National Whistleblowing
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15 May 2013

Committee Secretary
House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021,
Parliament House
Canberra ACT 2600

Dear Ms Pauline Cullen,

**Submission -- Public Interest Disclosure Bill 2013 (Cth)**

Thank you for this opportunity to make a submission in relation to the Public Interest Disclosure Bill 2013. Unfortunately this submission is far from comprehensive. Time prevents further analysis of the Bill. Therefore this submission is restricted to issues 'in principle' rather than addressing the many specific problems with the Bill.

The National Whistleblowing Information Centre Inc is a newly formed organisation consisting of a small number of very experienced whistleblowers. Most members have previously held office in other organisations dedicated to public interest disclosures and whistleblowing.

My experience in relation to public interest disclosures and whistleblower protection covers more than 40 years in the Commonwealth public sector. My involvement in whistleblowing matters includes various Royal Commissions, Commissions of Inquiry, Parliamentary inquiries, the Human Rights Commission, the ILO and legal action.

In making our submission, Dr A J Brown of Griffith University and Mr Greg McMahon of Whistleblowers Action Group is Qld Inc, have kindly granted permission for us to utilise their respective submissions to the Committee, either expressly or otherwise, without further attribution.

Yours sincerely

P.P.Bennett

**Subject INDEX** **PUBLIC INTEREST DISCLOSURE BILL 2013 (Cth)**

**Page**

**SUBMISSION PUBLIC INTEREST DISCLOSURE BILL 2013 (Cth)**

**Preface;**
This Commonwealth Government is to be commended for introducing legislation with the intention of establishing a facility for the disclosure of public interest wrongdoing and the protection of whistleblowers. It is an acknowledgement that the processes of government need to be more transparent and accountable and that the current system of disclosing public sector wrongdoing is totally inadequate.

For the last 20 years successive Federal governments have had the opportunity to create such legislation and each has failed to do so. This is so, despite legislative precedents which have been set in every State and Territory. Therefore it is fit and proper to commend any government which formulates legislation and introduces it for the consideration of Parliament.

Giving the government the benefit of the doubt, it must be presumed that despite the unsatisfactory construction of this Bill, there is a genuine intention to get this Bill through Parliament. The Bill is presumed to create suitable legislation to facilitate public interest disclosures and whistleblower protection in the public sector. Therefore it is difficult to understand why the Government failed to incorporate or adapt parts of the 'Andrew Wilkie' 2012 Public Interest Disclosure bill. Similarly it is difficult to understand how the Bill has been drafted with such poor regard for the advice received by the Government through the 2009 Dreyfus Committee. It seems that the Government has had in mind a model for public interest disclosures for some time and virtually nothing the States, Territories, research projects or inquiries have done to inform the government has been utilised in drafting this Bill.

The government has clearly failed to take a more inclusive approach to the development of this current Bill. Good solid information, advice or research has been available about the need for, and measures which would improve public interest disclosures and whistleblower protection. But as the Bill stands it is clear that such information has been seriously undervalued.

However the government has done the right thing by floating this draft Bill for comment and possible reconsideration and re-drafting. It can only be hoped that in reconsidering the current Bill, the government will actually listen to those who have real time, real life experience with the problems associated with public interest disclosures and the protection of whistleblowers.

Unless there are very dramatic and significant improvements to this Bill, it will do little to promote public confidence in the legislation and do nothing to encourage whistleblowers to come forward or to protect whistleblowers when they do so.

**The Bill must become law**. Even if this legislation is unable to provide public sector transparency and accountability in the public interest and even if it is unsuitable or dangerous for whistleblowers, it must be put into law. Once the legislation is enacted at least Australia will have public interest disclosure legislation which acknowledges the need for whistleblower protection. That is something that does not exist at a National level at present. If this legislation does not become law then it is unlikely that any foreseeable government will even contemplate similar legislation for years to come.

It is easier for public opinion or political policy to fix ineffective public interest disclosure legislation than it is to force any Government to introduce legislation which would promote public sector accountability, public interest disclosures and whistleblower protections.

## Submission

1. **A Whistleblower by any other name:** Throughout the world an individual who makes a public interest disclosure is identified as a 'Whistleblower'. It is incomprehensible that this Bill does **not** refer to individuals who make public interest disclosures as 'Whistleblowers'. This Bill does not even acknowledge the universally accepted label of 'Whistleblower'. It seems politically and legislatively pedantic and prejudicial to avoid defining 'Whistleblowers' in the Bill..
   Even if, for some "political correctness gone mad" reason the title 'whistleblower' was found to be unsuitable, then why not define the term 'discloser' in Section 8. This term is used in the Bill to describe whistleblowers but it is not defined in Section 8.

