Submission: Public Interest Disclosure Bill 2013

'All men are equal. Do not flatter those in authority … and speak the truth. … Allah has for the time being made me your ruler. But I am one of you. No special privileges belong to the Ruler. I have some responsibilities to discharge, and in this I seek your cooperation. Government is a sacred trust, and it is my endeavour not to betray the trust in any way. For the fulfilment of the trust I have to be a watch-man. … I have to run the administration not on the basis of my personal preferences; I have to run it in the public interest and for promoting the public good.'

Umar bin Al-Khattab, Second Caliph of Islam, 580-644 AD

'In the performance of [official] duties, we shall have to become skilled evaluators of duty, and by calculation perceive where the weight of duty lies.'

Cicero, *de Officiis, Bk111* c.63 BC

A. Summary of Submission

This submission is concerned to assess a small number of critical policy and practice issues which arise from the Government's *Public Interest Disclosure Bill 2013*, rather than a detailed critique of the Bill's provisions.

In general terms, the submission is critical of a number of major features of the Government's Bill currently under consideration. These are set out in summary terms below.

The objective of creating '*a pro-disclosure culture in the Australian public sector'*, reflecting the principle espoused so long ago by the Second Caliph, namely that public office involves a trust duty on the part of officials, is properly seen by the Government as central to the Bill's

approach. The resulting focus on the disclosure of claimed 'wrongdoing', as defined by the law, instead of on a whistleblower's presumed motives or state of mind, is also rightly seen as crucial to creating such a culture.

It is my submission that the objective of all such laws must necessarily be to encourage the disclosure of wrongdoing, as defined, and imminent danger to persons or the public interest more generally, in an appropriate way, so that something might be done about it.

The encouragement of the principled disclosure of defined wrongdoing must therefore be conceptualized in the Bill as a primary fiduciary duty – in terms well understood by the Roman jurist Marcus Cicero. This is to be seen as a duty to advance the legitimate interests of the whistleblower's organisation, the government which the official serves in a position of trust, and the broader public interest, unaffected on the one hand by a personal concern for favour, or on the other by a Government's wish to protect its secrets.

The Bill, at minimum, must therefore encourage and enable officials to do what is generally still conceived of as their legal or fiduciary duty, to report fraud, misconduct, malfeasance, corrupt conduct, maladministration, and other forms of illegality, to the organisation or to a proper authority. In the present era, the Bill must also articulate effectively with existing Australian 'integrity institutions' and laws, and support the forthcoming National Anti-corruption Plan.

It is my submission that the current Bill is unlikely to achieve these crucially-important goals.

Complexity and Uncertainty

The Bill is very complex. It is my submission that the Bill is so complex that it is difficult even for experts to understand many of its provisions and their interactions.

It is also lacking in clarity on many matters, inadequate in scope, and variously at odds with its stated Objectives. It is likely that most intending whistleblowers will need a lawyer at their elbow to understand the many procedural steps required for a disclosure to be granted 'protection', and even then it is not possible to be certain *ab initio* that a given disclosure will in fact be protected.

It is also not clear that a genuine whistleblower is protected if their disclosure is considered by the receiving official as not constitutive of a protected disclosure. The Act is silent as to what grounds the receiving official must – or must not - take into account in reaching this decision, which can only occur after the disclosure, or purported disclosure, has been made.

The likely 'chilling effect' on intending whistleblowers is self-evident. It is also easily avoided.

Considerations of notions such as 'duty' in the context of Australian Public Service employment (and the provisions of the unhelpful APS Code of Conduct) aside, potential whistleblowers will be likely to require, not unreasonably, a reasonable degree of certainty that their disclosure *will* be covered by the available protections, not merely that it might be.

Overall, the Bill's excessively complicated processes and inadequate definitions fail to respond to real-world issues which other Australian jurisdictions' Whistleblower Protection laws – notably those of New South Wales, the ACT, and Queensland – resolved satisfactorily almost two decades ago.

Secrecy and Intelligence

The current Bill is excessively focused on claimed secrecy concerns, especially in relation to Intelligence matters, and inadequately concerned with encouraging the principled disclosure of 'wrongdoing' by Australian public officials involved in security and Intelligence functions at all levels.

The Bill appears not to contemplate the possibility that an Intelligence activity by an Australian intelligence operative might involve otherwise disclosable official misconduct, corruption, criminal conduct, or other illegality.

If this is intended as a*'007 – Licence to Kill*' approach, it is my submission that this is sorely misconceived.

