INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

Review of Protected Disclosures

Melbourne — 20 June 2016

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Ms Cynthia Kardell, Whistleblowers Australia *(via teleconference).*

The CHAIR — Cynthia, good morning. I need to read a statement first so that we can make sure that it is all recorded properly, and then we will come back to you. Do you wish to make an opening statement or will we go straight into questions?

Ms KARDELL — No. Go straight into questions.

The CHAIR — All right. Welcome to the public hearing of the Independent Broad-based Anti-corruption Commission Committee's review of public disclosures. You have chosen to give evidence to this committee by videoconferencing/audio conferencing or other electronic means. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and, where applicable, the provisions of reciprocal legislation in other Australian states and territories. Any comments you make outside the hearing or after the official hearing proceedings have concluded, whether made while still in videoconference or made after this video-audio conference hearing, may not be afforded such privilege. Are you clear about what this means?

Ms KARDELL — I am.

The CHAIR — Thank you. Have you received and read the guide for witnesses presenting evidence to parliamentary committees?

Ms KARDELL — I did. It was a little while ago, but that is okay.

The CHAIR — We are recording the evidence and will provide a proof version of the Hansard transcript at the earliest opportunity so that you can correct it as appropriate. Do you agree to have your evidence taken by videoconferencing/audio conferencing?

Ms KARDELL — I do.

The CHAIR — We will go straight into questions. With the Victorian protected disclosure regime as it stands, Cynthia, what concerns does your organisation have in regard to that?

Ms KARDELL — Our concerns are that it produces the same sorts of consequences as does the existing legislation in other jurisdictions, that it continues to allow bullying, harassment, mobbing in the sorts of behaviours that are either undertaken by small groups or sometimes orchestrated by management. We continue to see whistleblowers who are not safe in their jobs; they do not stay in their jobs. In paragraphs 33 to 37, I think, in my submission I have laid out what I see as generally the sorts of responses that people have or, if you like, I have set out the sort of consequences that usually occur, keeping in mind that I mostly hear from people who are unhappy with the process. I do occasionally get a call from someone who is content with the process, but more often than not that is the person who is still or remains in ignorance of the outcome and is acting in hope.

Whistleblowers continue to be unsafe and to be kicked out of their jobs, and that is not good enough, so I think that we need to reassess what we are doing. Although I understand that your act has been amended a number of times and perhaps was not — I think New South Wales, the ACT and South Australia had the first legislation, but it is roughly about 20 years, and in that 20 years we have seen a system grow which provides pathways for the supply of information and controls that information but does not really go the next step of embracing whistleblowing and making sure that whistleblowers remain safe in their jobs. It has not made that quantum leap. I think that there are ways of doing that, and that is why I made the submission.

The CHAIR — So specifically what needs to happen to make sure that whistleblowers, I guess, one, are respected; two, are safe in their jobs; and three, I guess, there is an encouragement within the system for people to come forward?

Ms KARDELL — Well, the encouragement is working, I think, and I think that is because whistleblowers mostly are keen to assist. But that encouragement is not going to the next step. You are

right; they are not treated with respect. They are not accorded open recognition within the system. There is no process which currently allows for the management of an organisation to publicly endorse and embrace whistleblowing and whistleblowers. The process is still fairly secret, and that is the problem. If you want a culture that is openly ethical and transparent, then you have to be that culture. You do not just provide a mechanism by which a small group of that culture can come forward and supply information; you need to be open and transparent in the way that you handle the information and how you respond to the people who come forward.

Eventually, if we succeed, it will be the case that every person in the organisation sees themselves as a whistleblower or potentially so, sees themselves as part of the solution rather than the problem, and proactively, wherever they are in that system, will work towards that end point. I see that the way in which you are going to achieve that is to put a little bit more effort and thought into the reasons why organisations act corruptly. I have gone right to the end of, if you like, the spectrum in calling it corrupt, because there is everything in between. But unless you start to think about why that happens, what facilitates it, what keeps it in place, we will not make any progress.

The CHAIR — Thanks.

Mr D. O'BRIEN — Thanks, Cynthia. Can I just ask a bit about the background of Whistleblowers Australia? What is the status of the organisation? How were you formed and funded and all that?

