



*Inquiry into the Public Interest Disclosure (Whistleblower Protection) Bill 2012 and the Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012*

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**Standing Committee on Social Policy and Legal Affairs**

Submission by the Administrative Law Committee of the Federal Litigation Section of the Law Council of Australia

30 November 2012

This submission has been prepared by the Administrative Law Committee (the Committee) of the Federal Litigation Section of the Law Council of Australia.

The Committee notes that there is already some Commonwealth provision for whistleblower issues through sections 13 and 16 and related provisions of the *Public Service Act 1999* (PS Act). See generally:

<http://www.apsc.gov.au/publications-and-media/current-circulars-and-advices/2001/circular-20014>; and

<http://www.apsc.gov.au/publications-and-media/current-circulars-and-advices/2011/circular-20115>.

However, the Committee generally supports the proposal by Mr Wilkie MP for the enactment of the more detailed whistleblower regime in the Bills which are before the Committee.

The Committee considers that the regime proposed by these Bills is a significant improvement on the current PS Act regime in the following aspects:

First – the Wilkie Bill provides more direct support for accountability in Government than does the current PS Act framework.

The current PS Act framework is based on dealing with allegations of Code of Conduct breach rather than on encouragement of the reporting of suspected breaches. If suspected Code of Conduct breaches are not reported then they cannot be called to account.

The Wilkie Bill encourages reporting of corrupt conduct, maladministration, misuse of public money or public property, danger to public health or safety, danger to the environment (see definition of ‘disclosable conduct’ in Clause 9).

The Committee believes that there is considerable force in Mr Wilkie’s assessment that

*“Whistleblowers – in other words, those professional people who take a stand and speak truth to power – are every bit as crucial to a healthy democracy as an independent media and judiciary. But whistleblowers are too often left with an unbearable personal cost ...”*

The Committee believes that it is fundamental to maintaining accountability and probity in Government that conduct in Government which may be improper is reported and investigated. The risks for individuals in organisations considering reporting suspected improper conduct are significant.

The Committee believes that it is fundamental to encouraging the reporting of suspected improper conduct to protect the persons who make such disclosures.

The Committee considers that the Wilkie Bill is preferable to the current PS Act regime because it recognises and addresses the need to encourage individuals to make public interest disclosures.

Second – the existing PS Act regime does not expressly extend protection to whistleblowers who are contractors or employees of contractors. Subject to the comments below about clarification of one aspect of the Bill, the Wilkie Bill does extend

protections to contractors, their subcontractors and the officers and employees of the contractors and subcontractors.

Section 16 of the PSA extends only to:

- a. protection to whistleblowers who are Australian Public Service (APS) employees; and
- b. protection of these APS whistleblowers from victimisation or discrimination by 'A person performing functions in or for an Agency'.

Accordingly s16 gives no protection to whistleblowers who are contractors or the employees of contractors. It may be that the general requirements of the s13 Code of Conduct for APS employees to act with integrity will be relevant to any discrimination or victimisation of whistleblowers who are contractors or employees of contractors. However, that protection is at best indirect and is not clearly declared.

Given the frequent use of contractors by the Commonwealth, this is a significant gap in the existing PS Act whistleblower protections.

The Wilkie Bill extends whistleblower protection to 'contracted service providers', their subcontractors and their employees (see clause 4 definition of 'contracted service provider' and clause 11(a)(iii)).

The Wilkie Bill also extends this protection to 'a contractor, officer or employee of a contractor, volunteer or other individual exercising a power or performing a function of the agency. (Clause 11(a)(ii)).<sup>1</sup>

Furthermore, the Wilkie Bill extends the protection beyond protection from discrimination and victimisation by 'A person performing functions in or for an Agency' (compare the PS Act s16) to detrimental action by any person (see Clauses 40-48).

This aspect of the Wilkie Bill is particularly important for the ongoing protection of a whistleblower from detrimental action by his or her employer even if the employer ceases to have a contractual relationship with the Commonwealth.

Third, the current protections for whistleblowers provided by the PS Act are broadly expressed and imprecise and do not deal with legal risks of disclosure to which whistleblowers are exposed. Furthermore, the focus of the PS Act is on the conduct of the person alleged to have victimised, or discriminated against, the whistleblower. The Wilkie Bill sets out specific protections and significant remedies for whistleblowers.

Section 16 of the PS Act refers generally to victimisation and discrimination. The Code of Conduct in section 13 of the PS Act sets up general standards for integrity which provide some indirect protection for whistleblowers.

The PS Act is silent on whether disclosure by a whistleblower could expose the whistleblower to legal consequences.

The Committee generally supports the Wilkie Bill approach of listing the legal liabilities from which a person is expressly immune when making a 'public interest disclosure' (Clauses 38 and 39). This aspect of the Bill provides encouragement for an individual considering making a disclosure in the public interest that there will – subject to compliance with the legislation – be immunity from these legal risks.

