

Chapter 2

Background

Introduction

2.1 This chapter provides the context for the current inquiry. It begins by summarising the arguments put to the committee on the value and importance of establishing effective whistleblower protections. It then notes the current legislative framework that applies to the public sector, to registered organisations, and to the corporate sector. This is followed by an overview of various whistleblower inquiries that have occurred in Australia since the early 1990s and the development of whistleblower legislation during that period. The following section sets out some of the international developments in whistleblower protection legislation as part of greater global moves to tackle corruption. The chapter finishes with an analysis of Australia's current whistleblower protection legislation as measured against specific best practice criteria.

Context—why whistleblowing is important

2.2 The key arguments for establishing effective whistleblower protections are essentially based on a view put by numerous submitters and witnesses that whistleblowing was critical in fostering a culture of transparency, accountability, and integrity. For example, Ms Serene Lillywhite, Chief Executive Officer, Transparency International indicated that:

- whistleblower protection is integral to fostering transparency, promoting integrity and detecting misconduct;
- protecting whistleblowers promotes a culture of accountability and integrity in both the public and private institutions; and
- whistleblowing empowers citizens against corruption and encourages the reporting of misconduct, fraud and corruption.¹

2.3 Mr Jordan Thomas pointed out that whistleblowers perform a vital service to both markets and organisations because:

- they force us to focus on our failings;
- they challenge our ideals; and
- they show the limits of law enforcement authorities, self-regulatory organisations, and corporate compliance programs.²

1 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 2.

2 Mr Jordan Thomas, *Submission 70*, p. 2.

2.4 As discussed below, several submitters and witnesses argued that a strong whistleblower culture would have a positive transformative impact on organisations by helping to drive organisational change from within.

2.5 For example, the Australian Institute of Company Directors (AICD) argued that boards and directors have a critical role to play in establishing and promoting a corporate culture that supports disclosure of wrongdoing:

...a speak-up culture within organisations. And this is very much an issue that is top of mind for Australian directors and is very much raised in the forums and committees with our members that we work with. We believe the regulation of whistleblowing has a significant impact, as well, on that culture of disclosure. The inadequacies in the current system limit the ability of corporates, directors and whistleblowers to play their part in ensuring the compliance of organisations with the law as a whole.³

2.6 Dr Simon Longstaff, Executive Director of the Ethics Centre argued that it would be useful to draw a distinction between the reporting of wrong doing as an ordinary regular practice and whistleblowing as a more extraordinary event. The Ethics Centre argued for creating cultures in which it is entirely normal for a person to spot a discrepancy between what the organisation says it stands for and what it is actually doing, or to spot some element of risk either to the corporation or to other people who have a legitimate interest in the corporation's conduct. Viewed in this light, the Ethics Centre suggested that whistleblowing should be seen as an extraordinary event where a person is required to go outside the bounds of the organisation and its normal channels in order to raise serious concerns about some aspect of the corporation's conduct, or somebody associated with that corporation.⁴

2.7 In a similar vein, Mr Warren Day, Senior Executive Leader from the Australian Securities and Investments Commission (ASIC) argued that a good organisational culture should reduce the need for whistleblowers and that the presence of a whistleblower indicated a failure of organisational culture and compliance systems.⁵

2.8 Likewise, Mr Phil Ware, Member of the Association of Corporate Counsel Australia took the view that whistleblower protection legislation should be designed to encourage proactive internal compliance procedures:

The regulatory goal should not so much be a more effective framework for corporate whistleblowing which is focused on punishment of offenders, which is lagging and punitive, let alone the windfall enrichment of whistleblowers and their lawyers via bounties in circumstances where they are immune from costs. The regulatory goal, rather, should be improving

3 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 23.

4 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, p. 7.

5 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 66.

the effectiveness of internal compliance cultures. This is leading, proactive and preventive.⁶

2.9 Mr Joshua Bornstein, Director/Principal from Maurice Blackburn Lawyers informed the committee of his concerns about sub-standard corporate governance in Australia:

I think there is a fundamental problem in Australian business culture, which is that its corporate governance standards are poor. This malaise feeds I think also into our political, legislative and regulatory culture. There have been countless scandals in our banking and finance sector in the last decade involving illegal and improper conduct. Many thousands of consumers, including vulnerable retirees, have been ripped off. Wage and superannuation fraud is now, in my experience, at an unprecedented level, particularly impacting low-paid and vulnerable employees right across the private sector. Bribery scandals regularly dog Australian companies trading overseas, and company tax compliance in this country is a rolling scandal.⁷

2.10 Mr Thomas asserted that corporations serve a necessary social purpose but can also cause great harm. He was of the view that encouraging those who know of wrongdoing in the workplace to speak out is essential to protecting the innocent victims of such misconduct.⁸

2.11 However, Mr Thomas also pointed out that being a corporate whistleblower is rarely easy or glamorous and can often involve great risk for the person speaking out. Mr Thomas explained why reprisals occur even when it is not in the corporation's best interest:

