Whistleblowers Australia

PO Box 129, Wollongong NSW 2500

"All it needs for evil to flourish is for people of good will to do nothing"- Edmund Burke

24 July 2017

Robert Bradshaw
Director, Policy Coordination
Department of the Attorney- General and Justice
GPO Box 1722
Darwin NT 0801
By email Policy.AGD@nt.gov.au

Dear Mr Bradshaw,

Independent Commissioner Against Corruption Bill 2017

I refer to your letter dated 14 July 2017 seeking feedback regarding the exposure draft of the Independent Commissioner Against Corruption Bill 2017 (the 'Bill') and reply briefly as it applies to whistleblowing and investigative integrity, as follows.

The proposed policy as a whole

On 17 February 2017 in a submission to Ms Fyles MLA in response to a review of current whistleblower laws (attached) I made the comment that "if the NT were to establish a general corruption body, the OCPID could become the public champion of whistleblowing that society deserves" – that remains our position.

By that I mean the Public Interest Disclosures Act ('Pid Act') should be retained. The OCPID should remain in operation, albeit with a different smaller focus and function as the *promoter, supporter* and *protector* of whistleblowing and whistleblowers. The new general corruption body or 'ICAC' would take over the investigative role and functions currently performed by the OCPID, with the exception of the investigation of allegations of retaliation. The OCPID would be the central registry for all PIDs, complaints. This would be ground breaking reform.

The OCPID unashamedly put whistleblowing front and centre and is a trailblazer, for the very public focus it gave to whistleblowing protection. And despite the fact, that it repeats the mistakes of other jurisdictions by combining the roles of the corruption investigator and whistleblower supporter/protector in the one organisation - which doesn't work. It hasn't worked in any jurisdiction in nearly 25 years and it won't work - whether we're talking about the OCPID or the proposed ICAC – because they are *competing interests*, which are routinely resolved by putting the integrity of the investigation ahead of the whistleblower's protection. This is not wrong, but it's why these roles must be kept *organisationally* separate if the NT is serious about providing real whistleblower protections in the fight against corruption.

Consider a situation in which the whistleblower blows the whistle on a criminal scheme operated by his boss. Under questioning he admits he has also broken the law, albeit as a part of his duties at the direction of his boss. The boss retaliates against him when he becomes aware he is being investigated by the ICAC. The whistleblower asks the ICAC for protection. The investigator decides he can't protect him *and* maintain the integrity of

the primary investigation, so he ignores, delays and eventually refuses the request for protection. The whistleblower loses his job and livelihood, is later exonerated and arguably, has a case for compensation against the ICAC for failing him. The ICAC fends off public allegations of failing to protect. The public gets behind the whistleblower in condemning the government. These circumstances are so, so familiar. The thing is, you you shouldn't build competing interests into the one organisational framework when it is set to fail.

In summary, the protection of whistleblowers will compete with and erode the ICACs role as an investigator.

Heed - and make history.

The ICAC proposal is a work in progress so please, heed history and pull together the best of what you've got and build on it: by retaining the Public Interest Disclosure Act (PID Act), hiving off most of the investigatory functions of the OCPID to the new corruption body and re-configuring the OCPID to register whistleblowers, pre-emptively protect whistleblowers, block retaliatory actions, investigate, resolve allegations of retaliation, seek penalties for the failure to support whistleblowers, publicly promote whistleblowing, undertake and publish research and act as an advisory body to whistleblowers, government and the public at large. It would be a much smaller operation than that which presently exists and *cost less*. It would refer all of the PIDs it registers, for investigation by the new ICAC body.

This would mean that the ICAC would be able to operate free of the competing interests that have plagued similar bodies like the NSW ICAC for nearly a quarter of a century – and always to the detriment of the whistleblowers caught up in the system. It would investigate complaints made directly to it and those referred to it by the OCPID. All PIDS and complaints would be required to be registered with the OCPID to allow it to monitor uptake, outcomes and developing trends.

