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130TH ANNIVERSARY HENRY PARKES ORATION

HENRY PARKES FOUNDATION
TENTERFIELD SCHOOL OF ARTS MUSEUM,
TENTERFIELD, 26 OCTOBER 2019

SAFEGUARDING OUR DEMOCRACY:
WHISTLEBLOWER PROTECTION AFTER THE AUSTRALIAN FEDERAL POLICE RAIDS

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A 7-point plan for restoring public confidence in Commonwealth whistleblower protection

1. Undertake **comprehensive overhaul or replacement of the *Public Interest Disclosure Act 2013* (Cth)** – not as a piecemeal reform, but so as to better support a consistent, coherent and workable national approach to whistleblower protection across Australia's public sector, business and not-for-profit organisations.
2. Reform the **criteria for when whistleblowing outside official channels remains protected** – to be simpler, more workable, reflect presumed public interest in disclosure of wrongdoing, and be consistent for both the public sector (PID Act) and Commonwealth-regulated private sector (Corporations Act or replacement stand-alone legislation).
3. Revise statutory definitions of **'intelligence information'** (PID Act, s. 41) and **'inherently harmful information'** (Criminal Code, ss.121, 122) to ensure whistleblower protection *at all levels* is extended to genuine public interest disclosures i.e. which meet the simplified public interest tests and pose no actual, real, unacceptable risk of harm to national security, defence or law enforcement interests.
4. Strengthen **journalism and other third-party shield laws** to ensure (a) confidentiality of public interest whistleblower sources or clients, and (b) freedom of journalists and other relevant professionals from prosecution for receiving or using public interest disclosures in the fulfilment of their duties or functions (PID Act and Evidence Acts).
5. Ensure it is **viable for public servants to use internal and official channels** for disclosure of wrongdoing, by updating the PID Act to be a true whistleblower protection regime:
    a. Amend anti-detriment protections to match international best practice, by **removing the *de facto* requirement for a deliberate, knowing intention to cause harm** before civil or employment remedies can be accessed (s. 13(1)(b)&(c));
    b. Update the anti-detriment protections to match new national best practice (Corporations Act), by:
        - expanding the definition of **unlawful detriment** beyond employment actions;
        - extending civil liability to **organisational failures to support and protect;**
        - reversing the **onus of proof** for civil or employment remedies;
        - providing for **exemplary damages.**
6. Make protections real by providing **effective support** to public interest whistleblowers:
    a. Update the statutory minimum requirements for **whistleblowing policies and programs** in the public sector, and increase the Commonwealth Ombudsman's monitoring and support roles;
    b. Establish a fully resourced **whistleblower protection authority** to assist all reporters and regulators with advice, support, coordination and enforcement action to prevent, deal with, and gain remedies for detrimental conduct;
    c. Continue to consider a **reward scheme** for public interest whistleblowers.
7. Recognise the wider validity of public interest disclosure of official information, beyond employee disclosures of wrongdoing, by making available **a general public interest defence** for any citizen charged with offences of unauthorised disclosure or receipt of official information (Criminal Code).

SAFEGUARDING OUR DEMOCRACY: WHISTLEBLOWER PROTECTION AFTER THE AUSTRALIAN FEDERAL POLICE RAIDS

INTRODUCTION: PUBLIC INTEGRITY IN AUSTRALIA

For decades, Australian journalists have uncovered truth and aided the quest for good governance around the world – "telling it like it is" with the frankness that makes Australians so well-loved in so many nations. Indeed, for most of the 130 years since Sir Henry Parkes' original Tenterfield Oration, the world has usually looked on Australia as one of the healthiest, most innovative democracies. No wonder, then, that the world stood shocked when on 4 and 5 June 2019, the Australian Federal Police (AFP) executed search warrants on the home of a News Corporation federal political journalist in Canberra, and the Sydney headquarters of the Australian Broadcasting Corporation, as part of an investigation into possible criminal offences by journalists for receiving and publishing unauthorised disclosures of government information.

In fact, the timings were clearly no coincidence. A third AFP raid on News Corporation's Sydney headquarters was also planned for the following days, but quietly abandoned due to the media and public backlash.[1] These events confirmed, more dramatically than before, that alongside all our trends towards more open and accountable government, we have experienced powerful counter-trends that undermine those advances, increasingly threatening both the health of our democracy and its long-held reputation. Even before the AFP raids, Australia was slipping on the World Press Freedom Index, largely due to laws eroding journalists' ability to investigate governments and protect their sources.[2] Viewed this way, the raids were a natural product of creeping increases in the criminalisation of public information as a result of national security, intelligence and border protection laws, about which many people have warned us, including at least one previous Henry Parkes Orator, Professor George Williams and my Griffith University colleague, Dr Kieran Hardy.[3] But these trends have an even larger context. Since 2012, Australia has also been slipping on other indices, including the global Corruption Perceptions Index

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[1] For a digest of the reaction, see Brown A J et al (2019), *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*, Griffith University, August 2019, p.46.

[2] See Reporters Without Borders, World Press Freedom Index (2019), <https://rsf.org/en/ranking>; Alliance for Journalists' Freedom (2019), *Press Freedom in Australia: White Paper*, Sydney, p.3.

[3] Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information' (2014) 37 *University of New South Wales Law Journal* 784; Keiran Hardy and George Williams, 'Special Intelligence Operations and Freedom of the Press' (2016) 41 *Alternative Law Journal* 160; Keiran Hardy and George Williams, 'Free Speech and Counter-Terrorism in Australia', in Ian Cram (ed) *Extremism, Free Speech and Counter-Terrorism Law and Policy: International and Comparative Perspectives* (Routledge, 2018).

compiled by my colleagues in Transparency International.[4] Many of the fundamental elements or pillars of our nation's integrity systems remain strong, but as our current assessment of those systems shows, many are not keeping up with our national and international challenges.[5]

Fundamentally, the values of honesty and truth in our democracy, and others around the world, have not been under such sustained attack for perhaps 80 years. The weaknesses in our integrity systems are many and varied. In Australia's case, they do actually begin with our ability to acknowledge the constitutional truth that our nation was settled by Europeans, but never ceded by its First Nations, and to deal with all the implications of that. I am delighted this year to be following Professor Megan Davis' 2018 Oration, and her call for support for the Uluru Statement from the Heart, including for constitutional recognition of Indigenous Australians in the form of a Voice to Parliament. We are still speaking here about integrity – our ability to tell and recognise the truth, including the truth that this proposal is perfectly constitutionally acceptable: as former High Court Chief Justice Murray Gleeson has pointed out, a Voice *to* Parliament can enrich our democracy, rather than being a measure that would undermine it.[6] As Megan said last year, unless recognition of Aboriginal and Torres Strait Islander people includes structural and not simply symbolic change to deal with the reality of the situation, constitutional reform is, 'to put it crudely, putting lipstick on a pig'.[7]

Now, my grandfather raised pigs, and I am sure Megan has nothing against pigs. But the same choice between symbolism and substance affects all issues of integrity, justice and accountability in our democracy. Remember that Sir Henry Parkes, the longest-serving Premier of New South Wales and the one who charted the path for Australia's colonies to federate on an American model, had a very progressive, as in dynamic view of how our system of government should evolve, to serve what was then his quite radical idea of a 'great and growing Commonwealth'.[8] We should remember he got into trouble in London in 1882, for daring to

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[4] Transparency International, Corruptions Perception Index 2018 (January 2019), Berlin: www.transparency.org.

