THE ETHICS CENTRE

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Dear Mr Irons

Re: Whistleblower protections in the corporate, public and not-for-profit sectors

The purpose of this submission is to canvass some of the core ethical issues that are relevant to your Committee's inquiry. We hope that our submission will help to inform the ethical foundation on which all good laws ultimately rest.

In particular, this submission considers:

- The ethics of the employer and employee relationship
- The ethics of 'dobbing'
- The intersection between 'good faith' and 'truth' in making a protected disclosure
- The difference between reporting wrongdoing and 'whistleblowing'.

These observations apply equally to corporate, public and not-for-profit organisations.

We then outline some of the implications of the arguments we make – for example, in relation to the potential offer of compensation (including the payment of 'bounties') to those who make protected disclosures.

Finally, we conclude with comments specifically acknowledging the need to ensure that people when acting as citizens (and not just employees) be able to act, with confidence and safety, when seeking to protect the public interest.

The ethics of the employer and employee relationship

While often converted into legal form through formal contract, the essential relationship between employer and employee is one of reciprocity in which the employee serves the employer's interests in return for reward. The duty owed to the employer is not limited to the offer of skills and labour. It also includes a care for and practical commitment to advancing the legitimate interests of the employer. Likewise, the duty owed to the employee is not limited to remuneration. It also includes the creation of a safe work place and access to the means by which the employee can discharge their duty. Such 'means' include relevant tools. Less obvious, but equally important, is the need for an employer to create and support a culture within which the employee can advance the employer's interests to the greatest extent possible.

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With the exception of contract negotiations (and/or enterprise or award bargaining rounds), when at work, an employee has no right to advance his or her own private interest. Everything that they do during the time that they are employed must be directed to the task of advancing the interests of the employer.

This is not just a duty to engage in positive and productive endeavour. The duty also extends to the prevention of evident or foreseeable harm to the employer's interests. Now, it should be recognised that the discharge of this second aspect of the principal duty (i.e. the subsidiary duty to prevent harm through reporting) gives rise to particular risks for employees. These risks obviously include the possibility of suffering retribution from wrongdoers and those who may be complicit in their misdeeds. However, people who raise such concerns may also be condemned and punished for having breached informal cultural 'taboos' (e.g. against 'dobbing') – even if a loyal employee has used formal mechanisms nominated for this purpose by the organisation.

Given the risks to employees who seek to prevent harm to an employer's interest by reporting wrongdoing are reasonably foreseeable, it is the duty of the employer to create safe channels for employees wishing to discharge their obligation - and to afford them protection. Some of this can be achieved through formal mechanisms. However, the safety of employees in such situations is as much a matter of organisational culture.

Finally, it is important to note that employees are not required to do 'whatever it takes' to advance or protect an employer's interests. For example, employees are not required to engage in illegal conduct for the sake of an employer. Of more relevance is an employer's obligation to create and maintain a safe working environment. With few exceptions (such as apply in the cases of the armed forces and emergency services) there is no obligation on an employee to risk injury or death in pursuit of organisational objectives. Even in the most extreme cases, there is a positive obligation on the employer to make the employee as safe as possible. So, in general, the obligation on employees to advance or protect the employer's interests is relative to the capacity of the employer to make it safe for the employee to do so.

In summary: employees have a duty to help prevent harm to the interests of their employers. This duty extends to the reporting of suspected or actual wrongdoing. In turn, employers have a responsibility to ensure that employees can discharge this obligation with relative ease and safety. To the extent that the working environment is not safe for employees to perform their *prima facie* duty, their obligation is lessened.

The ethics of 'dobbing'

At least since the time Europeans arrived in Australia (and perhaps before) there has been a general cultural aversion to those who report on the conduct of others to those in authority. Various explanations for this cultural tendency come to mind. They include; the mutual dependence on which survival often depended, cynicism about the legitimacy of the authority being exercised, fear of retribution, and so on. However, at a general level, there is a reasonable expectation that people engaged in a common endeavour should enjoy a broadly benevolent relationship. Although competition between individuals and organisations can spur innovation and progress, the constructive outcomes that individual outcomes seek to achieve depend on a minimum of harmony and good will amongst those who seek to advance and protect its interests.

Given this, it is reasonable that employees should feel a sense of obligation to each other – providing only that this is not inconsistent with the principal duty owed to the employer.

As often happens, cultural practices that made sense in one environment often carry over into another where they become aberrant. Such has been the case in relation to 'dobbing'.

