

**Answers to Questions on Notice by the
Commonwealth Ombudsman**

**WHISTLEBLOWER PROTECTIONS IN THE
CORPORATE, PUBLIC AND NOT-FOR PROFIT
SECTORS**

PUBLIC INTEREST DISCLOSURE

Acting Commonwealth Ombudsman, Doris Gibb

24 April 2017

1. CORPORATE SECTOR

(a)-(c)

As outlined in our submission to this inquiry, the Office of the Commonwealth Ombudsman (OCO) as a Commonwealth Agency, does not comment on whistleblowing legislation in the corporate sectors. An exception to this is our involvement as a research partner in the 'Whistling While They Work 2: Improving Managerial Responses to Whistleblowing in Public & Private Sector Organisations' project. The project is currently being led by Griffith University's Centre for Governance and Public Policy, under the stewardship of Professor A J Brown, focussing on public interest whistleblowing in the public, corporate and not-for-profit sectors.¹

2. PUBLIC SECTOR

- (a) We refer the Committee to the OCOs pages four and five of our submission to this inquiry. For further information, we refer the Committee to the OCOs submission to the Australian Government, Department of Prime Minister and Cabinet, *Review of the Public Interest Disclosure Act 2013* (PID Act) which was attached to our submission.
- (b) The OCO does not have responsibility for the *Fair Work (Registered Organisation) Amendment Act 2016* (FWRO) nor any of its subsequent amendments. Currently the two pieces of legislation interact to the extent that a person has access to information which falls under disclosable conduct in both the FWRO and the PID Acts. The disclosable conduct test is harder to apply, noting that it must be action undertaken by a person in connection with both their position as a public official and as a member or employee of a registered organisation.

For example, this may occur where a delegate of the Community and Public Sector Union represents their fellow union members within the public service agency and in doing so, contravenes a law of the Commonwealth, the FWRO Act or the Fair Work Act. In this instance they are acting in their capacity as a public official and a member of a registered organisation. The discloser must also be a public official *and* a member, employee, official of a registered organisation or a contracted service provider.

If both threshold tests are satisfied, a discloser may choose whether to report the disclosable conduct to an Authorised Officer under the PID Act or an authorised official under the FWRO Act. This would largely depend on the circumstances of the case. However, if a person is concerned about reprisal actions, the FWRO Act provides for a broader definition of detriment. This may provide a person with increased protections. Both pieces of legislation have penalties of two years imprisonment if a person takes a reprisal against another person due to the belief that a person may have made or proposes to make a disclosure. A person cannot seek a remedy under both the FWRO Act and the PID Act in the Federal court or Federal Circuit Court in relation to the same conduct.

¹ Griffith University, *Whistling While They Work 2: Improving Managerial Responses to Whistleblowing in Public & Private Sector Organisations*, <http://www.whistlingwhiletheywork.edu.au/> (accessed 7 February 2017).

If a discloser believed that extensive investigative powers were essential to the success of the investigation, they may choose to make a disclosure under the FWRO Act. The Registered Organisations Commissioner, or a person to whom the Registered Organisations Commissioner has delegated power to, has greater investigative powers under the FWRO Act in comparison to that of an investigative officer under the PID Act.

There are limited confidentiality and secrecy provisions in the FWRO Act in comparison to those in the PID Act. The Registered Organisations Commissioner may disclose or authorise disclosure of information obtained in the course of undertaking functions and exercising powers under the FWRO Act. This can be undertaken if they reasonably believe it will assist in either, performing or exercising their own functions under the FWRO Act, or will assist in the administration or enforcement of a law of the Commonwealth, State or Territory.

- (c) The OCO generally supports the Moss review findings and embraces recommendations that the OCO should have an enhanced role in the PID Scheme. While the independent statutory review of the PID Act accepted several recommendations made by the OCO, we believe that Australia's whistleblowing framework can be enhanced by considering OCO recommendations that were not adopted in the final report of the statutory review. The OCOs recommendations are at pages 4 and 5 of our submission to this inquiry.