Proposed whistleblower protection

Part 6 of the Bill is a step back in time to the bad old days, when institutions did their level best to cast the whistleblower as mad or bad or both. It unnecessarily turns on its head the progress the NT made when it established the OCPID and public interest disclosures (whistleblowing) as a force for the good in civil society.

I have identified some of the more egregious proposals as follows.

a) Primary responsibility - s.88

This is a really bad idea. The OCPID should retain primary responsibility for whistleblower protection, so that the ICAC can focus on exposing and correcting wrongdoing, rather than having to find ways to legitimise decisions that potentially, harm the whistleblower (refer discussion above, under the heading, 'Proposed policy as a whole').

b) Use of the descriptor 'protected'

The use of the descriptor 'protected' in whistleblowing protection legislation has form. The initial legislation in NSW in 1994 used similar language in its title and text. In practice a 'protected disclosure' came to mean that it (the alleged wrongdoing) would be protected from being investigated - and buried, along with the whistleblower. The title and text was changed to focus on what a disclosure *was*, rather than what it *was not* when it became known as the Public Interest Disclosures Act 1994.

I know jargon can be convenient, but it is no substitute for well directed language. So beware the catchy phrase. Avoid spinning it, lest it's seen as a con. And don't promise what you can't do – because section 88(2) makes it clear you don't want the ICAC to be

held liable for its decisions, when things turn sour - when whistleblowers understand, it is little more than a sop.

This language continues a longstanding practice of calling something it is not; when clearly it is meaningless, unless and until a court rules on it. It sticks in the craw, when practical protection is possible and achievable if legislators have the courage to provide the systems for it. The OCPID could easily do a better job.

c) Entrenching false expectations

Similarly with s.89: as a matter of language, you cannot make a 'protected communication' when that status is clearly conditional on certain conditions being met - after the fact.

d) Remedy

I suggest you take a different tack. Drop the whole idea of 'protected' this or that. Use simpler, more sincere language. Use language, which simply explains *how* and *where* a disclosure may be made. In short, stay with the PID act.

e) Obtaining a declaration of protected status under s.91

Section 91 sets up a system designed to deny protection – it is unnecessary and will be punishing in its effect.

It allows for a declaration to be withheld in circumstances where for example, ICAC considers the alleged improper conduct to be insufficiently serious. Now to my mind, this may be a reason for not investigating it, but not for denying a whistleblower the means to defend him or herself.

To give you some idea of just how nitpicking and silly s.91 can be. A declaration can potentially be withheld if the whistleblower mistakenly submits the PID to the wrong entity. I ask you, why on earth wouldn't you simply pass the PID on, like other entities do? Why would you penalise a whistleblower for not being an expert in your field?

Plus there are conditions like whether you have cooperated, which can have no bearing on the *fact* that you supplied information of wrongdoing. And it is unfair, when it ignores the other side of the story.

Another worrying example is one, which allows for a declaration to be withheld if the PID potentially or actually has an adverse impact on the public interest or the interests of a person. So, conceivably the ICAC could withhold a declaration to protect a mate from any future action brought by a whistleblower - in secret – rather than investigate an allegation of corruption in the public's interest. This type of opportunity has the potential to corrupt the ICAC. It should go.

If you survive the s.91 process, the ICAC can issue you with a 'declaration' to use as defence in a court action. You'd expect after all that that the ICAC would go into bat for you, but no! And to add insult to injury, you're *permitted* to apply! All this, when what the ICAC should be doing, is voluntarily providing a simple written confirmation of its receipt of the PID, that it has been registered with the OCPID and or why it has been referred to another entity before including information as to what lies ahead.

Most jurisdictions simply put a whistleblower on notice, by requiring that they have an honest belief that the information they allege is true, then provide a written confirmation of their receipt of the information and leave it for a future court to determine it either way, depending on the claim before it. That is, a legal defence based on having supplied a PID, which is better than the ICAC setting itself up as judge and jury with no right of appeal. The entire rationale behind s.91 is really unhelpful and should be dropped.