[5] See Brown, A J et al (2019). *Governing for integrity: a blueprint for reform*. Draft Report of Australia's Second National Integrity System Assessment. Griffith University & Transparency International Australia. www.transparency.org.au/national-integrity-systems-assessment.

[6] Gleeson, M. (2019). *Recognition in keeping with the Constitution: A worthwhile project*, 18 July 2019. Uphold & Recognise, https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/ 5d30695b337e720001822490/ 1563453788941/ Recognition_folio+A5_Jul18.pdf

[7] Megan Davis, 'And remind them that we have robbed them?' 2018 Henry Parkes Oration, Canberra. https://parkesfoundation.org.au/activities/orations/2018-oration/.

[8] Parkes in Tenterfield spoke of America as the "great commonwealth", then concluded his follow-up St Leonard's speech with references to Washington and Franklin, echoing Franklin directly with the idea that an Australian commonwealth would also be "great and growing": Parkes, H. (1890). *The Federal Government of Australasia: Speeches*. Turner and Henderson, Sydney, pp.4, 28, 169.

suggest – accurately – that democracy was becoming more advanced in the Australian colonies than in the Mother Country.[9] And, we should recognise this is no longer a claim that he could honestly make, were he standing today in London, or even in Washington or a range of other capital cities around the world. (I will shortly mention Sir Henry again, one more time.)

Taking this long-term view of our direction of travel, we see a strong national integrity system as involving wider issues than simply the freedom for public interest journalism to operate, if it is to meet the challenges of our times. Clearly, press freedom is vital, and no-one should doubt my huge personal sympathy for journalists caught in the cross-fire. My father was a long-serving political journalist in Canberra, who once famously told our dinner table that my sister would make a very good secretary, so much to his delight, she became a very accomplished journalist too. But importantly, in Australia at least, the threat of criminal prosecutions against journalists is still mainly just that: a cross-fire. The primary targets – intended and sometimes unintended – are actually the employees, officials and everyday citizens who might, and do, speak up with concerns about wrongdoing in their organisations. I am talking here about protecting the sources of information on whom not only journalists, but all of us rely. This is what the rest of this Oration is about – the whistleblowers at the heart of this struggle.

PROGRESS IN A TIMELESS CHALLENGE

In fact, the importance of whistleblower protection for our democracy – for the health and integrity of all our institutions – begins not with the media, but with the role of whistleblowing as something much more fundamental. Inevitably, for any employee or official to raise concerns about wrongdoing in an organisation, they have to disclose information, and often sensitive or confidential information, including information that some people want to label that way, specifically because they do not want it shared or transferred. And the trouble can start even when they do this purely internally. Just think about your own organisation, or workplace. Or, for a vivid demonstration, look at US President Donald Trump's recent reactions to the intelligence officers worried about the records of his dubious conversations with other world leaders being hidden on even more dubious servers.[10]

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[9] Parkes, Henry. *Fifty Years in the Making of Australian History* (Longman, Green & Co, 1892).

[10] See https://www.theguardian.com/us-news/2019/oct/06/trump-ukraine-scandal-second-whistleblower-comes-forward.

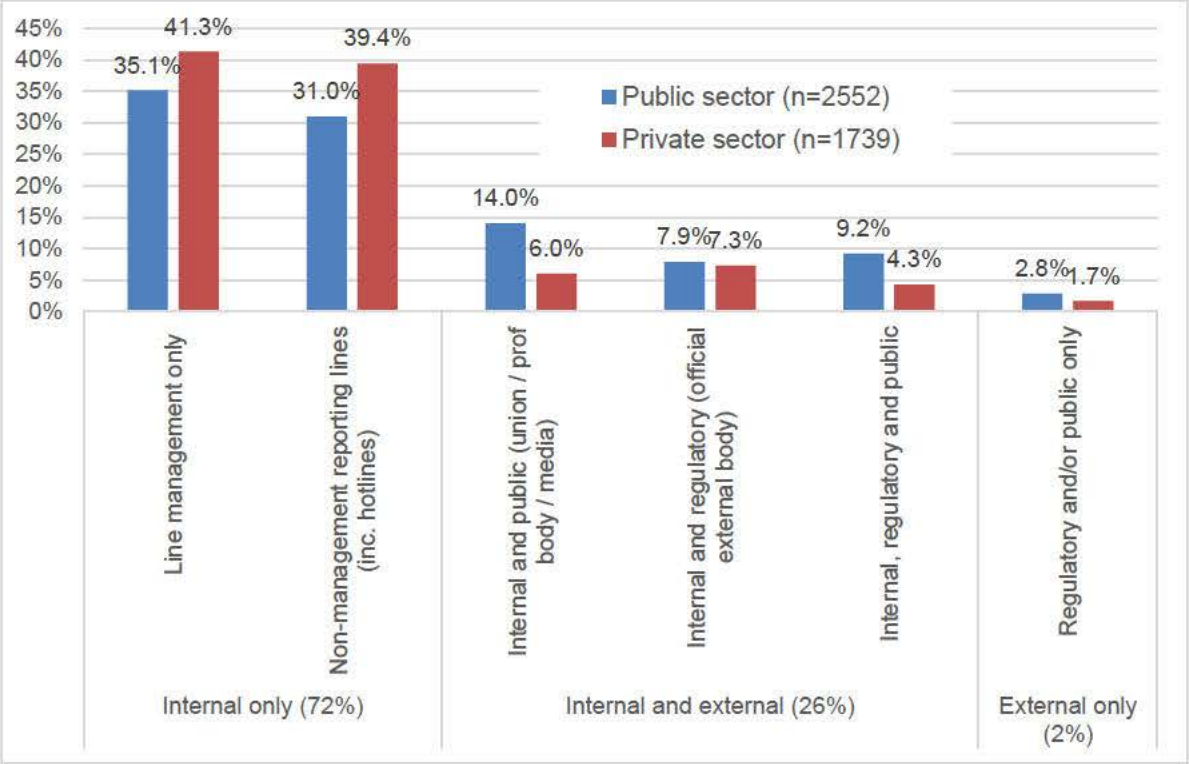
In Australia, if they do end up going outside our more limited official channels, it is whistleblowers who are *actually* being prosecuted, even when, as yet, journalists are hopefully unlikely to be. And whistleblowers play an even more fundamental role in public integrity than the media, because they help ensure honesty, integrity and performance within our institutions, every single day. Even if it never reaches the public domain.

