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To the House of Representatives Standing Committee on Legal & Constitutional Affairs (LACA) Inquiry into whistleblowing protections.

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Introduction

I am concerned the Committee might consider that the existing State whistleblowing legislation is adequate for the purposes of encouraging and facilitating disclosures in the public interest and protecting whistleblowers and ensuring that those disclosures are properly investigated. While I think it is fair to say that some of the acts are better than others, they do represent the thinking of the early 90's, tempered as it was by political expediency. And even a cursory reading of the two Senate reports 'In the Public Interest' and the 'Public Interest Revisited' in the same period, gives you some idea of just how limited and inadequate they were even then. They were not adequate then, so they should not be seen as a blueprint for future federal legislation now.

The State acts are obviously of interest though. Take for example the NSW provision, which *conditionally* allows disclosures to be made to a journalist. No other act does that and you might say it was pretty daring for its time. But the act also gives the investigating authority the option (over 6 months) to do something or nothing first, delaying the possibility of media exposure. You don't have to look far over the last 13 years to appreciate that the six month *option* has mostly been used as a delaying tactic to give the authority the time to get rid of the whistleblower. In my submission the conditional nature of this provision represents a failure in policy thinking and political will. I deal with this aspect in some detail below, where the Committee is asked to consider whether time based restrictions on disclosures actually do achieve any public interest purpose.

I am even more firmly of the view that the NSW act does not serve its public interest purpose since reading the transcript of the evidence given Mr Wilkins, the Secretary, of the Attorney General's Department on 27 November. Mr Wilkins is out of step with his colleagues, who prepared their written submission before Mr Wilkins joined the department. His evidence is revealing for what it says about the policy ideas and thinking that underpinned the NSW act. Mr Wilkins was apparently involved with its drafting.

He talks about days gone by, when the public interest was seen more narrowly, as simply 'promoting effective and efficient government'(p2). Not even accountable and transparent government, a subsequent development, which was one step closer to realising the public's interest. But since then, outsourcing, privatisation, private public partnerships and catastrophic corporate collapse have forced the public's realisation that their interest lies in ensuring the public interest remains paramount across all sectors of society, including in government.

Finally I am also tipping the Committee is sufficiently familiar with the NSW act to be able to understand the propositions I have put below and consider how those suggestions might also be adapted for the purpose of legislating federally.

A. Encourage and facilitate disclosures, in the public interest.

A1. True to its name, not its purpose.

The NSW act is instructive, because in its operation it has been true to its name, not its stated purpose. It is a timely lesson about drafting: about keeping a stated purpose uppermost at all times.

The, public interest purposes set out in s.3 of the Protected Disclosures Act NSW 1994 (the Act) are generally not evident in the rest of the provisions of the Act, because they concern themselves with defining and constraining the nature and effect of 'protected' disclosures, rather than encouraging and facilitating public interest disclosures or disclosures 'in the public interest'. That is, I think the Act is and has remained true to its name and not it's objects or purposes.

You see disclosures in the public interest or public interest disclosures are not defined. Only 'protected' disclosures' are defined: defined to mean disclosures that satisfy the 'applicable requirements of Part 2' of the Act, which Part, most importantly, does not refer to or rely on a disclosure being in the public interest.

I think it fair to say that in the absence of any other definition, Part 2 effectively defines a disclosure under the Act as a 'protected disclosure' made in accordance with other and related acts like that of the Ombudsman (s.10). Which is to say that the provisions of the Act are for the most part, inconsistent with its object, because the Act defines the 'character' of a disclosure by what gives it it's protected status rather than by its purpose.

In its operation and effect the NSW Act has been drafted to encourage and facilitate 'protected disclosures': a particular conception that is not necessarily a disclosure in the public interest or in the public's interest, in encouraging and facilitating whistleblowing.