   Section 8 of the Bill defines dozens of people by their function or action. The failure to define Whistleblowers or define 'discloser' in Section 8 is yet another example of systemic public sector discrimination and prejudice against whistleblowers. Moreover it tends to reinforce the perception (of Whistleblowers) of the significant influence that senior public sector individuals (i.e. mandarins) have had in guiding the principles of this Bill.

   **Recommendation:**
   a. Define 'Whistleblowers' as the individuals who make public interest disclosures.
      [*"Whistleblower" is the descriptor used in this submission to describe an individual who makes a public interest disclosure*. ]

   b. If the term 'Whistleblower' is to be banned from the Bill then at least in Section 8, define 'disclosers' as the individuals who make public interest disclosures and who need protection.

   c. If 'Whistleblower' is not used in the Bill to identify those who make public interest disclosures, then it would be helpful to have a 'Note' in Section 8 providing some rationalisation for that prejudicial and depreciatory like decision.

2. **'Public Interest' is primary criteria**. The public sector, particularly at decision making levels, is unjustifiably obsessed with secrecy. This secrecy obsession is primarily imposed so as to avoid accountability. The secondary secrecy consideration is about protecting aspects of the public interest. This secrecy fixation is the perfect breeding ground for institutionalised wrongdoing and/ or corruption. The extent of public sector wrongdoing or corruption is not known. But unless Australia and the Commonwealth public sector are both unique in the world – then corruption certainly exists in the public sector. Some research suggests that there is sufficient misconduct to be concerned. Recent criminal arrests and Crime Commission inquiries confirm that there is public sector wrongdoing and criminal activities.

   Public sector information and processes are consistently classified with unnecessary levels of disclosure restrictions. In particular, many if not most matters which are well past their time of relevance, retain a totally unjustifiable nondisclosure status.

'Nondisclosure' is the informal self-imposed default classification of public sector information. Information is not released or readily accessible simply because it is public sector information.. This is a cultural characteristic of the public sector.

It is a combination of culture, control of information and outcomes, power in knowledge, avoidance of accountability and protection of vested interests which underpins the public sector secrecy obsession. Undoubtedly there is also an element of wanting to protect aspects of the public interest. But after 43 years of observation it is clear that the self-interest of the public sector far outweighs any concern to protect the public interest.

This cultural secrecy obsession is a public sector fixture. The consequence of this culture is to stop any disclosure of information which may hold elements of the public sector to account. It also breeds an environment where misconduct and corruption can flourish.

This Bill is extremely prescriptive and is based on procedure rather than public interest value and the context of the information. The method used by the public sector to protect their self-interest is to create procedures and controls which appear to be designed to protect the public interest but are really generated to protect the secrecy interests of the public sector. This Bill is a classic example of that procedure.

The 'Kessing' matter is the ultimate example of public sector procedures being given primacy over the public interest. In that instance the release of the Border Security information significantly served the public interest.

Yet because procedures which were designed to protect the public sector were not used, the public sector was able to retaliate by inappropriately and unnecessarily using legislation to protect their prized secrecy interests and to deflect any move towards accountability.

The principal aim of the Bill should be the unfettered disclosure of any information generated within the public sector, provided that the disclosure causes no real harm to the public interest, the public sector or clients of the public sector. And whether the disclosure causes embarrassment or other administrative difficulties within the public sector, it should not be an impediment to disclosure.

In effect this Bill is more akin to a public sector protection bill than a public interest disclosure bill. This Bill should have described the matters which must be disclosed (the forms of corruption and misconduct) in the same detail that it lists grounds for non disclosure.

The non disclosure restrictions in this Bill are akin to those in the Freedom of Information Act. But whereas the FOI Act non disclosure provisions are intended to protect the greater public interest, the same non disclosure provisions in this Bill may be used to protect wrongdoing or corruption. Therefore this Bill should impose more restrictions on the grounds for non disclosure to ensure that the disclosure of wrongdoing is not hampered.

Failing to establish a default environment for disclosure enables matters of public interest to be hidden and it makes the whole process of exposing wrongdoing all the more difficult. And likewise providing protection for whistleblowers is all the harder in an environment of secrecy and avoidance of accountability.

