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by Email

## **Review of Tax and Corporate whistleblowing provisions**

Thank you for the opportunity to contribute to this inquiry. I consider the terms of reference so broad that any proposal likely to promote whistleblowing or curb corruption fits within those terms. Though the terms are focussed on Tax and Corporate sector corruption, my view is that a broader anticorruption strategy which includes those sectors still fits the review terms.

I have approached this submission from that perspective.

My background is:

Federal Office Holder (mostly Federal President) of the Customs Officers Association of Australia for more than 30 years.

Former President of Whistleblowers Australia (10 years)

Current member of Whistleblowing Information Network.

Actively participated in many whistleblowing and anti-corruption Royal Commissions, Parliamentary inquiries other inquiries and related studies.

Co Convener (with Cpt Brian Watters – J Howard's drug advisor) on both the Federal and NSW Drug Conference.

Involvement in many high-profile whistleblowing matters – some of which involved parliamentarians.

Caused an 87year old Public Service Regulation to be struck down thus permitting public comment by public servants.

Listening to, helping, guiding and protecting very many whistleblowers over 40 years who naively blew the whistle and suffered for their anticorruption effort.

Peter Bennett

Whistleblowing Information Network

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## **Review of Tax and Corporate whistleblowing provisions**

Submission by Peter Bennett (Whistleblowing Information Network).

### **OVERVIEW.**

Corruption, graft and greed are human failings. On the other hand, the absence of a cultural strategy to fight corruption is a culpable political failure.

Corruption must be stopped because it harms the public interest, wreaks havoc on individual victims, sorely discredits governments and undermines the democratic process.

The cornerstone of this submission is a strategic plan for whistleblowing. Without whistleblowing, corruption cannot be curbed let alone stopped. However, for whistleblowing to work it firstly needs to be supported by a pro whistleblowing cultural change. It also needs legislation which imposes ethical conduct pre-emptively, that is, before harm is inflicted on the public interest. And lastly, whistleblowers need an independent agency to protect their wellbeing.

It is puerile to think that whistleblowers could possibly control corruption in the current cultural environment, without a strong legislative direction and without strong protection and care. Therefore, this submission addresses those essential assets firstly because without those assets, consideration of whistleblowing to curb corruption is nigh on futile,

This review is an acknowledgement by Government that levels of corruption in the tax and corporate sectors are publicly unacceptable. Public hostility to corruption is evolving into an election winning political issue. The Government imagines that whistleblowers will curb corruption and wrongdoing in the tax and Corporate sectors. This is an admission that the existing agencies tasked with that responsibility cannot control corruption. It is also an admission that the existing so called whistleblower protection provisions have failed to induce whistleblowers to make corruption disclosures.

To my knowledge over 15 years, anticorruption agencies have kept repeating mistakes and misunderstandings about corruption and whistleblowing. Repeating failed procedures and systems produces nothing but failed procedures and systems. Improvements in agency anticorruption measures have been minimal. Moreover, rather than being induced to make disclosures by so called whistleblowing protection measures, fewer people are now willing to make disclosures.

This submission is an alternative approach which would work if the Government has a genuine conviction to curb corruption - or more appropriately, to protect the public interest.

The Government has a duty to protect the public interest. The Government breaches that duty by failing to instil an anticorruption culture and to maintain and uphold the integrity and ethical standards of all public interest transactions. Moreover, Governments have failed in their duty of care to establish a framework to enforce ethical standards upon all transactions which affect the public interest.

These transactions are simply dealings between people, entities or parties. The public interest requires that transactions will be conducted ethically and fairly and that no harm will be caused to the public interest. If transactions involve corrupt conduct, then that is against the public interest and it requires the intervention of government.

## **SUBMISSION PLAN in Summary**

This plan has four elements to combat corruption, one of which is a new structural framework. It is proposed that the new framework be centred around a **Public Interest Protection Agency (PIPA)**. This agency would have the positive duty to protect the public interest rather than pursuing the negative objective of curbing corruption.

The focus of this submission is to protect the public interest (See Structural Framework below).

There are four fundamental elements necessary to create a public interest protection framework.

- An anti-corruption culture, led and exemplified by government and parliamentarians.
- An ethical standards act - applicable in all public interest circumstances.
- A structural framework, consolidated resources, unified legislation and implementation of enforceable ethical standards into all facets of public interest transactions.
- An effective and efficient (e.g. whistleblowing) means to discover, disclose and curb corrupt conduct.

The first two elements are absent from our Australian national psyche.

Without the first element, there is no aim. Without the second and third there is no mechanism.

Without the fourth, there is no means.

The framework of ethical standards must apply to all transactions in all sectors,

- Communications.
- Conduct.
- Services.
- Products/goods.

**This submission** contests the logic of this review. The review aims to reduce corruption by improving whistleblowing. Before the review starts – the assumption is that whistleblowing can solve the problem. But Government’s aim should be to determine how best to protect the public interest – even if that involves cultural issues, ethics or organisational structures. Prevention is better than cure.

Surely the prime aim must be to protect the public against those that would cause harm rather than catching those who have already caused harm. The review is not aimed at a proactive outcome it is aimed at a reactive outcome.

The review is ostensibly intended to “protect tax whistleblowers...(in) tackling tax misconduct.” The emphasis on whistleblowers implies that the aim is to curb corruption and other wrongdoing in the financial sector by disclosing wrongdoers. The review appears disinterested in the losses by those being harmed. The review is not required to consider how corruption harms individuals, society, corporations or the credibility of government. The review’s aims are to compliment other far off plans to protect whistleblowers who report corruption, fraud, tax evasion and misconduct in the corporate, public and not-for-profit sectors. The terms of reference invites consideration of “broader reform in this area generally.”