We could speak for hours about examples of whistleblowers and whistleblowing, and of the research we now have, internationally, about its dynamics and the role it plays. But I will give you just three vital statistics from our own, recently concluded large-scale study, funded by the Australian Research Council and supported by 23 partner and supporter organisations across Australia and New Zealand, including the Commonwealth Ombudsman and Australian Securities and Investments Commission (ASIC), for whose support we are truly grateful. This is taxpayers'' dollars being spent to better understand how other taxpayers (workers and officials) help protect the interests of all taxpayers, by speaking up. Ours is actually the world's largest empirical research project to date focused on organisational responses to whistleblowing, and the first to systematically compare what happens in both public and private bodies at the same time. You can find our *Clean As A Whistle* report on our project website.[11] We surveyed over 17,000 employees and managers across 46 organisations of all shapes and sizes, including just over 5,000 people who had reported wrongdoing concerns, and 3,600 managers and governance professionals who had handled, directly dealt with or observed what happened with reported concerns.

This research therefore gives an overall picture of the role of whistleblowing in organisational integrity, not simply on "public" whistleblowing involving the media. Consistently with previous studies, we found that 72% of those who raised concerns *only ever* reported internally, including many who went no further even though the wrongdoing was not dealt with, or they suffered repercussions. A quarter (26%) reported internally first but also then went outside to regulatory channels, other public channels or both. Only 2% went outside their organisations without ever reporting internally. Even within these figures, however, most 'public' reporting was not actually to the media, or at least not directly. Of the 20% of reporters who ever went public, 19% went to a union, professional association or industry body. Only 1% of reporters ever went directly to a journalist, media organisation or public website (Figure 1).

[11] see Brown A J et al (2019), *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*, Griffith University, August 2019.

Figure 1: Reporting paths (current and previous organisation reporters)



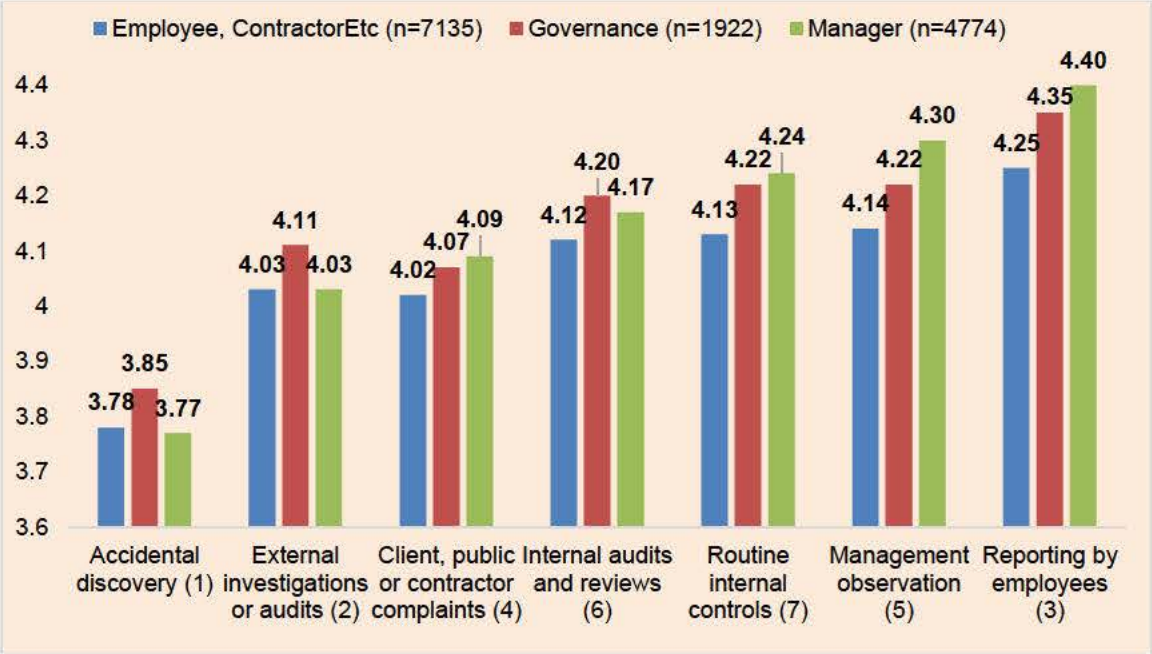
These data indicate there is hardly a crisis of leaking and external disclosure of information in Australian institutions. Indeed, only 16% of reporters ever went to an external regulatory body at any stage – fewer than who went public – even though research indicates that staff often believe external sources are more likely to take the wrongdoing seriously, treat the reporter more fairly or enact change. What may be a "healthy" level of external disclosure cannot be defined, but there is little reason to think that current levels are unhealthy – if anything, the reverse. Quite probably, from a purely utilitarian perspective, there should probably be more external whistleblowing to regulators or if necessary, publicly, than probably now occurs.

This picture also helps make it clear why whistleblowing is so vital to integrity, accountability and the good health, not only of government, but to all our institutions. Our research has established that according to employees at all levels of organisations, right up to managers and leaders, employees who speak up are the single most important way that wrongdoing or other problems come to light in organisations (Figure 2). Even auditors know that employee reporting more important, even, than their own internal audits or routine controls; while managers, who understand its role best of all, see employee reporting as more important than their own ability to observe what is going on. This picture holds for both public and private sectors. Indeed, 89% of public and 94% of private sector workers agree it is 'in the best interest

of the organisation when an employee reports wrongdoing'. However challenging, whistleblowing is not actually a strange or unfamiliar behaviour that we don't understand. This is why sensible organisations now invest so heavily in speak up programs, even when the law doesn't actually require it.[12]

Figure 2: Importance of employee reporting (all respondents)

'How important do you believe each of the following is for bringing to light wrongdoing…?'
(1=Not important, 2=A little, 3=Somewhat, 4=Important, 5=Very important)



Nevertheless, it is public scandals that, by definition, mostly shape our perception of whistleblowing, and what can happen. And these tend to confirm that whistleblowing can often be the only way that appropriate action is eventually taken on problems, or highlight the people who *didn't* speak up, or the systems that failed. We could speak of nursing manager Toni Hoffman, Australian Local Hero of the Year in 2006, who spoke up about medical negligence in Queensland's Bundaberg Hospital. Or Jeff Morris and the 'ferrets' who revealed criminal misconduct in the Commonwealth Bank's financial planning arm, eventually triggering the Banking Royal Commission. Or James Shelton and Brian Hood, who tried to alert the Australian Federal Police and/or spoke up internally about foreign bribery by Australia's Reserve Bank-owned companies, Securency Ltd and Note-Printing Australia, before James then took that public. More recently, we see the wave of federal prosecutions of whistleblowers for going outside our