Therefore a Public Sector Disclosure Bill should have three primary objectives.

I. Promoting and facilitating the disclosure of public sector information providing that the disclosure does no harm to the greater public interest.

II. Providing a means for witnesses of public sector wrongdoing (whistleblowers) to expose that wrongdoing and

III. To protect whistleblowers who disclose suspected wrongdoing.

Unfortunately the Bill does nothing to promote an environment of disclosure. As a consequence the environment of secrecy will be maintained. This will ensure that the process of making public interest disclosures will be less safe and information about the so called protection of whistleblowers will continue to be subject to disclosure restrictions.

3. **Too late to reverse the focus of this current Bill.** The legislation should have been directed at promoting the timely and safe disclosure of public sector information. Instead it has been constructed to introduce a prescriptive process that does little to properly service the public interest and which offers complex whistleblower protection procedures.

Unfortunately this Bill will be an inducement for some naive and ill informed whistleblowers to come forward and again place themselves at risk of severe harm. Some will survive, others will not. But at least some whistleblowers may disclose information which will serve the public interest and they may still survive. The weaknesses of the act will become apparent and it will be difficult for governments to defend legislation that protects the public sector at the expense of serving the public interest. Therefore as a generalisation, that is possibly a better outcome and certainly no worse than has been available to date.

As indicated in the above 'Preface', it is better to have a Public Interest Disclosure Act that may do little to service the public interest and very little to protect whistleblowers, than it is to have no Act at all. For years governments and the public sector have denied or obstructed the release of information which would inform the public and serve the public interest (see Kessing below). At the same time, whistleblowers have persistently suffered for their moral principle of trying to release information that would inform the public and serve the public interest (again see Kessing). At least this current Bill holds out some hope that the public and whistleblowers will get some improvement to the current situation and that should be sufficient justification for its acceptance.

Despite the considerable inadequacies of the current Bill, it is a small but worthwhile move in the direction of freedom of political expression, transparency of the public sector, accountability of public sector decision makers and a preliminary move towards some protection for Whistleblowers.

**Recommendation:**

a. Where possible change the focus of the Bill to promoting the disclosure of public sector information provided that the disclosure causes no harm to the public interest.

b. Change the focus of the Bill towards the safe disclosure of public sector information.

c. Any restriction on disclosure must be justified and the primary justification test is whether the disclosure will cause real harm.

d. Transparency and accountability of the public sector should be the aim even if it exposes the public sector to criticism, censure or reprimand.

4. **'Exemptions' should be based on subject not position**; The title of the Bill is the 'Public Interest Disclosure Bill 2013 (Cth)'. The title indicates that the government is actually seeking to serve the public interest by the disclosure of public interest information. But regrettably the Bill is narrowly focussed and it only provides for the disclosure of information about public sector wrongdoing (and some protection for whistleblowers).

   Given the range of people and agencies who are excluded from disclosures, it would be more appropriate for the Bill to be titled the Public Interest (Exempt Entities) Disclosure Bill.

   Excluding people and agencies on the basis of who they are or what they are, seriously undermines the credibility of legislation narrowly aimed at the disclosure of information about any public sector wrongdoing. That proposal implies that some Commonwealth public sector people or agencies are beyond questioning about suspect conduct or misconduct. It further implies that the public has very limited rights to transparency or accountability in respect of certain classes of people or agencies within the Commonwealth. This is a bad precedent and opens the door for those classes of people or agencies to be expanded on a political whim.

   The principal for any exclusion to apply, must be strictly dependent on whether the exclusion best serves the public interest. For any person, agency or subject to be excluded from disclosure there must be an objective and substantive reason that serves the greater public interest. The reason should not be based on a title, status or position but rather on whether the disclosure will best serve the public interest.

   Therefore there should be no exemptions which exclude government ministers, ministerial staff, the Speaker of the House, the President of the Senate and officers of courts or tribunals.

   The exemptions from disclosure as set out in Section 26 are comprehensive and parallel the FOI Act. Those exemption should address any unique need to protect the functions or work of those positions set out above. If there are any functions or work carried out by those people in those positions which need further non disclosure protection then those matters should be added to Section 26.

   **Additional provisions** are also necessary to regulate when (timing) information must be made available for public access. If a matter was exempt from disclosure but is no longer current or its disclosure is no long likely to have any adverse affect on the public interest then the matter should be disclosed or be available for disclosure despite its previous exempt status.