Corruption throughout society is a systemic cultural failure. But tax and corporate sector corruption is just a portion of a much wider strategic problem. The need for this review confirms the failure of the current federal anti-corruption measures in those sectors. But once again a review is considering two sectors out of context of the strategic problem.

There is no logic in a review to consider two public interest transactional sectors when other sectors remain unprotected to corrupt conduct.

Previous federal reviews of the corporate sector have disclosed these self-same corruption and whistleblowing issues. Those reviews did not curb corruption or improve whistleblowing disclosures. This review is simply repeating a failed anticorruption methodology and is expecting a different outcome. It is time to implement a different strategy.

As an alternative, this submission proposes a holistic strategic plan to protect public interest transactions and to curb corruption in all sectors of society.

**The plan** requires the Government to initiate and instil both an anticorruption culture and a pro-whistleblowing culture. It also requires the Government to establish an Ethical Standards Act and a False Claims Act. Supporting these acts requires a new framework which would oversight and link all anticorruption agencies. Finally, and most emphatically, the plan requires all whistleblowing arrangements to be standardised, improved and brought under management of the oversight framework.

The plan uses existing anticorruption agency resources and therefore no additional costs or resources would be needed. All anticorruption resources would be consolidated to improve efficiency and effectiveness. A concerted effort to protect the public interest would give whistleblowers confidence to come forward with information to curb corruption.

#### **Critique of Current Review.**

In the Tax and Corporate sectors, the primary obligation of Government is to protect public interest transactions. If such protection was effective, there would be no corruption in these sectors. Pre-emptive measures can stop harmful actions.

This review is not tasked to identify measures to protect public interest transactions, be they in the financial sector or otherwise. This review is tasked inter alia, to devise measures to induce whistleblowers to disclose corruption. Improved protection appears to be the only inducement offered. Given the parlous state of existing whistleblower protection, there is enormous opportunities for improvement. But considering how totally inadequate and misconceived the current protections are, a promise of improvement seems little more than nothing.

The Government intends that this review will strengthen anticorruption laws dealing with fraudulent conduct, dodgy dealings, malpractice and misconduct in the financial sector. That is commendable. But this sort and similar types of misconduct and wrongdoing exists in all sectors of society. Therefore, focussing narrowly on the corporate and financial sectors for unique attention, only adds to the existing fragmentation of Australia's anticorruption and whistleblowing framework.

Moreover, in establishing this review it is incredible that the Government did not incorporate a requirement to consider a False Claims Act. There are volumes of proof internationally that many organisations act corruptly. They are gouging money from governments and the public by false claims about goods and services. I am advised that submissions from Whistleblowing Information Network members concerning the introduction of a False Claims Act will be made to this review. Those submissions are unreservedly supported.

The Government expects that better laws will protect (tax) whistleblowers. This shows that the Government is ill-informed and naïve about the needs of whistleblowing (See Whistleblowing Section below).

## **The Status Quo.**

There is no anti-corruption cultural or policy framework in Australia. Agency arrangements presumably devised to protect public interest transactions are a piecemeal conglomerate of overlapping agencies competing for resources. Each piece/agency of the anticorruption system stands independently along with disparate legislation and a hotchpotch of ineffective whistleblowing provisions. Though the word 'system' is really an overstatement.

The fact is, there are no effective preventive measures, no system, no framework, no anticorruption culture and no policy. And it is truly misleading for governments to refer to whistleblowing provisions as whistleblower protection.

This new review must inevitably add to the convoluted assortment of ineffective whistleblowing provisions. That assumption comes from experience. None of the previous narrowly focused reviews have produced whistleblowing provisions that work effectively to protect whistleblowers. Another one will just add to the list of ineffective whistleblowing provisions.

At least one reason for these persistent failures has been because the views and experience of injured whistleblowers are invariably passed over in favour of placating the managerial and financial interests of organisations or agencies.

Without a consolidated anti-corruption framework, another ad hoc anticorruption review is pointless. It is a "finger in the dam" approach. It seeks to plug another corruption hole while leaving a multitude of other sectors and public interest transactions ill protected. Band-aides are being applied as each corruption hole appears - but that is after the damage is caused. Adding more reviews, enforcement and legislation, selectively and narrowly, simply adds to complexity. It does little to plug all facets of corruption. In short, the current political strategy just keeps building up a retroactive arrangement that is growing more complex, inconsistent and inefficient.

Moreover, all the existing anticorruption legislation, enforcement and agencies are essentially reactive. They are set up to identify corruption where it exists and to bring those responsible to account. The problem is, this system only comes into play after the public interest has been harmed. The current system interferes with some corruption activities but in practical terms, it cannot prevent harm before it affects the public interest.

In virtually all corruption cases, the Australian Securities and Investment Commission (ASIC), the Australian Competition and Consumer Commission (ACCC), the Australian Prudential Regulatory Commission (APRC) and the Australian Federal Police (AFP) and other authorities, only become engaged in anticorruption enforcement after somebody discloses the corrupt conduct. That somebody is very often a victim of the corruption - but having made a corruption disclosure, each of those victims must be acknowledged as "whistleblowers".

Quoting Louise Sylvan, ACCC Deputy Chair, "..... an explicit acknowledgment that the secretive nature of cartels means that they are often only exposed by whistleblowers – by those persuaded to break the code of silence".

