Chapter 12

Whistleblower Protection Authority

12.1 This chapter discusses the committee's consideration of the best practice criterion for an oversight authority to provide oversight by an independent whistleblower investigation/complaints authority or tribunal. The best practice criteria on transparent use of legislation and requirements for internal disclosure procedures are also discussed at the end of the chapter.

Previous consideration by committees

12.2 Previous parliamentary inquiries have considered the establishment of an oversight authority or national public interest disclosure agency. In 1994, the Senate Select Committee on Public Interest Whistleblowing recommended the establishment of a 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.[1]

12.3 In 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into public sector whistleblower protections recommended that the Commonwealth Ombudsman be the oversight and integrity agency for whistleblowing with the following responsibilities:

- general administration of the Act under the Minister;
- set standards for the investigation, reconsideration, review and reporting of public interest disclosures;
- approve public interest disclosure procedures proposed by agencies;
- refer public interest disclosures to other appropriate agencies;
- receive referrals of public interest disclosures and conduct investigations or reviews where appropriate;
- provide assistance to agencies in implementing the public interest disclosure system including;
    - providing assistance to employees within the public sector in promoting awareness of the system through educational activities;
    - providing an anonymous and confidential advice line; and
    - receiving data on the use and performance of the public interest disclosure system and report to Parliament.[2]

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1 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. xv–xix.

2 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. xxiv.

Current arrangements

Public sector

12.4 The PID Act sets out the functions of the Ombudsman in relation to public interest disclosures, including:

- acting as an investigative agency and authorised internal recipient under the PID Act;
- investigating disclosures under the PID Act or using separate powers under the *Ombudsman Act 1976*;
- assisting principal officers, authorised officers, public officials and former public officials in relation to the operation of the PID Act;
- conducting educational and awareness programs relating to the PID Act for agencies, public officials and former public officials;
- assisting the Inspector-General of Intelligence and Security in relation to the performance of its function under the PID Act;
- determining standards relating to:
    - procedures for dealing with disclosures;
    - the conduct of investigations and the preparation of investigation reports;
    - reporting on the operation of the PID Act within agencies;
- receiving notices from agencies relating to the allocation of disclosures and decisions not to investigate disclosures;
- approving extensions for time limits of investigations and informing the discloser; and
- preparation of an annual report.[3]

12.5 In addition, the way a disclosure is allocated or investigated, or the allocation or investigation decision, may be the subject of a complaint under the *Ombudsman Act 1976*.[4] In addition the Ombudsman may also investigate actions using its own motion powers.[5]

Private sector

12.6 In the private sector there is no agency performing the equivalent independent functions that the Ombudsman performs for the public sector. However, some of the functions are required of agencies such as approving extensions to time limits by the ROC and annual reporting on investigations.[6]

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3 PID Act, sections 8, 34, 44, 49, 50A, 52, 58, 62, 73, 76.

4 *Ombudsman Act 1976*, sections 5, 5A.

5 *Ombudsman Act 1976*, subsection 5(1)b.

6 FWRO Act, sections 337CB, 329FC.

Evidence received by the committee

Oversight body

12.7 This section sets out the evidence put to the committee in support of the creation of an independent oversight agency. However, different witnesses emphasised different aspects of what they considered to be the key role and functions of an oversight agency.

12.8 Mr John Price, ASIC Commissioner, recommended that any new whistleblowing regime should be supported by an independent oversight agency.[7] GIA recommended that there be a stand-alone office of the whistleblower to be the advocate for whistleblowers.[8]

12.9 Ms Rani John, Partner, DLA Piper was also of the view that creating an independent whistleblower agency would remove a potential conflict of interest that might arise if a regulator that had carriage of a matter disclosed by a whistleblower was also given the responsibility of being a whistleblower oversight agency. [9]

12.10 Similarly, Ms Eva Scheerlinck, Chief Executive Officer, AIST, also saw the benefit in having a whistleblower agency that was separate from existing regulators, as well as having an agency with a name that is recognisable in the community.[10]

12.11 The IBACC argued that there should be an independent agency established, or a statutory office created, with clear statutory rights and powers to act on behalf of whistleblowers. The IBACC further suggested that there should be one independent agency, not separate bodies or commissions focusing on discrete sectors or industries.[11] The IBACC suggested that such a body needs to be properly funded and resourced, to act as the clearing house for whistleblower complaints and to act as applicant in any court proceedings.[12]

12.12 Dr Vivienne Brand and Dr Sulette Lombard supported the notion of a centralised whistleblowing clearing-house to remove the challenges faced by potential whistleblowers in determining to whom, how and when they should blow the whistle.

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7 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 60.

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

9 Ms Rani John, Partner, DLA Piper Australia, *Committee Hansard*, 27 April 2017, pp. 12–13.

10 Ms Eva Scheerlinck, Chief Executive Officer, Australian Institute of Superannuation Trustees, *Committee Hansard*, 27 April 2017, p. 24.

11 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017, (received 18 May 2017).

12 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017, (received 18 May 2017).