Ms KARDELL — We are a voluntary organisation. We do not have funding of any sort, other than a very small membership fee which basically covers the distribution costs of our newsletter. The people who are part of Whistleblowers Australia can come forward and by election take up roles as office-bearers, as I have done. We work towards helping whistleblowers help themselves, and we work wherever we can to encourage legislative and administrative reforms.

Mr D. O'BRIEN — Are your members from across Australia, and are they mostly people who have had direct experience of whistleblowers issues, or are they just generally interested people?

Ms KARDELL — We are trying to encourage generally interested people to become members, and that is a small growth, but primarily probably 95 per cent of our membership at any one time are people who have blown the whistle in either the private or the public, not-for-profit or whatever sector of our society. The people who are currently on the executive and the committee are people who have — with one exception, I think — blown whistles.

Mr D. O'BRIEN — Just getting to the nub of it now, you have talked about the need to expand the act to the private sector as well. Is that done anywhere else in the world?

Ms KARDELL — In the UK they have achieved that by tying their protective laws to employment, and they do not distinguish between public and private. So you can achieve it in different ways. In South Australia, like your legislation, they allow any person. South Australia, though, does not require the information to relate only to public sector organisations — or wrongdoing in public sector organisations. Your legislation allows any person to come forward, but the wrongdoing has to be wrongdoing occurring in the public sector. So it is just a little shift which would allow you to embrace whistleblowing more broadly across society to recognise that organisations in the private sector are as much a part of our civil society and there is as great a need for those organisations to be ethical, accountable and open to scrutiny as there is in the public sector. So there needs to be a greater understanding of where the public interest lies in a civil society.

Mr D. O'BRIEN — How do you get that balance right, though, if you were opening up to the private sector that you are not unnecessarily going into issues of a commercial or private nature that really do not have any public interest element that could otherwise be dealt with by the police, if it is fraud or otherwise?

Ms KARDELL — The Victorian legislation, like most, confines itself to wrongdoing and then defines that wrongdoing in terms of the more innocent end — waste, misconduct — through to the things which ordinarily you would see turning up in our courts in terms of theft, fraud, bribery and the like. So staying

with that process — determining what wrongdoing you will look at but that you will look at it from all sectors. That is the simplest way for you to go about it, and it will happen.

There are moves afoot in other jurisdictions to embrace whistleblowing more broadly across all sectors and to find ways to do that. The simplest way, as I said, is the way I have just described and to change your whistleblower protection laws to apply to any person. You can tap into, if you already have them, an existing structure or an existing system of investigative bodies looking at a whole array of different sorts of behaviours, and those bodies could continue to do that. But if you were to have a whistleblowing protection act which provided realistic and practical protections to people operating in all of those sectors and then perhaps gave thought to something that is longstanding and quite productive in the United States of America jurisdiction, and that is the False Claims Act, you would have covered the field.

Mr D. O'BRIEN — Okay. Thank you.

The CHAIR — Can I just do a follow-up? With the UK experience that you spoke about, we are not just talking about a private company where it has had public sector involvement and there is corrupt activity as a result of that public sector activity in the private company.

Ms KARDELL — No. That is correct. In Australia, so far we have extended protection only as far as it applies to organisations which receive public money or contract to public sector organisations. It is the next step that you need to take, which is to ignore whether it is public or private but simply go to any person, talk about the type of wrongdoing that you are interested in exposing and dealing with and applying protections that would apply to anybody who is in employment or alternatively as a public citizen and is harshly dealt with for speaking out. That happens too. The UK pursues one mechanism, and it has its critics and its failures. I think it did not need to do what it has done. It was an unnecessary step to tie it to employment, because it excludes the people who are outside of that, like the volunteers who are part of an organisation.

The CHAIR — So in the case of a private company and a whistleblower makes a public disclosure and it turns out to be a vexatious claim, how do we deal with that from a public perception point of view?

Ms KARDELL — Do you mean that you think that a company is going to be embarrassed by the exposure and then subsequently you find it is all a nonsense?

The CHAIR — Correct, yes.