[12] See Kenny, K., Vandekerckhove, W., & Fotaki, M. (2019). *The whistleblowing guide: Speak-up arrangements, challenges and best practices*. Chichester: Wiley.

limited official channels, which is so central to our current debate. As is so often the case, irrespective of exactly what may play out in court in terms of clarifying the history and merits of these cases, there is wide acknowledgement that these whistleblowers raised matters which did, or do need addressing. There is the ASIS operative, Witness K in relation to secret overseas bugging operations, (although we won't find out there, because the whole prosecution is secret). Military officer and lawyer, David McBride in relation to the war in Afghanistan. Richard Boyle in relation to debt collection practices of the Australian Taxation Office.[13]

In fact, everyday workers and officials have served us as whistleblowers since the dawn of institutions, and have straddled this difficult line between internal and external reporting. A little known example is Sir Henry Parkes himself. As a young man in 1845, six years after arriving in the colonies and nine years before he was first elected to parliament, Parkes was working in the NSW Customs department when he raised concerns about rorts involving colleagues stealing alcohol (and worse) on the Sydney wharves. I'm told by at least one descendant[14] that Parkes alerted his superiors without success, and then went further by penning an anonymous letter to the Sydney *Register* (Figure 3). He was merely suspended for three months for this leak, a punishment tending to confirm the merit of what he was saying, along with his final reference from Customs, which commended him as 'a person of great integrity and some talent'. But Parkes' whistleblowing still led to his resignation, feeling his treatment was 'most unreasonable and unjust'.[15] The rest, as they say, is history.

There are no end of tales about the repercussions whistleblowers can experience, especially if dragged or forced into the public domain. The good news, however, is that not all whistleblowers suffer in our institutions, at least today.[16] In our research, when we asked our respondents how well or badly reporters were treated as a result of raising concerns, less than half (42%) of reporters said they felt they were treated badly by their management or colleagues. Managers and governance professionals were slightly more positive, saying reporters were treated badly in 34% of cases (Figure 4). The fact that a majority of reporters said they were treated the same, or even well by the organisation, shows bad outcomes are not inevitable.

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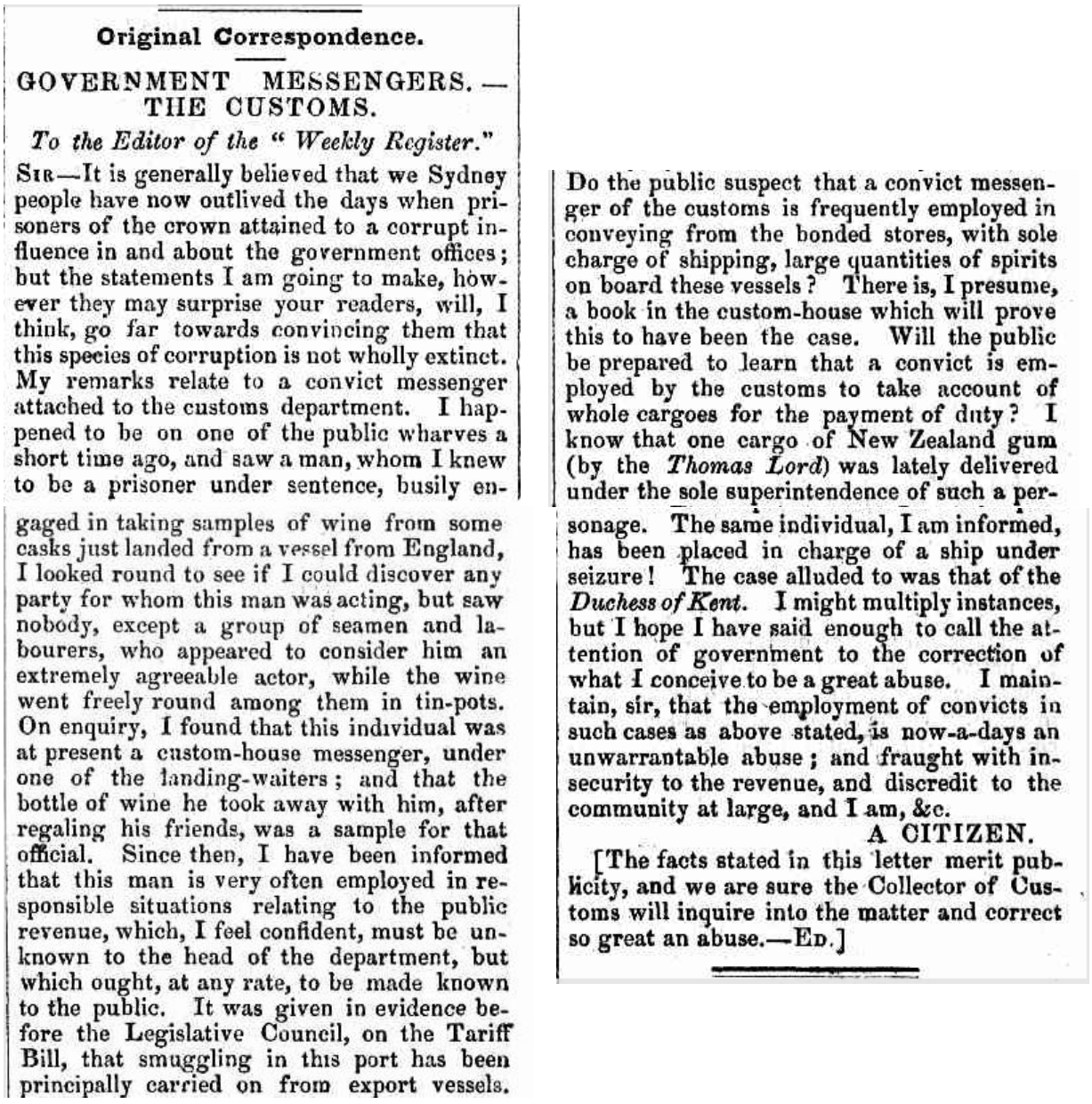
[13] For some references to recent cases, see Christoper Knaus, https://www.theguardian.com/australia-news/2019/oct/22/witness-k-lawyer-warns-many-whistleblowers-have-nowhere-to-go.

[14] My great thanks to Ian Thom for alerting me to this episode in Henry Parkes' history.

[15] See Martin, A.W. *Henry Parkes: a Biography* (Melbourne University Press, 1980), p.32 and notes accompanying.

[16] Smith, R. (2014). 'Whistleblowers and Suffering', in A.J. Brown, D. Lewis, R. Moberly and W. Vandekerckhove (eds.), *International handbook on whistleblowing research* (pp. 230-249), Cheltenham: Edward Elgar.

Figure 3. "Government Messengers – The Customs" (Henry Parkes)



Original Correspondence.

GOVERNMENT MESSENGERS. — THE CUSTOMS.

To the Editor of the "Weekly Register."