Wrongdoing by such operatives could, in principle, readily be made disclosable to a nominated Intelligence agency or the relevant scrutiny body without compromising the identity of individuals or operations.

It appears to be the case that the problem, such as it is, arises partly or solely because of the potential created by the current Bill for public disclosure of the wrongdoing involved.

It is my submission that the preferable policy choice here is not to protect *public* disclosure of identifying information which reasonably could compromise legitimate secrecy concerns.

Elected officials: Members of Parliament

The omission of elected officials (especially Members of Parliament) from the coverage of the Bill is wholly unjustifiable, especially when MPs have been covered by similar State and Territory legislation for two decades without difficulty.

In relation to disclosures *about* wrongdoing or corrupt conduct of Members of Parliament, a matter which is not canvassed in the Parliamentary Committee's 2009 recommendations, the Government's response is to the effect that the conduct of MPs is a matter for the Parliament: that is, MPs are intended by the Government to be outside this scheme. This is a wholly inadequate response.

Even if the government does not recall the 1988 corruption finding against former NSW Premier Greiner by the NSW Independent Commission Against Corruption, there should be no need of a reminder of the cases of former Queensland Minister for Health Gordon Nuttall, gaoled for multiple corruption convictions, or of the allegedly corrupt activities of former NSW Ministers Obeid and MacDonald, who are currently the subject of multiple ICAC public inquiries. There are numerous other examples over the past two decades alone to serve as reminders that corruption involving MPs is – sadly - far from unthinkable.

Disclosure to the Media and the Public at Large

It is submitted that disclosure to the public media, while currently a popular notion, (especially among journalists and bloggers who have vested interests), should generally not

be protected except in cases of extreme emergency. Public distrust of the integrity of our public institutions may well be part of the motivation for the modern demand for public disclosure. The ACT and Queensland laws provide a best-practice approach to this question.

Disclosure to the media is not favored in principle because it is public: since not all disclosures are proved true, or are provable, innocent reputations can be destroyed by a mistaken allegation. The possibility of retaliation can become *more* likely as a result.

Further, not all disclosures are related to single instances of wrongdoing, as the Bill seems to assume. A given disclosure may be connected with a larger case, which may already be partly or wholly the subject of disclosures, and which may already be under investigation. In either case, public disclosure may alert the subject to the fact that their conduct has come under suspicion, and prompt them or their associates to destroy evidence, interfere with potential witnesses, or evade investigation or prosecution.

As an alternative, it is my submission that the Bill should make it clear that in cases where a whistleblower is unhappy with the response to their disclosure, they are entitled to make the same disclosure to another public body, including the Parliament and the relevant oversight agency.

Burden of Proof

It is submitted that the Bill does not make it sufficiently clear that a would-be whistleblower is *not* to be required or invited to provide evidence to 'prove' that their disclosure is true before their disclosure will be accepted. (This is a separate set of issues from those involved in an organisation's discretion as to whether to investigate a given disclosure.)

The Bill should make it obligatory that all evidence should ideally be obtained by competent investigatory authorities acting on the basis of a disclosure. While the whistleblower *may* provide evidence where it is lawfully available to him/her in the ordinary course of their work, they must not be required or encouraged (nor indemnified) to act illegally or improperly in order to provide evidence.

It is my submission that to require or encourage the whistleblower to prove the truth (or 'seriousness') of their disclosure is likely to compromise the integrity of any evidence so obtained, and may also have the result that the whistleblower alerts the subject of the disclosure to the fact that their conduct has come under suspicion, thereby prompting them to destroy evidence, interfere with potential witnesses, or otherwise undermine an investigation.

Rewards and Incentives

Historically, all whistleblower schemes in Australia have refused to contemplate the possibility of any form of reward or incentive for the making of a principled disclosure of wrongdoing. In all cases this position was justified on the basis that rewards would tend to introduce complicating factors to do with motivation, Conflict of Interest, and possibly the encouragement of entrapment, on the part of the whistleblower. It was argued that this approach could undermine the schemes' proper concentration on the disclosure, by placing the focus on the whistleblower.

It was (and still is) argued by opponents of rewards (including the author) that the disclosure of emergent wrongdoing formed part of a public official's duty, and should not be additionally rewarded. Guaranteed employment, protection against reprisal, and the possibility of a commendation or a Public Service Medal, was held to be sufficient recompense.

It is my submission now that this position, twenty years on, is untenable in principle, with the effective disappearance of guaranteed employment, and the rise of serious corruption within the public sector. It is also untenable in the context of a new and untried Commonwealth scheme, for which there are no antecedents and no strong cultural support for whistleblowers, where the potential whistleblower will take all the risks inherent in the scheme at least for the first several years.