Such an office could provide a central information and advocacy service for whistleblowers in addition to sectoral whistleblowing regulators.[13]

12.13 Ms John from DLA Piper supported the idea of a whistleblower agency to act as a clearing house, deal with vexation claims, and handle other functions:

> I think some people have talked about a 'clearing house' idea, and I see some utility in that sort of structure, particularly if it is looked at as being a place where whistleblowers go regardless of the subject matter of the allegations that they are making…It could be an agency that offers initial advice…that supports whistleblowers should they need to bring action in the event that they are facing some sort of victimisation or retaliation. But the 'clearing house' idea, which is helping the whistleblower or serving as the agency that then directs that allegation to the appropriate agency—or sends it in the appropriate direction—which relieves the whistleblower of the burden of trying to legally characterise the nature of the wrongdoing that they think that they have encountered, is, I think, a useful idea.[14]

12.14 The ACTU was of the view that a central agency with a corruption prevention focus would be the ideal body to which disclosures could be made.[15]

12.15 Ms Eva Scheerlinck indicated that the AIST would consider supporting the creation of a national anticorruption body or a specific body with the responsibility of looking at whistleblower disclosures. She argued that such a body would provide the incentives and trust that is necessary for potential whistleblowers to make disclosures.[16]

12.16 Mr Matthew Chesher informed the committee that the MEAA supported the establishment of a statutory office or a public interest disclosure panel with broad-based membership to investigate whistleblower claims, as whistleblowers do not presently have an advocate and a body that they can trust.[17]

12.17 Mr Jordan Thomas informed the committee that the confidence that the public has in the relevant enforcement agency determines how frequently they will use it, because if people do not believe the organisation will aggressively investigate and prosecute the tip, they will not expose themselves to that risk.[18]

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13 Dr Vivienne Brand and Dr Sulette Lombard, *Answers to questions on notice*, 27 April 2017, (received 18 May 2017).

14 Ms Rani John, Partner, DLA Piper Australia, *Committee Hansard,* 27 April 2017, pp. 10–11.

15 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 27 April 2017, p. 16.

16 Ms Eva Scheerlinck, Chief Executive Officer, Australian Institute of Superannuation Trustees, *Committee Hansard*, 27 April 2017, p. 21.

17 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

18 Mr Jordan Thomas, Private Capacity, *Committee Hansard*, 28 April 2017, p. 5.

12.18 Mr Thomas also drew the committee's attention to some examples in the US in which enforcement action had been taken in relation to reprisals against a whistleblower. The first case involved the sacking of a whistleblower:

> The Commission [SEC] brought a first-of-its-kind enforcement action in September 2016, when it brought a stand-alone whistleblower retaliation case against casino-gaming company, International Game Technology (IGT). The company agreed to pay a half million dollar penalty for firing an employee with several years of positive performance reviews because the employee had reported to senior management and the SEC that the company's financial statements might be distorted. As this case demonstrates, strong enforcement of the anti-retaliation protections is a critical component of the SEC's whistleblower program.[19]

12.19 The second case involved a company trying to prevent an employee from blowing the whistle by threatening them with a large financial penalty:

> In September 2016, the Commission [SEC] filed an action against Anheuser-Busch InBev SA/NV, in which the company agreed to settle charges that it violated Exchange Act Rule 21F-17(a), among other violations, by entering into a separation agreement that stopped an employee from continuing to voluntarily communicate with the SEC due to a substantial financial penalty that would be imposed for violating strict non-disclosure terms. As this case demonstrates, companies simply cannot impede their employees' ability to report wrongdoing to the agency through threats of financial punishment.[20]

12.20 Ms Julia Angrisano explained that the FSU supports the creation of an independent statutory body empowered to receive, investigate and determine all matters relating to whistleblower disclosure and protections because the FSU does not have confidence in the current internal whistleblowing regimes within the finance industry. She argued that the ability for employees to lodge their disclosures with an independent external party will encourage more employees to report unethical and unlawful behaviours.[21]

12.21 Transparency International argued that the task of oversighting effective whistleblower protection in the corporate and not-for-profit sectors is sufficiently specialised and that it is difficult that no existing agency is well placed to undertake the key oversight and implementation roles. Nevertheless, Transparency International recognised that any new whistleblower protection agency would need to be 'well integrated with existing avenues for employment remedies' such as Fair Work

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19 Mr Jordan Thomas, *Submission 70*, Exhibit D, US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 2.

20 Mr Jordan Thomas, *Submission 70*, Exhibit D, US Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, p. 2.

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

Australia, the Fair Work Ombudsman, the Federal Circuit Court and workplace health, safety and compensation systems.[22]

12.22 Transparency International suggested that an oversight agency focus on:

- supporting and protecting whistleblowers;
- providing advice to whistleblowers and agencies;
- promoting best practice processes and procedures;
- ensuring that protection is afforded;
- ensuring that whistleblowers can access their legal rights; and
- acting on behalf of whistleblowers or on the agency's own motion to remedy reprisals or detrimental outcomes in appropriate cases.[23]

12.23 Professor A J Brown drew a clear distinction between investigation and oversight. In his view, the investigative function, that is the investigation of the alleged or actual wrong-doing exposed by whistleblowers, should be undertaken by already-existing regulatory agencies.[24]

12.24 In addition to the existing role of regulators, however, Professor Brown saw a real need for an independent whistleblowing oversight agency that would:

- play an active role in advising whistleblowers, supporting whistleblowers, and making sure that whistleblowers can access legal remedies; and
- provide advice and guidance to companies and entities about what best practice looks like and working with regulatory agencies and investigative agencies to support whistleblowers and ensure the process works effectively.[25]

12.25 In arguing the case for a new independent whistleblowing agency, Professor Brown emphasised that:

- firstly, no existing Commonwealth regulatory agency has a sufficiently broad jurisdiction to take on the support, protection and oversight function on behalf of all regulators; and

22 Transparency International, *Answers to questions on notice*, 11 and 27 April 2017 (received 18 May 2017).

23 Transparency International, *Answers to questions on notice*, 11 April 2017 (received 17 May 2017).

24 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

25 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 15 June 2017, p. 2.

- secondly, it is desirable that the investigative responsibilities of regulators are kept separate from the support and protection responsibilities provided by a new agency.[26]

Tribunals

12.26 This section summarises evidence received by the committee about whistleblower tribunals, including existing tribunals in other countries, and suggestions for a tribunal in Australia.