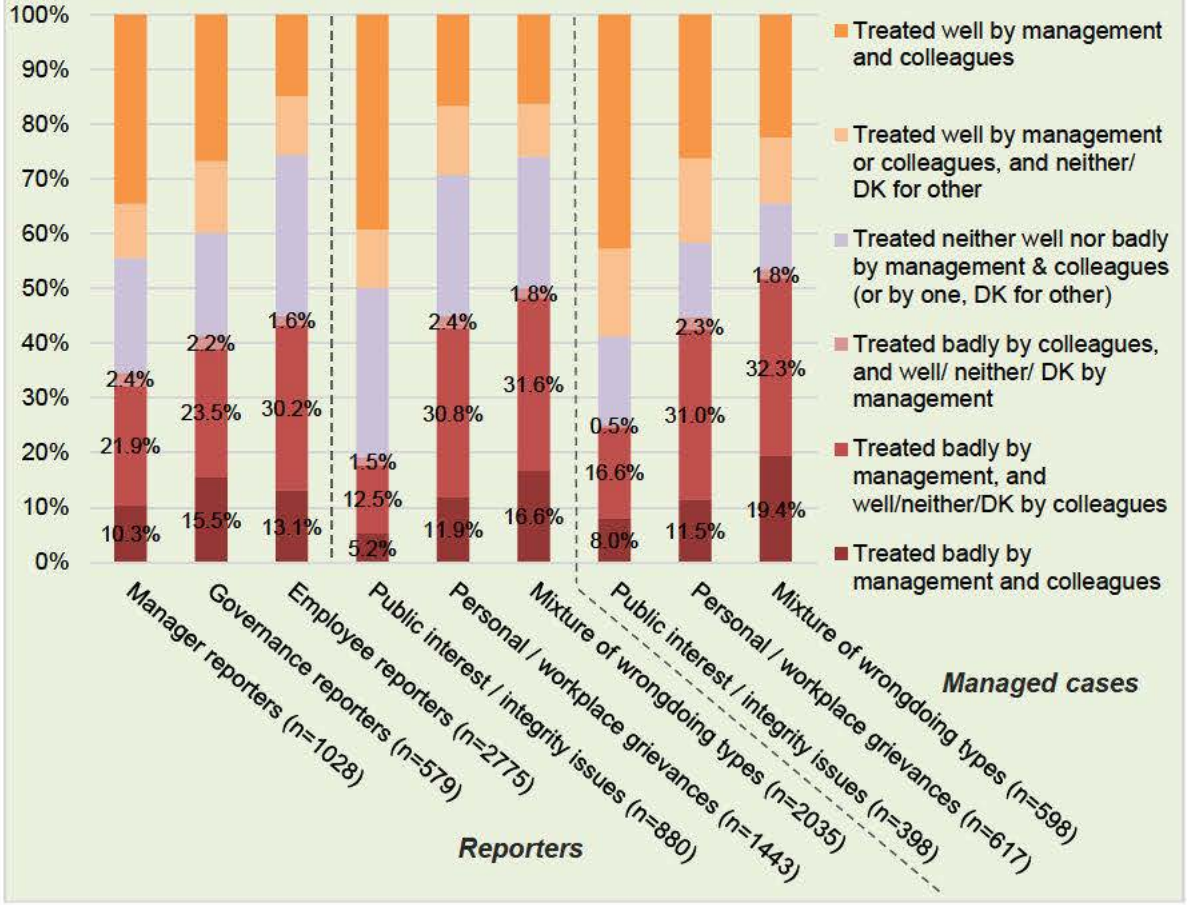
SIR—It is generally believed that we Sydney people have now outlived the days when prisoners of the crown attained to a corrupt influence in and about the government offices; but the statements I am going to make, however they may surprise your readers, will, I think, go far towards convincing them that this species of corruption is not wholly extinct. My remarks relate to a convict messenger attached to the customs department. I happened to be on one of the public wharves a short time ago, and saw a man, whom I knew to be a prisoner under sentence, busily engaged in taking samples of wine from some casks just landed from a vessel from England, I looked round to see if I could discover any party for whom this man was acting, but saw nobody, except a group of seamen and labourers, who appeared to consider him an extremely agreeable actor, while the wine went freely round among them in tin-pots. On enquiry, I found that this individual was at present a custom-house messenger, under one of the landing-waiters; and that the bottle of wine he took away with him, after regaling his friends, was a sample for that official. Since then, I have been informed that this man is very often employed in responsible situations relating to the public revenue, which, I feel confident, must be unknown to the head of the department, but which ought, at any rate, to be made known to the public. It was given in evidence before the Legislative Council, on the Tariff Bill, that smuggling in this port has been principally carried on from export vessels. Do the public suspect that a convict messenger of the customs is frequently employed in conveying from the bonded stores, with sole charge of shipping, large quantities of spirits on board these vessels? There is, I presume, a book in the custom-house which will prove this to have been the case. Will the public be prepared to learn that a convict is employed by the customs to take account of whole cargoes for the payment of duty? I know that one cargo of New Zealand gum (by the *Thomas Lord*) was lately delivered under the sole superintendence of such a personage. The same individual, I am informed, has been placed in charge of a ship under seizure! The case alluded to was that of the *Duchess of Kent*. I might multiply instances, but I hope I have said enough to call the attention of government to the correction of what I conceive to be a great abuse. I maintain, sir, that the employment of convicts in such cases as above stated, is now-a-days an unwarrantable abuse; and fraught with insecurity to the revenue, and discredit to the community at large, and I am, &c.

A CITIZEN.

[The facts stated in this letter merit publicity, and we are sure the Collector of Customs will inquire into the matter and correct so great an abuse.—ED.]

The Weekly Register of Politics, Facts and General Literature (Sydney, NSW : 1843 - 1845), Saturday 25 October 1845, p.195. https://trove.nla.gov.au/newspaper/article/228135127

Figure 4: Reporter treatment (reporters and managed



And this is exactly the aim of whistleblower protection. Even if it is never likely to be easy, the evidence shows that speaking up is often something that individuals and organisations can learn to encourage and manage quite well. Often it is exactly because it is handled well, that we *don't* hear about it.

But plenty do suffer bad outcomes, and this is the point. Clearly, there is also plenty going wrong. Even when they do not ascend to the level of criminal investigation and prosecution, the barriers and disincentives for speaking up are always significant, sometimes huge. And yet, people do speak up. Sometimes it is too late. Sometimes it is only after they have left the organisation or the industry with the problem. But very often it is right then and there, and overwhelmingly, at least at first, it is inside the organisation or institution involved, notwithstanding the risks. Fewer need to suffer adverse consequences, than currently do.

