



## **Australian Government**

Australian Government response to the Parliamentary Joint  
Committee on Corporations and Financial Services report into  
whistleblower protections in the corporate, public and  
not-for-profit sectors

April 2019

# **AUSTRALIAN GOVERNMENT RESPONSE TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES REPORT INTO WHISTLEBLOWER PROTECTIONS IN THE CORPORATE, PUBLIC AND NOT-FOR-PROFIT SECTORS**

## **Introduction**

The Australian Government welcomes the consideration of the adequacy of the Government's legislative, institutional and policy framework for addressing whistleblower protections by the Parliamentary Joint Committee on Corporations and Financial Services (the Committee), and its inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.

The Committee's *Whistleblower Protections* report, tabled in the Parliament on 13 September 2017, with a corrigendum tabled on 14 September 2017, made 35 recommendations.

The Government acknowledges the Committee's observation that effective whistleblower protection frameworks foster integrity and accountability while deterring and exposing misconduct, fraud and corruption. The Government is committed to strengthening the whistleblower frameworks in the public, corporate, tax and registered organisations sectors.

The Government has delivered on its commitment to strengthen whistleblower protections in the tax and corporate sectors through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Whistleblower Act). The Government intends to undertake future reforms to the *Public Interest Disclosure Act 2013* (PID Act), incorporating agreed proposals from the Committee's report and the review of the PID Act undertaken by Mr Philip Moss AM (the Moss Review, tabled in Parliament on 20 October 2016), and reforms to the *Fair Work (Registered Organisations) Act 2009* (FWRO Act) incorporating agreed proposals from the Committee's report.

In considering its response to the Committee's report, the Government has consulted with a number of agencies and also had regard to feedback received from the Expert Advisory Panel on whistleblower protections announced by the then Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, on 28 September 2017. The Government thanks all of the Panel members and in particular the non-Government members, Professor A J Brown, Dr David A Chaikin, Mr Michael Croker and Mr John Nguyen, for their advice and assistance.

## **Government response**

Of the 35 recommendations made by the Committee, the Government agrees (wholly or partially) or agrees in principle with 16 recommendations. The Government notes a further 11 recommendations. The Government does not agree with eight of the recommendations made

because they have since been addressed by the Whistleblower Act, they are not necessary or desirable, or may compromise agency investigations. In some cases, the Government considers it more appropriate that these recommendations be reconsidered in the future as part of a post-implementation review of Commonwealth whistleblower laws including the Whistleblower Act, and future reforms to the PID Act and the FWRO Act.

The Whistleblower Act passed by Parliament on 19 February 2019 extends the corporate whistleblower protections in the *Corporations Act 2001* (Corporations Act) and introduces a new protection regime for tax whistleblowers in the *Taxation Administration Act 1953* (Taxation Act). It gives effect to many of the Committee's recommendations.

Recommendation relating to consistency of whistleblower protections across sectors

**Recommendation 3.1**

The committee recommends that:

- (a) Commonwealth public sector whistleblowing legislation remain in a single updated Act, redrafted in parallel with the private sector Act;
- (b) Commonwealth private sector whistleblowing legislation (including tax) be brought together into a single Act;
- (c) 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
- (d) The Commonwealth, states and territories harmonise whistleblowing legislation across Australia.

(a) **Agree in principle.** The Government agrees to retain the PID Act as a single stand-alone Act establishing a whistleblower regime for the Australian Government public sector. The Government supports the principle of seeking to align this legislation as much as possible with private sector whistleblowing legislation.

(b) **Agree in principle.** The Whistleblower Act establishes a single, strengthened, private sector whistleblower regime in the Corporations Act which applies to the corporate, financial [financial products and services], superannuation, insurance, credit and not-for-profit sectors (within the Commonwealth's constitutional powers). The Act will provide protections for whistleblowers who report suspected contraventions of corporations and other legislation regulating the banking, insurance, superannuation and credit sectors, as well as any suspected misconduct or improper state of affairs or circumstances relating to entities regulated under those statutes irrespective of whether they indicate there has been a breach of any Commonwealth, State or Territory law, and Commonwealth law offences that carry prison terms of at least 12 months.