Therefore as a first step and to ensure that the legislation *actually* satisfies a public interest purpose, the act:

1. should be named the Public Interest Disclosures Act (PID act),
2. drafted to ensure that disclosures made under the act are interchangeably referred to as disclosures in the public interest or public interest disclosures, and a
3. public interest test should be applied in determining and dealing with all

other aspects in amending *and then* implementing the act so as to give full effect to the stated purposes of the act in the public interest.

A2. Public interest disclosures, in the Public Interest.

An ordinary person and potential whistleblower should be able to just apply a public interest concept or test to any given set of circumstances to be able to use and rely on the act. They should be able to determine whether or not those circumstances disclose matters, which if disclosed would serve the public's interest of having the alleged wrongdoing stopped and put to rights.

An ordinary person should also be able to distinguish between a public interest disclosure for the purposes of the act and a disclosure that is confined (only) to a personal grievance or workplace complaint.

This could easily be achieved by drafting a provision based on just two requirements. One, whether the conduct and circumstances as alleged and disclosed by the whistleblower is, prima facie, *contrary to or not* in the public interest. And two whether the public interest disclosure is made pursuant to the act.

A suggestion as to the wording is as follows:

For the purposes of this Act a public interest disclosure is a disclosure where:

(a) the conduct and circumstances alleged and disclosed by the whistleblower are prima facie *contrary to and not in* the public interest and

(b) the disclosure is made pursuant to this Act.

The phrase '*contrary to and not in*' is expressed in the negative, because it would impose *a wider more objective appreciation of what lies in the public interest on the assessor and avoid the very human temptation to exclude all*

but the assessor's personal preferences.

The, second question, whether the disclosure was made pursuant to the act should be resolved by an assessment of whether or not, based on all of the circumstances, the disclosure *generally* conformed with the requirements of the act.

This conception is easily understood in society and can be readily applied in a court.

Using a test like this: one that *assumes* the truth of the whistleblower's disclosure for the purpose of establishing whether or not the conduct and circumstances (eg. apparent medical research fraud) is or is not in the public interest, avoids the need to do anything other than to sit quietly, think about what you have in front of you and ask yourself the question. That is, only thought, not investigation, is required as a preliminary matter.

A3. Protect the person, not the disclosure.

The separate question of whether or not the whistleblower should be afforded protection under the act could be drafted in such a way as to build on the above assessment (item A2 above) so as to include the following three requirements *that the disclosure was (1) substantially a public interest disclosure, (2) as defined by the act and (3) made with the honest belief as to its truth.*

Note the use of the word 'substantially' is intended to recognise and allow for the situation in which, a public interest disclosure may contain some element of a grievance or workplace complaint, it is still 'substantially' a public interest disclosure and so, deserving of protection. *"Substantially'* is preferred, because it raises concepts of quantity and proportion as well as those of essential or fundamental character or purpose.

This would strike the right balance between what is reasonable and more likely than not to achieve the overriding purpose of any act that has as its object something similar to the NSW Act like 'encouraging and facilitating' the public's interest, by actually protecting the whistleblower, not the disclosure.

A4. There should be a presumption as to protection.

I would argue there are very good reasons why there should be a presumption as to protection: that the presumption is only resolved, if it ever needs to be resolved at all, at the point at which the whistleblower seeks to raise it as a bar to litigation.

That is, at all times before and leading up to that point, that end game: each and every player in the process should be working from a position that any and all available protection **is** to be afforded in the public interest, because it would work towards preventing reprisals that might otherwise be inflicted.

There is little to be gained and a lot to be lost in continuing the NSW provisions at the federal level: provisions which, allow for the ill informed and ungenerous souls with an overly legalistic approach to life to avoid or even deny doing what I suggest is obviously reasonable, sensible, practical, and *likely to be effective its application in furthering the acts' public interest purposes.*

A5. The public has an interest in the private sector.