   The legislation should be clear enough for any reasonable person to determine what subjects are prima facie barred from disclosure on the basis of a greater public interest. However it is not legislatively possible to cover all possible valid reasons for exemptions or justification for disclosure. Therefore it is possible that some disputes may arise as to whether the subject is validly excluded from disclosure.

There is already a FOI Commissioner who could adjudicate (within a tight time frame) whether a proposed disclosure contained information which is barred (in whole or part) from disclosure.

**Recommendation:**

a. exclusions from disclosure should not be based on position, rank or title.

b. exclusions from disclosure must only be based on subject material (as per the FOI Act template) and time relevance.

c. In determining whether a matter should be excluded from disclosure or disclosed, the test should be which serves the greater public interest.
   An exclusion which is likely to protect the greater public interest from harm will be deemed to best serve the greater public interest.

d. A proposed disclosure could be subject to appeal/review and determination by the FOI Commissioner.

5. **Any source should report public sector wrongdoing**: Restricting the Bill to persons within the Commonwealth public sector is a wasted opportunity that does not properly serve the public interest.

Public sector clients are well placed to observe or be subject to public sector wrongdoing. It is vital that members of the public or clients of the public sector have an open doorway to readily submit information about suspected public sector wrongdoing. Every opportunity and means must be provided to permit members of the public or clients of the public sector to submit information about suspected public sector wrongdoing.

Section 70 permits individuals from outside the public sector to provide information about suspected wrongdoing but only by written leave of an authorised officer. This thorny provision should effectively dissuade any non-public sector individual from ever offering to make a disclosure about public sector wrongdoing. The process is unnecessarily complex, restricted and overwhelming. A witness to suspected wrongdoing may well put themselves in jeopardy simply by trying to find a principal or authorised officer to whom a disclosure should be made.

It is suggested that complexity of the disclosure process has been done to dissuade general members of the public who have a grievance against the public sector or particular officers from lodging false and malicious claims..

This is definitely a serious concern. But the solution is quite simple. Any individual member of the public should be able to submit information about alleged/suspected wrongdoing in the public sector.

The Bill should make provision for allegations of wrongdoing to be recorded on a form signed by the person making the disclosure. The form would contain a notice that any false or malicious claim will attract a significant penalty.

Similarly the reverse should also apply. Any official who falsely or maliciously claims that a person has attempted to induce them into wrongdoing should be subject to severe repercussions.

Public sector officers soliciting bribes or other persons inducing a public officer to accept a bribe or coercing a public officer into a wrongdoing, is a worldwide phenomenon. Such conduct may not only involve public sector clients and public sector officers but may also include witnesses who observe those people engaged in possible wrongdoing.

The possibility of public sector officers being offered bribes or suffering coercion is high. And there is also a possibility that some public sector officers may solicit a bribe or benefit from a member of the public. Individuals directly involved or other members of the public may witness or be aware of these types of activities. Therefore it is vital that all members of the public are able to easily report matters where they have an honest belief of possible wrongdoing within the public sector.

In an effective and comprehensive Public Interest Disclosure Bill, provision should exist for the protection of any person who reports suspected wrongdoing associated with the public sector.

It is acknowledged that legislating for the protection of a person outside the public service raises a range of difficulties. Nonetheless to help remove corruption and wrongdoing from the public sector, it is important that any person who discloses public sector wrongdoing should be afforded proper protection and compensation if they are harmed or damaged for so doing.

It should be a criminal offence to cause or threaten harm or disadvantage to a person because they disclosed public sector wrongdoing. All the protection provisions and the compensation structure that exists under the current Bill should be available to any person who suffers any harm or disadvantage as a result of disclosing public sector wrongdoing.

**Recommendation:**

a. the Bill should provide a means whereby any person may report alleged or suspected public sector wrongdoing.

b. The Bill should make provision for serious penalties to be applied to any person making a false, malicious or mischievous report of public sector wrongdoing.

c. The Bill should make provision for serious penalties to be applied to any officer who makes a false report about a person attempting to bribe or coerce the officer in the course of their duties.

d. The Bill should include any person who has reported public sector wrongdoing in its protection and compensation provisions.

## 6. Unsatisfactory reporting and investigation arrangements

Under this Bill, the reporting and investigation arrangements should be carried out by an independent organisation and
the protection, support and restitution of whistleblowers must be carried out by Comcare/OHS (See below)

The reporting and investigation procedures as set out in the Bill should be scrapped. There is no way to save them as they are totally inappropriate. The internal reporting mechanisms (Sections 34 -36) have the potential of being outright dangerous. The Investigative arrangements are at best lax and unprofessional and may well be counterproductive.