More particularly, it is my submission that the 'conflicting interests' issue – always more apparent than real – can be dealt with by the introduction of genuinely discretionary *ex*

gratia payment, made in retrospect where warranted by the facts of the case, by the responsible Minister, where a given disclosure of genuinely serious misconduct or fraud against the Commonwealth justified so doing.

In other words, the US system of formulaic payment of a reward based on a percentage of the value of the fraud (etc), is not to be favoured. (It is to be noted that the US Government is currently taking steps to 'cap' such reward payments, in response to recent cases where the reward amounted to many millions of dollars in the case of very large frauds.)

It is also submitted that a lively perception that such a reward *could* be paid is likely to have a significant chilling effect on intended misconduct (etc), where the would-be fraudster was aware that others including their workplace colleagues could have a significant financial incentive to disclose their scheme. This effect should be sufficient to justify the a policy of genuinely discretionary reward for the disclosure of serious misconduct.

Compensation for Detriment

As identified by the 2011 '*Whistling While They Work*' report, effective access must be available to compensation for detriment, so that a whistleblower who has suffered adverse treatment at the hands of an employer can be recompensed in some way, and the employer can be sanctioned effectively.

It may be noted that the 1998 UK Public Interest Disclosure Act itself was influenced by, and improved in some important respects upon, the policy model adopted for the various Australian laws of the 1990s. In particular, access to compensation, and to an effective compliant procedure, is better handled under the UK law for the generality of cases, in that retaliation or reprisal is treated as a matter arising in the employment relationship, rather than as a criminal offence. It is my submission that the UK's parallel with Workplace Bullying and Harassment is self-evidently appropriate.

The resolution of cases by a relevantly empowered Tribunal has proved effective in the UK, whereas very few cases of alleged retaliation have been successful in Australian Courts.

Conclusion

This submission generally endorses the recommendations of the relevant 2009 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (Parliamentary Paper: 40/2009 *Inquiry into whistleblowing protections within the Australian Government public sector*).

The submission also takes account of the major 2011 research report by Brown, Roberts, and Olsen, '*Whistling While They Work' (at:* http://epress.anu.edu.au/titles/australia-and-new-zealand-school-of-government-anzsog-2/whistling_citation).

In summary, it is my submission that the Bill, in its current form , is unlikely to prove acceptable in principle, adequate in scope, or effective in achieving its stated Objectives in practice.

If these concerns are borne out, Australia is likely to be the subject of renewed criticism for its failure to comply with important provisions of the *UN Convention Against Corruption* (UNCAC) to which Australia is a State Party. It is also likely that the Bill, if enacted in its current form, will not adequately support the National Anti-Corruption Plan, currently in preparation by the Government, which is also required by Australia's commitment to the UNCAC.

Perhaps most serious of all, in the absence of an effective independent anti-corruption agency at the national level, ACLEI notwithstanding, Australia will have lost a major opportunity to take a preventative approach to apparently rising levels of corruption in the Australian public sector, including in the Australian Public Service where the Public Service Commission has acknowledged in its recent *State of the Service Report* that the level of official misconduct and corruption is unknown, and possibly unknowable.

B. Background

Effective laws to encourage and facilitate the principled 'public interest disclosure of wrongdoing', can no longer be regarded as a new or controversial idea in mainstream

Australia. While this was certainly not the case in 1988, two decades of experience with developing effective legislation demonstrate that most Australians do not now support early concerns that protecting whistleblowers was infeasible, inappropriate, un-Australian, or too expensive.

This change of view might have been encouraged by the seemingly endless stream of media reports and inquiries involving high level wrongdoing (including major corruption) which have emerged across Australia, and continue apparently unabated. What is significant in many of these cases is that would-be whistleblowers either did not come forward, of were ignored by their organisation when they did, or were subject to some form of (prohibited) retaliation.

The key feature of the various legislative approaches taken in Australia since 1991, other than at the Commonwealth level, has been the recognition that the ultimate objective of Whistleblower protection law and policy, properly understood, is not the protection of whistleblowers as such. Properly understood, whistleblower protection is a key strategy for achieving the main objective, not the end in itself.

This is a concern of practical public administration, and more generally of integrity in public governance: a strong focus on advancing 'the public interest' is the key to good law in this field.