Even if, in 1994 the legislature could have been forgiven for not appreciating that the public interest extended much more widely than government spending and accountability, the same can't be said for now. Not after extensive outsourcing and privatisation of public assets. Not after seeing the enormous public havoc and harm caused by for example the HIH, OneTel, AWB and now, the sub prime mortgage scandals. The public thinking has changed as

we have come to fully appreciate just how much an ethical, accountable and properly run public **and** private sector is *in the public interest.* And just how inappropriate and inadequate the existing NSW Act is in encouraging and facilitating disclosures that serve that wider public interest.

In this respect the Committee should look at the experience of other jurisdictions, which were more in tune in the 90s with the need to include the private sector and allow for a whistleblower or 'person' to make a public interest disclosure. Although I suggest the legislation should not define 'a person' to include particular categories like corporate and other employees, contractors and agents as it appears to be unnecessary and may prove counter productive by encouraging and facilitating delay, and litigation as to whether or not a particular person is a whistleblower or 'person' for the purposes of the act.

In other words federal legislation should not, and should not be seen to be taking a backward step to NSW in the 90s, but take the opportunity to move with the times and give the legislation the flexibility it will need if it is to serve the public interest in 21st century.

B. Enhancing and augmenting existing procedures.

B1. Separating public interest disclosures from personal grievances.

In the intervening years since the NSW Act took effect existing complaints handling systems for grievances or workplace complaints have been adapted to accommodate 'protected disclosures' without ensuring that they were handled separately and differently from workplace complaints. For example, I have seen mediation used for both: mediation is entirely *in*appropriate to resolve a public interest disclosure.

More importantly those implementing & using the system were not educated about the significance of the 'public interest' in making a disclosure. The

result has been that both streams have suffered at the hands of people who were untrained, ill informed and or indifferent to the distinctions to be drawn between the two streams. It has been a serious failure in public education and policy and has worked against the objects of the Act.

I have seen complainants with a legitimate grievance derided, because theirs was only a self interest and whistleblowers (derided), as if theirs was *really* only a grubby self interest. People can be bad for no good reason, so good policy needs to understand that and educate, set proper standards and build on what is good and bad about people if it is to work properly for the right reasons.

It will be essential for the two systems to be separate and for the managers of the existing grievance or complaints handling systems in the federal sector to be educated about the fundamental distinction to be drawn between a *public* interest disclosure and a *personal* grievance or self interested complaint and why it matters that they get it right.

B2. Confidentiality and the 'Guidelines' under s.22

Section 22 of the NSW Act does recognise the difference between a public interest disclosure and a self-interested complaint or grievance by requiring the investigating authority not to routinely disclose information that 'might identify or tend to identify' the whistleblower, as they might in the ordinary course of dealing with complaints. Because the circumstances a whistleblower complains about usually do not personally involve the whistleblower.

That is, it is mostly not necessary and the agency needs to be constrained from inadvertently treating PIDs like their other disclosures or complaints, without first making a proper assessment and, if the public interest requires it, obtaining the whistleblower's consent so to do.

Section 22 should operate as an effective constraint on the agency so as to

(1) protect whistleblowers from reprisals, which otherwise might be inflicted and (2) to condition the method of investigation.

Sloppy, lazy thinking and work should not be a reason for inadvertently exposing a whistleblower to unnecessary risk. That is, the investigative agency should be required to fully inform the whistleblower as to their reasons and reasoning (using the alleged facts) for wanting the whistleblower's consent and it must be couched as a formal request for consent. Not as I have seen it: where the agency simply informed, it would not be proceeding with an investigation unless it could reveal the whistleblower's identity. An amendment to the NSW Act should be drafted in such a way as to ensure the issue of identity is never used as a *precondition* to the investigation proceeding.

This failure in thinking and public policy has resulted in some quite perverse outcomes in the workplace, where whistleblowers are routinely encouraged to accept that the only way they can be protected is by keeping the entire matter, from the point of making the disclosure, strictly confidential. In practice keeping it confidential has been imposed on the whistleblower, but not the employer and sometimes, even as a requirement to keep everything strictly confidential under threat of possible disciplinary action.