All references to an agency carrying out internal investigation within their own agency or having the ombudsman's office carry out investigations should be expunged from the Bill.

**Recommendation :**

a. The most appropriate Commonwealth corruption reporting mechanism is to have an independent Commonwealth body such as the NSW Independent Commission Against Corruption or the Queensland Crime and Misconduct Commission.

b. Given the financial constraints on the government at this time it is clear that the Commonwealth Corruption Commission will not be established.

c. It is possible that the Australian Commission for Law Enforcement Integrity (ACLIE) could be expanded to include a Commonwealth corruption reporting and investigation unit. Utilising the resources and skills of ACLEI's integrity and investigative specialist would be cost-effective and bringing professional standards into corruption investigation.

d. As another alternative it may be possible to use the Australian Federal Police, Integrity and Professional Standards unit as the primary investigative body.
*Whether disclosures were made to ACLEI or the AFP - they will be referred to hereunder as the Reporting Agency.*

e. To facilitate the reporting process to the Reporting Agency, each Commonwealth agency or employer would nominate a vetted employee or employees as the reporting officer(s) to whom whistleblowers would make their initial disclosure.

f. These agency employees would be designated as acting ACLEI or AFP officers and would be under the direct control of either ACLEI or AFP in respect of any whistleblower disclosure.

g. No Commonwealth agency or employer would be entitled to any information in relation to a disclosure until after the matter had been considered by the Reporting Agency.

There can be no justification for legislation which permits an agency to conduct their own inquiry into allegations of corruption. There is no Commonwealth public sector organisation which has the capacity to independently and objectively assess and report on their own conduct. For that reason ACLEI has been created to oversight Commonwealth law enforcement organisations.

In the absence of an agency with Commonwealth wide oversight authority it will be necessary to utilise some other independent agency.

**Ombudsman's office;** The ombudsman's office carries out up to 20,000 enquiries per year concerning administrative practice and procedure within the Commonwealth public sector.

It has levels of expertise appropriate to carry out those duties. It is fair to say that under the workload, the ombudsman's office does an exceptional job in dealing with the resolution of disputes about public sector processes and procedures.

But the ombudsman's office has absolutely no capacity to deal with criminal matters or serious acts of wrong doing by public sector officials. There is no level of expertise in relation to the investigation of criminal matters or the protection of whistleblowers. For years the Commonwealth ombudsman's office has consistently failed to objectively or professionally deal with whistleblowing matters.

The Ombudsman's office repeatedly rejects whistleblower attempts to disclose on the basis that the situation is employment related and it is barred from considering work related matters. On rare occasions when a disclosure is reported, the Ombudsman's office immediately reports it to the affected agency. This goes beyond a mere incapacity to deal with whistleblowing matters. It actually seems to suggest ineptitude in dealing with whistleblowing matters.

Without knowing who they are reporting to in an agency, the Ombudsman's office discloses everything the whistleblower as disclosed including their name and other relevant identifiers.

It cannot be stressed strongly enough that the Ombudsman's office is not an appropriate agency to deal with the reporting or the investigation of any whistleblowing matter.

Finally it must be pointed out that no consideration whatsoever should be given to having the Public Service Commission or the Merit Review Commission being used as an alternative to the Ombudsman's office. In respect of whistleblowing disclosures, the Ombudsman's office is a skilled, competent, well-qualified and professional organisation when compared to be Public Service Commission.

7. **Protections or remedial action; I**t should be noted that taking action to stop a reprisal or detriment (including a threat) is not protection; it is remedial action. The whistleblower has already suffered the reprisal/detriment or threat. And subsequent action cannot be claimed to be protection – any action can only be described as remedial action.

   Section 59 requires a principal officer to conduct a risk assessment of a potential detriment to a whistleblower. And subsection 3(a) requires that reasonable steps be taken to protect the whistleblower from reprisals. There is no actual mechanism suggested or stipulated as to how the assessment is made – that appears to be at the discretion of the principle officer. The whistleblower is not identified as a contributor to the risk assessment.

   However in effect, virtually none of the statutory public sector detriments can be imposed on a whistleblower within an organisation without some authorisation or sanctioning of the principal officer, either directly or implicitly through delegated officers acting for the principal officer.