The Act also establishes a new regime in the Taxation Act to protect whistleblowers who report suspected non-compliance with Australia's taxation laws. This regime will operate

independently of the regime established by the Corporations Act amendments because there are some elements of the tax whistleblower regime which necessarily differ from the corporate sector whistleblower regime. A post-implementation review (Government response to recommendation 12.11 refers) will provide an opportunity to assess the effectiveness of the new regime and the necessity and feasibility of any further consolidation of whistleblower legislation in the private sector.

(c) **Agree in principle.** The Whistleblower Act and the proposed amendments to the PID Act and the FWRO Act will more closely align the whistleblower schemes for the public and private sectors and for registered organisations. As outlined in its response to recommendation 12.11, the Government supports a post-implementation review of the reforms after they have had a reasonable time to operate. Such a review will provide an opportunity to consider the need for any further consolidation of the whistleblower legislation.

(d) **Agree in principle.** The Government supports the alignment of Commonwealth private and public sector whistleblower legislation as is appropriate. It is open to State and Territory governments to review harmonisation of their whistleblowing laws.

*Recommendations relating to disclosable conduct*

**Recommendation 5.1**

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.

**Noted.**

The Government has progressed its consideration of the Moss Review in conjunction with considering the Committee's report. The Government supports an approach whereby reprisal action against a person who has made a public interest disclosure remains conduct that can, in and of itself, be the subject of a disclosure under the PID Act.

In relation to the proposal for a national database on disclosures related to personal employment grievances, Australian Government agencies subject to the PID Act are currently required to report to the Ombudsman annually on the kinds of disclosable conduct involved in disclosures. As presently defined in the PID Act, 'disclosable conduct' does not include a discrete ground of wrongdoing described as an employment related grievance. A grievance of that kind could involve allegations related to a range of disclosable conduct, including a

contravention of a Commonwealth law, or conduct that could be reasonable grounds for disciplinary action. Should the PID Act be amended to exclude personal employment related grievances from its scope, the data collection would record purported disclosures considered to be out of scope of the PID Act.

### **Recommendation 5.2**

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.

### **Agree in principle.**

The Government agrees in principle with a definition of disclosable conduct in relation to corporate whistleblower protections. The Whistleblower Act covers contraventions of any Commonwealth law punishable by imprisonment of 12 months or more, contraventions of corporate and financial system legislation within the remit of the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA), conduct that represents a danger to the public or the financial system as well as misconduct or an improper state of affairs or circumstances in relation to regulated entities. The latter definition is broad and is capable of covering breaches of industry codes, professional standards and contraventions of State and Territory laws.

The Government recognises that not all not-for-profits will be covered under the new corporate reforms. However, not-for-profit companies that are limited by guarantee and fall within the Commonwealth's constitutional powers will be covered. The Whistleblower Act brings all tax law breaches, including those relating to not-for-profits, within the scope of protected disclosure.

**Recommendation 5.3**

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.

**Agree in principle.**

The Whistleblower Act broadens, aligns and consolidates the scope of disclosable conduct to include breaches, or suspected breaches, of relevant corporate and financial system legislation, as well as protecting disclosures based on a suspicion of misconduct or an improper state of affairs or circumstances in relation to regulated entities, or conduct that represents a danger to the public or the financial system.

*Recommendations relating to definition of whistleblowers and thresholds for protection*

**Recommendation 6.1**

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.

**Agree in principle.**

The definition of a 'public interest disclosure' in the PID Act expressly states that a public interest disclosure is made by a person who is, or has been, a 'public official' (paragraph 26(1)(a) of the PID Act). Section 69 of the PID Act sets out the persons who are taken to be present or past public officials and the agencies to which those persons are taken to have belonged at that time. The Government proposes to amend the PID Act to clarify that purpose, through a note. It also proposes to amend other provisions in the PID Act to clarify its application to former public officials.

**Recommendation 6.2**

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

**Agree.**

The definition of 'eligible whistleblower' in the Whistleblower Act captures all current and former officers and employees of regulated entities or related bodies corporate, all people and their employees who provide services or goods to these entities, and all unpaid workers, associates, close relatives and dependents.

The tax regime takes a similarly broad approach and provides protection for individuals with insider knowledge of tax law breaches, including current and former employees, contractors and volunteers.

The FWRO Act allows for disclosures by current and former officers, employees and members and disclosures by contractors (section 337A).