Many whistleblowers are people who have been harmed and/or suffered loss by fraud, bribery, abuse of office, deception, misfeasance, malpractice, misrepresentation or other forms of corrupt conduct - and who then tries to remedy the wrong suffered by making a disclosure to authorities.

Their motivation is to get back what has been taken from them by corrupt means. But they also often seek to alert authorities to the conduct of the wrongdoers in the hope that others may be protected against the harm that they had suffered. This later motivation is actually an altruistic purpose.

Alternatively, the whistleblower is a person with inside information about the wrongdoing being perpetrated against the public interest. In these cases, the whistleblower is suffering no direct harm, yet they are moved to protect the public interest. Motives of these whistleblowers can be wide ranging – but in most circumstances, their disclosure is for altruistic purposes.

They see a wrong being inflicted against the public interest and wish for it to stop. They make a disclosure to those who they expect will protect them and stop the wrongdoing.

Whistleblowers of both categories are usually very disappointed – often the harm is not acknowledged, the instigators are not punished, the matter is covered up, whistleblower protections are not applied and there is no restitution or compensation. Worst of all, the whistleblower is very often, denigrated and harmed in status, wealth and health.

### **This ALTERNATIVE Plan simplified.**

The four fundamental elements of an anticorruption framework.

- An anti-corruption culture,
- An ethical standards act.
- A structural and legislated framework.
- A safe whistleblowing environment.

## **CULTURE**

The absence of an anticorruption culture is a serious political failure. In addition, the existing anticorruption systems are essentially reactive. They don't actively work to prevent wrongdoing. And whistleblowers, legislation and structural improvements of themselves cannot curb corruption.

Cultural misconduct is systemic and insidious. The most explicit example of corrupt conduct was the entrenched culture of protecting religions and priests from disclosures about child abuse. A culture perpetuated by Governments. That culture was not exposed by governments or any agency. It was exposed by whistleblowing victims. The public then demanded public interest protection.

Governments belatedly did their public interest duty and led a cultural change with legislation and an independent investigative body (Royal Commission). Now a new culture exists which condemns such conduct and demands (public interest) protection of children.

There is a clear parallel between abused children (whistleblowers) having no option but to disclose their abuse to religious institutions and whistleblowers in tax and the corporate sector having to disclose corruption within the offending organisation. (see Undisclosed Corruption section below).

The ideal model is clear. The Prime Minister, our parliament and our government has promoted a top down cultural change to curb domestic violence and child abuse. That same process must be applied to fight corruption.

Unfortunately, there are mixed messages about corruption. On one hand, we have the Australian Building and Corruption Commission (ABCC) being established as a matter of urgency to stop

corruption in one industry. A very creditable objective. While on the other, organisations such as banks, managed funds, investment companies, pharmaceutical companies, tech companies, real estate agencies and a multitude of other organisations have failed the “misconduct” (read ‘corruption’) test. Courts, ASIC, the media and the “pub Test” have repeatedly found people in these organisations acting corruptly.

Some of what is legislatively defined as ‘corruption’ in the ABCC, is regularly regarded as ‘misconduct’ in the corporate, financial and public sectors. Misrepresentation, bribery, graft, abuse of office, fraudulent conduct, dodgy dealings, misappropriation, malpractice and misconduct are often treated as a misdemeanour in these sectors. Offenders seldom suffer any penalty greater than a mild hiccup in their corporate ladder climbing.

What is astounding is that these corrupt/unethical acts happen without anyone having further regard to the harm caused to individuals, the public interest or the reputation and integrity of government.

Some business executives and even some parliamentarians misuse or abuse their entitlements. This is regarded as “bad judgement”; nothing wrongful, nothing corrupt, nothing fraudulent and nothing misappropriated. Whereas if an employee did the same for virtually any other employer, the employee would be sacked, charges could be laid, and the “offender” would have to repay any losses.

However, there is growing public angst against politicians and government officials not meeting ethical (pub test) standards. A State Premier was obliged to quit for accepting a bottle of wine. A Parliamentary Speaker was sanctioned for failing to meet expected ethical standards. The Perth Mayor has admitted to wrongdoing over gifts and a contract with the Victorian Government was corrupt and cost more than \$127m. There are new examples of such corruption daily.

A culture against corruption can only flourish if it is led, promoted and exemplified by governments and politicians. If that proposition does not accord with the government’s anticorruption strategy, then the whole purpose of this submission fails and this submission will require no further consideration.

In any event, corrupt conduct is not widely recognised as antisocial and against the public interest. A Government committed to controlling corruption will have a hard sell on their hands. There is far too much public acceptance that corruption is inevitable and unstoppable. The examples of some business moguls and politicians rorting entitlements have helped to instil that cultural perception.

Clearly, what is needed is a strategy to prove that the Parliament is totally committed to controlling corruption. Proof that the Parliament is committed to curb corruption will be firstly measured by the Government’s support for whistleblowers and whistleblowing (see Whistleblowing section below). The second proof of that commitment would be the establishment of a Public Interest Protection Agency (or Commission).

There is a different public perception between an anticorruption strategy and a Public Interest Protection Agency. Anticorruption strategies have little to do with most members of the public. It is an activity outside their sphere and involvement. However, public interest protection is a self-interest matter. Public interest protection applies to the public generally and most members of the public favour any matter that protects their interests.