   Dismissal is a prerogative of the principle officer. Injuries and discrimination are matters reportable to the principle officer (as per Comcare or Anti Discrimination legislation). Alteration of an employee's position is normally a process that has to be approved by human services based on a reasoned purpose. Human services officers are delegates of the principle officer.

If the detriment was merely a rouge officer imposing a detriment on a whistleblower, then the obvious resolution would be for the principle officer to immediately terminate the detriment on a simple application by the whistleblower. If a detriment continues to the point where a whistleblower has to institute proceedings in the Federal Court, that shows that the risk assessment by the principle officer was seriously flawed and that the "reasonable steps necessary to protect the whistleblower" were totally useless. Therefore, for the matter to get to the point where Federal Court intervention was necessary, strongly suggests that the principle officer was total incompetent, indifferent to the detriment being inflicted on the whistleblower or complicit in the reprisal against the whistleblower.

**Recommendation: COMCARE to be the Protection Agency**

The root of this issue is that there is no independent authority which has statutory responsibility for the protection of the whistleblower. Comcare has associated Occupational Health and Safety (OH&S) responsibilities. The health, protection and safety of whistleblowers is a Comcare/OHS duty and responsibility. This should be formalised within the Bill.

**a.** Comcare should have total responsibility, resources and means to ensure that whistleblowers are protected from detriment or harm.

**b.** Comcare must be the first agency informed when a whistleblower makes a disclosure – and no other agency (including the agency in which the suspected wrongdoing is occurring) is to be informed of the whistleblower or the disclosure until Comcare is able to ensure that the whistleblower is receiving adequate support and appropriate protection.

**c.** Comcare must be empowered to direct an agency in matters to ensure adequate protection is provided to a whistleblower.

**d.** Where Comcare takes positive and successful action that reasonably and effectively protects a whistleblower from reprisals or detriment, all costs and associated expenditure by Comcare shall be reimbursed to Comcare by the agency where protection action was instituted.

**e.** Where a whistleblower suffers any unreasonable or avoidable detriment or reprisal, Comcare will bear the burden of compensation, restitution and reinstatement and will pay an exemplary penalty to the whistleblower

8. **No protections – only remedies**. As a generalisation, the protections offered in the Bill for various forms of overt detriment are not protections, they are remedies. Compensation and Injunctions only apply after a person is threatened, harmed or suffers a detriment. If a person is threatened or harmed or suffers a detriment then they have not been protected – they are already victims of harm. Therefore it is beyond comprehension that the Bill requires the whistleblower to institute proceedings in a Federal Court to stop harassment and victimisation.

When reprisals are taken against whistleblowers the first things that happen is their health deteriorates, they lose income (particularly when Comcare and the employer rejects ill-health claims), and the whistleblower is usually moved to jobs where their income is further reduced.

In a victimise state of stress and anxiety with reduced incomes and a strong potential that they will lose their jobs, this Bill explicably requires the unassisted whistleblower to institute proceedings in the Federal Court to seek satisfaction and remedy.

9. **Overt reprisals and detriments;** The Bill sets out reasonably comprehensive 'explicit' detriments/reprisals which are prohibited from being inflicted upon a whistleblower. These detriments are of the types which are overt and reasonably unambiguous. Dismissal and injury are pretty obvious detriments. Detrimental alteration of employment and discrimination are somewhat less definite but in general are readily provable.

   The Bill sets out offences and penalties which are complimentary. The Compensation, injunctions and reinstatement provisions are comprehensive. However what seems to be missing is a mechanism and resources necessary to enable a whistleblower who has suffered detriment to institute proceedings in the Federal Court . Even if a whistleblower manages to find sufficient resources to mount a claim for protection, Section 23 should stand as an effective barrier against proceedings for a claim. This Section is unnecessarily complex and convoluted.

   **Recommendation:**

   a. The Bill must provide a means, resources, facilities and help generally for a whistleblower who has suffered a reprisal or detriment to institute proceedings in the Federal Court

   b. Section 23 must be rewritten so that it clearly describes the individuals concerned, the actions to be taken and how a claim should be processed.

10. **OVERT as compared to COVERT detriments**.
   *(Capitals are used to distinguish between the words Overt and Covert)*

   The Bill sets out reasonably comprehensive Overt detriments or reprisals which are prohibited from being inflicted upon a whistleblower. These detriments of dismissal, injury, alteration and discrimination are fairly, explicit and reasonably unambiguous. The Bill makes it an offence to inflict these detriments.