### **Recommendation 6.3**

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.

### **Agree.**

The Government notes the Whistleblower Act provides protections where a threat or reprisal is taken against a person because the wrongdoer believes or suspects that the person or any other person made, may have made, proposes to make or could make a protected disclosure. This extends protections to persons who may suffer a reprisal due to being directly or indirectly (as well as knowingly or unknowingly) associated with whistleblowers e.g. blanket retaliatory action taken by an employer against a group of employees because the employer does not know the identity of the whistleblower.

Implementation for the PID Act will require incorporating the concept of taking a reprisal action against a person who *could make* a disclosure, noting the PID Act now covers the other grounds in this recommendation. This would align section 13 of the PID Act with section 337BA of the FWRO Act.

### **Recommendation 6.4**

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.

### **Disagree.**

For the public sector, section 78 of the PID Act provides protection from criminal or civil proceedings or administrative action for public officials that receive disclosures or have other functions under the Act. The protection applies to acts or omissions by those public officials done in good faith in the performance of functions or the exercise of powers under the Act.

The Government does not agree that public officials who are responsible for performing functions or exercising powers under the PID Act should have the benefit of a statutory protection if they have not acted in good faith in discharging those functions or powers. A distinction can be drawn between providing statutory protections to a person who has made a disclosure and who has not done so in good faith, and providing protections to a person who is discharging a statutory obligation and who has not done so in good faith. In the former case, a public interest lies in discovering wrongdoing despite the discloser's motivation. However, there is no parallel public interest in protecting public officials who have not acted in good faith when performing a statutory function related to handling a public interest disclosure. For example, it would potentially mean the official is protected from civil or criminal action if the official has deliberately caused a wrongful reprisal action.

Section 337DA of the FWRO Act is in similar terms to section 78 of the PID Act.

For the private sector, the Government will assess how the new regime operates before determining whether a further review is required.

**Recommendation 6.5**

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.

**Disagree.**

The Government considers that this inquiry is no longer necessary. The Whistleblower Act protects against reprisals against businesses by, for example, enabling a court to order that a business be paid compensation if it has suffered a reprisal.

The Whistleblower Act also broadens the categories of eligible whistleblowers and would cover situations where a whistleblower is an associate of a regulated entity or is a contractor (or an employee of a contractor) who supplies services or goods to a regulated entity. Similar rules apply in the new tax whistleblower regime.

**Recommendation 6.6**

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.



**Agree.**

The Whistleblower Act repealed and substituted the ‘good faith’ test with an objective test requiring ‘that a discloser has reasonable grounds to suspect’ the relevant disclosable conduct. This approach has been adopted in the new tax whistleblower regime.

This reform aligns the private sector legislation with the FWRO Act and international best practice, which require disclosures made on ‘reasonable grounds’ or based on a ‘reasonable belief’, which are objective tests.

*Recommendations relating to anonymity of whistleblowers*

**Recommendation 7.1**

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.

**Agree.**

The Whistleblower Act repealed the requirement for a discloser to provide their name before making a disclosure and provides explicit protection for anonymous disclosures (see Schedule 1, item note to section 1317AA of the Corporations Act and section 14ZZT of the Taxation Act).

Private sector legislation, including the new tax regime, is now aligned with the PID Act, the FWRO Act and international best practice in protecting anonymous disclosures.

**Recommendation 7.2**

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

**Disagree.**

If a disclosure qualifies for protection under the PID Act, FWRO Act or the Whistleblower Act, those protections will apply regardless of whether a finding of wrongdoing is made about the information that has been disclosed. The legislation applies consistently in that respect.

### **Recommendation 7.3**

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.

#### **Agree.**

The Whistleblower Act makes it an offence for a person to disclose a whistleblower's identity, subject to certain exceptions, for both the corporate and tax sector regimes, and aligns with the PID Act.

Also in line with the PID Act, the Whistleblower Act protects a discloser or other person from being required to provide identifying information to a court or tribunal. Exceptions to this protection are where it is necessary to give effect to the whistleblower protections in the legislation or the court or tribunal thinks it necessary in the interests of justice.

The Government agrees to amend the FWRO Act to further strengthen the confidentiality protections for whistleblowers in registered organisations, bringing these protections in line with those in the Whistleblower Act.

