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22 December 2023

Attorney-General's Department

3-5, National Circuit, Barton, Australian Capital Territory 2600

By email: PID.consultations@ag.gov.au

Dear Attorney-General's Department,

RE: Public sector whistleblowing stage 2 reforms

Who we are

Governance Institute is a professional membership organisation with more than 8,000 members working in governance and risk management roles in listed and unlisted companies, charities and not-for-profits and the public sector. We also influence a broader community of 43,000 individuals who engage with our activities including education, training, advocacy and information about governance and risk. As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates, and postgraduate study.

Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society. Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted, and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors.

We regularly contribute to the formation of public policy through our interactions with the Attorney General's Department, Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the ASX Business Committee and the ACNC Sector Users Group.

Governance Institute has been actively engaged in advocating for reform of the laws relating to whistleblower protection for some years.

General Comments

Governance Institute welcomes the Government's proposals to improve whistleblower protections for the federal public sector under the *Public Interest Disclosure Act 2013* (PID Act). Our members see these reforms to be long overdue, and hope they represent the beginning of more comprehensive whistleblower reform for both the public and private sectors.

Given our members are drawn from both sectors, Governance Institute is ideally situated to understand the difficulties of the current complex whistleblower protection system. Improving whistleblower protection in either sector will be undermined without a strong commitment to consistent protections across both sectors.

Governance Institute advocates that there should be a consistent whistleblower protection regime for both the private and public sectors, so the duplicative or different rules do not deter whistleblowers or confuse employers about whether or how protections apply. Harmonising the regimes would eliminate the current gaps in protection coverage (for example, for private sector employees including consultants who 'blow the whistle' on public sector wrongdoing, and vice versa), so no-one is in doubt which protections apply to them.

It will be easier, and more cost-efficient for government, individual agencies, and businesses if simpler, consistent protections apply across the board, rather than the current piecemeal situation involving different regulators, which each lack sufficient resources. The Griffith University Whistling While They Work[1] research demonstrates that the dynamics of whistleblowing are the same for public and private sectors. For this reason, the regimes for the public and private sector should be as harmonised and consistent as possible.

As they stand, whistleblower protections are complex to understand, complex to administer and confusing for anyone contemplating speaking up about unlawful, unethical or irresponsible behaviour. As the best source of information about misconduct in an organisation is its employees, they should be encouraged to speak up about any unlawful, unethical or irresponsible behaviour without complex dissuading barriers unnecessarily blocking them doing so.

The current patchwork of provisions expects an unrealistic level of sophistication on the part of whistleblowers in relation to their ability to analyse and understand which legislation and which regulator covers misconduct. A whistleblower should not need a nuanced knowledge of applicable legal and regulatory frameworks to know to which regulator or law enforcement agency they should make their disclosure to qualify for protection. It is a strong disincentive to making disclosures if employees or other relevant parties feel that they require legal advice before making any such disclosure.

More sophisticated whistleblowers are not necessarily in a better position. Even qualified professionals, aware of their responsibilities and able to navigate the legislative maze report difficulty in determining which regime may apply to a particular situation.

The need for a comprehensive, sector agnostic and harmonised legislative regime has been apparent for some years. In 2017, Senator Deborah O'Neill wrote in the Parliamentary Joint Committee on Corporations and Financial Services Report 'Whistleblower Protections'[2]:

> *'Currently, whistleblower protections are simply not working. They're inadequate and are rarely used, especially in the corporate sector. Whistleblowers are not coming forward, and that is because we have failed to protect them'.*

Governance Institute also considers that there is a need for an independent Whistleblower Protection Authority. An independent, single source, sector agnostic authority for whistleblower protections would provide the necessary clarity and confidence for potential whistleblowers across all sectors to report unlawful and unethical behaviour. Knowing what support for whistleblowers is provided, and knowing how to access this support are some of the strongest predictors that a whistleblower will be well-treated.

Our responses on specific consultation questions are set out below.

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[1] Griffith University, Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations. The WWTW2 Project | Whistling While They Work

[2] Joint Parliamentary Committee on Corporations and Financial Services, Whistleblower Protections. Report – Parliament of Australia (aph.gov.au)

Consultation Questions

1. **Who should be protected for public sector whistleblowing under the PID Act?**

Whistleblowing has a critical role to play in identifying and stopping misconduct. As the best source of information about misconduct in an organisation is its employees, they should be encouraged to speak up about any unlawful, unethical or irresponsible behaviour. 'Employees' should refer to more than permanent staff of a department and include contractors.

Public servants who internally disclose corrupt conduct anywhere in the public sector should attract PID protections, regardless of whether the conduct specifically related to their own agency. This should also apply to private sector employees who blow the whistle on public sector misconduct as contracted employees or as informed observers.