Examples of whistleblower tribunals

12.27 Professor Brown informed the committee that in the UK, the public interest disclosure regime is fully embedded in the employment relations legislation with a specific avenue for the treatment of public interest disclosures.[27]

12.28 Mr Howard Whitton, Director, The Ethicos Group, provided further information about the advantages of the tribunal approach taken in the UK:

> The one innovation which I thought was worth noting in 1998 was to treat retaliation or workplace reprisal as a workplace matter, which is then put through the workplace tribunals, rather than to criminalise it as we did here, which, I think, raised the bar too high, which was one of the reasons we did not get much action by way of response to retaliation, whereas the British did, and when I last looked at the website of Public Concern at Work, hundreds of cases had been settled through the tribunals, and compensation had been paid. In one case 780,000 pounds was paid to a finance officer who blew the whistle on his parent company in the United States, which was illegally paying secret bonuses to executives.[28]

12.29 Clifford Chance noted that the UK tribunal operates with a reverse burden of proof, once all the necessary elements of a whistleblowing claim are established.[29] However, for employees with less than two years' service, the burden of proof remained with the whistleblower.[30]

12.30 The Breaking the Silence report revealed that the expense of running a whistleblowing case in the UK may lead to many cases settling before going to the employment tribunal. This has resulted in extensive use of 'gagging clauses' whereby a whistleblower accepts a settlement in return for silence. This has occurred despite a

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26 Professor A J Brown, Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

27 Professor A J Brown, Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, pp. 24, 26.

28 Mr Howard Whitton, Director, The Ethicos Group, *Committee Hansard*, 23 February 2017, pp. 9–10.

29 Clifford Chance, *Submission 9*, p. 6.

30 Simon Wolfe, Mark Worth, Sulette Freyfus, A J Brown, *Breaking the Silence, Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 67.

ban on such clauses in the UK public interest disclosure laws. The Breaking the Silence report expressed grave concern about this practice because the use of gag clauses is incompatible with the tenets of disclosing information in the public interest:

> These 'non-disparagement clauses' are counterintuitive to the release of information in the public interest to the public domain and removes the focus on rectifying wrongdoing. In 2013 the Francis Report found: 'non-disparagement clauses are not compatible with the requirements that public service organisations in the healthcare sector, including regulators, should be open and transparent'.[31]

12.31 Canada has a Public Servants Disclosure Protection Tribunal where retaliation victims can seek remedies and compensation. If a person suffers a reprisal, they are required to notify the Integrity Commissioner of Canada within 60 days. If after an investigation, the Commissioner has reasonable grounds to believe that reprisal has occurred, the matter is referred to the Public Servants Disclosure Protection Tribunal. The Tribunal is a quasi-judicial body independent from government and is composed of judges of the Federal Court or a superior court of a province. It can order disciplinary sanctions against those who conducted reprisals.[32] Remedies that could be ordered by the tribunal include:

- a return to duties or reinstatement;
- compensation in lieu of a reinstatement;
- compensation equal to the remuneration lost or to a penalty;
- rescinding of any disciplinary action;
- payment of expenses and financial losses resulting directly from the reprisal; and
- compensation up to $10,000 for pain and suffering.[33]

Suggestions for a tribunal in Australia

12.32 The committee received a range of suggestions for a tribunal in Australia. Most of these submitters and witnesses viewed a tribunal system as less time-consuming and less costly than the court system. However, some submitters pointed out that a tribunal that reviewed a case involving a whistleblower would need to be able to offer a different level of compensation to that typically awarded by tribunals involved in determining matters arising solely from employment legislation.

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31 Simon Wolfe, Mark Worth, Sulette Freyfus, A J Brown, *Breaking the Silence, Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 67.

32 Office of the Public Sector Integrity Commissioner of Canada, *Process for Handling Reprisals*, http://www.psic.gc.ca/eng/reprisal/process-handling-reprisals (accessed 17 May 2017); Public Servants Disclosure Tribunal Canada, http://www.psdpt-tpfd.gc.ca/Home-eng.html (accessed 17 May 2017).

33 Public Servants Disclosure Tribunal Canada, http://www.psdpt-tpfd.gc.ca/MenuBottom/FAQs-eng.html?zoom_highlight=compensation (accessed 17 May 2017).

12.33 Clayton Utz argued in favour of a tribunal observing that currently whistleblowers must bear the significant financial burden of unilaterally enforcing their whistleblower protections in the courts. A tribunal would be a more appropriate forum, as the informal evidentiary rules, reduced time costs and reduced financial expense would better facilitate the progress of claims.[34]

12.34 The Law Council considered that a whistleblower's access to compensation should be accessible and low cost. The Law Council supported a review to ascertain whether a court is the right forum to consider a claim for compensation.[35]

12.35 ASIC noted the importance of establishing a clear pathway for employees and non-employees to make a compensation claim. ASIC indicated that a tribunal could be a new body or an existing tribunal such as the Fair Work Commission or Administrative Appeals Tribunal. ASIC suggested that the tribunal would require similar availability and expertise to the Fair Work Commission. [36]

12.36 Mr Trevor Clarke from the ACTU was of the view that the court system is not very good at fully compensating people for what they may have suffered in making a disclosure in the public interest.[37]

12.37 The MEAA also noted that one of the challenges with court based processes for compensation is that decisions can be appealed through multiple court systems.[38]

12.38 The Queensland Council of Unions argued that in their view, employment related tribunals have only been able to grant limited and inadequate compensation for unfair dismissals. They therefore cautioned against implementing a similarly limited tribunal approach for whistleblowers because it would not encourage potential whistleblowers to speak out.[39]

12.39 Professor Brown suggested that, as well as working closely with regulatory and integrity agencies, a whistleblower oversight agency would work closely with compensation avenues and tribunals (such as the Fair Work Ombudsman and Fair Work Australia) to ensure that remedies were truly accessible; including representing whistleblowers in, or appearing before, those tribunals (or the Federal Court). Professor Brown noted that this would prevent the need for any new or additional tribunal to be created.[40]

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34 Clayton Utz, *Submission 4*, p. 2.