### *Recommendation relating to internal, regulatory and external reporting channels*

### **Recommendation 8.1**

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.

#### **Agree.**

The Whistleblower Act protects corporate-related disclosures made to senior managers of the body corporate or related body corporate, or to a person authorised by the body corporate to

receive disclosures. Similarly, tax whistleblowers may make disclosures to a person authorised by an entity to receive disclosures in addition to other prescribed recipients.

Public companies, large proprietary companies and registrable superannuation entities will be required to have a whistleblower policy that includes details on to whom a disclosure should be made.

The Government agrees to amend the FWRO Act to protect internal disclosures, aligning this scheme with the Whistleblower Act.

**Recommendation 8.2**

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

**Agree.**

The Whistleblower Act protects disclosures made to prescribed regulatory bodies, in addition to providing channels for corporate and tax-related disclosures to be made to other prescribed recipients. The protections for regulatory disclosures are, to the extent possible, consistent with the protections that apply for disclosures made in accordance with the PID Act and the FWRO Act.

The Whistleblower Act also protects eligible public interest disclosures and emergency disclosures made under the Corporations Act to a Member of Parliament or journalist, subject to certain requirements. These broadly align with similar provisions under the PID Act.

*Recommendations relating to disclosures to Australian law enforcement agencies*

**Recommendation 8.3**

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.

**Disagree.**

The Government is concerned that obliging law enforcement agencies to provide regular updates to whistleblowers could unduly impact on their investigation resources and may prejudice investigations. Whether such an update is provided, and the extent of the update, is better left to the discretion of the relevant agency, which is in the best position to assess what (if any) information may be safely provided. In addition, it would not be possible for regulators to provide updates to anonymous whistleblowers.

#### **Recommendation 8.4**

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.

#### **Disagree.**

The Whistleblower Act provides that corporate-related disclosures can be made directly to ASIC or APRA whilst, for the tax sector, disclosures can be made directly to the Commissioner of Taxation. These agencies have discretion to share disclosures and, if needed, refer them to the Australian Federal Police or any Commonwealth, State or Territory agency in the performance of its functions or duties. The Whistleblower Act does not oblige any of these agencies to transfer any disclosures as they generally already have relevant information-sharing protocols and processes in place.

The Government supports the current focus in the PID Act that disclosures are, in the first instance, made within the agency to which the underlying conduct relates. If the investigating officer suspects on reasonable grounds there is information that an offence may have been committed, the PID Act permits the officer to disclose the information to a member of an Australian police force. Disclosure is mandatory if the offence is punishable by imprisonment for at least two years. The FWRO Act requires the person to whom a protected disclosure is made to allocate the disclosure to an authorised official to investigate. Authorised officials include the Registered Organisations Commissioner, the Fair Work Ombudsman and members of the Fair Work Commission. The Act also provides for agencies to disclose the information to a member of an Australian police force in certain circumstances.

#### *Recommendations relating to external disclosures*

#### **Recommendation 8.5**

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.

#### **Noted.**

To the extent the recommendation relates to external disclosures under the PID Act, the Committee's supporting commentary refers to a Moss Review recommendation to 'include a more objective test for the grounds for external disclosures under the PID Act'. It is noted that the Moss Review does not make a recommendation to that effect, but recommends that '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' (see recommendation 8 of the Moss Review).

Insofar as it is recommended that the provision in the PID Act for external third party disclosures be extended to disclosures made to a registered organisations, a federal Member of Parliament or their office, the PID Act permits an 'external disclosure' and an 'emergency disclosure' to be made to 'any person other than a foreign public official'. Accordingly, those types of disclosures can now be made to a person in a registered organisation, a federal Member of Parliament or a person in their office.

To the extent the recommendation applies to the private sector, the Whistleblower Act protects public interest disclosures or emergency disclosures made under the Corporations Act to a Member of Parliament or journalist.

#### **Recommendation 8.6**

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.

#### **Agree in part.**

The Whistleblower Act protects eligible emergency disclosures and public interest disclosures made under the Corporations Act to a Member of Parliament or a journalist (the Taxation Act does not provide for emergency disclosures). Both types of disclosures require the whistleblower to have first made a disclosure to ASIC or APRA and to subsequently provide written notification that the discloser intends to make an emergency disclosure or a public interest disclosure prior to doing so.