'Dobbing' is, in essence, based on the claim that a dominant loyalty I owed to those of your colleagues who are not in authority. The ties formed by these reciprocal obligations are a form of collective strength that can stand in opposition to those with the authority and means to enforce their will through the exercise of power. However, central to the idea of loyalty is that there is a 'deserving subject'. For example, it would be odd to claim that loyalty is owed to an unscrupulous vagabond who betrays one's trust, steals one's goods, bullies one's family … and so on. Such a person does not deserve the loyalty of those whom they harm. Yet, in Australia, the link between loyalty and a 'deserving subject' is often set aside as redundant. Instead, in a corruption of the virtue of loyalty, too many Australians claim that it is wrong to 'dob' irrespective of the character or conduct of the person about whom the report of wrongdoing is to be made.

This is important in the context of whistleblowing – as it is essential that organisations be able to establish their own 'moral authority' – which includes helping their employees to see that the self-interested conduct of colleagues is a breach of good faith and inimical to the interests of all.

Finally, it needs to be stressed that any loss in the legitimacy of the authority of those to whom a report should be made reinforces the cultural tendency not to 'dob'. It is therefore essential that those encouraging disclosures do so for a proper purpose and in conditions where their legitimacy is not undermined by their own unethical conduct.

In summary: an effective regime for encouraging disclosures requires explicit attention to be paid to the limits of loyalty owed to a colleague. To the extent that organisations lose legitimacy (typically through unethical conduct) they increase the likelihood that proven or suspected wrong-doing will not be reported.

The intersection between 'good faith' and 'truth' in making a protected disclosure

It has been argued that employees have a duty to promote and protect the legitimate interests of their employer. It has also been argued that, with one exception, it is reasonable for employees to feel an obligation to look after the interests of each other – just so long as this is not incompatible with the principal duty owed to employees. The one exception that we have noted is when employees – either individually or collectively – are engaged in negotiations about their wages and conditions. At that time, the employees' interests prevail.

Unfortunately, there are times when people report suspected or actual wrongdoing for entirely selfish reasons. That is, they do not act out a duty to their employer but simply in order to advance their own interests. For example, it used to be well known in various police forces that the best way to halt a rival's progress would be to make an anonymous complaint against them to the 'professional standards' section. Even if the police officer was subsequently found to be innocent of the charge, the damage to their career would be done.

Some people argue that motives should not matter when it comes to reporting wrongdoing. Instead, the only relevant criterion should be truth. On this view, detecting, preventing or correcting wrongdoing is all that matters. If one takes a narrow view of an employer's interests, then this is arguably true. After all, why should the employer care about motives (even malicious motives) if it is being helped to advance or protect its interests? However, on a wider (and we think reasonable) view of an organisation's interests, we do not think that indifference to malice, amongst and between employees, to be a sound basis for sustainable success.

As a minimum, we agree that disclosures of alleged or actual wrongdoing ought to be based on a sincerely held belief, by the reporter, that the information on which they base their report is true. As such, those who report wrongdoing have an obligation not make their 'best efforts' to determine the truth of what they say. This can sometimes difficult to achieve – especially when a loyal employee is at risk should it be discovered that they know of the alleged wrongdoing. So, there will be occasions when employees make a report based on reasonable beliefs rather than irrefutable evidence. Even so, claims of wrongdoing by others should not be reckless. Nor should they be self-serving.

In our opinion, indifference to motive (including malice) is inconsistent with the reciprocal obligation owed by employers to employees.

Employers cannot reasonably be expected to control the motives of those who report wrongdoing. However, they are accountable for how they respond to malicious but true reports. On the arguments outlined above, it would be a breach of an employer's general obligation to employees to reward malicious acts. Instead, an employer might accept and act on true information that it receives (irrespective of motivation) while reserving praise for those who act in good faith. By 'good faith' we mean the inclination to act out of a sense of duty owed to the employer – especially in relation to the advancement or protection of the employer's interests. That is, those who act in 'good faith' are not motivated by self-interest.

It could be objected that an objectively dishonest or disloyal employee has forfeited their right to be dealt with in good faith – either by a colleague or their employer. We have some sympathy with this view in that the dishonest or disloyal employee has unilaterally broken the reciprocal bonds of obligation. However, on balance, we do not think that 'two wrongs make a right'. To raise concerns in bad faith (e.g. for selfish reasons) is inconsistent with the obligation to report wrongdoing in the interests of the employer. Although the same ends might be achieved by an act of bad faith, the means are thereby tainted by poor motivation which, we would argue, forms part of the act of reporting when seen as a whole.

In summary: truth (at least reasonable beliefs about the truth) matter when it comes to reporting wrongdoing. However, although a company might, as a matter of prudence, act on reports that are made in bad faith, those who make such reports should not be rewarded for doing so.

The difference between reporting wrongdoing and 'whistleblowing'.

Having worked with each of the sectors, we have seen the adverse impacts of brittle ethical foundations and unhealthy cultures, including as manifested in poor conduct and the 'whistleblowing' that this often gives rise to.