Ms KARDELL — And the company has been put at risk by that and possibly lost business.

The CHAIR — Yes, the public reputation of the company has been put at risk. Are there ways of being able to do what you suggested in a strictly confidential way? I guess once an investigation starts it is no longer going to be confidential.

Ms KARDELL — I think you would be mistaken to worry too much about public reputations. Business can best survive if they tackle it up front, address the issue and come out and talk about it. That is the thing that will keep its reputation intact. The sooner that we learn that right across the board — we are only slowly starting to grasp that in the public sector, that we need to talk about our wrongdoing and we need to learn from our past. In recent times there have been a couple of large companies, and Myer is one, which have publicly come out and talked about what has been going on and have tried to deal with it. All right; they were not directly in the line of fire, because it was the employment or the hire company which was directly in the line of fire because they were underpaying the cleaners. But Myer showed how it could be done, and it is not through secrecy. I just urge you to think about this more and to understand that it does not matter where you exist in society, you are much better protected if you come out and argue your patch.

Mr RAMSAY — Our conversation probably leads me to a question I was going to ask in relation to your submission where you identify that confidentiality and secrecy provisions within the public disclosure act should be amended on the basis that it allows or should allow or permit an investigator to discuss with

the discloser the progress of the investigation. You have already indicated perhaps you find the provisions in the current act somewhat restrictive in allowing that sort of process to occur, so I am just interested in your views about why you see that as so important. Does it compromise the ability to provide some confidentiality for those that are making public disclosures and also what further amendments you might like to see in the current act, or in fact for the act to be abolished and a new act put in place to meet the requirements that your organisation might be seeking?

Ms KARDELL — I think the first question is to do with disclosers dealing with the investigative team. If you really want a whistleblower to be respected, then they have to be seen in the same way as you would look at someone who was providing you with an audit function. They have information which in the course of the investigation may well be relevant to advancing the investigation. At the outset you give your information, but it may well turn out that as the investigative team becomes more familiar with the case, gathers information and is able to establish this but not the other, if they come back to the whistleblower they may well find that the whistleblower holds other information or other insights which allow them to progress the investigation. That is the first thing. It is a very practical way of harnessing the information and insights of the whistleblower.

At a broader level, if you are culture building, or if you are thinking about culture building, you will want outsiders to see that the whistleblower and that person's information are treated as credible and that they are treated with respect. It is the only way you can do it. Initially you will find that people will be unwilling to have themselves known more publicly, and I think that is because we have spent 20 years trying to convince whistleblowers that their interests — their personal interest and their safety — are best served by remaining behind a screen of secrecy. Whistleblowers would much rather have everything open and out there, but it will take some time because, as I said, the system has done a lot towards conditioning people to think that the only way that they can have safety is by remaining out of sight.

The next step is to understand that after 20 years staying out of sight has not helped the whistleblower, because the people who know what you have done in coming forward are usually the people who are most able to retaliate, and then it is all happening in secret. No-one is served by secrecy. Once you start along this path and you start to understand how it can operate, and everybody is pulled into acting accountably, you will find that the entire system will respond in an appropriate way.

The CHAIR — In your submission you identified and spoke about relevant stats that should be collected. What kind of stats do you think should be published, and how frequently do we publish those figures?

Ms KARDELL — Now what question was that? Let me just find it. I made a list for you.

The CHAIR — Our question no. 4.

Ms KARDELL — Your question no. 4. Firstly, you need to be obtaining the statistics about cases of wrongdoing. So you need to conscientiously research back through what has happened and draw from those cases statistics that tell you what facilitated the wrongdoing, what was the relationship between the wrongdoer and the whistleblower and what enabled retaliation — the types, the frequency, who was involved — and then you need to gather statistics that are derived from the claims lodged with the bodies. You need to track the employment history of the whistleblower and the wrongdoer, because if you were to just take a quick look, you would find that the whistleblower is mostly sacked and the wrongdoer is rewarded with promotion. That is something that needs to come together. Over time they need to draw level, and then further into the future whistleblowers have to be seen to be staying in employment and having reasonable opportunities for promotion over time, and the wrongdoers have to be seen as suffering some sort of demotion or deceleration or being held back for a period of time before they start to come forward again. Then you will start to know that your system is starting to work for you.

