ABN 76 325 886 267
Level 24, 580 George Street, Sydney NSW 2000
T 02 9286 1000
Tollfree 1800 451 524
www.ombo.nsw.gov.au

Ombudsman
New South Wales

25 January 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary

Submission on the National Integrity Commission Bill 2018

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the National Integrity Commission Bill 2018, the National Integrity (Parliamentary Standards) Bill 2018 and the National Integrity Commission Bill 2018 (No. 2).

I welcome the contribution that this proposed legislation makes towards enhancing the integrity of the Commonwealth public sector. In saying this, I note the valuable work currently being undertaken by a range of integrity bodies, most comprehensively described by the Senate Select Committee on a National Integrity Commission.[1] Nevertheless, in the experience of my office, a body responsible for preventing, detecting and responding to corruption across all of the public sector is a necessary pillar of any integrity system.

The submission makes some general comments about the integrity commission that would be created by the National Integrity Commission Bill 2018, but primarily focusses on the proposed whistle-blower protection regime, that being this office's area of expertise.

I am happy to provide any further information or comment should the Committee desire it.

Yours sincerely

Michael Barnes
NSW Ombudsman

[1] Senate Select Committee on a National Integrity Commission 2017, *Report*, Canberra.

NSW Ombudsman submission to the Senate Legal and Constitutional Affairs Committee

National Integrity Commission Bill 2018

1. The *National Integrity Commission Bill 2018* (the Bill) proposes a model consistent with many of the principles I believe underpin an effective integrity commission:

- **Independence** from the government of the day or Ministerial direction.
- Taking a **proactive integrity approach** that moves beyond the prevention of corruption towards instilling a culture of integrity across the public sector, and avoiding a disproportionate emphasis on investigations.[2]
- A **broad jurisdiction** in terms of who it can investigate and for what conduct, if the conduct is serious and systemic.
- A robust **mandatory reporting system**, whereby the principal officer or other senior officers of public sector agencies are required to notify the Commission of any reasonable suspicions that corruption has occurred. My office has observed that such an obligation is not only key for monitoring and intelligence purposes, but also for prompting public sector agencies to embed reporting systems internally.
- Strong **investigative powers**, including:
    - The ability to initiate investigations on its **own motion**, without need for a referral or complaint.
    - The **coercive powers** of a Royal Commission, including to compel witnesses, require the production of evidence and documents, and to override the privilege against self-incrimination.
    - To hold **public hearings**, if doing so would be in the public interest, in order to expose corruption, increase public trust, make investigations more effective by encouraging witnesses to come forward with new evidence, educate the public sector and the community, deter future corruption, and increase the transparency of the investigation.[3]
    - To make public **findings of fact and recommendations**, including to refer criminal conduct to the Commonwealth Director of Public Prosecutions.
- Robust **accountability**, including through oversight by a parliamentary bipartisan committee and parliamentary inspector.

2. However, I think it crucial to emphasise that implementation of such a model will be ineffective without strong government and Parliamentary support, evidenced through an appropriate level of resourcing.

3. A strength of the Bill is the proposal to establish a Commonwealth Integrity Coordination Committee and a National Integrity and Anti-Corruption Advisory Committee. Based on my experience as Chair of the NSW Public Interest Disclosures Steering Committee, I see value in enshrining an ongoing partnership between integrity bodies in statute. It can enhance the commitment of participating members, ensure the secretariat is resourced, and increase transparency and accountability by requiring annual reporting to Parliament. The involvement of business and civil society in the development of a national integrity and anti-

[2] AJ Brown, Adam Graycar, Kym Kelly, Ken Coghill, Tim Prenzler & Janet Ransley 2018, *A National Integrity Commission: Options for Australia*, Griffith University.
[3] The Australia Institute 2018, *Public hearings key to investigating and exposing corruption*.

corruption action plan is another unique, yet welcomed, aspect of the legislation aimed at coordinating policy efforts across sectors.

4. In my view, any assessment of what action should be taken in respect of corruption matters needs to be informed by an intelligence-driven, risk management model. This would include evaluating reports/complaints/allegations based on the likelihood/risk that corruption could occur, as opposed to making such assessments primarily on an evidentiary basis. I suggest that this be included in clause 48 of the Bill which sets out the criteria for deciding how to deal with a corruption issue.