A harmonised legal framework of whistleblower protections would also allow parliamentary and ministerial staff to be protected by stronger whistleblower protections, rather than the piecemeal legislative protections that currently exist. In the absence of such a framework, these staff should be included under the PID Act whistleblower protection reforms.

Governance Institute supports the view taken in *Protecting Australia's Whistleblowers: The Federal Roadmap* by Griffith University, the Human Rights Law Centre, and Transparency International Australia, that a 'no wrong doors approach' is needed.[3]

2. **What, if any, additional pathways should be created to provide ways for a public sector whistleblower, including those from intelligence agencies, to make a disclosure and receive protections?**

Any disclosure by a whistleblower to any agency to whom they would logically report wrongdoing, should automatically trigger PID protections. This should include all specific integrity agencies, as recommended by the Moss Review, and any agency (or internal officer or area) with a general function of investigating relevant matters.[4]

Agencies which receive disclosures should have a responsibility to refer these disclosures to the right place, rather than requiring whistleblowers to 'shop around' in the hope of finding the appropriate recipient of the disclosure.

Agencies should not be able to 'opt out' or override basic principles in the PID Act, for example, that disclosers are protected even if they are anonymous or do not explicitly identify their disclosure as a PID.

3. **In what circumstances should public sector whistleblowers be protected to disclose information outside of government? Are there circumstances where information should not be disclosed outside of government?**

The current regulatory regimes are unhelpfully complex and inconsistent with each other, especially as to when external disclosure is deemed reasonable.[5] The current extra public interest test should

[3] Brown, A. J. & Pender, K. (2022). Protecting Australia's Whistleblowers: The Federal Roadmap. Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne
[4] Review of the Public Interest Disclosure Act 2013, Mr Phillip Moss AM, Review of the Public Interest Disclosure Act 2013 | Attorney-General's Department (ag.gov.au)
[5] Brown, A. J. & Pender, K. (2022). Protecting Australia's Whistleblowers: The Federal Roadmap. Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne

be simplified, or removed altogether, given that disclosure of wrongdoing is already in the public interest.

Our members support the expansion of the grounds for third party (external) disclosure to include:

- Disclosures to lawyers or other support persons, and in other circumstances where a disclosure has not been adequately dealt with, as recommended by the 2013 Moss Review
- Any circumstances where an internal or regulatory disclosure could not reasonably or safely be made.

7. What reforms to the PID Act should be considered to ensure public sector whistleblowers and witnesses have access to effective and appropriate protections and remedies?

Governance Institute members are in favour of making civil remedy and compensation rights workable by bringing them into line with international best practice, including reversing the burden of proof. [6] This would mean reverting the burden of proof onto the agency or individual allegedly responsible for detriment, when a whistleblower is seeking civil remedies such as compensation for detrimental treatment, bringing the PID Act further into alignment with the Corporations Act.

Moreover, where detriment flows from a failure to follow required procedures or to fulfil a duty to support or protect a whistleblower, this alone should be sufficient grounds for civil remedies (compensation etc), as is now partly provided for in NSW and recommended in Queensland.

These reforms should also include dedicated legal aid support for disclosers seeking legal advice or taking formal action to secure remedies to remove any unnecessarily burdensome barriers to disclosure.

8. Should the Act prescribe additional statutory minimum requirements for agency procedures under the PID Act?

Our members contend that there should be additional minimum requirements for agency disclosures under the PID Act which should not be less than those under the Corporations Act requirements. This is consistent with our members' support for harmonised whistleblower protection regimes across the private and public sectors.

Accordingly, Commonwealth contractors would also need to be required to have their own procedures, under which disclosures would automatically trigger the PID protections, unless or until private sector whistleblower protections are extended to ensure they apply.

9. In what additional circumstances should protections and remedies be available to public sector whistleblowers, such as for preparatory acts?

Our members consider protections should apply to all necessary or reasonable actions relating to the disclosure, including preparatory acts such as securing relevant information of which the discloser had become aware.

10. Do you have any other views on reforms for protecting public sector whistleblowers who make a disclosure under the PID Act, and remedies for when protections fail?

[6] Brown, A. J. & Pender, K. (2022). Protecting Australia's Whistleblowers: The Federal Roadmap. Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne

As is noted in the Griffith University Report Protecting Australia's Whistleblowers: The Federal Roadmap:

> *'A fundamental purpose of whistleblowing laws is to ensure that if a whistleblower suffers unjust detriment, this can be remedied through civil or administrative orders, employment remedies like reinstatement or financial compensation for impacts on their career, current and future earnings, personal life or mental health. This requires free-standing rights to remedies for injustice, irrespective of whether individuals knowingly or recklessly intended any harmful actions – which is the subject of separate criminal 'reprisal' or 'victimisation' offence*s.'[7]

Our members support this statement and consider the PID Act reforms should ensure civil remedies are available even for negligent or 'collateral' damage that could and should have been prevented, irrespective of the intent or state of mind of any person(s).