The public will support and utilise a Public Interest Protection Agency. By contrast the public tends to passionately avoid any involvement in matters of corruption. (See further comment below under STRUCTURAL FRAMEWORK)

## **An ETHICAL STANDARDS ACT;**

### **Why it is necessary?**

An Ethical Standards Act is necessary because breaches of ethical standards cause harm to the public interest. Any anticorruption cultural change cannot materialise while offenders persistently breach ethical standards with virtual impunity.

Ethics applies to people, not organisations. This proposed Act is directed at individuals who make decisions or take actions which harm the public interest. Current legislation punishes organisations which engage in corrupt conduct – but those who unethically initiate the organisational corruption are seldom held to account. An Ethical Standards Act would make individuals who engage in corrupt conduct, accountable and punishable.

Every person is entitled to know precisely what is ethical and what is not. However, ethical standards can be ambiguous. Inadvertent mistakes can be made. But this ambiguity is regularly abused by some to obtain a wrongful gain or benefit. This is corrupt exploitation of the public interest. Therefore, failing to codify ethical standards has been political and legislative laziness contrary to the public interest. It is necessary for legislation to identify unethical conduct as a form of corruption that harms the public interest. Therefore, such conduct must be defined as unlawful and attract punitive action.

A simple ethical test of a transaction is whether the instigator employed corrupt means to gain a benefit or advantage.

If the answer is 'no' – the transaction is ethical.

IF the answer is 'yes' the transaction is corrupt and in breach of ethical standards.

An Ethical Standards Act must apply to all public interest transactions.

These transactions include;

- **Communications:** includes any transmission of information from the instigator to a recipient by any means whatsoever.
- **Conduct:** includes any action (directly or indirectly) by an instigator which affects the recipient.
- **Services:** Includes any service provided by an instigator (directly or otherwise) which affects the recipient.
- **Products/goods:** includes any products or goods provided by an instigator (directly or otherwise) which affects the recipient.

Other transactions which have not been identified herein may need to be included in the scope of public interest transactions.

Obviously where corruption involves systemic or institutional misconduct, the test may be more complex – but the fundamental framework must be based on simple ethical values.

The Act must specify that in all transactions, the instigator must act ethically; providing where possible all relevant information truthfully, honestly without obfuscation or misrepresentation, acknowledging any self-benefit or advantage that may ensue.

The instigator must ensure that the recipient obtains as much relevant information as possible to enable a proper evaluation of the merits of the instigator's communication, conduct, service or product/goods.

There is no Australian Ethical Standards Act or other similar legislation. But ethical standards do have wide application. It is just that the public and the law has no voice on how and to whom the

standards must apply. Various organisations (public and private), particularly professional organisations, set ethical standards for their members. Even the Australian Parliament has unpublished, uncodified, non-specific ethical standards. But none of those standards have standing in federal law. Breaches of those standards are matters dealt with by the respective organisations as they see fit. Restitution for harm caused by unethical conduct to victims is often also made the purview of those self-serving organisations.

Relevant organisations regularly deal with breaches of their respective professional standards. However, a breach of a professional standard undoubtedly means that a member of the public or the public interest has been harmed. That harm is also dealt with by the relevant organisations as they see fit. The Government does not provide protection in law.

Clearly, it is not too difficult to distinguish between ethical and unethical conduct. Untrained organisational members adjudicate ethical conduct matters all the time. The media regularly questions public opinion about ethical conduct of various entities. Senior public servants, Prime Ministers, council officers, defence, police, fire brigade, customs, State Premiers and nursing officials regularly adjudicate ethical standards – but so does virtually every other Australian – consider the “Pub Test” which often identifies wrongful conduct by those seeking to gain or benefit by unethical means.

There are literally thousands of organisations throughout Australia specifying or expecting ethical standards from their members. Breaches of those ethical standards on occasions lead to penalties being imposed, systems are rectified, organisations restructured and occasionally, some people sacked. On rare occasions, restitution may be paid to those who have been harmed.

Yet for some inexplicable reason, governments have shied off legislating ethical standards to protect the public interest. The public interest is best served by clearly codifying ethical standards. Breaches of those standards could then be dealt with through the court system under Australian law applicable to all citizens.

Australian law and courts are mature enough to distinguish between unintentional, accidental or inadvertent conduct as opposed to intentional, negligent, deliberate and premeditated misconduct.

Holding professionals, organisational executives, business mandarins, senior employers, and (dare we say) politicians to an ethical standards account is more than justified in the public interest. Given the rate and extent of corruption, it is crucial and should be mandatory.

As a rule, ethical misconduct will be done wilfully, intentionally, recklessly, clandestinely, furtively, indifferently and/or surreptitiously. The conduct is invariably carried out for a personal or group benefit or gain. This could be a material gain (wealth) or an abstract benefit (position, prestige or power).

Nonetheless, that gain or benefit achieved by the instigator invariably leads to a loss or harm (howsoever inflicted) to the recipient. That this loss or harm may only happen to one or a few people does not moderate the fact that the harmed person or people represent the public at large. So the harm or loss is in effect, against the public interest.

## Practical application.

Corruption usually starts from an unethical intent – usually to obtain a gain or benefit by corrupt means. Therefore, any anticorruption framework must be able to interrupt unethical intent before it matures into corrupt activities. This requires a proactive, pre-emptive strategy applied at the formative stage, before the harm is inflicted on the public interest.

Corruption usually has two stages. The formative planning stage and then the implementation and action stage. In almost all cases, corruption involves a conspiracy of proponents. Under current law, unethical intent is not a criminal offence. Therefore, conspiracy to engage in unethical conduct is also not an offence. At best, unethical intent is regarded as a misdemeanour or an administrative wrongdoing.