I can't see many submitting to this process, which makes me wonder whether that is actually why s.91 makes the issue of a declaration conditional on the whistleblower asking for it.

In summary it will reduce the effectiveness of the ICAC by discouraging many from coming forward and it will frustrate and harm those who do, making the ICAC experience more damaging than the payback at work.

Funding allocations

I appreciate that the proposal for an ICAC allows for an almost seamless transfer of funding, roles, functions and staffing from the OCPID to the new body and is no doubt, irresistible financially. But it is short sighted, because it fails to capitalise on what we already from our failures over nearly 25 years and the very real gains the NT has already made in establishing the OCPID in the public mind. It risks the Government looking too stupid to realise the opportunity it had, to invest in a better future.

Under our proposal the NT could maintain its budget and achieve something really worthwhile, by adjusting the funding package to provide for a smaller more focussed OCPID to continue, with the initial reduction in ICAC funding being picked up over the forward estimates as the two organisations settle into their role.

Political considerations

These are troubled times for the NT and it might be hard to see the upheaval around the Don Dale Detention Centre revelations as an opportunity to break new ground, to do something more than play just *play catch up*. Yet it is such an opportunity and one the government would do well not to ignore.

Yes, the race is on. The ACT is likely to establish an ICAC body sooner rather than later, and the pressure for an ICAC is building federally, so the thought of pipping them all at the post must thrill. But it won't satisfy the electorate once it realises that the government ignored the opportunity it had to protect and support the very people who are the *lifeblood* of any ICAC – something the government always knew, but failed to act on.

So can we please, have a government that looks beyond the near horizon and provides policy reform that we can all be proud of in the decades to come?

Thank you, for the opportunity to contribute.

Yours sincerely,

Cynthia Kardell

Attachment: Submission dated 17 February 2017 to the review of the current whistleblower protection laws.
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Cynthia Kardell
President
Whistleblowers Australia Inc
https://www.whistleblowers.org.au
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Whistleblowers Australia

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17 February 2017

Natasha Kate Fyles MLA
Attorney-General and Minister for Justice
Department of Attorney-General and Justice
Old Admiralty Towers, 68 Esplanade
Darwin City NT 0800
agd.whistleblowerfeedback@nt.gov.au.

Dear Madam

Re: how the law could be improved to better protect whistleblowers

Please find below our submission to the review of the current whistleblower protection laws.

Our organisation has been in existence since 1991 and in our current form since 1993. I have been a member and office bearer at a state and federal level since 1994 as have a number of others. We bring nearly 25 years experience to the question of what makes the NT act fit for purpose.

I've confined this submission to providing ideas of how the law could be improved to better protect whistleblowers as the other two terms (of reference) don't apply.

The Public Interest Disclosures Act (NT) 2008 is not dissimilar to the acts that exist in other jurisdictions, although I tend to think the NT act has benefited from the experience of those that went before it. The earliest acts were enacted in NSW, VIC, SA and the ACT in or about 1993-4. There have been a series of amendments since and currently, the Victorian and federal acts are also the subject of a review. We have made submissions to both inquiries.

Our submission is necessarily short due to time constraints and draws on the submission we made to the federal inquiry, because the structural failures that it identifies have plagued all of the acts since their inception. We recommend you have a copy on hand as you read this submission.

The NT act is a trail blazer in establishing the Office of the Commissioner for Public Interest Disclosures (OCPID). We have long championed the setting up of a Public Interest Agency (PIDA), albeit with a different role. The OCPID appears to be more like (eg) the NSW Independent Commission Against Corruption than the PIDA we recommend: it suffers from the inherent conflict that exists between investigating a disclosure and supporting, protecting its author. If the NT were to

establish a general corruption body, the OCPID could become the public champion of whistleblowing that society deserves. If the NT were to legislate for a US false claims act, it could easily accommodate its administration.