In agency theory it is recognized that there is an inherent potential for conflict between the interests of an entity and the interests of its agents – the ones who act for the company. So while a 'company' may logically have an interest in acting legally and ethically, and in encouraging its employees to report misconduct without fear of retaliation, its managers and officers, as agents, may not share this corporate interest...The 'corporation' may have no interest in harming the whistleblower, but the corporation can only act through its agents. History, and countless surveys and media stories, consistently show that those agents can and do retaliate against corporate whistleblowers.⁹

2.12 Ms Julia Angrisano, National Secretary from the Financial Sector Union (FSU) informed the committee that the feedback it received from its member surveys indicates that workers lack trust in the current frameworks and policies across the industry because they have experienced, seen or heard practices that suggest a

6 Mr Phil Ware, Member, Association of Corporate Counsel Australia, *Committee Hansard*, 27 April 2017, p. 32.

7 Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 42.

8 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017).

9 Mr Jordan Thomas, *Answers to questions on notice*, 28 April 2017 (received 16 May 2017).

significant gap between policy and practice for whistleblowers. The FSU gave some examples of the feedback that it had received:

When we asked the reason for not accessing whistleblower policies, many of our members told us that it is made very clear to them that they should not rock the boat by calling out bad behaviours or that the system rewards people who do what they are told. Often, they talk to us about the fact that their pay system sometimes rewards them for selling an insurance policy or another financial product that is worse than the current policy, but that is the framework that they operate within.¹⁰

Our members contact us feeling like they have seen something or they have heard something, but they are too scared to raise it, because they have seen it happen in other circumstances where people just simply lose their jobs or move on to another department or are isolated.¹¹

2.13 The Australian Federal Police (AFP) informed the committee that whistleblowers are important in detecting serious financial crime that is often sophisticated, well concealed, and part of a culture of cover-up. The AFP noted that due to the complex nature of serious financial crime there is often a low risk of discovery by regulators and law enforcement unless whistleblowers are supported in coming forward. The sorts of matters where whistleblowers may inform investigations include foreign bribery, serious tax crime, identity crime, corporate and government corruption matters and serious fraud offences. The AFP argued that:

If people are discouraged from coming forward to regulators or law enforcement due to lack of protections for their safety, protection from legal action and the personal and financial impacts of disclosing company information, there may be no case to prosecute. Where people do come forward, but are not willing to give evidence, due to lack of protection for anonymity, law enforcement may not have sufficient evidence to prosecute. This may not be fixed solely by enhancing protections as court procedures can only go so far in protecting witness identity.

Whether or not improved whistleblower protections would encourage people to come forward and disclose wrongdoing would depend on how the system is framed, and whether the public has the confidence that the system can ensure any protections.¹²

2.14 The Governance Institute of Australia (GIA) argued that whistleblowing has a critical role to play in identifying and stopping misconduct in the corporate sector, but it is only one aspect of companies' overall programs to ensure compliance with regulation and to prevent and detect misconduct:

10 Ms Julia Angrisano, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 28 April 2017, p. 9.

11 Ms Julia Angrisano, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 28 April 2017, p. 12.

12 Australian Federal Police, *Answers to questions on notice*, 28 April 2017 (received 19 May 2017).

Whilst we do not consider that misconduct and illegal activity is endemic within Australian companies, our members' experience is that whistleblowing usually occurs when other avenues that already exist have been exhausted or failed. Again, we note our support for significant reforms in this area.¹³

2.15 The International Bar Association Anti-Corruption Committee (IBACC) argued that, from the submissions to this inquiry, it appeared that those who blow the whistle outside of the public sector do so at their own risk and at their own peril:

There have been numerous reports, inquiries and research done over the years that have looked at this question, and yet still the messenger and the message are attacked, and the underlying conduct seems not to be addressed or, if it is addressed, it is addressed privately and out of the public spotlight.¹⁴

Protections in the private sector have generally been non-existent...Whistleblowers face a large number of severe sanctions on and processes of adverse consequences for them. They are real, they are emotional and financial, and they can affect people for many years thereafter, when all they were doing, invariably, was their job, by reporting something that they observed to the company by which they were employed, and they, in turn, became the target of an attack—from the company or from those engaging in the behaviour—to suppress it.¹⁵

2.16 The Law Council of Australia (Law Council) considered whistleblower protection reform to be urgent. However, the Law Council cautioned that piecemeal regulation would be insufficient, and that careful policy analysis was necessary to ensure that regulation led to genuine behavioural and structural change.¹⁶

2.17 The AICD argued that legislative reform that took account of best practice indicators could lead to substantial improvements in Australia's corporate whistleblowing framework, particularly given the current anaemic framework.¹⁷

13 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 25.

14 Mr Robert Wyld, Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 28 April 2017, p. 14.

15 Mr Robert Wyld, Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 28 April 2017, p. 14.

16 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

17 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 28.

