

Submission to the Senate Economics Legislation Committee on the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

by David Lewis¹

Preliminary observation:

This submission is made on the basis that Australian Commonwealth and State whistleblowing legislation, dealing with the public sector, have set an example to other countries on many issues, for many years. The comments below are intended to ensure that Australia remains a world leader in the field of whistleblowing statutes.

1317AAA: The fact that relatives and dependants are covered is in accordance with best practice. However, as many international and national organisations recognise in their whistleblowing arrangements, interns and volunteers are often in a position to disclose information about suspected wrongdoing. Such people may well be covered as persons providing services “whether paid or unpaid” but I suggest that, for the avoidance of doubt, they are expressly included.

1317AAD: Although there is a risk of serious harm, danger to public health or safety etc, the police are not identified as emergency recipients under (i). I suggest that they are mentioned here. [In the UK Section 43H of the Employment Rights Act 1996 (ERA 1996)

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allows workers to report an “exceptionally serious failure” to *anyone* so long they act reasonably].

1317AD (1)(a): This seems to be unnecessarily complicated in that a distinction is drawn between “victimising conduct” and “detriment”. Although it may have some educative value, in my opinion there is no need to separately identify a threat in (1)(a)(ii) as a threat in itself constitutes a detriment

1317AE(1)(e): I think this should be revised so as to require the court to give priority to reinstatement if that is sought. A position at a comparable level means that the victim re-engaged and is not made whole i.e. there is still a detriment.

1317AD (1)(b) (c) & 1317 AE (2): In terms of onus of proof, I do not think it helpful to focus on the “belief or suspicion” of the respondent. Indeed, it is worth contrasting the provisions in this Bill with those currently applied in the UK. Here the test is whether a worker was “subjected to any detriment...on the ground that (he or she) made a protected disclosure” (Section 47B ERA 1996). According to the Court of Appeal,² this section will be infringed if the protected disclosure materially influences the employer’s treatment of the whistleblower.

Nevertheless, I would urge the committee to adopt international best practice by requiring a claimant to establish a prima facie case of detriment and then obliging a respondent to show by clear and convincing evidence that it would have taken the same action in relation to the claimant if the disclosure had not been made.

² *Fecitt v NHS Manchester* [2012] IRLR 64

1317AD (2): This method of imposing liability seems unnecessarily complicated. Again it might be worth noting the approach taken to personal and vicarious liability in the relevant UK provisions. Section 47B (1) ERA 1976 deals with employer liability for a detriment incurred; Section 47B (1A) covers detriments imposed by another worker or an agent of the employer; and (subject to exceptions in Section 47B(1D & 1E), Section 47B (1B & 1C) make an employer vicariously liable for the acts of its workers and agents even if they are not done with the employer's knowledge and approval.

1317AI: In my opinion this section is really about **procedures** rather than policies. I do not regard this as mere semantics as a policy is likely to be a management document whereas a procedure might be negotiated (or at least be the subject of consultation with employee representatives). In support of this I would point out that it is procedures rather than policies that are mandated in other countries (for example, see Ireland's Protected Disclosures Act 2014).

Subsections (1)-(3) use the words "make that policy available". Posting on the intranet/internet might satisfy this requirement but that is not the same as **communicating** the policy to individuals. I suggest that an additional requirement for training to take place be included.