The background of legislative efforts by various Australian jurisdictions is relevant: States and Territories (but not the Commonwealth) began to legislate specifically to protect 'Whistleblowers' and 'public interest disclosure of wrongdoing' from 1991 onwards, commencing with the Queensland government's legislative response to the 1989 report of the '*Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*' in Queensland - the 'Fitzgerald Inquiry'.

The last two decades have seen legislative efforts by most States and Territories (notably South Australia (1993), Queensland (1994), New South Wales (1994), and the Australian Capital Territory (1996)), which demonstrate not only that effective protection measures are feasible, but also that they have not been subject to significant abuse, and that Australians generally support such measures, and whistleblowing itself, in principle.

It is noteworthy that the policy model followed by Australian State and Territory legislation since 1991 has been radically different from that of the United States federally and in most States: whereas the US approach may be said to focus adversely on the whistleblower, the approach initially adopted in Australia (and followed in the UK law of 1998, and the UN Secretariat regulation of 2005) focuses entirely on the public interest disclosure, and the question of whether or not it is true. In the Australian legislation, the motivation and state of mind of the whistleblower is unimportant. Not so for the Australian media or the lobbyists, for whom a good story seems to be the main objective.

Extending the concept of whistleblower protection to the private sector - as a fraud and corruption prevention measure - has also been a noteworthy development. A new Australian Standard (*AS 8004-2003*) for *Whistleblower Protection Programs for Entities* now sets out minimum requirements for effective programs of protection for principled disclosure of wrongdoing for all Australian organisations.

By contrast, in the Australian government sector the protection of whistleblowers remains nugatory at best. The Australian Public Service lacks adequate statutory provision protecting public servants, adopting in 1999 only minimal protections in the *Public Service Act* for a very limited form of whistleblowing activity by APS employees in relation to breaches of the APS Code of Conduct. Perhaps not surprisingly, the annual State of the Service Report by the APS Commissioner records that the numbers of disclosures made each year under the APS provisions remains vanishingly small.

All Australian legislative schemes provide for the protection of disclosures of sensitive and potentially damaging information, and are capable of drawing hard definitional lines between non-genuine would-be disclosers. It is necessary to be able to identify so-called whistleblowers who seek to abuse the protections available in order to advantage themselves or damage the interests of other individuals or organisations, from those who are genuine but ill-informed. Current Australian whistleblower protection laws generally follow this approach, recognising that the motives of the whistleblower should be of no significance provided that they can satisfy the 'good faith' test.

Protection is a crucial strategy for achieving the main objective – to encourage the disclosure of wrongdoing, so that something can be done about it. Practical concern about identifying and exposing corrupt and corruptive conduct, rather than moralism or misplaced notions of loyalty and disloyalty, is the key to effectiveness.

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Howard Whitton
Brisbane

30 April 2013

The Ethicos Group

ANZSOG Institute for Governance at the University of Canberra

HOWARD WHITTON

(Biographical Note)

Howard Whitton is an Associate at the University of Canberra's National Institute for Governance, and a Founding Principal of The Ethicos Group, a consortium of seven Australian and international specialists working in the Governance field. He has particular interests in Public Sector Ethics, Whistleblower policy, Anti-corruption strategies, 'State Capture', and Integrity in Parliament matters.

As a federal and state public servant in Australia over a twenty-year career, Howard Whitton was principal author of the original 1994 Queensland laws on Ethics and Whistleblower Protection, and the 1997 Office of the Integrity Commissioner. (The *Whistleblower Protection Act* subsequently influenced the new laws of the other Australian States and Territories, the UK, the UN Secretariat, and a number of national governments.)

From 2002 Mr Whitton served in the OECD's Public Governance Directorate in Paris, where he co-authored the OECD's *Toolkit and Guidelines on Managing Conflict of Interests,* which has now been published in over 30 countries.

From 2006 Mr Whitton served as a technical expert on Whistleblower Protection for the then-new UN Ethics Office. He was appointed as an honorary Ethics Adviser for the international *Group of Parliamentarians Against Corruption* (*GOPAC*) in 2007.

Howard participated in the NATO Peacekeepers Anti-corruption training course in Sarajevo in 2010, and provided advice to the Government of Victoria on Whistleblower Protection law and the review of Members' Pecuniary Interests in 2011. He is a member of the national consultative committee on the Commonwealth Attorney-General's *National Anti-Corruption Plan*, a subject-matter expert for national Anti-corruption projects for the governments of Vietnam and Indonesia, and Co-Convenor (with Professor John Uhr) of the Australian *National Forum on Integrity in Government*.

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