Public interest disclosure

2.18 Whistleblowing is often technically referred to as public interest disclosure. Whistleblowers play a critical role in identifying and preventing misconduct. Legislative protections have existed for public sector whistleblowers in most Australian states and territories since the 1990s. Protections for private sector whistleblowers were not legislated until 2004.¹⁸

Commonwealth public sector

2.19 The *Public Interest Disclosure Act 2013* (PID Act) is intended to promote the integrity and accountability of the Commonwealth public sector by:

- encouraging and facilitating the making of disclosures of wrongdoing by public officials;
- ensuring that public officials who make protected disclosures are supported and protected from adverse consequences relating to the making of a disclosure; and
- ensuring that disclosures are properly investigated and dealt with.¹⁹

Registered organisations

2.20 In November 2016, the Parliament passed amendments to the FWRO Act which strengthened whistleblower protections for people who report corruption or misconduct in unions and employer organisations. The amendments provide protections to whistleblowers who disclose information about contraventions of the law, including current and former officers, employees, members and contractors of organisations.²⁰ Amendments that were introduced by the Senate and passed both Houses include:

- defining what constitutes a reprisal;
- civil remedies against reprisals;
- awarding of costs against vexatious proceedings;
- civil penalties for reprisals;
- criminal offences for reprisals;
- that protections have effects despite other Commonwealth laws;
- provisions for the investigation and handling of disclosures;
- time limits for investigations;

18 Senate Economics Reference Committee, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*, Issues Paper, April 2016, p. 2.

19 Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act 2013*, April 2016, p. 2.

20 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 7.

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- disclosures to enforcement agencies; and
 - protection of witnesses.²¹

Corporate whistleblowing

2.21 Current protections for whistleblower disclosures in the corporate sector are contained in Part 9.4AAA of the *Corporations Act 2001* (Corporations Act) which was introduced as part of a range of corporate legislative reforms in 2004. Those protections:

- confer statutory immunity on the whistleblower from civil or criminal liability for making the disclosure;
- constrain employer rights to enforce a contract remedy against the whistleblower (including any contractual right to terminate employment) arising as a result of the disclosure;
- prohibit victimisation of the whistleblower;
- confer a right on the whistleblower to seek compensation if damage is suffered as a result of victimisation; and
- prohibit revelation of the whistleblower's identity or the information disclosed by the whistleblower with limited exceptions.²²

2.22 For public interest disclosures concerning misconduct or an improper state of affairs or circumstances affecting the institutions supervised by the Australian Prudential Regulation Authority (APRA), whistleblower protections in the following acts may apply:

- the *Banking Act 1959*;
- the *Insurance Act 1973*;
- the *Life Insurance Act 1995*; and
- the *Superannuation Industry (Supervision) Act 1993*.²³

Previous inquiries and reviews

2.23 In 2005, the Parliamentary Library published a research note on whistleblowing in Australia. The library noted that whistleblower protections became a significant issue in the late 1980s and early 1990s when inquiries identified that the common law was unable to provide employees with a right to disclose information about the workplace and protection from reprisals. Following those inquiries, all

21 FWRO Act, Part 4A.

22 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 4.

23 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 5.

Australian states and the Australian Capital Territory (ACT) adopted some form of public interest disclosure protection legislation.²⁴

2.24 In 1991, the Gibbs committee review of Commonwealth Criminal Law recommended that catch-all secrecy provisions should be replaced with provisions limiting penal sanction for the unauthorised disclosure of official information to specific categories required for the effective functioning of government, such as defence and foreign affairs. The Gibbs committee concluded that appropriate protections should be provided for disclosure of other information in the public sector.²⁵

2.25 In 1991, the Senate Standing Committee on Finance and Public Administration concluded that the Commonwealth Ombudsman has often been unsuccessful in resolving major and complex complaints and made the following observations in relation to whistleblower protections:

Perceived failings were that the Ombudsman's investigations were ineffectual, that there was no power to resolve any serious deficiencies which might have been detected or to protect complainants effectively and that members of the Ombudsman's staff were too close to the public servants they were sent to investigate.²⁶

2.26 This led the committee to make the following conclusions and suggestions:

...that the Ombudsman should be responsible at least for filtering whistleblowing complaints or redirecting them if appropriate to another agency. In some cases it would be necessary for the Ombudsman to undertake a full investigation into a whistleblowing allegation.

To deal with whistleblowing allegations and to enable the Ombudsman to fulfil a role as an external review body as outlined above, the Committee recommended that the Ombudsman establish a specialist investigation unit within its Office. This new aspect of its operations would also be able to target areas for systemic reform, but its activities would remain separate from the bulk complaint work of the Ombudsman because of the different investigative approach required.²⁷

2.27 In 1994, a Senate Select Committee on Public Interest Whistleblowing acknowledged that whistleblowing is a legitimate form of action within a democracy. That committee also indicated that national leadership and education would be required in addition to the legislative changes it recommended, including:

24 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability ... but above all, the truth*, Research Note, February 1995, p. 1.

25 Review of Commonwealth Criminal Law – Final Report, Sir Harry Gibbs (Chairman), December 1991, pp. 335–355.

26 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, December 1991, pp. 67–68.

27 Senate Standing Committee on Finance and Public Administration, *Review of the Office of the Commonwealth Ombudsman*, December 1991, p. 69.