Indeed, Henry Parkes' experience resonates with the type of issues we see today, as impacting on our ability to support whistleblowers. Notwithstanding the issues on the wharves, Parkes' own biographer, A W Martin, did not see it as whistleblowing at all, describing the

dispute as a 'trivial' grievance — 'a quarrel at the lower level of the department between Parkes and his immediate superior over the arrogance of a man whom Parkes suspected of being 'a convict under sentence' and who made confidential reports' on other workers, such as Parkes himself.[17] Maybe that is true – it probably was. Parkes' letter suggests he was also directly targeting the inappropriateness of putting convict employees in such roles, perhaps linked to his policy disagreement – shared with many – that transportation of convicts to New South Wales should still be happening at all.

But rather than suggesting that here's a whistleblower we should simply abandon, we need to recognise that these questions are always likely to be raised in such situations, or at least, more often than not. And that we don't handle them well (see Figure 4). They reinforce the importance of comprehensive, effective whistleblowing regimes for ensuring that disclosures to third parties (including the media) occur as much as possible in a manner that recognises and supports the wider public interest. And that this in turn helps sustain confidence in our systems of public integrity generally.

However, it also shows that unless the regime is properly calibrated, it will help have the reverse effect – of feeding public concern that current systems for controlling abuses of government power are either missing or ineffective, and that those in government cannot be trusted. And so, especially now, we have a major problem. We have a crisis of confidence in our whistleblowing regimes, made worse because criminal actions against whistleblowers are going too far. When this happens, we have to recognise the consequences. As Law Council president Arthur Moses SC says, it not only has a 'chilling effect' on public disclosures to the media, but all whistleblowing. It makes all workers and officials unsure about whether their superiors really do want them to speak up, worry about the correct way to do it, and fear they – not the problem – will become the target.

So, people with concerns are left with two options. Say nothing – or if it's too serious to let go, leak anonymously, even though in the surveillance age this is increasingly dangerous. Paradoxically, one effect of a strong-handed approach may be simply that suspected wrongdoing is left to get worse, and only then revealed (but not necessarily resolved) through the more political act of individual public servants making unauthorised "leaks" to the media. The results are obvious. Our society's integrity systems start to break down, at every level. Public confidence is further eroded by a dangerous game of "hide and seek" in which government

[17] A W Martin, op cit.

agencies are tasked, or feel bound, to try to enforce criminal penalties against leakers and reporters, which are not informed by logical public interest principles; and in which public confidence in the media is undermined by being forced to either (a) resort to new and different forms of subterfuge to receive and handle public interest information, or (b) cease receiving and reporting on such information altogether, no matter how serious and important.

Somehow, this is the path Australia has managed to put itself on. This unhealthy and destructive dynamic is the current situation with respect to the Commonwealth's public sector whistleblowing regime – and it calls for major reform.

FINDING OUR WAY AGAIN: A 7-POINT PLAN

Our present situation is a tragedy, because Australia actually has a record of innovation in whistleblower protection. In principle, we know how to get the balance right.

Despite all this, whistleblower protection laws and regimes have been a cornerstone of our integrity systems, at state level, for over two decades. Internationally, we have led the way in a range of aspects. It is perhaps telling that the Commonwealth government came late to the party, only introducing its public sector whistleblowing legislation, the *Public Interest Disclosure Act,* in 2013. Indeed, then Attorney-General Mark Dreyfus' achievement of this Act, in the dying hours of the Gillard government, was something of a miracle, because strong forces of darkness within the Labor Party had tried to undermine it, and help explain that some aspects were always designed not to work. Ultimately, notwithstanding the support of cross-benchers such as Andrew Wilkie and then Shadow Attorney-General, George Brandis, for a strong and effective regime, we ended up with a scheme that works in some respects, but often, not when it really matters.

So how did we end up in a situation of apparent crisis? Reform of the Commonwealth's approach is not a new issue, especially given that the *Public Interest Disclosure Act* had such a difficult birth. Some important reform issues were already identified by the statutory review of the Act by Philip Moss AM (2016)[18], and even more by the Parliamentary Joint Committee on Corporations and Financial Services inquiry on *Whistleblower Protections* (September 2017).[19] Importantly, around half of that inquiry's recommendations were addressed in respect of the

[18] Moss, P. (2016). *Review of the Public Interest Disclosure Act 2013: An independent statutory review*, Department of Prime Minister & Cabinet, Canberra.

[19] Parliamentary Joint Committee on Corporations and Financial Services (2017), *Whistleblower Protections*. Canberra: Parliament of Australia.

private sector by reforms to the *Corporations Act 2001* and *Taxation Administration Act 1953,* under the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* – some of them groundbreaking. Instrumental in this was the partnership between Senator Nick Xenophon, and now Centre Alliance Senator Rex Patrick, in securing advances which are in some respects quite historic, but also remain piecemeal. As a member of the Turnbull-Morrison Government's ministerial expert advisory panel on whistleblowing, I was glad to play some role. It was good that it happened, flaws and all, as otherwise, nothing would have happened in the last Parliament.

But this does not change the fact – indeed it reinforces it – that despite the strengths in the new *Corporations Act* protections, overall, our whistleblowing laws currently amount to a well-motivated but largely dysfunctional mess. Many agencies and companies succeed in recognising and protecting whistleblowers, but often despite the relevant laws, not because of them. And they are undermined by the tide of confused, inconsistent secrecy provisions on which government continues to embark, often apparently without realising what it is doing.

Fortunately, there is recognition in government that this all needs to be addressed;[20] just as there are widespread calls in the media, and across society. So, what to do? Sorting this out requires, in my estimation, seven simple but vital steps. "Simple" does not always mean easy, and they require stepping back and seeing the full picture. But they can be done, and if done, we should have some confidence they may work.

1. Undertake **comprehensive overhaul or replacement of the *Public Interest Disclosure Act 2013* (Cth)** – not as a piecemeal reform, but so as to better support a consistent, coherent and workable national approach to whistleblower protection across Australia's public sector, business and not-for-profit organisations.

The first step is recognising that we have to take a comprehensive approach, and ensure that whistleblower protections work simply and consistently across all sectors. This was recommended by the Parliamentary Joint Committee on Corporations in 2017, and others, but is yet to be done. Simply tweaking known technical difficulties in the *Public Interest Disclosures Act* is not going to cut it. That Act needs major reform, if not a total rewrite. Commissioner Moss recommended redrafting using a simpler 'principles-based' approach, in place of the level of prescriptive procedural requirements which currently undermine the pro-disclosure culture which the Act seeks to create.[21] But there are other structural weaknesses – the Act completely leaves out disclosures about wrongdoing by politicians or their staff, and limits regulatory reporting

[20] See Merritt, C., & Berkovic, N. (2019). Attorney-General flags plan to protect sources behind public service leaks. *The Australian,* 21 June 2019, pp.1-2.

[21] See Moss Review (2016), pp.6-7.

channels to just the Ombudsman and Inspector-General of Intelligence and Security – not other obvious points like the AFP itself, Inspector-General of Taxation, Independent Parliamentary Expenses Authority, or the National or Commonwealth Integrity Commission which is to come.