In many if not most cases, unethical conduct is the decisive precursor to most forms of serious corruption or criminal activities which will harm the public interest. And it is the prospective involvement of multiple people in a conspiracy which potentially exposes corruption and/or crime to early disclosure and ultimately, to defeat.

Some examples of unethical conduct:

- ❖ Banking executives creating a cabal of traders who engage in unethical practices which harm the public interest. The banks gained significant profit, the traders got good commissions and the public are exploited and victimised.
  - The traders were recruited and tasked to make profit with negligent regard for ethical conduct. No integrity, audit or accountability system was established.
  - Banks/Traders made good profits/commissions. Clients were exploited. Clients complained and made disclosures.
  - Bank executives blamed the traders who were held responsible. But ethical standards had not been imposed by the executives – either through reckless indifference, negligence or intent. Profit was at a premium and integrity was discounted at a cost to the public interest.
- ❖ Nurofen executives were guilty misleading advertising through unethical misrepresentation of their product. Their company made \$46m profit before the courts imposed a penalty of \$6m.

In both cases the businesses made a significant profit. Only after the harm was inflicted on the public interest was the harm brought to account.

In both cases, those actually responsible for permitting the unethical business arrangements suffered no penalties. Even though penalties were imposed on those businesses, the individuals who were responsible for the public interest harm were not penalised by law.

Though some banking clients received some restitution for losses – the real losses of stress, anxiety and disruption were not compensated. For Nurofen clients, there was no restitution. In both cases both members of the public and the public interest were harmed.

Many whistleblowers have witnessed corruption. They know that principal wrongdoers usually conspire with others to engage in unethical conduct. This conspiracy is the forerunner to the implementation of corrupt activities. The conspiracy of unethical conduct is needed by the principal wrongdoer to draw in a cohort of those who will then become part of the planned corrupt activities. This conspiratorial conduct can be observed and therefore provides a means for whistleblowers to intercede and stop unethical conduct from becoming corrupt activities.

But why should a conscientious, altruistic whistleblower come forward with their observations of suspected corrupt conduct when the Government offers no workable means of protection?

## STRUCTURAL FRAMEWORK

### PIPA functions.

This submission proposes a Public Interest Protection Agency (PIPA) which would take over all federal enforcement and operations related to public interest protection, anticorruption and whistleblowing responsibilities. PIPA would oversight any Company with an ACN or ABN or which is accountable to a public agency. PIPA would also take control of all corruption and serious disciplinary matters currently under the jurisdiction of the Commonwealth Ombudsman and the Public Service Commission. In short, PIPA would be responsible for all private and public sector anticorruption and whistleblowing matters. PIPA would be established within the Minister for Justice's portfolio. PIPA should also take responsibility over the enforcement of the Attorney General's Department (Fraud Control role).

At present a person in the private sector with information about corruption must firstly figure out whether they're entitled to make a disclosure. Then they must figure out which legislation might apply. Then to which agency they need to report the matter. Then to consider whether they will be protected or need to be protected. Then whether the agency will do them into their organisation. Then ..... and so on and so on.

Clearly it would be far better for any potential whistleblowers to simply report any corrupt conduct to a 'one stop' Public Interest Protection Agency.

PIPA would in effect, be the operational 'regulatory' arm of all public and private sector agencies. PIPA would deal with unethical conduct or administrative misconduct within the public sector and the corporate and finance sectors. Ultimately that jurisdiction would be extended to all public service agencies to which corporate organisations are accountable.

The transition of these responsibilities would be gradual and be applied as soon as was practical to the private and public sectors respectively.

In respect of the private sector, PIPA would, as soon as possible, take control of all corporate and finance sector offences which harm the public interest – except for serious felony offences or those crimes involving risks to public safety. These matters would remain the purview of the AFP.

The AFP generally deals with criminal conduct outside the public sector, involving physical felony crimes against people, property and the state. PIPA would be its counterpart in the public, corporate and finance sectors and would be restricted to lesser felony offences unless the AFP are involved. This would free up the AFP from having to deal with contentious corporate corruption litigation.

In the public sector the transition would commence with the Office of the Commonwealth Ombudsman (OCO) and the Australian Public Service Commission (APSC) and would eventually progress throughout all public sector agencies.

It is beyond doubt that public service managers will fight tooth and nail to reject this proposal so they can retain their enforcement, in-house discipline and whistleblowing powers. These agencies gain budgetary advantages, political clout, influence and discretionary powers through their existing enforcement responsibilities. More importantly for agencies, is a strong desire to maintain control over any whistleblowing that may relate to that agency.

However, the current arrangements of agencies having both administrative and enforcement authorities is unhealthy. Agencies help organisations to function. But if an organisation falters (ethically or otherwise) then the blame is partly that of the administrative agencies.

So in some circumstances, agencies may play down organisational 'irregularities'. It is simply wiser and more impartial to separate administrative functions from enforcement and regulatory functions.

In respect of this review, agencies such as ASIC, ACCC, APRC, OCO and the APSC would continue to manage and administer the respective functions of these agencies. But their intelligence, investigations, enforcement, prosecutions, in-house discipline and whistleblowing management resources would be shaved off and transferred to PIPA.

The OCO deals with its own, and a range of other agencies or quangos in respect of contested administrative matters. These administrative resolution resolving functions would remain with the OCO. But any functions related to breaches of the Ethical Standards Act, investigations or enquiries about corruption, serious disciplinary or whistleblowing matters would need to be transferred to PIPA. Similarly, it is absolutely necessary to remove any anticorruption, whistleblowing, or disciplinary function from the APSC and transfer them to PIPA. The APSC should never have been given any responsibility for disciplinary or whistleblowing matters.