5. I also note that clause 78 of the Bill does not require legal practitioners to disclose privileged communications to the Commission. This poses challenges to investigating bodies by preventing access to what may be highly relevant information, particularly given that organisations and individuals may use legal advisers to shield their actions and decisions from scrutiny.

6. I suggest that the Commissioner be able to require, although not necessarily disclose, the production of information claimed to be privileged.

Functions of the Whistleblower Protection Commissioner

7. The remainder of this submission draws on my office's practical experience in handling whistleblower matters for over twenty years and oversighting the *Public Interest Disclosures Act 1994* (NSW) (PID Act). Our work around public interest disclosures has involved not only careful consideration and analysis of the way in which the NSW scheme has operated, but the giving of advice and training to agencies and advice to whistleblowers, investigating allegations that agencies have failed to properly deal with disclosures or to protect whistleblowers, and the direct investigation of allegations made by whistleblowers. My office has also been directly involved in both Whistling While They Work research projects.

8. Research has consistently shown that the best source of information concerning serious wrongdoing within an organisation is from the people who work there. Given the essential service whistleblowers perform in our society, it is now widely acknowledged that they should not face harm or detriment for speaking up.

9. It is very encouraging that Part 9 of the Bill provides for a joint public-private sector Whistleblower Protection Commissioner. As the recent work-in-progress results from the Whistling While They Work 2 (WWTW2) research project show, the basic nature and dynamics of whistleblowing across the public and private sectors are similar.[4] The oversight model proposed breaks new ground in four key ways:

- by proactively preventing detriment from occurring
- by establishing a mandatory reporting regime for the public sector
- by separating support and investigative roles
- by funding legal and practical assistance to whistleblowers.

10. For decades, whistleblowing policy and legislation have focused on achieving protection by proscribing reprisal action, and extending legal remedies to whistleblowers who suffer such consequences. Rarely, however, do these mechanisms result in satisfactory outcomes

[4] Brown, AJ (ed) 2018, *Whistleblowing: New rules, new policies, new vision*, Brisbane: Griffith University.

for a whistleblower, not least because the damage has already been done by the time the remedies become available.

11. The Bill takes a different approach, by giving responsibility to the Whistleblower Protection Commissioner and organisations to prevent or reduce detriment in the first place, through support and proactive management of whistleblowing in order to address risks of conflict, repercussions or retaliation before they arise or before they get worse.

12. The WWTW2 results showed that there are indeed reasonable steps an organisation can take to prevent whistleblowers from facing harm; and that when organisations intervene early, whistleblowers perceive better treatment from both managers and colleagues, and face significantly fewer repercussions – on average, around half as much.[5]

13. Clause 162 of the Bill introduces a mandatory reporting regime whereby public officials must refer whistleblower matters to the Whistleblower Protection Commissioner. This would allow for high-risk and complex matters to be identified early, so that the whistleblower can be supported and advice and assistance provided to the relevant organisation, leading to better outcomes for both.

14. The Bill's oversight model clearly separates support and investigative responsibilities by providing for the Whistleblower Protection Commissioner to refer the substantive issues raised by a whistleblower to the most appropriate investigating body, while maintaining the ability to monitor the way in which that body investigates or deals with the disclosure. This avoids a conflict of roles between supporting and advocating on behalf of a whistleblower, and impartially investigating allegations of wrongdoing.

15. In my office's experience, the support needs of whistleblowers can be high, demand a high frequency of communication and be resource intensive. This cannot be provided by an investigator whose role and experience is not in providing ongoing psychological support. A recent international study of the institutional whistleblowing protection arrangements in a range of countries identified only a few countries where the government funds psychosocial care for reporters.[6]

16. Where detriment does occur, the Bill provides for the Whistleblower Protection Commissioner to recommend a range of remedies, including reinstatement or compensation. More importantly, however, it allows the Commissioner to commence legal proceedings for remedies or to mediate a dispute, while providing the whistleblower with legal advice, representation or other practical support. This goes beyond the role of any existing whistleblowing oversight body in Australia and is strongly supported.

17. Participants at training sessions conducted by my office frequently raise concerns about whistleblowers in our jurisdiction being responsible for their own legal representation and associated costs, and state that this would discourage them from reporting wrongdoing. The Bill is to be commended on establishing a fund to provide legal and other support and to compensate whistleblowers who have suffered detriment.

---

[5] Ibid.
[6] Kim Loyens & Wim Vandekerckhove 2018, 'Whistleblowing from an international perspective: A comparative analysis of institutional arrangements', *Administrative Science*, v 8, p 30.