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- the establishment of the public interest disclosure agency to receive disclosures, act as a clearing house, arrange for investigations, ensure protection of whistleblowers, and provide a national education program;
 - that legislation cover both the public and private sectors;
 - that the states, territories and industry work with the Commonwealth to address areas of Commonwealth constitutional limitations in relation to private sector whistleblowing, including consideration of an industry ombudsman;
 - that legislation extend to policing, academic institutions, health care and banking;
 - not allowing anonymous disclosures;
 - exemption of public interest disclosures from most secrecy provisions;
 - that protection of whistleblowers be conditional on correct procedures being followed;
 - that victimisation of whistleblowers should be investigated;
 - that the subject of whistleblowing be protected in accordance with the principles of natural justice and that false allegations should constitute an offence;
 - that Legal Aid should be available to whistleblowers; and
 - that a reward system should not be considered.²⁸

2.28 In 1995, another Senate Select Committee examined unresolved whistleblower cases. There were also several unsuccessful attempts at a federal level to introduce whistleblower legislation.²⁹

2.29 In 2004, this committee considered corporate sector whistleblower protections as part of its inquiry into the Corporate Law Economics Reform Program (CLERP) (Audit Reform and Corporate Disclosure) Bill 2003 (CLERP Bill). At the time the committee noted:

The latest spate of corporate failures has once again highlighted the problems created by a culture of corporate silence which allows wrongdoing to go undetected. It has raised public awareness of the crucial role that personnel can have in uncovering corporate wrongdoing. Most recent studies into whistleblowing agree that change is needed on two main

28 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. xiii–xxv.

29 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability ... but above all, the truth*, Research Note, February 1995, p. 1.

fronts a cultural shift in attitudes toward whistleblowers and legislative reforms to both encourage and maintain this change.³⁰

2.30 The committee considered the whistleblower scheme in the CLERP bill to be 'sketchy in detail', with scant information in the legislation and the Explanatory Memorandum on the obligations of companies to ensure that they have in place a whistleblower scheme.³¹

2.31 The committee made a number of recommendations to offer greater encouragement for whistleblowers to come forward and for companies to investigate wrong doing, including:

- requiring corporations to establish a whistleblower scheme;
- requiring ASIC to publish guidance notes for companies on whistleblower schemes;
- clarifying the application of legislation to employees of contractors;
- replacing the 'good faith' test with 'an honest and reasonable belief';
- requiring that disclosures are about serious matters;
- providing for anonymous disclosures and confidentiality; and
- allowing ASIC to represent the interest of a person who is alleged to have suffered a reprisal.³²

2.32 In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered public sector whistleblower protections and made recommendations, including:

- the introduction of legislation for public sector whistleblower protections;
- rights for people in the public sector to raise concerns without fear of reprisal;
- a requirement for whistleblowers to act in 'good faith';
- a definition of who is able to be a whistleblower;
- a suggestion for future consideration of whether members of the public may be able to make public interest disclosures;
- that the Commonwealth Ombudsman be the authority for receiving and investigating public interest disclosures and for oversight of the public interest disclosure scheme in the Commonwealth;
- the types of disclosure that should be protected;

30 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, p. 6.

31 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, p. xxii.

32 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, pp. 14–28.

- that the motive of the whistleblower should not prevent the disclosure from being protected;
- that protection not apply to disclosures that are 'knowingly false';
- that protections include immunity from criminal liability, civil penalties and certain civil actions;
- obligations for agencies to establish whistleblower protection procedures;
- provision for disclosure to the media and Members of Parliament; and
- protection for disclosures to third parties such as legal advisors, professional associations and unions where the disclosure is made for the purpose of seeking advice or assistance.³³

2.33 In March 2013, the Public Interest Disclosure Bill 2013 (PID Bill) was introduced to the House of Representatives.³⁴ It sought to make a number of reforms and bring a new act to replace limited whistleblower protections that previously existed in the *Public Service Act 1999*. The PID Bill overlapped with earlier private members Bills on whistleblower protections introduced by Mr Andrew Wilkie MP.³⁵

2.34 The House of Representatives Standing Committee on Social Policy and Legal Affairs considered both the PID Bill and Mr Wilkie's Bills. That committee tabled an advisory report in March 2013, recommending that the PID Bill be passed with amendments to clarify continuity of protection, protections for external disclosures and protections from reprisals.³⁶

2.35 The Senate Legal and Constitutional Affairs Legislation Committee also examined the provisions of the PID Bill and made recommendations, including:

- adding protections for disclosure to supervisors;
- clarifying provisions for misleading or false claims;
- clarifying requirements for external disclosures; and
- removing a clause that was ineffective in relation to parliamentary privilege.³⁷

2.36 In its inquiry into the performance of ASIC, the Senate Economics References Committee made recommendations on whistleblower protections including:

33 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. xix–xxv.

34 House of Representatives, *Votes and proceedings*, No. 160, 21 March 2013, p. 2198.

35 Parliamentary Library, *Bill Digest*, No. 125, 3 June 2013, pp. 3–6.

36 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report, Public Interest Disclosure (Whistleblower Protection) Bill 2012, Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012, Public Interest Disclosure Bill 2013*, May 2013, p. xi.