All public sector agencies must provide PIPA with any and all communications between agencies and the office of the Australian Government Solicitors (AGS) or any other legal firm in relation to corruption, discipline or whistleblowing matters. PIPA would have the right to take responsibility over any such matter if PIPA considered it in the public interest to do so.

It would be essential for PIPA officers and resources to retain their physical placement within the respective original agency. PIPA officers must be provided with full access to all information related to their functions held by the agency in which they work.

In general, the established agencies would continue with normal management and administration of their respective functions. However, those agencies would no longer have control over PIPA operational officers or their functions or duties, even though those PIPA officers are in situ within the respective agencies.

Recruitment, selection and training of PIPA officers would be outside the Public Service staff employment arrangements. PIPA officers would be recruited, selected and trained in a manner more akin to the recruitment selection and training of AFP officers. Because the employment standards of PIPA and the AFP would be compatible it may be advantageous to have staff interchanges between both organisations. This would firstly create a larger enforcement pool of experienced officers but more importantly would improve intelligence exchanges about activities which may harm the public interest.

PIPA would closely liaise with the AFP particularly if matters under investigation involved a possible cross agency matter.

### **PIPA is necessary.**

No informed, rational person would claim that Australia's current anticorruption and whistleblowing arrangements are the best options available to provide public interest protection.

The current anticorruption arrangements are a cobbled mismatch of agencies with overlapping responsibilities, incompatible operational arrangements, variously trained and untrained staff, differing modes of management and differing standards of conduct - just to mention a few of the issues likely to impede intra and inter agency effectiveness.

There are a range of public sector agencies and quangos which 'regulate' various institutions, establishments and organisations. ASIC, ACCC, APRC and the AFP have already been discussed. There are many other agencies and dozens of government financed quangos to which the government has

devolved regulatory powers. Customs, Immigration, Quarantine, Therapeutic Goods Administration, National Parks and Wildlife, Food Standards Australia New Zealand to mention a few major players.

Other “bodies” have been established with devolved government powers which enable them to grant or withhold licences or permits for businesses or organisations to “operate”. These bodies are one step removed from prudent government auditing and anticorruption controls. Any complaints about the operation of these bodies are immediately referred back to the alleged offending body. Clearly this is a glaring opportunity for corruption with no effective oversight in operation.

All these agencies (and perhaps some of these ‘bodies’) have their own operating system, data holdings, structural arrangements and recruitment standards. Each also jealously protects their patch. There appears to be no consistency between the application of ethical standards and procedures relating to agency personnel or their clients. Some agencies demand that their clients have ethical standards but do not appear to have formal ethical standards for their employees. Some rely on the substandard Public Interest Disclosures Act.

Most agencies appear to have some form of regulatory capability, usually in the form of infringement notices and/or administrative penalties which may be issued to clients who engage in misconduct and low levels of corruption. The recruitment selection and training of regulatory staff appears to be different in each agency.

However, the priority of most of these agencies is servicing client organisations and to a lesser extent, ensuring administrative compliance. Regulatory functions including intelligence, investigation and prosecution are not a priority. Similarly, the development of whistleblowers, both in-house and in client organisations is virtually non-existent.

This criticism is not so much aimed at the agencies. Rather it is aimed at the failure of government to create an efficient anticorruption system. Agencies are not provided with working arrangements to best detect corruption. Staffing limitations demand that administrative processing is dealt with before compliance checks. Compliance checks are deferred or set aside depending on processing priorities. Intelligence, investigations and enforcement issues are addressed virtually as an afterthought. Recruitment and training focusses on administrative processing and does not focus on corruption awareness. Insular legislation makes it difficult to share information and intelligence with other agencies.

The silo structure of these agencies is a disincentive for interaction between similar agencies. In short, the whole process is not designed as a public interest protection facility nor is it appropriately designed as an anticorruption system. And most importantly it is not structured to encourage whistleblowing in client organisations or within the agency.

Compounding the problem is that the operational interactions between the agencies is minimal. Agencies are often forbidden to share certain information. To share some information between agencies often requires a ministerial agreement, a court order or a change in legislation.

Any analysis of financial sector administering agencies would confirm a total inconsistency as to capabilities, competence and abilities to protect the public interest.

This review is not tasked to protect the public interest. But that is the purpose of this submission. This submission contends that a Public Interest Protection Agency would deter corruption and promote whistleblowing. Anticorruption measures would not be needed if effective public interest protection measures were in place.

As mentioned elsewhere, there are other submissions being lodged to this review which strongly recommend the introduction of a False Claims Act. Those submissions contain extensive research

which shows that these existing 'regulatory' agencies and their legislation are dramatically failing to protect the public interest.

Therefore, if a False Claim Act was enacted it would not be appropriate to allow an existing agency to enforce that Act. For that reason alone, it would be necessary to establish PIPA or a similar agency to enforce that Act.

## **WHISTLEBLOWING and WHISTLEBLOWERS**

At present the public does not have confidence that the Government is concerned about the harm being inflicted on the public interest by corruption. That lack of confidence is justified. The public and political outcry after the most recent banking scam has given rise to this review. The alternative which many people are still pushing for, involves a Royal Commission. The fact is, many people are being harmed by repeated instances of corrupt conduct, yet few if any offenders are being held to account.