35 Law Council of Australia, *Submission 52*, p. 16.

36 Australian Securities and Investments Commission, *Submission 51*, pp. 5, 24.

37 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 27 April 2017, pp 18–19.

38 Mr Matthew Chesher, Director, Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 29.

39 Queensland Council of Unions, *Submission 3*, p. 2.

40 Professor A J Brown, Program Leader, Public Integrity and Anti Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (received 15 June 2017).

Investigation of reprisals

12.40 During the inquiry it came to the committee's attention that there is a significant gap in the capacity for reprisals or workplace retaliation to be investigated in both the public and private sectors. This section summarises the committee's consideration of that gap.

12.41 Before looking at this evidence, however, the committee makes a distinction between two types of investigative functions. The first type of investigation would be into the alleged or actual wrongdoing exposed by a whistleblower. As noted above, the evidence before the committee strongly suggested that, in the private sector, this should continue to be the domain of existing regulators. The second type of investigation would be into alleged or actual reprisals that have been taken against actual or suspected whistleblowers. Evidence relating to the ability to conduct investigations into alleged reprisals is discussed below.

12.42 The Moss Review noted that a reprisal against a discloser is an offence under the PID Act as well as grounds for disclosable conduct (as a breach of Commonwealth law). The Moss Review recommended that the PID Act be amended to continue to include reprisals within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.[41]

12.43 Both the FWRO Act and the Corporations Act contain provisions for reprisals or threats of reprisals. As a result, a reprisal may be a contravention of those Acts and therefore also come within the definition of disclosable conduct.[42]

12.44 A reprisal or threat of reprisal fitting within the definition of disclosable conduct would provide whistleblowers with an important avenue for redress. In particular, both the PID Act and the FWRO Act require disclosure to be investigated if certain criteria are met.[43] As a result, it would appear that both those Acts therefore require disclosures about reprisals to be investigated. However, as is discussed in the next section, other legislation may prevent such investigations from occurring.

12.45 In contrast to the PID Act and the FWRO Act, the Corporations Act does not appear to have a positive requirement to investigate disclosures. ASIC does have the power to investigate contraventions of the Corporations Act. However, ASIC informed the committee that its practice is only to investigate reprisals if that would assist in investigating the primary matter that was the subject of the original disclosure of misconduct.[44]

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41 Recommendation 6, Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 34.

42 FWRO Act, sections 6, 337BE; Corporations Act, Sections 1317AA, 1317AC.

43 PID Act, Division 2; FWRO Act, Division 3.

44 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Regional Commissioner, Victoria, ASIC, *Committee Hansard*, 16 June 2017, p. 60.

The Ombudsman's power to investigate allegations of reprisal in the public sector

12.46 Section 46 of the PID Act indicates that complaints can be made to the Ombudsman about the way a disclosure has been investigated:

> The way a disclosure is investigated (or a refusal to investigate a disclosure) may be the subject of a complaint to the Ombudsman under the *Ombudsman Act 1976*, or (in the case of an intelligence agency) to the IGIS under the *Inspector-General of Intelligence and Security Act 1986*.[45]

12.47 Furthermore, reprisals fall within the definition of disclosable conduct (a reprisal is an offence under the PID Act, and being a breach of any Commonwealth law, would meet the threshold for being disclosable conduct). It appears, therefore, that a complaint to the Ombudsman about the way a disclosure has been investigated could also include a complaint about the way a disclosure about a reprisal has been investigated.

12.48 During the inquiry it came to the committee's attention that whistleblowers had an expectation under the PID Act that the Ombudsman may be able to assist them with investigations into reprisals.

12.49 However, subsection 5(2d) of the *Ombudsman Act 1976* states that the Ombudsman is not authorized to investigate:

> …action taken by anybody or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment, including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person.[46]

12.50 In answers to questions on notice, the Commonwealth Ombudsman confirmed that:

> If a discloser alleges that they are subject to reprisal action, the OCO [Office of the Commonwealth Ombudsman] advises the discloser to use the protections of the PID Act, namely: seek legal advice, contact the police, submit an application to the Federal Court or the Federal Circuit Court or contact the PID risk assessment officer within the agency.
>
> The OCO is not a law enforcement agency, nor can our Office provide a person with available remedies under the PID Act. The OCO does not have the jurisdiction to investigate whether or not reprisal action has occurred.[47]

12.51 This would appear to rule out the Ombudsman investigating any allegation of reprisal or disclosure of an alleged reprisal relating to a person's employment. In others words, the Moss Review finding and recommendation that reprisal be

45 PID Act, Note to section 46.

46 *Ombudsman Act 1976*, subsection 5(2d).

47 Commonwealth Ombudsman, *Answers to questions on notice*, 7 June 2017 (received 22 June 2017).

including in disclosable conduct is unlikely to be effective for any reprisal related to employment.

Committee view

12.52 The following sections present the committee's views on the following matters:

- the investigation of public interest disclosures in the public sector by the Commonwealth Ombudsman;
- the investigation of public interest disclosures in the private sector by regulators;
- the investigation of reprisals;
- a Whistleblower Protection Authority for the public and private sectors;
- consistent investigations of disclosure and reprisals;
- requirements for internal disclosure procedures;
- transparent use of legislation; and
- a statutory post-implementation review

The investigation of public interest disclosures in the public sector by the Commonwealth Ombudsman

12.53 As noted earlier, the committee draws a distinction between the investigation of a public interest disclosure and the investigation of an alleged reprisal arising from a disclosure. The committee begins by considering the ability of the Commonwealth Ombudsman to exercise independent investigative oversight in the Commonwealth public sector into the substance of a public interest disclosure.