Under an emergency disclosure, the discloser must have reasonable grounds to believe there is a substantial and imminent danger to the health or safety of one or more persons or to the natural environment. To avoid any uncertainty of protection for the whistleblower in emergency circumstances, however, such disclosures are not subject to a 'reasonable period' condition.

However, a public interest disclosure is protected if the discloser does not have reasonable grounds to believe that action is being, or has been, taken to address the matters previously disclosed to the regulator and a 90-day period has passed since the disclosure was first made. This defined time period provides certainty for the whistleblower in contrast to an undefined 'reasonable period' and aligns with the PID Act.

The Government agrees to amend the FWRO Act to protect disclosures to the media, in appropriate circumstances, in line with the protections in the Whistleblower Act.

**Recommendation 10.1**

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

**Disagree.**

Under the FWRO Act, civil remedies, civil penalties and criminal liability rely on the same definition of ‘taking a reprisal’ (section 337BA). This definition requires a connection between the behaviour constituting the reprisal and a belief or suspicion that a person has made, may have made, or could or proposes to make a protected disclosure. The Government supports the need for such a connection in order for any remedy to be available and does not support separate grounds for civil and criminal liability. Respondents should be able to argue that they took action for reasons unrelated to a whistleblower’s disclosure.

**Recommendation 10.2**

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.

**Agree in part.**

The Whistleblower Act strengthens protections for whistleblowers against reprisals. These protections include:

- protection from harassment, harm (including psychological harm) and damage to property, reputation or a person’s business or financial position;
- remedies including damages, injunctions, order for an apology or reinstatement, exemplary damages or any order the court thinks appropriate;
- sanctions including civil penalties; and
- criminal and civil liability for reprisals as well as provision for a whistleblower to claim compensation for a reprisal irrespective of whether a criminal or civil action has been commenced.

**Recommendation 10.3**

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.

**Agree.**

The Whistleblower Act permits a court to make an order for the wrongdoer to pay compensation. The apportionment of liability between a wrongdoer and the wrongdoer's employer, or vicarious liability, is consistent with the PID Act.

**Recommendations relating to a reward system****Recommendation 11.1**

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.

**Noted.**

As identified in its response to recommendation 12.11, the Government supports a post-implementation review of whistleblower protections. This will provide the opportunity to assess the merit and cost case of a rewards scheme when the present reforms have had a reasonable time to operate and further information is available.

### **Recommendation 11.2**

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).

### **Noted.**

As identified in its response to recommendation 12.11, the Government supports a post-implementation review of whistleblower protections. This will provide the opportunity to assess the merit and cost case of a rewards scheme when the present reforms have had a reasonable time to operate and further information is available.



Recommendations relating to a Whistleblower Protection Authority

**Recommendation 12.1**

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.

**Noted.**

As identified in its response to recommendation 12.11, the Government supports a post-implementation review of whistleblower protections. This will provide the opportunity to assess the merit and cost case of establishing a 'one-stop shop' Whistleblower Protection Authority when the present reforms have had a reasonable time to operate and further information is available.

**Recommendation 12.2**

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 authorised, 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).

**Noted.**

As identified in its response to recommendation 12.11, the Government supports a post-implementation review of whistleblower protections. This will provide the opportunity to assess the merit and cost case of establishing a 'one-stop shop' Whistleblower Protection including whether a replacement wage scheme would be appropriate and within the remit of such an agency's responsibility.

*Recommendations relating to consistent investigations of disclosures and reprisals*

**Recommendation 12.3**

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.

**Noted.**

The Government has progressed its consideration of the Moss Review in conjunction with considering the Committee's report. The Government supports an approach where reprisal action against a person who has made a public interest disclosure remains conduct that can be the subject of a disclosure under the PID Act.

The Whistleblower Act provides protections against victimisation, which is both a criminal and civil offence under the Act. The whistleblower protections under the Corporations Act limit protection for disclosures about solely personal employment related matters, while preserving protection for disclosures about systemic issues or reprisals against a whistleblower. A disclosure of a personal work-related grievance will remain protected if it concerns detriment to the discloser in contravention, or alleged contravention, of the victimisation provisions. A disclosure of a personal work-related grievance will also remain

protected if it is made to a legal practitioner for the purposes of obtaining legal advice or legal representation in relation to the operation of the whistleblower provisions.