Every jurisdiction relies on an internal disclosure as a first step. It gives executive and senior management the opportunity and the time to do the things that properly, need to be done: but it also gives the less scrupulous and the corrupt the time to cover up the wrongdoing and punish the whistleblower. The evidence is there - it happens – and it happens too often to keep turning a blind eye. It's a temptation that can be removed. So we need to recognise where conflicts of interest exist and even flourish and remove them - and develop the strategies that reward good behaviour and punish bad. And we need to allow whistleblowers to decide if or when an external disclosure to a third party including the media is necessary – and continue, to encourage internal disclosures. The evidence is whistleblowers will mostly continue to use internal disclosures as a first preference but it is the threat of imminent exposure that will pull executive and senior managers back from the brink.

Ideas of how the law could be improved:

- limit the role and function of executive and senior officers to deny them a role in making the decision to investigate a disclosure or not and or to protect a discloser;
- ensure that only the officer with responsibility for investigating the disclosure (the investigator) is able to decide whether or not to investigate a disclosure;
- ensure that only the officer with responsibility for the safety and protection of whistleblowers (the 'protector') is able to make decisions so to do;
- ensure that investigators and protectors are legally independent of their employer in their work;
- define a 'public interest disclosure' as a disclosure made *in or on the behalf of* the public interest;
- legislate a general public interest defence;
- develop and implement a new social contract to keep whistleblowers safe, anchored in top down transparency and accountability;
- provide for criminal and civil offences for failing to support a whistleblower and or whistleblowing whether by action or inaction;
- ensure that external watchdogs publish their reasons for adopting another organisation's decision and reasons not to investigate;
- provide for disclosures to be made externally to third parties including investigative bodies, media and politicians *at the will* of the whistleblower without limitation or penalty – but continue to encourage internal disclosures at a policy level on the ground;
- extend the external investigative bodies available under the present act to provide a general corruption watchdog and
- redefine the role of the OCPID to confine its duties to protecting, supporting whistleblowers and whistleblowing (refer the PIDA below)

Public interest disclosure agency or PIDA

Establish a public interest disclosure agency or PIDA to register, publicly promote, protect and support whistleblowers and whistleblowing across all sectors. It would (eg) be able to seek injunctive relief for whistleblowers, prosecute claims of reprisal and seek penalties for the failure of management to support whistleblowers and whistleblowing.

If the Northern Territory decided to legislate a US style false claims scheme now or at some time in the future, it could establish a **'false claims' division** within the PIDA to register and monitor false claims actions and receive, assess and resolve claims for compensation under a false claims scheme – that is, a PIDA could become largely self funding.

It must have a strongly preventative, educative function online, on the ground and in real time that fosters public knowledge and awareness, by gathering data [eg., about the number of whistleblowers and wrongdoers promoted, sacked, demoted or forced out sick under cover of workers compensation claims, bogus re-structures and confidential agreements and the related costs, false claims], conducting research and driving reform via parliament and regular public review.

Whistleblowers Australia has been calling for a PIDA like body for nearly 25 years.

I'd dearly like you to open your mind to change and benefit from our experience, as well as your own. These are troubled times for the Territory and the Don Dale tragedy is a terrible wake up call for all of us. You might consider looking to the Scandinavian countries for ideas, which rely heavily on professionally educated, well trained staff. The vicious beatings we saw on our television screens were devastating, but I must commend those who made it public. They were fearless and unflinching in doing what had to be done to begin the process of putting it right. As unpalatable as it might be publicly, politically, it was never going to be fixed otherwise. We do hear from NT whistleblowers from time to time and their concerns are the same as whistleblowers everywhere: internal disclosure, sham investigation, cover-up and reprisals.

Ideas that you could also consider now rather than be dragged to the party over years include opening up your act to apply across all jurisdictions - the private, public, unions and associated bodies, not for profit and charitable organisations and volunteers – because our shared history over nearly 25 years indicates it is inevitable. You can fiddle away at the edges over the next decade or so – or be bold and pull it all together now, while you still have a sensible clear sighted base to operate from.

Thank you for this opportunity.

Yours faithfully,

Cynthia Kardell LLB
President
Whistleblowers Australia Inc
http://www.whistleblowers.org.au