12.54 The committee understands that the Ombudsman has the requisite powers to investigate the substance of a disclosure, for example, in cases where the Ombudsman forms the view that there may be of conflict of interest within an agency that may prevent that agency from satisfactorily conducting an investigation, or where the Ombudsman is of the view that the substance of the disclosure merits investigation by the Ombudsman. The Ombudsman indicated that it has investigated the substance of a disclosure in about five per cent of cases.[48]

12.55 Beyond the Ombudsman making a decision as to whether to conduct its own initial investigation into a public interest disclosure, a question arises about how the Ombudsman conducts an investigation into a complaint about the way another agency has handled a public interest disclosure.

12.56 For example, the committee received confidential submissions and correspondence from public sector whistleblowers alleging that, following a whistleblower complaint about an agency's handling of a public interest disclosure,

48 Ms Nicola Dakin, Director, Public Interest Disclosure Team, Integrity Branch, Office of the Commonwealth Ombudsman, *Committee Hansard*, 28 April 2017, p. 50.

the Commonwealth Ombudsman only reviewed how the administrative aspect of the disclosure process was handled by the agency, rather than undertaking an investigation into the substance of the public interest disclosure itself. The committee notes that while an administrative review (including, for example, whether the agency conducted a risk assessment) is a common approach for the Ombudsman, the Ombudsman is not limited to that approach because, if the evidence demonstrated a need, the Ombudsman could undertake an investigation under its own motion powers.[49]

12.57 The committee is concerned that there may be a shortfall in the number of independent public interest disclosure investigations in the Commonwealth public sector. In the committee's view, effective oversight of a public interest disclosure regime in the public sector would include, where necessary, a rigorous investigation into the substance of a public interest disclosure.

The investigation of public interest disclosures in the private sector by regulators

12.58 The process for the substantive investigation of a public interest disclosure in the private sector is necessarily different from that pertaining to the public sector, partly due to the differing nature of the public interest and private interests in the two sectors, and also to the differences between the role of an Ombudsman and the role of a regulator.

12.59 The committee anticipates that under the legislative changes it is proposing for the private sector, a whistleblower would be able to make a protected disclosure internally within their organisation, or directly to the relevant regulator, either simultaneously, subsequent to an internal disclosure, or instead of an internal disclosure. In the case of a disclosure to the relevant regulator, the committee expects that the regulator would investigate the substance of the disclosure and that the whistleblower would be informed of the outcome of the investigation.

The investigation of reprisals

12.60 While the committee has not had the opportunity to gather further data, the committee considers that it is highly likely that a large proportion of reprisals are employment related. As a result, there may, at present, be no mechanism for a whistleblower to have an allegation of reprisal investigated.

12.61 Evidence to the inquiry (including confidential evidence) appears to indicate a misconception amongst whistleblowers about the powers of the Commonwealth Ombudsman with respect to the investigation of reprisals. Having said that, it seems to the committee that, taking the PID Act at face value, a whistleblower could reasonably believe that a reprisal would be investigated by an independent agency, because a reprisal is likely to qualify as disclosable conduct under section 29 of the PID Act. Yet, paragraph 5(2)(d) of the *Ombudsman Act 1976* effectively prevents, for all practical purposes, the Commonwealth Ombudsman from investigating reprisals.

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49 See *Ombudsman Act 1976*, section 5(1)b.

12.62 Part of the difficulty in drawing firm conclusions in this area lies in trying to separate a complaint about the investigation of a disclosure from an allegation that reprisal action associated with the disclosure has also occurred, particularly when other factors such as workplace performance may be contemporaneous with the initial public interest disclosure. Nevertheless, the committee heard from whistleblowers who stated that, having lodged a complaint of reprisal with the Ombudsman, the Ombudsman was only able to refer the allegation back to the agency that had conducted the original investigation into the disclosure, or direct the whistleblower to the Fair Work Commission or the courts.

12.63 The Ombudsman confirmed that its practice is to advise whistleblowers who have suffered reprisal to contact relevant officers in their agency, the police, or seek remedies through the courts. The Ombudsman also indicated that it has referred a disclosure about a reprisal back to the original agency for investigation.[50] In the case of a referral back to the agency that may involve an allegation of reprisal, the committee draws attention, in general terms, to the fact that the Ombudsman would be referring a case back to the same agency that, if the allegation had substance, had failed to adequately protect the whistleblower from reprisal action in the first place.

12.64 The committee was further concerned to discover that when a reprisal allegation is referred back to the original agency for investigation, the Commonwealth Ombudsman does not have any jurisdiction to monitor the agency's investigation of the reprisal.[51]

12.65 It appears, therefore, that the only other avenue currently available to whistleblowers for redress is to pursue their rights under the PID Act in the courts. The Moss Review indicated that compensation provisions are one of the most essential sources of help for whistleblowers. However, the Moss Review noted that the PID Act provisions were yet to be tested in litigation, in spite of 75 per cent of respondents to the Moss Review online survey indicating that they had experienced a reprisal after making a disclosure.[52]

12.66 The Moss Review found that there have been no successful litigations for reprisal actions in the Commonwealth public sector.[53] The committee draws attention to the following excerpt from the Commonwealth Ombudsman's submission to the Moss Review:

> We are not aware of any case where a prosecution has been brought under the PID Act for alleged reprisal action. Nor are we aware of any case where a discloser, or person suspected to be a discloser, has taken civil action in the Federal Court or Federal Circuit Court under any of the reprisal

50 Commonwealth Ombudsman, *Answers to questions on notice*, 7 June 2017 (received 22 June 2017).

51 Commonwealth Ombudsman, *Answers to questions on notice*, 7 June 2017 (received 22 June 2017).

52 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 34.

