laws and enforcement also reinforces the need to close this gap. Australia is also yet to seriously consider the benefits of *qui tam* provisions which incentivise corporate employees to disclose fraud and wrongdoing by providing rewards of up to 25 per cent of recovered damages, such as in the US where US$6 billion was recovered in 2014 through the federal *False Claims Act*.

In 2014, a major Senate Economics Committee inquiry recommended a comprehensive overhaul of the limited existing whistleblowing provisions of the *Corporations Act 2001* (Part 9.4AAA),[6] to achieve an integrated scheme. The alternative is piecemeal regulation such as in the US, where protections vary across more than 47 different federal regulatory laws.[7] So far, the Australian Government (October 2014) has 'noted' but taken no action to respond to this recommendation.

Despite advances, there also remain many gaps and challenges for effective whistleblowing regimes **in the public sector**. Federal protection – now undergoing statutory review – does not apply to disclosures about corruption or wrongdoing by Ministers, their staff, other politicians, or judges. Protections are weaker for national security employees.[8]

At state level, major legal upgrades took place in Queensland, NSW and the ACT in 2010-2012, but protections remain inconsistent and in same cases out-of-date. For example, Victoria, Tasmania, the Northern Territory and South Australia continue to have no rules governing when a protected disclosure may be made to the media.

In **all sectors**, there are also across-the-board challenges:

- the effectiveness of the legislation in **delivering remedies** for whistleblowers whose lives and careers suffer remains highly uncertain – more evaluation is needed to establish whether compensation or sanctions are flowing and if not, what reforms are needed;
- **organisations** need more knowledge and guidance on 'best practice' internal approaches to facilitating and protecting whistleblowing, especially in the private sector – and this is also needed to inform effective standard-setting by government as to minimum procedures;
- there is a lack **of independent advice and support services** for employees who are considering, or who do, blow the whistle on wrongdoing in Australia – some 'hotline' services exist which can provide advice to employees, and some unions and professional associations may provide advice, but there is no equivalent to the type of specialist, public interest advice and support services available in many countries (such as Public Concern At Work in the UK, Open Democracy Advice Centre in South Africa, Government Accountability Project in the USA, or TI Anti-Corruption Legal Advice Centres (ALACs) elsewhere).

TI AUSTRALIA'S POSITION

- **The Australian Government should immediately review, and legislate to fill, the gap in private sector whistleblower protection, by accepting the Senate Economics Committee's recommendations and developing comprehensive legislation,** including:
  - A consistent approach across all industries and sectors, and
  - Consideration of rewards and 'qui tam' remedies (which compensate whistleblowers by allowing them to directly recover a proportion of the proceeds of fraud or corruption that they reveal, in the public interest)

- **The Australian and State governments should upgrade their laws to ensure comprehensive public sector whistleblower protection,** including
  - Extending the Commonwealth law to cover disclosures of wrongdoing by any form of public official, and effective coverage of national security employees;
  - New or replacement legislation in Victoria, Tasmania, South Australia and the Northern Territory to put in place comprehensive schemes covering all major wrongdoing and reporting avenues (including the media);
  - Law reform in the other jurisdictions to bring other elements of their regimes up to 'best practice' standards, including with regard to reporting thresholds, minimum internal disclosure procedures, and compensation provisions.

- **Australian governments and business should support research and policy reform for best practice in whistleblowing management systems in organisations,** including:
  - Development of a new **Australian Standard** on Whistleblower Protection
  - Better practice legislative requirements, minimum standards, & incentives (e.g. defences) for good whistleblowing systems
  - Review of the effectiveness of remedies for maltreated whistleblowers, including by identifying the most efficient remedial systems for workers and employers alike.

- **Governments, business, unions, and legal affairs bodies / foundations should join TI Australia in assessing the need for, and feasibility of, an independent national public advice line and support service on whistleblowing,** to assist organisations and employees in detecting and dealing with suspected corruption**.**

[1] See M Gorbanova, *Speak Up: Empowering citizens against corruption*, Transparency International, April 2015 http://www.transparency.org/whatwedo/publication/speak_up_empowering_citizens_against_corruption

[2] OECD Compendium of Best Practices and Guiding Principles (2011) http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf.
[3] http://www.transparency.org/whatwedo/pub/international_principles_for_whistleblower_legislation.
[4] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower Protection: A comprehensive scheme for the Commonwealth public sector* (2009).
[5] See Wolfe, S., Worth, M., Dreyfus, S & Brown, A.J. (2014), *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, Blueprint for Free Speech, Griffith University, University of Melbourne, Transparency International Australia <*https://blueprintforfreespeech.net*> September 2014.
[6] Senate Economics Committee (2014). *The Performance of the Australian Securities & Investments Commission: Report of the Senate Economics Committee Inquiry.* Canberra: Parliament House (June 2014).
[7] Devine, T. and T. Massarani, 2011, *The Corporate Whistleblower's Survival Guide,* San Francisco: Berrett-Koehler, p.151.
[8] See A J Brown, 'Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience', *E-Journal of International and Comparative Labour Studies,* September/October, 2(3): 153–182.