In fact, these problems still also affect the private sector. There is similar unfinished business there, because the Corporations Act protections share common problems, have gaps, and only recognise the role of the financial regulators. For example, there too, they do not even protect disclosures of federal criminal offences to – guess who – the Australian Federal Police. Or breaches to the ACCC. This is why the 2017 Joint Parliamentary Committee recommended a single, comprehensive Act for the private sector, not different schemes in different Acts. This would make it easier to overcome the sheer problems of inconsistency between what remain multiple whistleblowing schemes in different areas, especially affecting government-owned businesses and government contractors. For them, it is not clear if access to remedies for whistleblowers is limited to the courts, as per the Corporations Act, or can also be pursued in Fair Work Australia, as per the PID Act. For unions, the Fair Work (Registered Organisations) whistleblower protection are now inconsistent with everything else, despite having helped show the way as recently as 2016. And who knows how many other laws are still littered with the types of out-of-date protections we have now hunted out of the Corporations Act, such as the entire Division 7 of the *National Disability Insurance Scheme Act* (2013).

2. Reform the **criteria for when whistleblowing outside official channels remains protected** – to be simpler, more workable, reflect presumed public interest in disclosure of wrongdoing, and be consistent for both the public sector (PID Act) and Commonwealth-regulated private sector (Corporations Act or replacement stand-alone legislation).

Obviously, as the backstop, we have to simplify the principles for when whistleblowing outside official channels remains protected. We know that no matter how good our internal systems, such public disclosure will continue to be necessary, from time to time. Our society's regulatory systems rely on public disclosure as a vital and sometimes advantageous means of ensuring action is taken. The law should reflect this reality, and properly extend protection to all three tiers of disclosyure.[22] Further, by ensuring that protections are available for justified public disclosures, the law provides the best incentive for regulators and companies to put in place more effective internal processes for dealing with wrongdoing and supporting whistleblowers.

[22] Vandekerckhove, W. (2010). 'European whistleblower protection: Tiers or tears?' in D. Lewis (ed.) *A Global Approach to Public Interest Disclosure* (pp. 15-35), Cheltenham: Edward Elgar Publishing.

These rules, too, can and should be more consistent between the public and private sectors. Presently, apart from being cumbersome, they are almost the reverse of each other, but for no good reason. Part of the good news is that Attorney-General Christian Porter is well qualified to help sort this out, because he personally introduced the very simple equivalent tests to Western Australia's state whistleblowing legislation in 2012 – along with shield laws for journalists. Indeed, there are different precedents in four Australian state or territory laws (NSW 1994, Queensland 2010, Western Australia 2012, ACT 2012), as well as the United Kingdom and Ireland, where the same principles cover both public and private sectors (1998 amended 2013; and 2014). It needs a consistent, fresh look and sensible negotiation. It can be done.

3. Revise statutory definitions of **'intelligence information'** (PID Act, s. 41) and **'inherently harmful information'** (Criminal Code, ss.121, 122) to ensure whistleblower protection *at all levels* is extended to genuine public interest disclosures i.e. which meet the simplified public interest tests and pose no actual, real, unacceptable risk of harm to national security, defence or law enforcement interests.

Third, as part of this process, it is imperative for the federal government to revise its definitions of 'intelligence information' (PID Act, s. 41) and 'inherently harmful information' (Criminal Code, ss.121, 122) to actually make sense. These are the definitions that mean, if this type of information is included in a disclosure, it can never be publicly revealed without criminal sanctions. But currently, they include any information that has ever come within a mile of any intelligence agency or issue, irrespective of the risk it actually poses. Hence it is sadly no surprise that Witness K was forced to plead guilty, irrespective of the merits of his actions. Again, we can do much better. And all sides of politics should support these better solutions, especially the Labor Opposition. After all, even though it was a miracle that then Attorney-General Dreyfus rescued the PID Act in 2013, this problem was in the Act from the start. We know this, because I was one who warned that this would lead to the outcomes we are now seeing. Again, there are sensible international principles than can help us refine these definitions back, to mean what they are meant to say;[23] and provide mechanisms for ensuring that even in the highest sensitivity contexts, whistleblowers have somewhere to go.[24]

[23] See Brown, A. J. (2013). Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience. *E-Journal of International and Comparative Labour Studies*, 2(3), 153–182.

[24] See Ben Oquist, https://www.theguardian.com/commentisfree/2019/oct/01/someone-blew-the-whistle-on-trump-if-it-happened-in-australia-we-might-never-hear-about-it; Chris Knaus, https://www.theguardian.com/australia-news/2019/oct/22/witness-k-lawyer-warns-many-whistleblowers-have-nowhere-to-go.

4. Strengthen **journalism and other third-party shield laws** to ensure (a) confidentiality of public interest whistleblower sources or clients, and (b) freedom of journalists and other relevant professionals from prosecution for receiving or using public interest disclosures in the fulfilment of their duties or functions (PID Act and Evidence Acts).

The fourth step is to strengthen press freedoms and protections for journalists, especially in ways that protect the confidentiality of their sources in cases of public interest. Thanks to the furore created by the current poor state of the law, and the actions of the AFP in trying to enforce it, sensible recommendations from the Alliance for Journalists' Freedom, Right to Know Coalition, Law Council and every Australian expert now abound.[25] In fact, many of the same principles need to extend beyond journalists, to other relevant professionals who may validly receive and need to deal with wrongdoing disclosures in the fulfilment of their duties or functions. This actually affects everybody.

5. Ensure it is **viable for public servants to use internal and official channels** for disclosure of wrongdoing, by updating the PID Act to be a true whistleblower protection regime.

Fifth, if governments and the public truly want to limit *public* whistleblowing on wrongdoing to when it is really necessary – as I believe we do – then we have to make sure our internal and official systems and protections for disclosure are actually working. Currently, despite all the recent improvements, the legal hoops that a worker has to jump through before they could access remedies for any detrimental conduct against them remain prohibitive. This is especially true for public officials, and simply updating their protections to match the new private sector rules would go a long way. There is much to do, simply to update the anti-detriment protections in new public sector legislation to match the new national best practice principles in the Corporations Act. This includes:

- expanding the examples given in the definition of **unlawful detriment** beyond employment actions;
- extending civil liability to **organisational failures to fulfil a duty to support and protect** whistleblowers, which is one of the most important new advances provided by Australian law, on the international stage;
- reversing the **onus of proof** for civil or employment remedies; and
- providing for **exemplary damages.**

[25] See submissions to the Parliamentary Joint Committee on Intelligence & Security, and Senate Environment and Communications References Committee.

