

Westmead Hospital Whistleblowers

www.westmeadhospitalwhistleblowers.com

House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600
By email: spla.reps@aph.gov.au

19 April 2013

Dear Sirs,

Re: Submission on Public Interest Disclosure Bill 2013 (Cth) (PID Bill)

Because whistleblowers often disclose corruption and wrong doing in the government the opposition has a positive and nurturing relationship and perception of whistleblowers whereas the government's relationship is usually overwhelmingly negative and suppressing.¹

There is very little incentive for the Government to pass legislation that provides adequate protection for whistleblowers.

Whistleblowing legislation to date has been largely window-dressing with very little real protection for whistleblowers. Any protections that appear to exist are unfathomable (difficult to understand the process and requirements) retrospective (cannot be predicted ahead of time), granted by the Court after the event (costly, uncertain and unpredictable) and must be made in a particular manner (one error and the protection is lost).

A whistleblower may believe that the whistleblowing or public interest disclosure was done in the appropriate manner only to find that long after the event a Court finds that the protection offered by the Act has been lost for a reason not reasonably anticipated by the whistleblower.

¹ Attack on the freedom of the press to report information from their sources. The media is usually the first port of call for whistleblowers, especially if they wish to remain anonymous; Crikey, *Media wrap: papers unite against press reforms* (13 March 2013)
<<http://www.crikey.com.au/2013/03/13/media-wrap-papers-unite-against-press-reforms/>>.

With regard to the Public Interest Disclosure Bill 2013 (Cth) (PID Bill):

1. The 'Public Interest Disclosure (Whistleblower Protection) Bill 2012 (Wilkie Bill) provided a better, balanced and more reasonable protection for whistleblowers.
2. It is appropriate to expect wrongdoing to be reported internally first if possible. It is never the less common for whistleblowers to suffer reprisals (loss of career, lost of income, loss of health etc) simply because they reported wrongdoing internally.² The government should set up an independent whistleblowing online "drop box" for whistleblowers or allow whistleblowers to disclose to third parties without restriction if the whistleblower has a reasonable apprehension that they will suffer reprisals if they disclose internally.

The "drop-box" would need to be managed with integrity otherwise it would lose public confidence and become unusable. Some commercial whistleblower "drop-boxes" are already tainted by reports that reprisals occurred after they were used.

3. The rules that allow third party disclosures are complex and difficult to grasp. The whistleblower would not be able to tell whether anyone had properly acted on the information or not. The rules should allow disclosure to third parties without restriction if the whistleblower has a reasonable apprehension that the disclosure has not been adequately acted on.
4. It is inappropriate to exclude politicians or policy. If a whistleblower reasonably believes that the conduct of a politician or Minister is disclosable it should be treated the same as any other disclosure.
5. It should be possible to make disclosures to Members of Parliament or Ministers as an alternative to internal disclosures. This would reduce the need for whistleblowers to disclose to the media in order to correct wrongdoing.
6. Whistleblowers should be allowed to disclose to whichever internal staff member they believe can be trusted to use the information appropriately and keep the whistleblower immune from reprisals. Very often this is no one. Complex rules about which staff member disclosures can or cannot be made to are inappropriate.
7. In this regard, for internal disclosure, confidentiality and protection from identification needs to be protected by the legislation.

² See eg, Westmead Hospital Whistleblowers <www.westmeadhospitalwhistleblowers.com>.

8. Some whistleblowers ensure that they have another job or career or even emigrate to another country before whistleblowing because they know that severe reprisals will follow.³ It is important that past employees are afforded the same protection as current employees. There is no logical reason to exclude disclosures by past employees.

Some consideration should be given to a system similar to *qui tam* legislation in the United States such as the *False Claims Act*. Under that Act whistleblowers can receive up to 30% of the amount they save the United States government by exposing fraud. The government receives the remaining 70% or more.

The problem is that a few whistleblowers gain millions of dollars while other whistleblowers of integrity who have benefited public safety or exposed non-financial wrongdoing get nothing, but instead risk their careers, finances and mental health.

It has been suggested that the 30% could instead be put in a protected account (cannot be subverted to other purposes by politicians) and used to litigate for compensation and protection for whistleblowers.⁴

Potential problems with this model are firstly that if the whistleblower gets nothing then there will not be an incentive for whistleblowing and secondly it does not address the issue of the non-fraud whistleblowers receiving nothing. Some whistleblowers would get free representation from the protected account if the case was considered 'sufficiently in the public interest'. Others would not even get that.

Never the less it is an idea with merit worth further consideration.

I suggest an alternate model in which the 30% (the protected fund) is split three ways. The percentages would need refining, but as a starting position:

1. the whistleblower disclosing fraud which saves the government and generates the 30% which goes into the fund would receive 10%,
2. all whistleblowers who registered under the legislation would share 5% between them, and
3. the litigation (whistleblower protection and compensation litigation fund) fund proposed by Dreyfus⁵ would receive 15%.

³ Phil Hammond, *Stephen Bolsin's Story: Too many babies were damaged and dying* (27 July 2011) Medical Harm

<<http://medicalharm.org/doctor-stories/stephen-bolsins-story-too-many-babies-were-damaged-and-dying/>>.

⁴ Suelette Dreyfus, *Keeping us honest: protecting whistleblowers* (2 April 2013) The Conversation <<http://theconversation.com/keeping-us-honest-protecting-whistleblowers-13131>>.

⁵ Ibid.

It is possible that if whistleblowers are not given adequate protection they will resort increasingly to anonymous whistleblowing to the media or online. Whistleblowing is a hazardous strategy. Anonymous external whistleblowing has much to recommend it. It is illogical to risk one's job, financial security, career, home, mental health and family by disclosing wrong-doing to those one presumes are the appropriate authorities when anonymous external whistleblowing is essentially risk free.

Considering the severe risks that whistleblowers take it is surprising that whistleblowers do not resort to the anonymous route more frequently or exclusively.

It is probable that many whistleblowers who report internally believe that they are merely citizens with integrity who report events to their managers as they believe is expected of them. They do not consider themselves whistleblowers or disclosers who require legal protection. It is only when they are bullied and mobbed and reprisals are taken against them that they realise that they have in effect blown the whistle (kicked over a beehive).

This is an important reason why the whistleblower protection should not be complex and should be designed to protect anyone who did in fact form a belief that they needed to disclose the matter internally at the time they made the disclosure.

Since the whistleblower often does not realise that they are in fact whistleblowing they do not consult legal advice or check the legislation ahead of time to ensure that they disclose to the correct person about the correct information in an approved manner.

Yours sincerely,

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www.westmeadhospitalwhistleblowers.com