I understand that this sort of policy action has emerged out of woolly headed thinking about how best to progress the investigation of person grievances. It is wrong thinking both in terms of grievances and public interest disclosures. And it can and does have the effect of completely isolating the whistleblower from their support base and put them at risk of a tardy, possibly vindictive employer. It allows an unhealthy level of secrecy and false innuendo to develop, because in effect, both groups are being treated as if they had been charged and bailed, on condition they don't approach anyone involved in the matter. This is wrong, contrary to the public interest and a complete failure in public education and policy.

Finally the reader should appreciate that section 22 of the NSW Act is

supposed to operate to protect whistleblowers **from** reprisals and in large part, s.22 makes it the whistleblower's call. And that's as it should be at a federal level, too.

Also that neither section 22 or any other part of the NSW Act requires the whistleblower to keep the disclosure confidential. And that's how it should remain at the federal level, if whistleblowing is to become the norm.

In fact legislation should require the employer or other agency to encourage the whistleblower to be open and confident in the knowledge that the employer or agency will act consistently with its obligations under the act to protect them from the reprisals that otherwise might be inflicted. That's how it should be.

Note finally that section 22 is the only *preventative* protection currently available under the NSW Act, but it has never been understood or put forward as that. It should be. It is an urgent public and professional education issue for NSW now, *but the Committee can learn* from this failure and ensure that any federal confidentiality guidelines only ever constrain the workings of an investigating authority, not the whistleblower.

B3. Proactive ways to educate, and promote the public interest.

Federal legislation could and should *require* an employer and or investigative body to take *a principled and public position* in dealing with a PID or an alleged reprisal.

I can envisage a system of public disclosure requiring the *receipt* of a PID to be disclosed on the basis that it is in the public interest to do so. A system that: *routinely required* the authority or agency to issue a formal notice or circular albeit in general terms, with copy to the whistleblower, but with sufficient identifying information to disclose the nature of the PID or any other milestone as follows.

For example, a circular in the following terms: (1) a public interest disclosure lodged *in the public interest* pursuant to the PID act, concerning possible medical research fraud is being investigated; (2) **all** staff are reminded that reprisals taken against a person believed to have made the PID could be held criminally liable for an offence under the act and (3) [a general warning that] reprisal action will not tolerated in any circumstances.

Another example, to apply in regard to alleged reprisals might be: (1) a personal grievance about bullying lodged pursuant to the PID act is being investigated; (2) all staff are reminded that reprisals taken against a person believed to have made a PID could be held criminally liable for an offence under the Act and (3) [a general warning that] reprisal action will not tolerated in any circumstances.

Another example is the final outcome of the investigation itself, including the reasons, outcomes and any other matter arising, where it would be in the public interest to do so.

It would resonate with all of those involved in or with the PID and send a clear signal to the whistleblower's detractors to pull their nose in before it was too late and reassure those who, (like the whistleblower but for different reasons) had been feeling cornered, feeling that their employer could not be trusted to do the right thing for the right reasons. It is a method as old as time itself **and** one that would serve to keep the authority from straying, when it needed it most. Penalties should apply.

This is just a small sample of the sort of actions an employer and or investigative authority could be obliged to take to ensure they operated a *system of public disclosure*. The only limit to what is possible, is a failure of one's imagination, but harnessed in the public, not any other interest.

C. Protecting persons *'from'* reprisals:

The NSW Act does nothing to satisfy the terms of s.3(1)(b) in 'protecting persons from reprisals', unless you still take the view after nearly 13 years that a deterrent (alone) will suffice. That ostracism, harassment, constructive and actual dismissal and all the things between are not reprisals. Because the existing protections, although worthy, do not protect persons **from** reprisals: because they all assume, with one exception, what I would call an end game. An end game in which, (eg) a whistleblower is the victim (and the witness) in a police prosecution under s.20 or is being sued for defamation or breach of confidence.