37 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, p. vii.

- broadening the definition of whistleblowers and scope of relevant information;
- protecting the identity of whistleblowers and anonymous disclosers;
- a review of Australia's framework for protecting corporate whistleblowers drawing on the 2009 Treasury options paper as appropriate;
- changes to requirements for whistleblowers to act in good faith; and
- remedies for whistleblowers who are disadvantaged and consequences for those taking reprisals against whistleblowers.³⁸

2.37 The Senate Economics References Committee also published an issues paper on corporate whistleblowing as part of its inquiry into scrutiny of financial advice which lapsed at the end of the 44th Parliament.³⁹ The committee invited submitters to the current inquiry to comment on the issues paper.

2.38 In October 2016 the government released the 'Moss Review' of the effectiveness and operation of the PID Act. The Moss Review found that:

- the PID Act had only been partially successful partly due to its recent implementation and ineffective operation of the framework;
- the mechanisms under the PID Act which facilitate investigation of wrongdoing were overly complex; and
- the categories of disclosable conduct were too broad and should be focussed on the most serious integrity risks.⁴⁰

2.39 The Moss Review made recommendations including:

- strengthening the ability of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security (IGIS) to scrutinise and monitor the decisions of agencies, and increasing the number of investigative agencies;
- a greater focus on significant wrongdoing and expanding the grounds for external disclosure; and
- redrafting the PID Act using a principles-based approach and better protections for witnesses and whistleblowers.⁴¹

38 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, pp. 224–225.

39 Senate Economics References Committee, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence*, issues paper, April 2016.

40 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. 15.

41 Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 7–8.

2.40 In December 2016, *Australia's First Open Government National Action Plan 2016–18* (the action plan) was finalised. The action plan includes a commitment to improve whistleblower protections in the tax and corporate sectors as follows:

Australia will ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector.⁴²

We will do this by improving whistle-blower protections for people who disclose information about tax misconduct to the Australian Taxation Office. We will also pursue reforms to whistle-blower protections in the corporate sector, with consultation on options to strengthen and harmonise these protections with those in the public sector.⁴³

2.41 As part of the action plan the government committed to examining the Registered Organisations Commission (ROC) whistle-blower amendments with the objective of applying those amendments to the corporate and public sectors:

The Government has committed to supporting a Parliamentary inquiry (Inquiry) to examine the Registered Organisations Commission whistle-blower amendments with the objective of implementing the substance and detail of those amendments to achieve an equal or better whistle-blower protection and compensation regime in the corporate and public sectors.⁴⁴

2.42 The timetable for government action set out in the action plan is shown in Table 2.1 below.

2.43 In December 2016, the government established a review of tax and corporate whistleblower protections in Australia. A consultation paper was released and submissions were due by 10 February 2017.⁴⁵

42 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 14.

43 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 14.

44 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, pp. 16–17.

45 Treasury, *Review of tax and corporate whistleblower protections in Australia*, 20 December 2016, p. vii.

Table 2.1: Timetable for National Action Plan whistleblower commitments

Milestone	End date
Establish Parliamentary inquiry.	30 June 2017
Treasury to release a public consultation paper covering both tax whistle-blower protections and options to strengthen and harmonise corporate whistle-blower protections with those in the public sector.	March 2017
(i) Development and public exposure of draft legislation for tax whistle-blower protections (informed by consultation). (ii) Recommendation to Government on reforms to strengthen and harmonise whistle-blower protections in the corporate sector with those in the public sector (informed by consultation).	July 2017
Finalise and introduce legislation for tax whistle-blower protections.	December 2017
Introduce legislation to establish greater protections for whistle-blowers in the corporate sector, with a parliamentary vote no later than 30 June 2018.	By 30 June 2018

Source: Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 16.

International developments

2.44 This section sets out some of the international developments in whistleblower protection legislation as part of greater global moves to tackle corruption.

2.45 The international legal framework has been strengthened to combat corruption and establish effective whistleblower protection laws as part of an effective anti-corruption framework. Whistleblower protection requirements have been introduced in the following ways:

- the United Nations Convention against Corruption;
- the 2009 Organisation for Economic Co-operation and Development (OECD) Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation);
- the 1998 OECD Recommendation on Improving Ethical Conduct in Public Service;
- the Council of Europe Civil and Criminal Law Conventions on Corruption;
- the Inter-American Convention against Corruption; and

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- the African Union Convention on Preventing and Combating Corruption.⁴⁶

2.46 In 2010, the G20⁴⁷ established an Anti-Corruption Working Group in recognition of the significant negative impact of corruption on economic growth, trade, and development. In November 2011, the G20 agreed to support the compendium of best practices and guiding principles for whistleblower protection legislation (G20 Compendium), prepared by the OECD.⁴⁸

2.47 The G20 Compendium underscored the critical importance of promoting and protecting whistleblowers in order to deter, detect and combat fraud and corruption:

Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, can also help authorities monitor compliance and detect violations of anti-corruption laws. Providing effective protection for whistleblowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It also helps businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.⁴⁹

2.48 The G20 Compendium identified the following specific features of whistleblower protection mechanisms:

- (a) definitions and scope:
 - (i) whistleblowing definition;
 - (ii) good faith and reasonable grounds requirements;
 - (iii) scope of coverage of persons afforded protection; and
 - (iv) scope of subject matter or protected disclosures;
- (b) mechanisms for protection:
 - (i) protection against retaliation;
 - (ii) criminal and civil liability;
 - (iii) anonymity and confidentiality; and

46 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, pp. 4–5.