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<sup>1</sup> See discussion below of possible clarification of the Bill's coverage of subcontractors and their employees.

The Committee generally supports the Wilkie Bill approach of providing positive remedies for the whistleblower by:

- ◇ bringing 'detrimental action' – causing detriment to a person because the person made a public interest disclosure (Clause 40) – within the *Fair Work Act 2009* definition of 'adverse action' (Clause 41);
- ◇ giving a whistleblower the right to apply for an injunction to remedy or prevent detrimental action (Clause 42);
- ◇ providing for Court ordered reinstatement where a person has been dismissed because they made a public interest disclosure (Clause 43) (this would be particularly relevant for employees of contractors and subcontractors);
- ◇ conferring a right to damages – including exemplary damages – for detriment suffered because of detrimental action (Clause 44);
- ◇ imposing vicarious liability on an agency whose employee takes detrimental action against a person making a public interest disclosure unless the agency can show, on the balance of probabilities, that it took every reasonable step to minimise the risk of, or to prevent the employee from taking, the detrimental action (Clause 45);
- ◇ creating an offence of victimisation of a person for making a public interest disclosure (Clause 46).

These provisions provide positive remedies for persons making public interest disclosures for some adverse consequences which they might suffer because they have made that disclosure.

This framework provides substantial reassurance for individuals considering making a disclosure in the public interest and should give some pause to persons considering taking detrimental action.

The vicarious liability in Clause 46 is particularly important both to ensure that a person damaged by detrimental action has an effective damages remedy and to encourage agencies to take positive steps to prevent their personnel from taking detrimental action against persons who have made public interest disclosures. The shifting of the burden of proof so that the agency has to 'show on the balance of probabilities that it took every reasonable step to minimise the risk of, or to prevent the employee from taking the detrimental action' is consistent with the shifting of the burden of proof which occurs in relation to occupational health and safety breaches.

Fourth – the Wilkie Bill recognises that disclosure to journalists may be in the public interest and provides a fair and balanced set of preconditions for when the protection of the Bill would extend to disclosures to journalists

The Committee believes that the media can be very important in exposing and calling to account improper conduct within government. The Wilkie Bill, in clauses 31-33, does not give a general licence for public officials to make disclosures to journalists, but sets out a balanced and reasonable framework to determine when the protection of the legislation would extend to disclosures by public officials to journalists.

Fifth – the Wilkie Bill gives the Ombudsman a central role in review of general agency processes for handling public interest disclosures and in monitoring and dealing with particular public interest disclosures.

The Committee considers that it is appropriate for the Ombudsman to have this strong role in the public interest disclosure regime because:

- ◇ the Ombudsman has a broad role in oversight of fair and proper administration;  
and
- ◇ the Ombudsman reports to Parliament which can call the Government to account.

For these reasons, the Committee considers that the general approach set out in the Wilkie Bill represents a considerable improvement on the current PS Act based regime.

The Committee has not attempted to review the detail of all provisions but has identified some aspects of the Bill which seem to call for some further consideration. These aspects are as follows.

### Clarification of whether subcontractors and the employees of contractors referred to in Clause 11(a)(ii) are covered by the public interest disclosure provisions of the Bill

It is not clear that the subcontractors or employees etc of Clause 11(a)(ii) contractors 'exercising a power or performing a function of [an] agency' would be protected by the Wilkie Bill if it is enacted in its current form.

The doubt about the scope of the coverage in this respect arises because there is no provision for the Clause 11(1)(a)(ii) category of contractors like paragraph (b) of the Clause 4 definition of Clause 11(1)(a)(iii) 'contracted service provider' to 'include a subcontractor for a Commonwealth contract'.

There is no apparent reason why the protection of the Bill should not extend to the subcontractors and the employees of such subcontractors for Clause 11(1)(a)(ii) contractors.

This particular aspect of the Bill should be clarified before the Bill is enacted.

### Possible breaches of State or Territory law – disclosable conduct

The definition of 'maladministration' in Clause 9(2) of the Bill which affects the definition of 'disclosable conduct' (see Clause 9(1)) includes 'an administrative action or a matter of administration that is ... (a) contrary to a law of the Commonwealth'.

There is, however, no reference in the definition to action that is contrary to a law of a State or Territory.

The Commonwealth, its employees and its contractors do not have general immunity from State or Territory legislation. There is no apparent reason why breach of State or Territory law should not be within the definition of 'disclosable conduct'.

This aspect of the Bill should be considered further if the Bill is to be enacted.

### Possible breaches of State or Territory law – referral to Police

Clause 25 requires an investigating entity for a public interest disclosure to refer possible breaches of Commonwealth law to the Australian Federal Police. There is no reference to possible breaches of State or Territory law. As noted above, the Commonwealth, its employees and its contractors do not have general immunity from State or Territory legislation.