Even so those protections are important and should remain and be augmented to include other more relevant 'end game' protections like (1) standing to bring a civil suit in damages and (2) a claim for compensation as a victim of a (s.20) crime. Both would be effective as a deterrent **and** by putting things to rights in the event the Act failed in its to operation and effect, to actually protect the whistleblower **from** reprisals.

That is the NSW Act must be amended to satisfy s.3(1) so as to actually provide protection **from** reprisals consistent with s.3(1)(b), because there are none presently.

The starting point might be to ensure that s.22 operates properly as the preventative protection I think it was intended to be (see above, under item 2).

The second is to allow a whistleblower (or a PIDA) to seek and obtain injunctive relief, to restrain 'any' person from taking the reprisals that 'otherwise might be inflicted' *in the public interest and based on the usual precautionary principles of avoiding harm.* A court should be able to apply a penalty against the employer or other in the event the whistleblower is granted relief. That is, the public interest must be upfront and centre in the court's considerations.

The third need is for an employer or investigative body to take a formal, principled *and public position*, on being made aware of possible reprisal

actions having been inflicted and at the end; when the wrongdoing disclosed by the public interest disclosure has been investigated and fully dealt with (see under C above).

These and other amendments like them would also operate together as a deterrent and as a powerful incentive for the employer or a dedicated Public Interest Disclosure Agency (see C above) to take the required proactive, principled & transparent action at the coal face, in 'protecting a person *from* reprisals that otherwise might be inflicted.'

Federal legislators have the opportunity to learn from these mistakes and bring down legislation that provides for the preventative measures above (including items B1-3 above) and extend what I call, the end game protections to include standing to bring a suit for compensation.

D. Providing for disclosures to be properly investigated.

The NSW Act does not actually provide for disclosures to be properly investigated at all, so it shouldn't come as a surprise that:

(1). Disclosures are allowed to languish for one reason or another until considered no longer relevant; when the whistleblower has been sacked or moved off the payroll, onto the workers compensation insurer's list of claimants.

(2). The decision to investigate is often wrongly predicated on the whistleblower's bona fides, credibility and poor performance record (real or imagined).

(3). Investigating authorities often disclose the whistleblower's identity when there is no need and no permission (s.22) so to do.

(4). The investigation usually ignores any sense of imminent harm, even

though on the face of it, further or continuing harm is more likely than not.

(5). It is usually so ineptly done and so inadequate in its result, it necessarily raises a suspicion that it amounts to a cover-up, which can in turn prove a useful distraction for those wanting to derail further investigations.

Consider for example the course of the internal disclosures made by Toni Hoffman in Qld about Dr Patel at Bundaberg Hospital, because it is current and unfortunately so similar to all those that have gone before it in every other jurisdiction.

You may recall the Dr Bruce Hall medical research fraud case in Sydney in (I think) about 2001, which was investigated internally twice, before being exposed on radio. Both matters are unresolved, notwithstanding the public havoc and harm they caused.

Then there are the (4) Campbelltown nurses from NSW, who got nowhere until the matter was made public.

The NSW Act and indeed any federal act should provide a set of criteria for the investigation of public interest disclosures that are defined in terms of the public interest and geared to regulate [under threat of a penalty] things like: what may not influence or be taken into account (eg. whistleblower's bona fides), in deciding whether or not to proceed with an investigation, including the whistleblower in the investigation process, set out the investigative duties in terms of methodology and procedures, timelines, the requirement to provide decisions and reasons and for any formal decisions, with those decisions to be subject to judicial review, based on whether the decision was both *reasonable and served the public interest.*

Finally it might seem that setting out how ***not* to go about** an investigation is unnecessary, but I am reminded of just how many times that is often the key to all manner of poor even bad behaviours that can follow. The first case on detrimental action brought in the Local Court under s.19 & 20 the NSW Act,

Pelechowski v The Department of Housing comes to mind. It's a short and simple decision. The Court found against Mr Pelechowski. I suspect being a self litigant and not including his direct supervisors as defendants played a part. Relevantly though it found that the internal PID he had made that his supervisor was operating a private business from within the department was correct and that the internal investigation of the PID was predicated on the wrong questions. The magistrate provided a simple few words about how *not to* go about the business of investigating a PID that I haven't seen bettered. I believe state and federal legislation would be the better for including something similar.