You need to maintain statistics about WorkCover claims which rely on whistleblowing as being the catalyst for the retaliation which caused the personal and psychological harm. You also need to start keeping statistics about the costs involved with dealing with, for example, WorkCover claims and dealing

with wrongdoing, and you need to see those things as costs that you need not have spent had you had a more open and transparent system in the first place. So it is not going to happen overnight, but you make a start.

And you will need to employ people with a research and academic capacity to be able to set up the processes and make sense of the information that you gather. I would imagine that you would publicly account to the wider population, perhaps once a year, but on a sort of contemporaneous basis you would make available information about the things that are going on at the time in the way that I said in my submission — that you would contemporaneously put it on your PID record, which would be open. This is so easy to do now that we have got the internet and computers. Once you start doing that — you put it up there, the bad things, the good things — you will find that your reputation will be accelerated in the right direction and people will get behind the system.

The CHAIR — Thank you. In your submission you highlight the difficulty arising from the title of the act, Protected Disclosure Act 2012 (Victoria). Based on your experience of working with whistleblowers, why is it important to include 'public interest' in the title of this kind of legislation?

Ms KARDELL — The first thing to say about it is that you could spend your life trying to get somebody in authority to tell you that you have a protected disclosure, but it does not matter; it does not help you. So there is an element of fraud in that, which really bites hard, as a whistleblower — when you take a system on trust and you find that it does not matter whether or not you have made a disclosure which is accepted as being protected, particularly when the protections that are currently offered are things that are not practical and are not relevant. Whistleblowers do not get sued for defamation; they do not get sued for breach of confidence. They get sacked. They lose their super. They lose promotion. They lose their history of reasonable employment so that they can continue. So from a whistleblower's perspective it does not work, because it underscores the failures of the system.

At the heart of all whistleblowing is the public interest. That is why whistleblowers are propelled to do it. They see something wrong, and they believe that their institutions will be able to respond in appropriate ways and put it to rights. It is just simply that. It is the public interest that gets them going. They have an overriding view of how our civil society should work, and they believe in its systems and its institutions. If you want to have something that is credible and you want a platform from which to launch and maintain a system, then harnesses that sense of public interest, because that is what it is about. And increasingly, across many, many jurisdictions 'public interest whistleblowing' is being harnessed as a term to describe what those legislated systems are all about, although 'whistleblowing' will always be the generic term.

It is for those sorts of reasons that I think that you would be best to come away from protected disclosure. New South Wales used to have a similar title. It began as the Protected Disclosures Act 1994, and its name was subsequently changed to the Public Interest Disclosures Act. I was having a look only the other day. The UK act is similarly named, and the more recent developments in other Australian jurisdictions have moved to public interest. That is why — I hope I have made myself clear — you need to harness the thing that drives people to want to keep our society accountable, ethical and civilised.

The CHAIR — Thank you. Are there any further questions?

Mr D. O'BRIEN — Just a very quick one. The False Claims Act in the US, can you just give us a brief overview of what that is about?

Ms KARDELL — It is a system by which — it is very simple — the whistleblower, private or public sector, becomes aware of wrongdoing and goes to a solicitor and lays a claim in the relevant court as a representative of the state. They stand in the shoes of the state. They are known as the relator. They bring a claim saying that this or that body has defrauded the government by causing it to spend money or to reimburse money or to compensate people wrongly. One of the most frequently cited examples in the US is in the Medicare field, where people come forward and say that the state has falsely paid certain invoices — that is where the false claim — like, a wrongdoer has made a false claim on the government.

Mr D. O'BRIEN — So this could be made against a private or public sector organisation?

Ms KARDELL — It is being used — in the US it has been around since Abraham Lincoln. He set it up first up because he was really upset that people who were selling the government gunpowder could actually sell them kegs of sawdust. They were paying for sawdust when they thought they were getting gunpowder. So that is where the notion of false claim comes in. People were making false claims on the government. In the 1980s the whole system was ramped up, and it is now cited as the most credible beneficial way of recouping money falsely claimed from the government. It has developed to a point where it can be used in the environmental area, commercial areas and government areas. It is huge.