**Recommendation 12.4**

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*.

**Disagree.**

The Whistleblower Act does not enact statutory requirements for the investigation of disclosures and reprisals as a universal procedure and this is not appropriate for the private sector due to the different corporate structures in existence. This facilitates specialised regulatory agencies such as ASIC, APRA or the Australian Taxation Office to be able to structure their own investigations as they deem appropriate.

However, for internal investigations the Government has introduced a requirement for public companies, large proprietary companies and registrable superannuation entities to have a whistleblower policy which must include information on (but not limited to) the following:

- to whom and how to make a disclosure;
- how the entity will support and protect a whistleblower from detriment; and
- how the entity will investigate a disclosure.

This ensures these large entities are transparent about their investigation procedures while also allowing each entity to develop suitable processes that reflect a number of considerations including, but not limited to, their structure, management chain, existing procedures and industry sector.

**Recommendation 12.5**

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.

**Agree.**

The Whistleblower Act, the PID Act and the FWRO Act each allow a person to bring civil proceedings for reprisal action against them even if a prosecution for a criminal offence in relation to the reprisal has not been brought or cannot be brought.

**Recommendation 12.6**

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

**Noted.**

All Acts provide for uncapped compensation through the courts.

For the public sector, the PID Act enables a person to seek civil remedies in the Federal Court or the Federal Circuit Court. In the alternative, the PID Act also preserves a right to make an application to the Federal Court or to the Federal Circuit Court under the *Fair Work Act 2009* (sections 22 and 22A PID Act). While no provision is made for assessment by a tribunal, the PID Act does not cap the compensation that may be ordered by the Court.

A similar provision is made under the FWRO Act (see section 337BB). The FWRO Act is silent on whether a person who has received compensation under section 337BB could also make an application under the *Fair Work Act 2009* regarding the same matters.

The Whistleblower Act does not prevent a whistleblower from seeking uncapped compensation in a court (indeed the right to seek compensation existed already under the Corporations Act and is uncapped; this is unaltered by the Whistleblower Act). The Court will have discretion in determining the compensation available to whistleblowers to put them back into the position they were in prior to making the disclosure (similar to the tort damages test). The Act permits the Court to make other orders including: injunctions, apologies, reinstatement, exemplary damages and any other orders it considers appropriate.

Recommendation relating to requirements for internal disclosure procedures

**Recommendation 12.7**

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).

**Noted.**

As identified in its response to recommendation 12.11, the Government supports a post-implementation review of whistleblower protections. This will provide the opportunity to assess the merit and cost case of establishing a ‘one-stop shop’ Whistleblower Protection Authority, including the appropriateness of powers to set standards for internal disclosure.

Recommendations relating to transparent use of legislation

**Recommendation 12.8**

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.

**Noted.**

As identified in its response to recommendation 12.11, the Government supports a post-implementation review of whistleblower protections. This will provide the opportunity to assess the merit and cost case of establishing a ‘one-stop shop’ Whistleblower Protection Authority including aspects within the remit of such an agency’s responsibility.

**Recommendation 12.9**

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).

**Noted.**

The Whistleblower Act, the PID Act and the FWRO Act each include a provision to the effect that no contractual or other remedy may be enforced or exercised against an individual for making a protected disclosure.

**Recommendation 12.10**

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.

**Disagree.**

High Court authority (see *Daniels Corporation International Pty Ltd v ACCC* [2002] HCA49 (7 November 2002)) provides that unless a law expressly excludes legal professional privilege, it will not be waived. The Government notes that the Whistleblower Act does not expressly or impliedly override legal professional privilege and it is not the Government's intention that legal professional privilege be abrogated by the Act. Accordingly, the Government considers implementation of this recommendation unnecessary.

**Recommendation relating to a post-implementation review****Recommendation 12.11**

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

**Agree.**

The Whistleblower Act provides that the Minister must cause a review to be undertaken of the operation of the whistleblower protections within the Corporations Act and the Taxation Act, five years after the commencement date of the Act. The operation of the whistleblower protections in the PID Act and the FWRO Act are intended to be reviewed at this time.