There is no apparent reason why the investigating entity should not be obliged to refer a possible breach of State or Territory law to the relevant State or Territory police.

Legal advice for persons making or considering making a public interest disclosure

Clause 35(2) of the Bill requires each agency to have procedures for public interest disclosures including (paragraph (b)) – ‘advice for managers, public officials and contractors regarding the means by which wrongdoing can be disclosed’.

It is a serious matter for an individual to decide to make a disclosure. The consequences for an individual if the individual makes a disclosure, which a court later decides did not come within the Clause 9 definition of ‘disclosable conduct’ or does not otherwise attract the protection of the legislation, could be very serious.

The Bill is clearly structured and drafted,<sup>2</sup> however some of the key aspects of the Clause 9 definition of ‘disclosable conduct’ use terms which will not always be clear in their application to particular fact situations, such as in the following example:

- (b) action of an agency or public official that is any of the following
  - (i) maladministration that adversely affects a person’s interests in a substantial or specific way;
  - (ii) a substantial misuse of public money or public property;
  - (iii) a substantial and specific danger to public health or safety;
  - (iv) a substantial and specific danger to the environment; ...

The references to ‘substantial’ and ‘specific’ are imprecise and involve some judgment about whether particular fact situations will come within the definitions.

A person considering making a public interest disclosure may also be concerned about whether they are affected by the Clause 48 – ‘Loss of protection’ provision which refers to ‘vexatious’ disclosure and failure by the discloser to comply with an obligation ‘under this Act’. The procedures developed by the agency under clause 35 may impose obligations on disclosers.

Most public sector employees are entitled to reasonable costs of independent legal advice when claims are brought against them for actions taken in the course of their employment. If individuals considering making a controversial public interest disclosure are concerned about the legal costs of defending their own actions in making the disclosure and/or about whether they may not get the protection of the legislation, they may be discouraged from making such disclosures.

The Committee does not propose that all persons considering making a public interest disclosure or all persons who have made a public interest disclosure should be entitled to legal advice at the expense of the agency or their employer. Nevertheless, the Committee does recommend that the matters which should be addressed by agency procedures in accordance with Clause 35(2) should include access to legal advice.

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<sup>2</sup> - It is noted Mr Wilkie has acknowledged the assistance which he has received from Professor AJ Brown Professor of Public Law at Griffith University and a Director of Transparency International Australia.

### Contractors and detrimental action

The Bill provides a fairly detailed package of protections and remedies for APS employees and – subject to clarification of the position of some subcontractors set out above – for the employees of contractors and subcontractors (Clauses 38-46).

However, the Bill provides very little protection for contractors. For many contractors, repeat business with the Commonwealth is a significant aspect of their financial viability. Most contractors – including external legal service providers – operate in competitive environments with no guarantee of any level of work.

The general definition of ‘detrimental action’ in Clause 40 may catch a situation where employees of an agency decide not to give any more contract work to a contractor because the contractor or its employees or officers have made a public interest disclosure. However, it will be extremely difficult to prove that a failure by the contractor to win any new contract work with an agency was based on a decision to punish the contractor for a public interest disclosure.

Administrators who wish to avoid the accountability from the rigour of the Bill’s protections for public interest disclosers who are APS employees may deliberately use contractors.

This is a major weakness in the legislation that needs further consideration not only to protect the interests of contractors, but also to ensure that the effectiveness of the Bill to advance the public interest through disclosure of improper conduct is not undermined.

A possible solution might be for the legislation to provide that – for an appropriate period after a contractor (or subcontractor/employee/officer etc) disclosure – decisions to award contracts for which they are competing are subject to scrutiny from outside the agency. That scrutiny could, perhaps, come from a representative of the Audit office or from a probity adviser. The scrutiny would need to be applied during the procurement process, ie before decisions are made, because once contracts have been awarded it is very difficult to give an effective remedy.

Finding a solution for this issue should not delay enactment of the rest of the legislation.

### Procedural Fairness in whistleblower investigations

The current PS Act based framework includes guidance to agencies on procedural fairness for persons in relation to whom a whistleblower report has been made. See Circular 2011/5 for which the link is provided above. It may be that those guidelines could simply continue to operate in parallel with the scheme of the Wilkie Bills which are focussed on protection of the discloser.

However, it would probably be appropriate to acknowledge the need for procedural fairness for persons accused or implicated by a disclosure to be one of the matters to be taken into account in each agency's development of procedures under Clause 35.

### **Summary:**

The Committee has identified some aspects of the Bill which call for some further consideration and/or review of the drafting.

However, the Committee generally supports the proposal by Mr Wilkie MP for the enactment of the more detailed whistleblower regime in the Bills which are before the Committee.

The Committee considers that the regime proposed by these Bills is a significant improvement on the current PS Act regime.



## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 59,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.