47 The Group of Twenty (G20) is an international forum for the governments and central bank governors from 20 major economies.

48 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, p. 1.

49 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, pp. 1, 4.

- (iv) burden of proof lowering in relation to retaliation;
- (c) reporting procedures and mechanisms:
 - (i) channels for reporting;
 - (ii) hotlines; and
 - (iii) use of incentives to encourage reporting;
- (d) enforcement mechanisms:
 - (i) oversight of enforcement authorities;
 - (ii) availability of judicial review; and
 - (iii) remedies and sanctions for retaliation; and
- (e) awareness-raising and evaluation mechanisms.⁵⁰

2.49 At the Brisbane G20 Leaders' Summit in November 2014, the G20 leaders recognised the need to take concrete, practical action on corruption and endorsed the *2015–16 G20 Anti-Corruption Implementation Plan*. The plan noted that:

The G20 has already recognised the significance of this issue by adopting the *G20 Guiding Principles for Legislation on the Protection of Whistleblowers*. The G20 now has the opportunity to build on this valuable work and ensure all G20 countries implement comprehensive and effective protections for whistleblowers in both the public and private sectors, ensuring G20 countries lead by example.⁵¹

2.50 The specific deliverable agreed by the G20 in relation to whistleblowers was:

G20 countries will conduct a self-assessment of their whistleblowers protection frameworks in both the public and private sectors, with reference to the *OECD Study on G20 Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, and consider next steps.⁵²

2.51 The *2017–18 G20 Anti-Corruption Action Plan* continued its support for whistleblower protections, noting that:

Encouraging the reporting of suspected actions of corruption is critical to deterring and detecting it. We will promote this goal, including reviewing our progress in implementing legislative and institutional protections for whistle-blowers.⁵³

50 G20, *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, November 2011, pp. 7–14.

51 G20 Leaders' Communique, Brisbane Summit, 15–16 November 2014, pp. 2–3; G20, *2015–16 G20 Anti-Corruption Implementation Plan*, pp. 4–5.

52 G20, *2015–16 G20 Anti-Corruption Implementation Plan*, p. 4.

53 G20, *2017–18 G20 Anti-Corruption Action Plan*, p. 2.

Analysis of international and Australia's whistleblower protections

2.52 The whistleblower protections in G20 countries were analysed in 2014 against principles for best practice set out in Table 2.2 below. Australia's laws, were found to be comprehensive for the public sector, but lacking when compared to international best practice for the private sector as shown in Tables 2.3 and 2.4 below. The review suggested that in the private sector the scope of wrongdoing covered is ill-defined, anonymous complaints are not protected, there are no requirements for internal company procedures, compensation rights are ill-defined, and there is no oversight agency responsible for whistleblower protection.⁵⁴

2.53 In May 2017, Professor Brown and his colleagues reported on their survey on the strength of organisational whistleblowing processes and procedures in Australia which was conducted as part of the *Whistling While They Work 2* research project. The survey's 699 respondents covered 10 public sector jurisdictions, five private industry groups and four not-for-profit sector groups. The analysis examined the self-reported presence of: incident reporting and tracking, support strategies for staff, risk assessment processes for reprisals, dedicated support staff and remediation processes.⁵⁵

2.54 The results which are summarised in Table 2.4 show that even when trying hard to encourage their staff to report integrity challenges, there is much that organisations can do to ensure whistleblowing processes are robust. The report also noted the following:

In particular, under the current state of guidance and incentives, most sectors are finding it difficult to realise their own goals of having processes which provide strong staff support and protection.

The results highlight that efforts towards strong processes for ensuring support and protection can and should be enhanced, across all sectors and in individual sectors.

Importantly, while size of organisation is a significant factor in the strength of processes, sectoral differences remain irrespective of size. This indicates that regulatory environment, oversight, operating conditions, professionalization, skills and industry leadership are also critical factors.⁵⁶

54 Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, pp. 24–25.

55 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. i.

56 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. iv.

Table 2.2: Summary of best practice criteria for whistleblowing legislation.