The ability to speak up and ask constructive questions, without fear of reprisal, is a sign of a healthy organisation. As a rule, employees feel safe to raise issues when they work in an organisation with a culture that is a practical expression of strong ethical foundations.

Whistleblowing usually occurs as a 'last resort' after attempts to report suspected or known wrongdoing, using formal 'internal' channels, have failed. The evidence shows that, with a few, rare exceptions, the impacts of whistleblowing on the organisations and individuals involved are disproportionately negative. Given this, smart employers create conditions of absolutely safety for those who feel obliged to report cases of suspected or known wrongdoing. The formal systems will often include:

- Safe routes (systems) for making formal reports,
- Cultures that (informally) encourage, support and acknowledge people for 'speaking up' – as a normal part of daily work,
- Cultures that are fully aligned to the organisation's espoused ethical framework of purpose, values and principles. Such organisations have high levels of trust and maintain legitimacy – especially of senior leaders, and
- Strict sanctions against those who would seek to harass or punish those who report wrongdoing.

In circumstances where an employer fails to create the conditions under which it is safe and reasonable for an employee to report wrongdoing using internal mechanisms, it should be allowable for an employee to make a disclosure to a legitimate external party, especially if the whistelblower reasonably believes that:

a) there is a risk to the safety or wellbeing of an individual, group or wider society,
b) the relevant conduct is criminal in nature, and
c) the report is made to a third party that acts in a spirit of public service and for the public interest.

In such circumstances, where the whistleblower has acted in good faith, the person should enjoy full protection from any form of recrimination.

In summary: organisations with strong ethical foundations, where employees can report wrongdoing in safety, are less likely to see reporting wrongdoing as an 'extra-ordinary' event. Indeed, a 'speak up' culture will typically prevent wrongdoing through early identification and rectification. This in turn will help to prevent a 'normalisation of deviancy' within which wrongdoing can flourish undetected. Ideally, formal acts of 'whistleblowing' need not extend beyond the boundaries of the organisation. If a whistleblower has no reasonable alternative but to make an 'outside' report, then they should be afforded all protections from recrimination – providing only that they meet the conditions noted above.

Some implications …

The arguments made above suggest that:

It would be inconsistent with the duty to act in good faith for a reward to be paid to those who report wrongdoing. Indeed, the expectation of a reward would be inconsistent with the concept of 'good faith' as developed in this submission. That said, is would be fair and proper for an employer to compensate a person who reports wrongdoing for:

- any direct costs incurred in the performance of their duty, and
- any detriment or loss suffered as consequence of performing their duty.

Additionally, it should be open to employers to recognise the discretionary efforts of employees – for example, by means of acknowledgement and the payment of a discretionary bonus (providing this is not seen to create an incentive for reporting).

The distinction here is of critical importance. A *bonus* is only paid – entirely at the discretion of the employer – after an employee has acted well and in good faith (without any expectation of reward. On the other hand, an *incentive* (e.g. the prior offer of a bounty, or a share of fines levied or monies saved) is an inducement to act out of self-interest, and therefore with a form of 'bad faith'.

Against what we have argued here, some might suggest that the offer of inducements to report (incentives) to those who report wrongdoing will increase the incidence of reporting. In practice, this might be true. However, if this is the sole basis for increased reporting, it will be at the cost of a predictable degradation in the ethical tone of the organisation. In turn, this may foster an increased incidence of wrongdoing amongst a cynical population of employees. Thus, apart from anything else, such an approach may prove to be self-defeating.

Conclusion

Whistleblowers are typically the reluctant victims of broken systems and dysfunctional cultures of a kind that fail to offer protection to employees seeking, selflessly, to discharge their obligations to employers. Well run organisations should be expected to create cultures within which disclosure of wrongdoing is expected and admired as a normal part of the relationship between employer and employee.

That is the ideal.

Naturally, the law needs to be fashioned to deal with reality. While organisations should be required to establish safe mechanisms for reporting matters that affect their interests, there are times when the risk of harm is not just to the employers' interests but also to individuals, groups and the wider community. In such circumstances, there is a legitimate public interest in ensuring that reasonably apprehended risks are disclosed, managed or prevented. This is especially so in cases where employers (organisations) either lack the will or the capacity to respond in ways that safeguard the community.

It is for this reason that provisions in the law should also exist with a view to providing an easy route for those who, as an act of good faith, wish to report what they reasonably believe to be suspected or actual wrongdoing.

Raising the alarm is no trivial matter. Even in the best of circumstances, it requires moral courage to speak out. Whether Edmund Burke ever said such a thing (the provenance is, at best shaky), we should recall the maxim that: ‘all that is needed for the triumph of evil is that good people do nothing’.

In this matter, parliament has the capacity to help good people do more.

Yours sincerely,

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