E. Qui tam actions are just another way of doing it.

The Committee should give consideration to introducing Qui tam actions.

Please note Qui tam actions pursuant to the USA False Claims Act (FCA) have established and existing precedents in our law. They rely on a 12th century English common law action, which allowed a person to sue as a relator, that is, he sued for the Crown as much as he sued for himself.

The FCA also utilises current common law concepts of punitive damages, in allowing a court to treble the amount falsely claimed against the government, in determining the judgment amount as a penalty for a breach of the act. The court can award a whistleblower between 15-20% of the judgment amount in compensation for the risk of taking the on the action: the balance is paid to the Government.

If the Department of Justice decides to take on the action, the whistleblower gets less.

In short, there is no inherent obstacle to the inclusion of a qui tam or relator action in Australian law and research readily available on the internet, indicates the FCA is considered to be one of the most effective tools in the

history of the USA, for recouping government finances.

I envisage a provision that encourages, facilitates and allow public interest disclosures to be made by a whistleblower or person directly to either:

1. an employer or third party including an investigative authority, MP or journalist or

2. where, the public interest disclosure relates to a false claim having been made against the government,

3. as a relator in a qui tam action filed in a court of competent jurisdiction.

The legislation should adapt the rest of the FCA 'system' to our jurisdiction and also extend the matters able to be disclosed in the public interest to include public health & safety, environmental harm and to allow for future categories not now apparent.

I am mindful of the possibility that the Committee might see this as a bridge too far, but I think that would be unduly conservative in a Government that sees itself as socially progressive. Particularly as it has already done comprehensive and exhaustive research into public sector whistleblowing: I refer of course, to the two excellent Senate inquiries into public interest whistleblowing in about 1993.

F. No restriction to making a disclosure to an MP or journalist.

In my observation the existing time based restrictions under the NSW act have seldom served the public interest. They have tended to protect wrongdoers from accountability, by providing them with opportunities to cover their tracks and avoid an investigation. That is, time based restrictions have tended to operate mainly as a delaying mechanism and have failed to encourage and facilitate the timely in-house rectification of wrongdoing by the

accused agency, contrary to what you might have thought might have been the result.

Consider what we know about the handling of internal disclosures made in NSW by immunologist, Dr Clara He and her (3) colleagues in the Prof. Bruce Hall, research fraud matter, before they were made public. I know for example that Clara He and her colleagues were vilified, ostracised, bullied by other the work colleagues in support of Prof. Hall, who importantly, had influence within the university. Their careers were trashed and not even a finding against Hall by the former Chief Justice Brennan was sufficient to reverse the early decision to delay, stonewall, retaliate and support one of their own no matter what. The status quo continues to today.

Consider also the recent disclosures by Toni Hoffman about Dr Patel and Alan Kessing, about airport security: both allegations prima facie raised urgent public interest issues about public health and safety requiring immediate attention. Equally both had a real potential for causing public embarrassment to the relevant agencies and we now know, which was the most compelling.

Not the risk to the wider public health and safety: in the Dr Patel matter the authorities were unmoved by her disclosures and apparently too concerned with finding fault with her to make public risk of actual harm their priority.

In both cases, the risk to public health and safety was allowed to continue unchecked until the allegations were exposed in the parliament and the press; and even then the agencies put their reputation and possible culpability ahead of public interest obligations.

The lesson here is that the opportunity to do the right thing, when there is a vested interest is not enough to drive proper decisions. The possibility of embarrassment, of being seen to be culpable generally drives the issue underground and into cover-up, not timely investigation and resolution.