	Criterion	Description
1	Broad coverage of organisations	Comprehensive coverage of organisations in the sector (e.g. few or no 'carve-outs')
2	Broad definition of reportable wrongdoing	Broad definition of reportable wrongdoing that harms or threatens the public interest (e.g. including corruption, financial misconduct and other legal, regulatory and ethical breaches)
3	Broad definition of whistleblowers	Broad definition of '[whistleblowers] whose disclosures are protected (e.g. including employees, contractors, volunteers and other insiders)
4	Range of internal / regulatory reporting channels	Full range of internal (i.e. organisational) and regulatory agency reporting channels
5	External reporting channels (third party / public)	Protection extends to same disclosures made publicly or to third parties (external disclosures e.g. to media, NGOs, labour unions, members of Parliament) if justified or necessitated by the circumstances
6	Thresholds for protection	Workable thresholds for protection (e.g. honest and reasonable belief of wrongdoing, including protection for 'honest mistakes'; and no protection for knowingly false disclosures or information)
7	Provision and protections for anonymous reporting	Protections extend to disclosures made anonymously by ensuring that a discloser (a) has the opportunity to report anonymously and (b) is protected if later identified
8	Confidentiality protected	Protections include requirements for confidentiality of disclosures
9	Internal disclosure procedures required	Comprehensive requirements for organisations to have internal disclosure procedures (e.g. including requirements to establish reporting channels, to have internal investigation procedures, and to have procedures for supporting and protecting internal whistleblowers from point of disclosure)
10	Broad protections against retaliation	Protections apply to a wide range of retaliatory actions and detrimental outcomes (e.g. relief from legal liability, protection from prosecution, direct reprisals, adverse employment action, harassment)
11	Comprehensive remedies for retaliation	Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action (e.g. compensation rights, injunctive relief; with realistic burden on employers or other reprisors to demonstrate detrimental action was not related to disclosure)
12	Sanctions for retaliators	Reasonable criminal, and/or disciplinary sanctions against those responsible for retaliation
13	Oversight authority	Oversight by an independent whistleblower investigation / complaints authority or tribunal
14	Transparent use of legislation	Requirements for transparency and accountability on use of the legislation (e.g. annual public reporting, and provisions that override confidentiality clauses in employer-employee settlements)

Source: Wolfe, Worth, Dreyfus, and Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws*, October 2015, p. 6.

Tables 2.3 Strengths and weaknesses in G20 country public sector whistleblower protections laws

Rating 1 Very/quite comprehensive 2 Somewhat/partially comprehensive 3 Absent/not at all comprehensive

	S.Ar	Mex	Tur	Arg	Rus	It	Ger	Brz	Jpn	Indo	S.Af	Fra	Chn	India	Kor	UK	Can	US	Aus	Tot '3'	
	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	Pu	
9 Internal disclosure procedures	3	3	3	3	2	3	3	3	3	3	3	3	2	3	3	3	1	2	1	1	14
7 Anonymity	3	3	3	2	3	3	2	3	3	3	3	3	2	3	3	3	3	1	1	1	14
5 External reporting channels (third party/public)	3	3	3	3	3	2	3	2	2	3	1	3	3	3	3	2	2	2	2	2	11
14 Transparency	3	3	3	3	3	3	3	3	3	3	2	2	3	2	1	2	1	1	1	1	11
13 Oversight	3	2	3	3	3	3	3	3	3	2	3	2	3	1	1	3	1	1	1	1	11
8 Confidentiality	3	3	2	2	3	1	3	2	3	3	3	3	2	1	1	2	1	1	1	1	8
12 Sanctions	3	2	2	2	3	3	3	3	3	2	3	2	2	2	1	2	1	1	1	1	7
11 Remedies	2	3	3	3	3	3	2	3	2	3	1	2	2	2	1	1	1	2	2	2	7
6 Thresholds	3	3	3	3	3	2	2	2	1	2	2	2	2	1	2	1	1	1	1	1	5
2 Wrongdoing	3	3	3	3	2	2	3	2	1	2	1	2	1	2	1	1	1	1	1	1	5
10 Breadth of retaliation	3	3	2	3	3	1	2	2	1	2	2	2	2	1	1	1	1	1	1	1	4
1 Coverage	3	3	3	3	2	1	1	2	1	2	1	2	1	1	1	2	2	1	2	2	4
3 Definition of whistleblowers	3	2	2	2	2	3	3	2	2	2	2	2	1	1	1	2	2	1	1	1	3
4 Reporting channels (internal & regulatory)	3	3	2	2	2	2	2	2	2	2	2	2	2	2	1	1	2	1	1	1	2

Source: Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 6.

Table 2.4 Strengths and weaknesses in G20 private sector whistleblower protections laws

Rating 1 Very/quite comprehensive 2 Somewhat/partially comprehensive 3 Absent/not at all comprehensive