53 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 57.

> provisions in the PID Act. However, we have received several complaints from disclosers who believe they have suffered reprisal but consider court action beyond their means.[54]

12.67 The committee heard from several whistleblowers who have taken a case of alleged reprisal to the Fair Work Commission or to court. As this juncture, all have been unsuccessful.

12.68 A common theme arising from correspondence to the committee was that whistleblowers not only felt aggrieved by what had happened to them, but that they were also 'deep-pocketed' by their agency in the Fair Work Commission or court process.

12.69 The committee emphasises that it is not the committee's role to seek to draw any conclusion on the merits of particular cases. Nevertheless, it is of great concern to the committee that there is a manifest and systemic power imbalance in the Fair Work Commission or court process between the resources available to an individual and the resources available to a taxpayer-funded public sector agency or department. Furthermore, if a whistleblower has been sacked as a reprisal for their disclosure, it seems unlikely to the committee that they would have the financial resources to attempt litigation.

12.70 In this regard, the committee notes the evidence from Professor Brown who informed the committee that most whistleblowers find the cost of accessing compensation prohibitive:

> One of the things we have learnt from whistleblower compensation provisions internationally, and certainly in Australia, is that in the vast majority of circumstances, no matter what you do to create compensation avenues, they will not get accessed by people who have already been through enough so that it is simpler to just walk away, even though it is highly in the public interest that those compensation avenues actually get triggered not just for the interests of compensation and fairness for the whistleblower but for the purposes of actually changing the way in which everybody handles this and takes it seriously.[55]

12.71 The committee recognises that the existing protections are an important step forward and may provide some incentives for organisations to do the right thing by whistleblowers. However, the committee considers that the lack of a capacity to investigate reprisals, and the obstacles to pursuing redress through the courts, are among the biggest impediments to effective whistleblower protections. Without a mechanism to investigate and seek redress for reprisals, whistleblower protections are only theoretical. Indeed, without a capacity to thoroughly investigate allegations of reprisal, access to appropriate remedies and compensation, and enforcing liability against those who have taken reprisal action, there is no real capacity for

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54 Commonwealth Ombudsman, *Submission to the Moss Review of the Public Interest Disclosure Act 2013 (Cth)*, March 2016, p. 14.

55 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Committee Hansard*, 15 June 2017, p. 4.

whistleblowers to be protected and no way to effectively deter reprisal activity or hold those who have taken reprisal action accountable.

Whistleblower Protection Authority

12.72 The amendments to the whistleblower protections in the FWRO Act indicate a potential approach that could be implemented in the public and private sectors more generally. As noted above, an allegation of reprisal is disclosable conduct under the FWRO Act. Therefore, it appears to the committee that the Fair Work Ombudsman would have the jurisdiction to investigate reprisals in registered organisations, as the Fair Work Ombudsman is able to receive and investigate disclosures under subsection 337A(1b) and section 337CA of the FWRO Act.[56]

12.73 While noting that the Fair Work Ombudsman may be able to investigate an allegation of reprisal taken against a whistleblower in a registered organisation, the committee does not intend to prescribe whether an existing agency, such as the Fair Work Ombudsman, should be tasked with taking on a broader role of investigating allegations of reprisal activity in the private sector more generally. In part, this stems from a recognition that any investigative agency would need to build up the resources and a requisite skills base in order to undertake such a task. Nevertheless, following on from the discussion above, the committee is of the view that an independent body to investigate allegations of reprisals is required in both the Commonwealth public sector and the private sector more broadly. In order for such an arrangement to be effective, the committee notes that attention would need to be given to addressing any carve outs in other legislation that would prevent such an investigative body from using its powers.

12.74 The committee considers that there are several benefits to having an independent body with the power to investigate reprisals, including that it would:

- overcome the current inability to conduct independent investigations of alleged reprisal activity in the public sector;
- avoid reprisal investigations being undertaken by the agency in which the allegation of reprisal occurred;
- be consistent with, and expand, the approach taken for the registered organisations whistleblower protections and provide a consistent approach across the public and private sectors;
- alleviate the lack of specific requirements in the Corporations Act to investigate reprisals; and
- allow ASIC and other regulators to focus their investigations on instances of serious misconduct revealed by whistleblowers in their original disclosure.

12.75 The committee notes that there would need to be appropriate provision for inter-agency information sharing to ensure that:

- investigations can be conducted effectively; and

56 FWRO Act.

- any information regarding the original misconduct identified in the reprisal investigation could be provided to the appropriate regulator.

12.76 The committee is strongly of the view that the capacity to investigate reprisals is an essential ingredient of an effective whistleblower protection system. The committee is therefore recommending that the public and private sector whistleblower legislation include specific requirements for the investigation of reprisals by a designated independent body with the requisite powers.

12.77 As discussed earlier, the committee is mindful that, under the current tribunal system operated by the Fair Work Commission, it is still perfectly possible for a public sector agency, private corporation or registered organisation to deep-pocket an individual whistleblower. It is for this reason that the committee is proposing that the government consider holistically the recommendations made in this chapter including those relating to the ability of a whistleblower protection authority to pursue selected cases relating to workplace retaliation through a tribunal system on behalf of a whistleblower.