Issues for further consideration

18. The whistleblower protection model proposed by the Bill relies on a number of Acts of Parliament – introduced for different purposes and containing inconsistent definitional and operational elements – interacting. In addition to the Bill itself, these include:

- the National Integrity (Parliamentary Standards) Bill 2018
- the *Public Interest Disclosure Act 2013* (Cth)
- the *Corporations Act 2001* (Cth)
- the *Taxation Administration Act 1953* (Cth)
- the *Law Enforcement Integrity Commissioner Act 2006* (Cth).

19. Such a fragmented system is undesirable. An effective whistleblower protection model needs to be easily understood, accessible and navigable to public officials, private sector employees, suppliers, volunteers and other insiders. There is an opportunity to consolidate the various statues providing protections for whistleblowers, while still allowing for differences between sectors, particularly in the regulatory space. The effectiveness of the whole system will depend to a significant degree on there being a body with oversight of all sectors, who can identify system failures, insights from other jurisdictions that will improve the management and protection of whistleblowers, develop and publish regularly updated guidance on best practice, and so on.

20. The Bill does not, for example, introduce a mandatory reporting regime of whistleblower protection issues for organisations in the private and not-for-profit sectors, thereby limiting the proactive protection that only early intervention can provide. It also means that statutory reviews of the whistleblower protection provisions contained in the Corporations Act and the Taxation Administration Act will not have the benefit of data about the number of disclosures made under the respective schemes, their subject matter, how they were dealt with and the resulting outcomes or organisational changes.

21. Neither can the Whistleblower Protection Commissioner request or compel information from such organisations, direct them to investigate whistleblower protection issues, or monitor or oversee progress. Further consideration is needed as to whether this could occur by requiring another government body with powers to investigate to do so, such as the Australian Securities and Investments Commission or the Australian Taxation Office. Alternatively, the Whistleblower Protection Commissioner could be given coercive investigative powers beyond those it has in relation to Commonwealth agencies. While the Bill provides for the Whistleblower Protection Commissioner to commence proceedings in a court in respect of a whistleblower protection issue, clarification is also needed on which body is responsibility for prosecuting criminal acts of reprisal and other offences, including the preparation of briefs of evidence.

22. I recommend avoiding the prescriptive approach taken in the Bill and instead advocate adopting a principles-based approach to any whistleblower protection legislation. The complexity and fragmentation of the current regime and the proposals contained in the Bill make it unlikely that individuals who have obligations under the legislation will be aware of, much less understand, these obligations and how to comply with them in complex or highly charged situations. It is important to avoid technical procedural requirements that lead to 'tick the box' compliance for minor breaches of legislation, or create barriers to protecting people who make disclosures of serious wrongdoing. This approach was endorsed in the 2016 Moss review of the *Public Interest Disclosure Act 2013* (Cth), which concluded:

This prescriptive approach actively undermines the policy goal – a 'pro-disclosure' culture within the Commonwealth public sector – and produces lesser outcomes for individuals. Decision-makers need to focus less on procedural compliance, and more on realising the policy aims of the legislation.

23. Finally, the Bill does not provide for the Whistleblower Protection Commissioner to perform a number of functions that I believe are essential in any whistleblower protection scheme. For example, my office is required:

- To promote public awareness and understanding of the PID Act and to provide training to public authorities, investigating authorities and public officials. This assists authorities to understand their obligations under the legislation, improves reporting cultures, and leads to consistency in the assessment and handling of disclosures, while raising awareness among public officials about their legal protections if they make a disclosure.
- To audit and report to Parliament on the exercise of functions under and compliance with the PID Act by public authorities. Our audit program – comprising audits of individual authorities, compliance audits of recommendations and audits of particular issues across the sector – has given us practical insight into the experiences of public authorities in dealing with disclosures. The audits have identified a number of areas of good practice, as well as areas for improvement.
- To provide reports and recommendations to the relevant Minister about proposals for legislative and administrative changes to further the objects of the PID Act. The intelligence gained through handling matters, building the capacity of agencies and auditing and monitoring authorities often leads my office to identify improvements to the existing legislative framework. We routinely raise such issues with the PID Steering Committee and, if more widely supported, recommend change.

I am happy to provide any further information or comment should the Committee desire it.

Yours sincerely

Michael Barnes
NSW Ombudsman