	Rus	It	Can	S.Ar	India	Mex	Brz	Arg	Aus	Ger	Tur	Indon	Jpn	Chn	Fra	S.Afr	Kor	UK	US	Tot '3'	
	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	Pr	
7 Anonymity	3	3	3	3	3	3	3	2	3	2	3	3	3	2	3	3	3	3	1	1	15
9 Internal disclosure procedures	3	3	3	3	2	3	2	3	3	3	3	3	3	2	3	2	3	3	2	2	14
14 Transparency	3	3	3	3	3	3	3	3	3	3	3	3	3	3	2	2	1	2	1	1	14
5 External reporting channels (third party/public)	3	3	3	3	3	3	2	3	3	3	3	3	2	3	2	1	3	2	2	2	13
13 Oversight	3	3	3	3	3	2	3	3	3	3	3	2	3	2	2	3	1	3	1	1	13
8 Confidentiality	3	3	3	3	3	3	2	2	2	3	2	3	3	2	3	3	1	2	1	1	11
12 Sanctions	3	3	3	3	3	2	3	2	3	3	2	2	3	3	2	3	1	2	1	1	11
11 Remedies	3	3	3	2	3	3	3	3	2	2	3	3	2	3	2	1	1	1	2	2	10
1 Coverage	3	3	3	3	3	3	3	3	2	3	3	2	1	2	2	1	1	2	1	1	10
2 Wrongdoing	3	3	3	3	3	3	3	3	3	2	3	2	1	2	2	1	1	1	1	1	10
6 Thresholds	3	3	3	3	3	3	3	3	2	2	3	2	1	2	2	2	2	1	1	1	9
10 Breadth of retaliation	3	3	2	3	3	3	3	3	3	2	2	2	1	3	2	2	1	1	1	1	9
3 Definition of whistleblowers	3	3	3	3	3	3	2	2	3	3	2	2	1	1	2	1	2	1	1	1	8
4 Reporting channels (internal & regulatory)	3	2	3	3	3	3	3	2	2	3	2	2	2	2	1	1	2	1	1	1	7

Source: Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 7.

Table 2.5: Strength of whistleblowing processes by sector & jurisdiction / industry

Sector	Jurisdiction/Industry	Total score		Incident tracking Rank	Support strategy Rank	Risk assessment Rank	Dedicated support Rank	Remediation Rank	N
		Mean ^a	Rank						
All organisations		5.66							699
Public	Aust Commonwealth government	6.95	1	1	1	1	9	2	26
Public	Aust Queensland government	6.59	2	2	4	6	1	4	54
Public	Aust New South Wales government	6.37	3	=3	5	3	7	7	86
Public	Aust South Australia government	6.36	4	=3	3	=4	4	8	47
Public	Aust Victoria government	6.32	5	5	2	=4	2	12	58
Public	Aust Western Australia government	6.13	6	6	6	7	=5	6	81
Private	Aust Finance & insurance	5.71	7	=7	7	8	3	9	53
Public	Aust Australian Capital Territory government	5.67	8	11	=16	2	12	1	7
NFP	Aust Health care & social assistance	5.21	9	10	=8	9	11	11	86
Private	Aust Other private industry	5.11	10	=7	=8	12	10	10	28
Public	Aust Northern Territory government	4.92	11	=7	13	16	13	3	12
Public	Aust Tasmania government	4.70	12	15	12	15	=5	16	20
Private	Aust Professional, technical, administrative etc services	4.67	=13	=12	11	11	15	15	13
NFP	Aust Arts, recreation, accommodation, food & hospitality	4.67	=13	=16	15	=13	8	13	16
Private	Aust Agriculture, forestry, fishing, mining & construction	4.44	15	=12	14	10	16	17	19
NFP	Aust Other NFP industry	4.15	16	=16	10	=13	18	18	18
Private	Aust Manufacturing, wholesale & retail trade	4.02	17	=12	=16	17	17	14	35
NFP	Aust Education & training	3.89	18	18	18	18	14	5	15

^a range (min-max score) = .00 – 10.00. NB. colours denote range/rank

Source: A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. ii.

2.55 The results of the survey analysis indicate:

- significant efforts by public and private sector organisations to improve whistleblower protections;
- the higher relative strength of whistleblower processes in the public sector compared to the private sector;
- that larger organisations appear to have stronger processes;
- that the finance and insurance industry group appear to have stronger processes than some other sectors;
- the comparative weakness of local government processes, relative to central government, in all jurisdictions other than Victoria; and
- the need for clearer guidance, and either statutory or industry requirements, or incentives, across key areas of whistleblowing processes especially for the private and not-for-profit sectors.⁵⁷

2.56 The authors note that the stronger public sector results (compared to the private sector) are consistent with stronger legislation over a period of time and the international history of more comprehensive research into public sector

57 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, pp. 6, 13–18.

whistleblowing processes over private sector ones.⁵⁸ However the results also show significant variations between public sector jurisdictions which raise questions about the difference in those frameworks and their implementation.⁵⁹

2.57 The report also concluded that legislative reforms such as the implementation of the PID Act, led to a significant improvement in the Commonwealth whistleblowing processes, which are now among the strongest in Australia. The report notes for example that:

Commonwealth agency heads came under a direct statutory responsibility to take 'reasonable steps... to protect public officials who belong to the agency from detriment, or threats of detriment' relating to disclosures.

...the two jurisdictions who scored most strongly for risk assessment – the Commonwealth and ACT – are the only jurisdictions where, by statute, agencies are required to have processes for assessing risks that reprisals may be taken against the persons who make those disclosures.⁶⁰

2.58 The following chapters focus on the evidence the committee has received arguing for and against a range of potential reforms to whistleblower protections.

58 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. 14.

59 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, p. 14.

60 A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – analysis from Australia*, May 2017, pp. 14–15.