12.78 Evidence to the committee also emphasised the vital importance of a recognisable name for any whistleblower protection agency. With this in mind, the committee considers that the name should make it clear that the agency exists to serve whistleblowers as its primary purpose. Assistance to, and oversight of, agencies is therefore a necessary, but secondary, function. For the purposes of this report, the committee has used the name Whistleblower Protection Authority.

12.79 The committee considers that a Whistleblower Protection Authority would need to exercise the following functions:

- provide a clearing house for whistleblowers bringing forward public interest disclosures;
- provide advice and assistance to whistleblowers;
- support and protect whistleblowers, including by:
    - investigating non-criminal reprisals in the public and private sectors; and
    - taking non-criminal matters to the workplace tribunal or courts on behalf of whistleblowers or on the agency's own motion to remedy reprisals or detrimental outcomes in appropriate cases.

12.80 One of the issues that arises in any consideration of a new agency is where that agency sits within the Commonwealth, whether there is an existing framework within which it could be appropriately housed, and also whether such an agency is a 'one-stop-shop', or whether there is some delineation between the public and private sector functions.

12.81 The committee considered alternative approaches with various aspects of whistleblower protections spread across the Commonwealth Ombudsman, another body performing similar oversight functions for the private sector and a further existing or new body to conduct investigations of reprisals. The committee concluded that there were no easy solutions for existing bodies to fill those roles.

12.82 The committee also considered the creation of a one-stop-shop Whistleblower Protection Authority to cover both the public and private sectors. The committee considers that there would be certain efficiencies in consolidating various whistleblower functions in the one organisation. In this case, the committee notes that the whistleblower protection oversight functions for the public sector that currently reside with the Commonwealth Ombudsman would need to be transferred to the new authority.

12.83 With these considerations in mind, the Whistleblower Protection Authority should be established in a suitable existing body.

Recommendation 12.1

12.84 The committee recommends that a one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors as follows:

- **a Whistleblower Protection Authority be established in an appropriate existing body;**
- **a Whistleblower Protection Authority be prescribed as an investigative agency with power to investigate criminal reprisals and make recommendations to the Australian Federal Police or a prosecutorial body and non-criminal reprisals against whistleblowers;**
- **a Whistleblower Protection Authority have power to investigate and oversight any investigation of a non-criminal reprisal undertaken by a regulator or public sector agency;**
- **a Whistleblower Protection Authority be prescribed to take non-criminal matters to the workplace tribunals or courts on behalf of whistleblowers or on the authority's own motion to remedy reprisals or detrimental outcomes in appropriate cases;**
- **any other necessary legislative changes are made to ensure that a Whistleblower Protection Authority is able to investigate non-criminal reprisals, including providing it with appropriate powers to obtain the necessary information;**
- **that the public sector whistleblower protection oversight functions be moved from the Commonwealth Ombudsman to the Whistleblower Protection Authority;**
- **that the Whistleblower Protection Authority, in consultation with relevant law enforcement agencies, approve the payment of a wage replacement commensurate to the whistleblower's current salary to a whistleblower suffering adverse action or reprisal; and**
- **that the Whistleblower Protection Authority have the oversight functions for the private sector excluding the functions relating to the Inspector-General of Intelligence and Security.**

Recommendation 12.2

12.85 The committee recommends that where a whistleblower is the subject of reprisals from their current employer, or a subsequent employer/principal due to their whistleblowing, the Whistleblower Protection Authority be authorized, after consulting with relevant law enforcement agencies to which the conduct relates, to pay a replacement wage commensurate to the whistleblower's current salary as an advance of reasonably projected compensation until the resolution of any compensation or adverse action claim brought by the whistleblower (where such advance payment would be repaid to the Whistleblower Protection Authority from such compensation if awarded).

Consistent investigations of disclosures and reprisals

12.86 As discussed earlier, the committee notes that, by implication, an allegation of reprisal would appear to meet the threshold for disclosable conduct under the PID Act. The committee further notes that the Moss Review recommended including reprisals in the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.[57] In other words, the Moss Review recommended making explicit what is already implicit under the PID Act. The committee considers that if the government were minded to implement recommendation 6 from the Moss Review, it would be appropriate, for the sake of consistency, for the definition of disclosable conduct in private sector whistleblower protections to explicitly include reprisals in the same way.

Recommendation 12.3

12.87 The committee recommends that, if the Government implements legislation as per the Moss Review recommendation 6, that a Whistleblowing Protection Act should include consistent whistleblower protection between the public and private sectors and include reprisals within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.

Recommendation 12.4

12.88 The committee recommends that a Whistleblowing Protection Act include specific requirements for the investigation of disclosures and reprisals that are consistent with the present *Public Interest Disclosure Act 2013* and the *Fair Work (Registered Organisations) Act 2009.*

12.89 Beyond the ability to effectively investigate allegations of reprisal, the committee also recognises the importance of establishing a mechanism that would allow for the equitable determination of reprisal cases.

57 Recommendation 6, Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 34.

12.90 Recognising that there have been no successful cases brought under the PID Act, the committee also acknowledges the argument that prescribing reprisals as a criminal offence under the Corporations Act may have set the bar too high. The committee is of the view that a criminal offence may be appropriate in certain circumstances. Nevertheless, the committee also considers that, as currently provided for in both the PID Act and the FWRO Act,[58] it is vital that a whistleblower should be able to access civil remedies without first needing to prove a criminal case.

Recommendation 12.5

12.91 The committee recommends that the public and private sector whistleblower legislation include consistent provisions that allow civil proceedings and remedies to be pursued if a criminal case is not pursued.

12.92 Related to this, the committee is persuaded by the evidence from Mr Howard Whitton, amongst others, that retaliation or workplace reprisal should be treated as a workplace matter, which would then be dealt with through the workplace tribunal system.[59] The committee considers that such an approach could occur after there has been an investigation by the Whistleblower Protection Authority. The committee also notes its earlier recommendation that the Whistleblower Protection Authority be prescribed to take matters to the workplace tribunal on behalf of whistleblowers or on the authority's own motion to remedy reprisals or detrimental outcomes in appropriate cases.