13. Are there benefits to better aligning the whistleblower protections available under the NACC Act?

Our members note that the NACC Act currently also criminalises reprisals (duplicating the PID Act). They therefore consider that rather than further replicating other whistleblower protections, for example, civil remedies, in the NACC Act, the full existing PID Act protections should be extended to all whistleblower disclosures of corrupt conduct anywhere in the public sector, irrespective of by whom and to whom the disclosure is made, unlike the current overly complex situation.

14. Do any gaps exist in the current oversight and whistleblower protection functions of agencies the Commonwealth Ombudsman and the IGIS? Who is best-placed to take on additional responsibilities to fill these gaps?

Our members believe there are major gaps. This is because the Ombudsman:

- Does not have the power or any obligation to provide independent investigations of most alleged reprisals or detrimental actions against a whistleblower, especially as they cannot investigate 'action taken in relation to… employment' of a public official, as opposed to matters of administration: Ombudsman Act 1976, s.5(2)(d))
- Does not have power to take legal action or make binding orders against individuals or agencies to enforce protections.
- Has a reactive complaint handling function, and
- Does not have the staffing or resources to undertake these functions, and other functions, including providing support, mediation or legal aid.

This is one of the reasons our members consider there is a need for an independent Whistleblower Protection Authority (WPA), as it would reduce burden on other agencies.

16. Should an additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?

Given the complexities involved in whistleblower protections, our members consider that there is a need for an independent WPA. This is not a new suggestion, having been recommended by a Senate Select

[7] Brown, A. J. & Pender, K. (2022). Protecting Australia's Whistleblowers: The Federal Roadmap. Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne

Committee in 1994[8], the Parliamentary Joint Committee on Corporations and Financial Services in 2017 in their Report on Whistleblower Protections (Recommendation 12.1)[9], and then as part of previous national integrity commission designs.

A stand-alone WPA should have the ability not only to enforce whistleblower protection legislation but could also play an important role in giving practical support to whistleblowers, providing guidance and educating organisations about their obligations. It would also reduce the complexity and potential for confusion involved in knowing which pathway a whistleblower should take where there is an issue.

The WPA should also be able to enforce whistleblower protections applying in any sector, not just the public sector – which would justify an additional independent body.

Our members consider this should be a priority reform.

17. **If established, is there an existing agency where it might be appropriate for an additional independent body to be located?**

Our members see clear independence from other agencies as a critical feature of a WPA.

18. **If an additional independent body is established, do you have any views on its operation, for example in relation to referral pathways, who should be able to make a referral, intersection with the external disclosure process, or the impact, if any, on available remedies for individuals that use the independent body?**

Our members consider that anyone entitled to, or considering making a whistleblower disclosure, under the PID Act or other federal whistleblowing laws, should be able to seek advice or support from the WPA.

This should include, under the PID Act, any person employed by a Commonwealth contractor, and should also include any person, wherever employed, who discloses wrongdoing covered by the PID Act, including corrupt conduct, and who may be at risk of detrimental consequences in their employment.

In this way:

- The WPA would act as a clearinghouse for receiving, referring and monitoring the progress of disclosures among other agencies, including investigatory agencies, as well as directly investigating, or mediating, alleged detriment or reprisals.

- Formal prosecution or legal action against persons who have made a public interest disclosure (PID) should not be able to be taken by agencies, unless they can first demonstrate to the WPA that the legal action is not linked in any way to the making of the PID.

19. **How would the role of an additional independent body differ from and intersect with other existing oversight agencies? Are there risks associated with establishing an additional integrity body alongside existing agencies – for example, duplication of functions,**

[8] See: Chapter 12 – Parliament of Australia (aph.gov.au)

[9] Joint Parliamentary Committee on Corporations and Financial Services, Whistleblower Protections. Report – Parliament of Australia (aph.gov.au)

stakeholder confusion or delays in conducting investigations, handling disclosures or processing complaints?

Our members contend that the role of the WPA would not be to investigate primary wrongdoing allegations, other than to assess that the discloser is entitled to protections, which would remain the role of existing oversight agencies. The existence of a WPA would ease the burden on agencies without their own resources, expertise or independence to effectively manage and resolve cases.

If you have any questions in connection with this Submission, please contact me or Catherine Maxwell, General Manager, Policy and Advocacy.

Yours faithfully,

Megan Motto

CEO