   The use of Overt detriments tends to be restricted to lower levels within the public sector. They are seldom used by upper levels of the public sector because Overt detriments are observable and readily exposes those involved to more accountability.

   As an alternative, the senior Public Sector has found that subtle Covert detriments are more effective. And an additional benefit is that they also have a broad "chilling effect" across the rest of the public sector structure.

   Unfortunately this Bill does not acknowledge the existence of Covert detriments. Nor does it make provision to prevent Covert detriments. Covert reprisals do not readily fit into the Bill's definition of reprisals or detriment. At times Covert reprisals may touch on discrimination but by careful manipulation of the reasoning behind the treatment of whistleblowers, Covert reprisals are made to look like the whistleblower is receiving a benefit rather than a reprisal

**Covert reprisals tend to be more damaging than Overt reprisals.** Covert reprisals are the invariable reaction of senior public service officers against whistleblowers who make any disclosure about suspected public service misconduct.

Covert reprisals involve action which on the face of it appear to be for the benefit of the whistleblower but are a reprisal in sheep's clothing. This form of reprisal is used to protect senior public sector officers from complaints about victimisation and harassment.

Covert reprisals are a form of reactive persecution and should be regarded as a unique systemic form of public sector corruption. This form of corruption is significantly different from the usual forms of criminal corruption and is usually not directly associated with that form of corruption (though it can be). Reactive persecution is based on the abrogation of moral and ethical conduct, avoidance of responsibility, rejection of accountability, perversion of fairness and engaging in wrongdoing generally for nothing more than self interest. The aim of this corrupt conduct is to protect self interest at any cost, even if that means the destruction of another person who has not intentionally done anything wrong.

This Bill deals with the issue of whistleblower protection on the basis that whistleblowers only suffer from overt and explicit forms of retaliation and reprisals. Unfortunately the worst forms of retaliation and reprisals are the furtive and undeclared covert kind of reactive persecution. Knowing that your career, income, health, well-being and future in general is in the hands of people with unlimited power and resources, who clearly are hostile to you and have no scruples about how much damage they can do to you is like standing in front of an active volcano with the lava already around your feet. This form of reprisal is completely devastating because it is personal, protracted, covert, insidious and wilfully malevolent.

The Bill does not address the issue of covert reprisals or reactive persecutions. *In the examples below, substitute 'the whistleblower' with the name of the person who made the disclosure.*

Examples of statements used to disguise covert reprisals;

- After movement to a new dead end job "administratively moved to a newly developed position to protect the whistleblower's interest,"
- relocated to a new and unfamiliar work location to "assist the whistleblower with gaining a broader perspective of the organisation."
- Having previous exemplary performance reports reviewed "to re-check the accuracy of the reports" (which are then down-graded).
- Removing any supervision of staff "to help the whistleblower cope with the disclosure issue" or "to help the whistleblower get through this difficult time".
- located in the only workstation that has no sunshade so the whistleblower cooks all day ("it is regrettable but it is the only workstation available near to the supervisor")
- placed under a new supervisor to "help the whistleblower adjust to the new work" (but the supervisor imposes levels of output equal to officers trained in the area.
- described as "disloyal" at every senior officer meeting with consequential flow-down effect,
- referred to a psychiatrist "because our duty of care is to ensure the whistleblower is not suffering a mental disorder" (while providing surreptitious reports suggesting a mental condition)
- shopping for a psychiatrist until one eventually gives a diagnosis that meet the needs of the agency "to ensure that the best medical advice is obtained'. ,

- has had their Comcare claim of stress and anxiety rejected by the employer and Comcare,
- taken off a useful training course " because we want to enhance the whistleblowers skills in a new direction".
- put on a totally useless training course "to enhance the whistleblowers skills," and
- perhaps offered a redundancy –

none of which would meet the definition of a "detriment" within the Bill. .

**Recommendation:**

a. The Bill must acknowledge the existence of covert reprisals and reactive persecutions.

b. The Bill must define conduct which amounts to covert reprisals and reactive persecutions

c. the Bill must provide protective measures against covert reprisals and reactive persecutions

d. the Bill must ensure compensation and restitution for any whistleblower suffering covert reprisals or reactive persecutions

**11. Bill not reasonable, adapted or suitable for the purpose intended;**

The objects of the Act are:

(a) to promote the integrity and accountability of the Commonwealth public sector; and

(b) to encourage and facilitate the making of public interest disclosures by public officials; and

(c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and

(d) to ensure that disclosures by public officials are properly investigated and dealt with.