I believe a time based restriction or indeed any restriction on making disclosures to a journalist (or an MP) is not warranted: not by the history and not by any cockeyed notion that organisational actors will see sense if they are given an opportunity to fix it first and they won't just do nothing, hoping that the whole issue will just go away over the next six months or so if they give the whistleblower a hard time. Or the woolly headed thinking that says the possibility of public embarrassment is something that should be avoided in the public interest.

Note the whistleblower has no obligation at all to save government from the embarrassment for its own actions. But if Government is feeling embarrassed, well maybe that's as it should be. But Government should not be allowed to let embarrassment stand in the way of its duty and obligations to society.

You see I think it fair to say that being embarrassed by your actions is a personal response to a personal situation. It's about you becoming aware you have been caught out and how you deal with that embarrassment is as they say, the full measure of the man. Or the government.

In my observation if you are sincere in your embarrassment, generally you want to make amends, to put the whole sorry business right, whether it is a personal or professional issue. This is an outcome that is obviously always desirable, in the public interest and consistent with our Westminster traditions. So, a whistleblower holding back or being held back, because it might embarrass, isn't in the public interest.

Equally holding back when a person makes a great show of being embarrassed, isn't in the public interest either, because mostly they are not at all embarrassed. They are feigning embarrassment. Deliberately. We have all seen this person at work. They have no shame: they are taking advantage of any discomfort they might cause, to drive the argument in other directions and away from any question of their responsibility for their actions.

There are those that might say yes, well that's all well and good but, there has to be a limit and particularly when our national security is threatened. Well possibly yes, but only in so far as it concerns *actual military and intelligence operations* and conceivably puts our operatives at risk. Not a decision affecting foreign relations. Not a decision made by government ostensibly in the public interest. I am thinking of Andrew Wilkie, WMDs, and the decision to invade Iraq. Children overboard. Vivian Alvarez and Cornelia Rau. I am thinking that surely we are over that as a way of doing government in the 21st century. Gone are the days when, representative government was seen to be satisfied by a regular election alone.

But, if after all it is still the view of the Committee that a time based restriction on going to the media should be included, I would recommend a 'public interest test' be applied, together with a *mandatory* process that restricts and takes account of the natural tendency to want to do nothing, particularly when embarrassment threatens. That is, a carrot, but with conditions.

A system that required the agency to do a preliminary prima facie assessment of the PID as to the degree of urgency and nature of the disclosure to determine *whether and why* a six month delay to media or political exposure would *not be contrary to* the public interest. The assessment would be carried out (only) by senior well qualified personnel, within say three to five days and assume for the purpose that the PID (allegations & information) was essentially correct. The agency would be required to notify the whistleblower of its decision and reasons for the decision in writing, within 7 days taken from the date of their receipt of the disclosure. Need and proper purpose drives efficiency.

In the event that the whistleblower took the same or substantially the same disclosure immediately, to journalist (or MP), the authority would be able seek restraining orders on the publication of the allegations. The authority should bear the onus of establishing that its decision was *not contrary* to the public

interest and that it had complied with the process in a reasonable time. Why? Because the authority has the information and it should be *obliged* to open itself to scrutiny in the public interest. The whistleblower would of course, be obliged to notify the authority of his or her intention so to do.

In the event the agency failed to notify its decision and reasons within (say) 14 days, the whistleblower would be at liberty to take the public interest disclosure immediately to the media or a parliamentarian, without suffering even a potential loss of protections under the act.

If on receiving the notice and reasons, the whistleblower determined that another and different agency or body would have been more appropriate in the first instance, the whistleblower would be entitled to lodge the PID with another body, without losing protection under the act. For example, a disclosure may at first glance appear suitable for an agency like the ICAC, but in hindsight appear more appropriate for the Ombudsman.

Nothing in this system would remove the opportunity for other arrangements to be made by formal written consent between the parties.