12.93 Further to this, the committee is of the view that the compensation available to whistleblowers through a tribunal system should be uncapped.

Recommendation 12.6

12.94 The committee recommends that the compensation obtainable by a whistleblower through a tribunal system be uncapped.

Requirements for internal disclosure procedures

12.95 The committee heard evidence from Professor Brown on the importance of the requirements for internal disclosure procedures,[60] particularly given the research indicating the weakness and inconsistency of many of these internal processes and procedures.[61]

12.96 Section 59 of the PID Act sets out the positive obligations on the principal officers of agencies to establish procedures for facilitating and dealing with

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58 PID Act, section 19A; FWRO Act, section 337BF.

59 Mr Howard Whitton, Director, Ethicos Group, *Committee Hansard*, 23 February 2017, pp. 10–11.

60 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 4.

61 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Committee Hansard*, 15 June 2017, p. 1.

disclosures. The committee notes that section 59 of the PID Act is given greater effect by section 74 of the PID Act which relates to internal disclosure procedures. Section 74 of the PID Act provides for the Commonwealth Ombudsman to determine standards for:

- procedures, to be complied with by the principal officers of agencies, for dealing with internal disclosures and possible internal disclosures;
- the conduct of investigations;
- the preparation of reports of investigations; and
- the giving of information and assistance and the keeping of records.[62]

12.97 The committee notes that section 74 of the PID Act is not prescriptive on the detail of the standards. The committee considers that the Whistleblower Protection Authority should have a similar power to set standards for internal disclosure procedures in the private sector, in consultation with the private sector.

12.98 The committee also understands that while a previous Australian standard for whistleblower protections is no longer in force, work is underway to establish a new whistleblower protections standard through the International Standards Organisation and Standards Australia, which may be available in 2020.[63]

12.99 The committee considers that such a standard may have the potential to form the basis of standards set by a Whistleblower Protection Authority in both the public and private sectors. Until such a standard becomes available, the committee considers that it would be appropriate for a Whistleblower Protection Authority to set the standards in the private sector.

Recommendation 12.7

12.100 The committee recommends that the Whistleblower Protection Authority be given powers to set standards for internal disclosure procedures in the public sector (where internal disclosure should be mandated before external disclosures are permitted) and private sector (which may include mandatory internal disclosures in organisations above a prescribed size and recommended approaches for others).

62 PID Act.

63 Professor A J Brown, Program Leader, Public Integrity & Anti-Corruption, Centre for Governance & Public Policy, Griffith University, *Answers to questions on notice*, 24 May 2017 (received 30 May 2017).

Transparent use of legislation

12.101 The committee comments on two aspects of the best practice criterion on the transparent use of legislation: annual reporting, and confidentiality clauses in employer-employee settlements.

Annual reporting

12.102 The Breaking the Silence report notes that the best practice criterion for whistleblower legislation on the transparent use of legislation relates to:

> 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).[64]

12.103 The committee considers that the Whistleblower Protection Authority recommended above would be well-placed to report annually to Parliament on the effective operation of whistleblower laws in both the public and private sectors. The committee considers that, as part of a single report, it would be appropriate for both the public and private sector aspects of the annual report to be closely aligned in format and content to facilitate comparison of the effectiveness of the two systems.

Recommendation 12.8

12.104 The committee recommends that the Whistleblower Protection Authority provide annual reports to Parliament, and that the information on the public and private sectors be closely aligned in format and content to facilitate comparison.

Confidentiality clauses in employer-employee settlements

12.105 The committee notes that section 10 of the PID Act, subsection 337(B) of the FWRO Act, and subsection 1317AB(1) of the Corporations Act all have various provisions that provide for a public interest disclosure to override confidentiality clauses in employer-employee settlements. The committee considers it appropriate for such provisions to be harmonised across the public and private sectors by taking the best aspects of such provisions from the PID Act, FWRO Act and the Corporations Act.

Recommendation 12.9

12.106 The committee recommends that provisions that override confidentiality clauses in employer-employee agreements or settlements be made consistent in public and private sector whistleblower legislation (including maintenance of public sector security and intelligence exceptions).

Recommendation 12.10

12.107 The committee recommends that it be made explicit in a Whistleblowing Protection Act that nothing in the legislation allows for or permits a breach of legal professional privilege.

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64 Simon Wolfe, Mark Worth, Sulette Dreyfus, A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 Whistleblower Protection Laws*, October 2015, p. 6.

Post-implementation review

12.108 The committee considers that, given the substantial changes recommended in this report, it would be appropriate for a post-implementation review to be included as a statutory requirement. The committee notes that the Moss Review of the PID Act provides an appropriate precedent as a post-implementation review was a statutory requirement of the PID Act itself.[65] The committee considers that three years would be an appropriate timeframe for a post-implementation review.

12.109 The committee also notes that while whistleblower protections may appear to increase the regulatory burden on business, if implemented carefully, it would only be a significant burden to businesses with significant misconduct problems and poor reporting cultures. Businesses that have no misconduct and already facilitate good reporting and disclosure will have no burden from whistleblower protections and will be more competitive with those businesses that were previously gaining an unfair advantage through misconduct. The committee considers it would be important for the post implementation review to examine the extent to which whistleblower protections had levelled the field for business with integrity.

Recommendation 12.11

12.110 The committee recommends that there be a statutory requirement for a post-implementation review of the new whistleblower legislation, within a prescribed time.

Mr Steve Irons MP

Chair

65 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 1.