Unfortunately these provisions of the Bill do not seem reasonable and are barely adapted or suitable for the execution of good government through civil and criminal processes and judgements.

Object (a) makes reference to the Commonwealth public sector but as discussed elsewhere above, some people or positions are exempt from this Bill not because of the function they carry out but on the basis of who they are.

Perhaps a more truthful object (a) should read;

(a) "to promote the integrity and accountability of the Commonwealth public sector with the exemption of certain entities within the Commonwealth public sector..

In respect of sub clause "(b) to encourage and facilitate the making of public interest disclosures by public officials;"

It is possible that some public service whistleblowers will be induced by the Bill/Act to make public interest disclosures. It should encourage ill informed, naive and unwary public servants to make disclosures about suspected public sector wrongdoing. But this should only last till they discover that the Bill is not designed to protect them from reactive persecution or covert reprisals.

**As for (b) 'facilitating' disclosures**, it seems that the only facilitation which may be achieved relates to some procedural matters dealing with the administration of a disclosure. There is no 'facilitation' issue that will assist a whistleblower. The set timeframe of dealing with a disclosure will ensure that the whistleblower cannot do anything to stop harm or detriment being inflicted until the matter is investigated and determined. By the expiry of the timeframe the whistleblower will have been subjected to reactive persecution and covert reprisals.

The time-frames will have another effect. The 14 days and then the 90 days (or more) to deal with the disclosure will do nothing to facilitate anything other than an opportunity to cover up any wrongdoing.

How disclosures are 'facilitated' by the processes set out in the Bill seem to have nothing to do with the whistleblower. All procedural matters that can be 'facilitated' seem to happen after the whistleblower has made the disclosure. Perhaps the "facilitation of disclosures" only applies to the processes used by everybody other than the whistleblower.

**In respect of sub section "(c)** to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures;"

**Support:** There is nothing in the Bill which makes reference to support or advises how support is provided to a whistleblower.

Unfortunately the Bill does not require that any 'support' be provided to a whistleblower at any stage either before, during or after making a disclosure. And though it is obvious that support is needed before making a disclosure and at the time of any disclosure it is absolutely vital that such support is available after making a disclosure. Though the objects of this Bill claim to provide support, the Bill is totally silent on the subject. There the 'object' claiming that support is ensured is plainly false..

There is a fundamental "duty of care" obligation on public sector employers to ensure that whistleblowers who are making a disclosure in the public interest are properly supported in that endeavour. But this Bill abrogates any responsibility on the part of employers to provide support to employees when they make or intend to make a public interest disclosure. The tumult, anxiety and fear experienced by any public official who intends to expose suspected wrongdoing in an agency is statutorily entitled to proper support and protection against harm or detriment.

'Support' indicates that a whistleblower will have access to support throughout the process of making a disclosure. There are at least 3 phases of making a disclosure.

a. Pre-disclosure;
b. After the disclosure but pre determination and

c. Post disclosure.

**Pre-disclosure Support**; 'Support' suggests that a prospective whistleblower will be able to get advice about making a duty bound disclosure about wrongdoing. Before making a public interest disclosure the whistleblower must be given confidential preliminary advice on the full ramifications that making a disclosure will have.

The whistleblower must be advised about their duty to disclosure matters and how that will benefit the public interest. Information must be explained about the need to make statements, give evidence, attend court and be cross examined. The nature of whistleblowing must also be explained to the prospective whistleblower along with likely effects that making a disclosure will have on the whistleblower, his or her career, income, job prospects, health, mental stability and family relationships in general. To give confidence and support to the whistleblower, the agency dealing with the disclosure should declare their credentials in dealing with criminal and serious civil or administrative wrongdoing. They should also describe their successful experience in protecting whistleblowers who are involved in disclosures related to crime and serious civil wrongdoing. And of course the procedural timeframes for dealing with the disclosure should also be explained.

This sort of advice should be a mandatory part of the Bill to ensure that employers meet their duty of care obligations. And whistleblowers must be properly advised of the risks they are taking in complying with their duty to disclose wrongdoing.

Pre-disclosure Support requirements pale into insignificance compared to the support that is necessary for whistleblowers once they actually make a disclosure. As there is no certainty how this Bill may be altered, it is a fruitless exercise to suggest how support might be offered at various stages of disclosure.

In reference to Object (d)
to ensure that disclosures by public officials are properly investigated and dealt with.

See **Unsatisfactory reporting and investigation arrangements** above.