Despite the call for a Royal Commission the fact is that a commission could only review a narrow spectrum of financial corruption. What the public needs is a much more strategic, creative and forward-looking approach that will actually deal with corruption wherever it occurs in society. That is the role of government not a Royal Commission. Experience shows that Royal Commissions are established to prove that a hypothesis of government is correct. The expected outcome is usually achieved. The problem with corruption at present, is that the government has no anticorruption hypothesis to test. There is no plan or policy to stop corruption other than appealing to whistleblowers to do the job for them. A Royal Commission into financial sector corruption would simply be making a judgement on what has previously happened in one sector of society. A Royal Commission could not envisage a prospective strategic plan to stop corruption throughout society.

In fact, no political party is proffering policies which will curb corruption and protect the public interest. This policy vacuum only adds to public perception that the government and major political parties are disinterested in the harm being inflicted on the public by the financial sector.

The Government solution at present is to keep throwing in money and resources and creating new agencies to fight corruption. This is being done without any appreciable improvement in preventing harm to the public interest. The agencies which are supposed to protect the public interest have consistently failed that duty.

It seems that the agencies are driving the agenda. Their argument seems to be that if the Government will only give them another 26 analysts, a larger computer, more office space and a bit more legislation they will be able to solve the corruption problem.

But none of these agency resources are at the workplace where corruption occurs. This misplacement explains why anticorruption bodies don't work efficiently or effectively. Without disclosures from co-workers, employees, clients and observers, these anticorruption agencies can only discover corruption by laborious, inefficient data analysis. By comparison, any and every co-worker, employee, client or observer at the workplace is a potential whistleblower with first-hand, direct information and evidence.

This review suggests that the government is looking for an option to protect the public interest in a way other than that being driven by the anticorruption agencies.

This submission provides a new, informed and creative option. This option would be better able to protect the public interest than the current agencies and at no additional cost to government – except perhaps for the ire of senior bureaucrats. But on the other hand, this option would also prove to the public that the Government does actually want to protect the public interest.

### **Whistleblowing can work.**

Whistleblowing can work to curb/stop corruption but not as a stand-alone tactic. To make whistleblowing work as needed, a cultural change, new and improved legislation and a new structural framework is needed.

It is imperative for government to actively empower all citizens to safely disclose wrongdoing or corruption wherever it becomes evident regardless of who is involved or where the corruption occurs. Under this holistic strategy, every person in Australia is potentially a government enlisted corruption whistleblower. Can there be any reason why the Government should not want that situation?

Corruption is endemic, yet almost no-one reports corrupt conduct unless they are being directly harmed. The reason for non-reporting is clear. Those who do observe wrongdoing have witnessed that reporting such conduct is fraught with danger and/or loss. Currently there is no community support and palpably less government support to encourage universal reporting of corruption. Unless that perception and reality is emphatically reversed, corruption will continue to flourish.

### **Whistleblowers can forestall harm.**

When people observe others behaving in a clandestine manner, suspicions are sometimes aroused. Such conduct is on occasions, the precursor to a wrongful act. However, conspiring to carry out a wrongful or unethical act is not unlawful. There is nothing can be done by the observer or law enforcement authorities. Because unethical conduct is not codified as an unlawful form of corruption, there is no authority to prevent such conduct.

However, if an Ethical Standards Act was in place, and it was discovered that the clandestine meeting was to obtain a gain or benefit by unethical conduct, that matter could be actioned by a relevant authority (e.g. PIPA or the AFP).

As matters stand, rather than allowing authorities to intercede and stop harm being inflicted on the public interest, the current legislation requires that authorities take no action until harm is caused.

Pre-emptive Ethical Standards action against offenders before actual harm is inflicted on the public interest is significantly better than waiting for the harm to occur.

### **Corruption concealed because of culture**

Victims of abuse in religious organisations did not make disclosures about abuse for decades. Why was that? The answer is simple. A blinkered culture protected the offenders. Victims had no place to make a disclosure other than to the organisation causing the abuse.

Only after an independent Royal Commission was established were some of the victims of abuse courageous enough to come forward and make disclosures.

It is fanciful for legislators and agencies to think that current day whistleblowers don't suffer the same reservations. What reason is there for whistleblowers to put their health, wealth and status at

risk? Self-protection alone would be sufficient to convince a whistleblower that blowing the whistle is just about the last thing they should do.

Yet all the legislation, structures and procedures insist that whistleblowers put themselves (directly or indirectly) at the mercy of people and organisations that have a vested interest in the outcome of any whistleblowing investigation.

The situation is ludicrous. No remotely prudent whistleblower should be expected to make disclosures to those who failed to prevent corruption. Government should not expect them to do so.

If governments are not prepared to establish cultural norms, effective legislation and organisational structures to properly protect whistleblowers, then whistleblowers have no obligation (moral or otherwise) to disclose corrupt conduct.

### **Whistleblowers are not welcome.**

In the USA, 3 whistleblowers were featured on the front page of Time Magazine. Whistleblowers are regularly compensated for loss or harm and many receive enormous gratuities for disclosing corruption. Movies are being made about real life whistleblowers concerning the environment, smoking and telecommunications abuses. In some places, whistleblowers are even given awards for their public service. Dozens of whistleblowers are receiving massive financial gratuities from governments for exposing companies which are misrepresenting their products and gouging money from the public purse.

In Australia, whistleblowers have been referred to by politicians and senior government advisors as “dobbers and leakers”. One bureaucrat suggested that leakers should be “hunted down”. Australian whistleblowers get no positive recognition from the government, the bureaucracy or corporate leaders. Surviving a whistleblowing event without losing their job, their health, their status or their family, is the best reward a whistleblower can expect.