3. NOT-FOR-PROFIT SECTOR

(a)-(c)

As outlined above, and in our submission to this inquiry, the OCO does not comment on whistleblowing legislation in the not-for-profit sector. An exception to this is our involvement as a research partner in the 'Whistling While They Work 2: Improving Managerial Responses to Whistleblowing in Public & Private Sector Organisations' project. The project is currently being led by Griffith University's Centre for Governance and Public Policy, under the stewardship of Professor A J Brown, focussing on public interest whistleblowing in the public, corporate and not-for-profit sectors.²

PIDA AGENCY, HARMONISATION AND CONSISTENCY

- 4. Operating under the four pillars of assurance, integrity, influence and improvement the OCO independently guides the best practice of public administration. The OCO has been handling complaints about government for 40 years. The notion is now embedded in Australia that people have a right to complain against government, without hindrance or reprisal, and to have their complaint resolved on its merits according to the applicable rules and the evidence.

The OCO is an independent body who currently receives disclosures and provides advice to disclosers and agencies. We encourage agencies to manage and investigate complaints internally, however the OCO has the power to investigate complaints made

² Griffith University, *Whistling While They Work 2: Improving Managerial Responses to Whistleblowing in Public & Private Sector Organisations*, <http://www.whistlingwhiletheywork.edu.au/> (accessed 7 February 2017).

under the PID Act and in doing so, obtain records and information from the agency that is subject to the disclosure.

Many of the disclosures made under the PID Act are about conduct that relates to an official's employment. However, the PID Act also facilitates and encourages officials to make disclosures about a range of integrity and governance issues that may not otherwise be discovered and addressed. The OCO is in a unique position to observe the full range of disclosures made across the Commonwealth, as agencies are obliged to notify us whenever they receive and allocate a disclosure for handling under the PID Act.

5. Currently the OCO does not have portfolio responsibility to consider whistleblower protections in the private or not-for-profit sector. Should whistleblower legislation be amalgamated and provided to an independent agency, such as the OCO, consideration must be given to the differences in each sector.

While consistent legislation would allow for a 'one stop shop' for complaint handling, and consistent branding, due consideration needs to be given to the peculiarities of each sector. There is a risk that the amalgamation of disparate industries could lead to further ambiguity for potential disclosers.

The OCO is unclear if standardised legislation would provide the flexibility to clearly address different types of misconduct. Some areas of immediate consideration would be the current public service use of Authorised Officers, Principal Officers and the legislative requirements placed on supervisors. The disparity in the professional scrutiny applied to public service employees will need to be considered comparatively to the background checks and clearances that occur in the private or not-for-profit sectors.

6. While the OCO cannot comment on whistleblowing protections in the corporate or not-for-profit sectors we are committed to the enhancement of public administration. The PID Act applies to contractors and subcontractors providing goods or services under a Commonwealth contract, either for or on behalf of an Australian Government agency. A person who is a contractor (or subcontractor) under a Commonwealth contract can make a public interest disclosure (PID). Officers and employees of those contractors and subcontractors can also make a PID.

Contracted service providers do not have to establish their own procedures for receiving PIDs. They and their employees and officers:

- are considered to be public officials belonging to the agency that is the other party to the contract; and
- may make a PID to that agency or to the OCO.

If the PID is about a different agency, it can be made to an authorised officer in that other agency or to the OCO. Contracted service providers and their officers and employees who make a PID will receive the protections and immunities available under the PID Act.

PIDs can also be made about disclosable conduct on the part of contractors to Australian Government agencies and their officers and employees. However, the conduct must be related to the entering into or performance of the contract with the agency.

Currently the OCO is unable to consider complaints from Commonwealth grant funded organisations as PIDs. There has been an increasing prevalence of Commonwealth grant funded services in recent years, which the OCO does not have jurisdiction to consider. Areas where we have seen an increase in Commonwealth grant funding arrangements include Indigenous affairs, disability and healthcare providers and employment services.

The OCO has received approaches from persons working in the Commonwealth sphere who wish to raise concerns of disclosable conduct, but are currently not afforded the protections of the PID Act.

The accessibility of the PID scheme is essential in ensuring that future disclosers come forward and that the Commonwealth is promoting best practice public administration. The lack of accessibility for Commonwealth grant funded organisations is of ongoing concern to the OCO.