Basically if we go back to the practical case, the whistleblower goes to a solicitor, sets up a claim, it is filed and the government gets a time — 60 days I think it still is — to decide whether they want to take it over and run with it or whether or not they want to leave it in the hands of the whistleblower. If they take it over, the whistleblower gets a lesser percentage of the money that is recouped. If the whistleblower goes ahead with it, they have all the litigation risk, so they get a bigger cut of the monies returned to government.

Now, here is what makes it work. They exploit and rely upon their punitive laws, if you like, or penalty laws. We have the same sort of system. We are both common-law systems; we can do the same. The system is that you work out how much has been falsely claimed from the government and you treble it — three times — and you claim three times the amount so that if the state takes over the action, the whistleblower ends up being able to claim something like 15 to 20 per cent of the total reward — or award I should call it; it is not a reward, it is a court award — whereas if a whistleblower takes the full litigation risk, that person is able to claim up to 30 per cent. The state is always the owner of the money or any money recouped, and the whistleblower becomes a driver of the litigation. I do not know whether I have made that simple or not.

Mr D. O'BRIEN — Yes. That is good.

Ms KARDELL — I think now is the time to tell me that, if you do not mind.

The CHAIR — Danny is happy.

Mr D. O'BRIEN — Thank you.

Ms KARDELL — Are you sure?

The CHAIR — He is fascinated by the gunpowder as well. That is a very good example.

Ms KARDELL — I can just imagine Abe Lincoln getting really mad as a hornet because he is thinking he has got all this gunpowder for whatever military action is coming up, and it is sawdust. It would be really, really upsetting. It would make you angry, I am sure. But you can do your research. The US situation works on the idea of a False Claims Act, and then aside to one side there is the Whistleblower Protection Act, which deals with what the whistleblower can and cannot claim from an employer in a situation of being a false claimant or as just being a straight whistleblower. It is sort of like an umbrella act.

So what I am suggesting to you is a sort of shift of gear — another look at what you have got and saying, 'This is an opportunity for us to reorganise how we go about all of this'. That is why I would like you to think about a public interest disclosure agency or a defender of the public interest. The best way I could get you to think about that is in New South Wales — I am sure you have something in Victoria like this; I have not had time to check — we have an environmental defender — that is, the EDO, the Environmental Defenders Office. It is government run, and they act in the public interest and they work to protect the environment. That is a model. That is a concept that I would like you to think about in developing a public interest disclosure agency. It would defend the public interest, it would promote whistleblowing and it would in time be the body which gathered all those statistics that I was talking about. It would in time be the body which would do the major body of research in the area, and it would also protect whistleblowers in that it would deal with claims of retaliation and be able to intervene with their employers to keep them in there. Sometimes all you need is a nudge to know you are facing somebody who has got equal power

and you will put your nose in and you will do the right thing. I envisage that in the future that is where we will go.

I have been promoting this, and we have been promoting this, for 20 years, and in 20 years we are making some very slow progress. I really would like you to take my suggestion seriously and work out how you could set up a body which would become the defender of the public interest and the whistleblower that serves it.

The CHAIR — But, Cynthia, surely the Victorian IBAC would play that role?

Ms KARDELL — No, because when you investigate something you have a whistleblower as part of that process who may or may not be wrong and you want the information from them, but you do not also want to protect them, because sometimes there will be a conflict between those two needs. An IBAC will always put its investigative function ahead of — —

Now, just think about this. You have got a person who is a whistleblower giving you information, and you have got your need to run an investigation. Then your whistleblower comes to you and says the person that you are investigating at their call is retaliating against them. How do you manage those two things? You cannot. It has never been done anywhere, and it will not ever be done, because we are talking about structural conflicts, and they are logical conflicts that will not ever go away. You cannot do it. You cannot try to protect somebody at the same time as you are trying to keep an open mind about the person you are investigating.

The CHAIR — All right. Thank you for that. Cynthia, we are extremely grateful for your time, and we wish Whistleblowers Australia all the very best in the future.