But there are actually still also defects – by international standards – in the old PID Act which were copied across to the new Corporations Act provisions, and which therefore continue to infect both. This is why we must amend the anti-detriment protections in both, to match international best practice, by removing what is a *de facto* requirement for a deliberate, knowing intention to cause harm before civil or employment remedies can be accessed.[26] This may be appropriate for a criminal offence of victimisation, but not for civil or employment remedies for the types of detrimental conduct by organisations – both acts and omissions – which can foreseeability result in damage to whistleblowers. As recommended by the Parliamentary Joint Committee, for protections to be realistic there needs to be a clear separation between this criminal liability, and the different bases on which whistleblowers should be able to obtain civil remedies.[27] We got ourselves into this particular mess by being the first country to systematically criminalise victimisation against whistleblowers, but without realising we were doing it in a way that would narrow the chances of wider remedies being made available. Internationally, best practice frameworks do not make this mistake.[28] Even with other improvements, we cannot expect these legal protections to work until this is addressed.

6. Make protections real by providing **effective support** to public interest whistleblowers:
    - Update the statutory minimum requirements for **whistleblowing policies and programs** in the public sector, and increase the Commonwealth Ombudsman's monitoring and support roles;
    - Establish a fully resourced **whistleblower protection authority** to assist all reporters and regulators with advice, support, coordination and enforcement action to prevent, deal with, and gain remedies for detrimental conduct;
    - Continue to consider a **reward scheme** for public interest whistleblowers.

Sixthly, making the protections real also requires a commitment to providing effective support to public interest whistleblowers in practice, and not just in legal theory. This means practical improvements to what government agencies are required to do, overseen by the Commonwealth Ombudsman. Again, the Corporations Act helps point the way – another world first, in explicitly requiring organisations not only to have their own whistleblowing policies and procedures, but to detail how they were will support and protect whistleblowers from the outset.

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[26] See PID Act, s. 13(1)(b)&(c); Corporations Act, s. 1317AD(1)(b)&(c).

[27] Recommendations 10.1 and 10.2.

[28] See OECD, *Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, Paris: OECD, 2011, p.11; Government Accountability Project, *International Best Practices for Whistleblower Policies* (2016); Joint Parliamentary Committee (2017), pp.21-23.

In addition, this means a fully resourced whistleblower protection authority to ensure workers can access their rights, especially the most vulnerable and least powerful. Internationally, the need for effective institutional arrangements is becoming clearer and clearer, and highlights Australia's gaps.[29] Again, the need for and roles of such an authority were laid out in some detail, supported by a bipartisan consensus, by the 2017 Parliamentary Joint Committee. More recently, the *National Integrity Commission Bill* developed and introduced to federal parliament by Independent Cathy McGowan and Centre Alliance's Rebekha Sharkie, in November 2018, shows that the types of roles and powers needed for a whistleblower protection commissioner can be readily translated into legislation.

And as a third element of support, we need to remember the historic recommendation of the 2017 Parliamentary Joint Committee that it is time for Australia to have a reward or incentive scheme, which enables eligible whistleblowers, and their lawyers, to claim a percentage of the financial benefits that their disclosures may bring to regulators or the public.

7. Recognise the wider validity of public interest disclosure of official information, beyond employee disclosures of wrongdoing, by making available **a general public interest defence** for any citizen charged with offences of unauthorised disclosure or receipt of official information (Criminal Code).

Finally, we need to remember it is not only worker disclosures about wrongdoing that might attract penalties under secrecy laws. A general public interest defence needs to be available for any citizen to assert, using the right criteria, if they are charged with offences of unauthorised disclosure or receipt of official information. The common law once provided this kind of relief, before being wiped out by recent decades of secrecy legislation. At one time, Anglo-Australian common law may have contained a general public interest defence to criminal or civil liability for a breach of confidentiality, such as to provide some legal protection to whistleblowers in 'non-emergency' situations.[30] However, federal Parliamentary Committees have concluded since at least 1994 that uncertainty over the scope of any common law protection

[29] Loyens, K., & Vandekerckhove, W. (2018). Whistleblowing from an international perspective: A comparative analysis of institutional arrangements, *Administrative Science,* 8(3), 30-46.

[30] In Australian courts it has been said that 'the public interest in the disclosure (to the appropriate authority or perhaps the press) of iniquity will always outweigh the public interest in the preservation of private and confidential information': *Allied Mills Ltd v Trade Practices Commn* (1980) 55 FLR 125 per Sheppard J. For qualifications, see - *G v Hayden (No 2)* (1984) 156 CLR 532, per Gibbs CJ; *Attorney-General (UK) v Heinemann Publishers* (1987) 10 NSWLR 86, per Kirby P at 166-170. The common law principle flowed from the famous English principle that 'there is no confidence as to the disclosure of iniquity': Wood V-C in *Gartside v Outram* (1856) 26 LJ Ch 113 (at 114). See generally, Brown, A. J. (2007). 'Privacy and the Public Interest Disclosure: When Is It Reasonable to Protect 'Whistleblowing' To The Media?' *Privacy Law Bulletin* 4(2): 19-28; Brown, A. J. (2009), 'Returning the Sunshine to the Sunshine State: Priorities for whistleblowing law reform in Queensland' *Griffith Law Review* 18(3): 666-689.

is exactly why statutory protections of these kinds need to be created, and extended to all reasonable circumstances.[31] But, to return to the very starting point of this Oration, the issue also goes beyond employee reporting, and beyond the reporting of clear wrongdoing. The nature of creeping criminalisation of official information means that *anyone* could potentially be caught by the increasing raft of criminal laws – not just whistleblowers, but public servants revealing information in other circumstances, journalists, or businesses and professionals dealing with confidential information as a result of their dealings with government. The Australian Law Reform Commission recommended, in 2010, that a wider approach was needed – not to excuse every public disclosure, but to at least give the courts the flexibility and discretion to *consider* whether the public interest outweighs the merits of secrecy, where this becomes a valid issue in individual cases.[32] Now is the time to re-equip our legal system with this kind of safety valve. Without this, neither these offences nor our legal system are consistent with justice.

CONCLUSION: FOLLOWING PARKES' EXAMPLE

From all these recent events, we can see how confused and inconsistent policy and lawmaking has become in this area. But we can respond, and those seven steps are my suggestions on how. Whatever the approach, we must act to strengthen our national systems of public integrity and accountability if Australia is to remain the world-leading democracy envisioned by our constitutional founders. The new attention on these issues, brought by the AFP's unfortunate attempts to enforce our current mess of laws, can let us turn things around.

These steps are clear, and achievable within this term of Parliament, even if some require a comprehensive view, or a return to basic principles. Our political leaders, especially current and former Attorneys-General with the skills of Christian Porter and Mark Dreyfus, are capable of doing it. So, however we got into this mess, by taking the right approach, we can get ourselves out. But we have to understand, this is not simply for the sake of press freedom, nor even for the sake of justice for everyday workers and officials. It is vital to safeguarding the future of Australian democracy.

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[31] See e.g. Senate Select Committee on Public Interest Whistleblowing, *In the public interest*, 1994, par 8.27.

[32] Australian Law Reform Commission (2010). *Secrecy Laws and Open Government in Australia*, Report 112.