Most Australian legislation refers to whistleblowers as “disclosers” rather than the universally recognised “whistleblowers”. Being referred to as “disclosers” in law is offensive to whistleblowers. “Disclosers” is a term just disparaging enough to denigrate whistleblowers and deprive them of any credible public service status. “Discloser” is a term offensive enough to dissuade even a conscientious person from making a disclosure. One asks the question – was that deliberate? Who will benefit most by discouraging corruption disclosures? Clearly it is only those who could be held to account by a disclosure.

From a whistleblower perspective, most governments (Federal and State) intentionally or otherwise, pander to corporate interests. Most legislation, processes and management do the minimum to protect whistleblowers while doing the utmost to protect organisations against public exposure of corruption.

Government propaganda, propagated by public service agencies deal with whistleblowers as a necessary evil, grudgingly tolerated but very unwanted. A culture of ambivalence if not antipathy against whistleblowers is being persistently nurtured (intentionally or otherwise) by people who may be held to public account for their conduct. This very much includes politicians, senior public servants and corporation leaders.

Finally, reckless harm is being inflicted on whistleblowers by propaganda about “whistleblower Protection”. By claiming the existence of whistleblower protection, naïve whistleblowers have made disclosures only to suffer adverse consequences. The inducement of protection is a cruel misrepresentation of reality.

## **Whistleblowers deserve “public service” recognition**

Inducing whistleblowers to make disclosures is like inducing a lamb into an abattoir. The inducer benefits but the whistleblower and the lamb both seriously lose out. The best inducement for whistleblowers would be to see whistleblowers being treated with respect and courtesy by those in power. It would help if whistleblowers were taken seriously and offered genuine assurances that their interests and protection are of the utmost importance. Whistleblowers would like to have confidence that they will get genuine protection, support, acknowledgment and some token of gratitude.

Unfortunately, a culture has been fostered which promotes whistleblowing as unAustralian. This adverse culture has been subtly nurtured by corporation leaders, bureaucrats, politicians and others who are at risk of public accountability.

But a resolute Government commitment to elevate whistleblowing as a service to the public interest could remove the negative stigma around whistleblowing. The bottom line is, that if the Government will not or cannot dramatically lift the status of whistleblowing to a praiseworthy status, then whistleblowing as an anticorruption resource will never eventuate.

Likewise, if the Government does not see a public service value in disclosing corruption then why should whistleblowers make disclosures. If whistleblowers have a public service benefit, then they deserve the most effective legislation to support their efforts. Similarly, if whistleblowers are carrying out a public service then why has the government denied them the establishment of an independent protection agency.

Proof that the Government and parliament value the public service of whistleblowers will be a drive for a cultural change promoting whistleblowing and whistleblowers. That drive should acknowledge the difficulties whistleblowers have faced to date. It should also do a “*mia culpa*” and admit past mistakes where whistleblowers have been attacked by the Government.

Ultimately whistleblowing against corruption could be a growth industry if there was strong support to acknowledge whistleblowing as a public service. An annual whistleblower of the year award should be part of that public recognition. In addition, aspects of the False Claims Act should be considered where whistleblowers have helped to recoup losses caused by corruption. And even if losses caused by corruption cannot be recouped it would be a strong incentive for whistleblowers to receive a gratuity from government when their disclosure has saved the public interest from harm.

## **Whistleblowing management**

All matters related to whistleblowing in the public sector and all private organisations, businesses and the like, subject to public interest protection and anticorruption laws should be transferred to PIPA.

The Public Interest Disclosure Act and most other so-called whistleblower protection legislation sets limits as to who can make a disclosure. This crafty move ensures that whistleblowers stay under the control and management of organisations about whom the disclosures are made. It defies logic that any person who has information about corrupt conduct must meet some acceptance criteria before they can make a protected disclosure. This is a perfect example of how much whistleblowing is under the control of organisations alleged to be involved in corruption.

Regardless of who is making a disclosure of suspected harm to the public interest, it must be dealt with until proven to be a mistake or deceitful. Obviously, making false or deceitful disclosures must be an offence punishable by significant penalties.

If a Public Interest Protection Agency existed, its' whistleblowing obligations would include;

- registering the whistleblower and their disclosure,
- benchmarking the status of the whistleblower,
- setting up protection mechanisms,
- liaising with organisational representatives,
- conducting investigations,
- testing the veracity of the disclosure,
- applying due process and procedural fairness,
- intervening to prevent any discrimination of the whistleblower,
- ensuring protection of persons not guilty of any wrongdoing,
- reallocation of staff to ensure protection,
- oversight of health, status and income of the whistleblower,
- action against possible corrupt conduct,
- appropriate legal action and enforcement of laws,
- prosecution where wrongdoing is confirmed,
- support as requested, needed or required for the whistleblower,
- remedial action by the organisation to prevent recurrence of corruption,
- advice to staff on outcome and public recording and promotion of all matters related to the disclosure (excluding organisational or personnel identifiers).

Only some of the above actions are stipulated under any whistleblowing provision. Without these provisions, making a disclosure is fraught with danger for the whistleblower. It is a sad reality that experienced whistleblowers are not asked or listened to, about what is necessary to create an effective whistleblowing system. Nothing is working properly to protect the public interest and curb corruption – yet each review reinvents the wheel and implements what hasn't worked in the past.

It would be really a rewarding surprise if this review looked outside the failure box.

Peter Bennett