Each and every decision of an authority required by the act would be subject penalty for breach and or review under the Administrative Review Judicial Decisions Act.

In summary in my submission if there is *no restriction* on going to the media (or an MP) and an authority is otherwise properly regulated and educated about the things set out above against the overriding need to satisfy the wider public interest in terms of its place in society, rather than its own self interest: then I forsee a time when most authorities will see the response of SA Health to a recent disclosure about the underdosing of cancer patients in Adelaide last October, as the norm.

SA Health immediately set up an independent investigation panel from interstate, focussed on the problem (disclosure), kept the whistleblower out of

the public eye, set up a hotline for patients, put out a media release and put all findings and reports up on the net.

[Note the disclosure was made internally in the first instance within Royal Adelaide Hospital, which had the time, relevant knowledge and expertise, but nevertheless put personal politics ahead of commonsense, patient care, the ongoing risk to their patients and its wider public responsibilities. This aspect is the subject of ongoing investigation.]

If however I have failed to persuade the Committee to my way of thinking and it is not disposed to allow immediate access to a journalist (or MP) then the Committee should see the sort of system or process that I have outlined above as a bare minimum. The push has to be there, simple timeframes won't do it. Remember the history: timeframes fail the public interest test.

That is, legislation must take account of both the history and the propensity of people to want to do the right thing and yet do bad things, if no one is watching. There is plenty of research in this area and it all points to bad behaviours becoming the norm where unadulterated self interest, unfettered positional and referred power, non disclosure and secrecy flourish.

There are obviously other ways to do anything, but the bottom line is that any process, which puts the public interest front and centre, will do the job required.

G. A dedicated Public Interest Disclosure Agency (PIDA).

I generally support the Committee's recommendation in the 1994 Reports for the creation of a separate agency to administer and enforce the act, but not as a part of any other existing authority. I will call it the Public Interest Disclosure Agency or PIDA, for this purpose.

I also do not support a PIDA being responsible for the investigation of the

public interest disclosures **as well as** alleged reprisals. I believe the former should be left with the existing investigative agencies, which have the qualities and experience and should be able to do that job well, if not also required to support and protect a whistleblower.

I see a PIDA being restricted to those things that directly support the whistleblower, which would mean for example, it would work as a clearing house, a plaintiff in relator actions and registry for public interest disclosures made pursuant to the act. It could and should investigate and litigate the alleged reprisals, be at liberty to seek injunctive relief, where the public interest required it and have responsibility for public education, research and monitoring and advising in the handling of whistleblower protection and public interest disclosures in accordance with the act and report to Parliament, so as to encourage and facilitate disclosures in the public interest.

Another reason why I say a PIDA should be restricted in what it can investigate, is because the role of fully supporting a whistleblower can be fundamentally opposed to the need of an investigator/prosecutor to ensure that there is not so much as a hint or suggestion that the whistleblower's evidence (in relation to the public interest disclosure) might have been compromised by the protection and support he or she has been afforded by the PIDA in its supportive function. This potential for conflict is real and would effectively tie the hands of a PIDA and defeat the overriding supportive purposes of a PIDA.

In my experience perception can be everything and here, it would be fatal for other reasons too. When a whistleblower realises that no one appears to be responsible for his support and protection other than doing what it takes to safeguard his evidence for the PID trial, he becomes increasingly agitated, perhaps even sick, and will want to drop out of the process with the knowledge that the risks are all his. I think it won't work: that a regulator's role is obviously and fundamentally incompatible with whistleblower support and protection.

Finally please note that in making this submission I have drawn on my experience as a whistleblower and as an officebearer of Whistleblowers Australia Inc. since 1995; during which time I have been the NSW Branch President, National Secretary and responsible for running the weekly 'caring, sharing & strategy' meetings in addition to dealing with many of the individual requests made by phone and email from both the private and public sector.

Yours faithfully,
Cynthia Kardell, LLB.