WHISTLEBLOWERS QUEENSLAND

WHISTLEBLOWERS ACTION GROUP QUEENSLAND (Inc)

PUBLIC SUBMISSION TO SENATE SELECT COMMITTEE ON A NATIONAL INTEGRITY COMMISSION

7 April 2017

WHISTLEBLOWERS ACTION GROUP QLD INC

SUBMISSION

THE SENATE SELECT COMMITTEE ON THE ESTABLISHMENT OF A NATIONAL INTEGRITY COMMISSION

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G. McMahon
President

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Chair
Senate Select Committee on a National Integrity Commission
Australian Parliament
CANBERRA ACT 2600

Dear Chair

The whistleblowers in Queensland have had twenty five years experience of interactions with government over whistleblowing. With respect to bodies similar to the proposed Integrity Commission, most of our experience has been with the Queensland State Government equivalents. We have, however, also had long experience with the Commonwealth Ombudsman, and recent experience with like bodies such as the various Defence bodies with responsibilities dealing with whistleblowing, and the Fair Works Commission in its recent whistleblowing role. Please allow the Queensland Whistleblowers Action Group Inc to provide our experiences under both state and Federal jurisdictions, in describing to your Committee the problems and challenges faced, and advices on how the Federal Government might proceed.

The abbreviation TOR is used for 'term(s) of reference'.

Greg McMahon
President

TOR (a): ADEQUACY OF THE GOVERNMENT'S JUSTICE FRAMEWORK

REFORM OR RETRIBUTION

QWAG submits that the existing legislative, institutional and policy framework simply mirrors the strength of the intention held by 'government' to address corruption and serious wrongdoing, both in government, Federal, State and Local, and also in the community.

Governments can be categorised by the position that they adopt between the **'pole'** of actively reforming serious wrongdoing and systemic wrongdoing in their government, and bringing offenders to justice, and the **'pole'** of covering up such wrongdoing and ensuring that those who break from that position are punished.

The interest here is about misgovernment or poor government. The phenomenon of whistleblowing arises from a failing government, where ministries function such that serious wrongdoing and systemic wrongdoing develop and grow, causing whistleblowers to step forward. Good government is self-correcting and self-healing, it is proposed. Whistleblowing should not arise where agencies and firms are engaged with parties involved with disclosures, where the intent is to correct wrongdoing, its causes and symptoms, and to heal any hurt to any of the parties.

This interest is strategic, because serious wrongdoing and systemic wrongdoing are areas of government that governments of all persuasions have found most difficult, if not impossible, for themselves to address. It is only the rare examples, such as by Premier Steele Hall in South Australia (late 1960s), and by Acting Premier Bill Gunn in Queensland (1987), both decades ago, that gives one confidence that some governments can address the issue of systemic corruption at all.

The tone of current governments in Australia on reform of corruption may be best exemplified by the way that principal watchdog authorities have performed their roles in the investigation of disclosures made by whistleblowers, and in protecting whistleblowers from reprisals. Those watchdogs are the Offices of Ombudsman and the standing crime commissions from most governments across Australia.

How have the watchdog authorities performed? A significant moment in the relationship between whistleblowers and the governments that whistleblowers serve, came with the completion of the Whistle While They Work (WWTW) research Study into whistleblowing. Watchdog authorities served on the Steering Committee for and as partners to the WWTW study conducted by several universities in Australia. This Study essentially was a survey into the responses taken by agencies towards disclosures of alleged corruption and maladministration within their own organisations.

At the time of release of the results of the completed WWTW study, one watchdog authority and chair of the Steering Committee, Qld's CMC, issued a media release claiming that bad treatment of whistleblowers was a ***'myth'***. A ***'myth'*** is defined in the Oxford Dictionary as ***'Purely fictitious narrative usually involving supernatural persons, etc, and embodying popular ideas on natural phenomena etc'***. The media release appeared to rely on the results of the WWTW study to support the ***'myth'*** claim.

The WWTW study did not do many favours for whistleblowers. Relevant to the CMC's ***'myth'*** claim, the report on the WWTW did describe the principal whistleblower studies in the literature, both popular and academic, as ***'mythical tales'*** and ***'popular stereotypes'***. The methodology used by the

WWTW also had limitations for what the Study could claim from its research surveys – principally, the study did not include in its survey former public servants who had made disclosures and were no longer in the workplace … and the report on the Study acknowledged this. Therefore the study could not legitimately state figures on whistleblowers who were terminated or forced out of their jobs after making disclosures. Unfortunately, the WWTW did state that the ***'sacking'*** of whistleblowers was ***'unlikely'***, even though the methodology used by the study did not enable the Study to make any comment from the survey results about those who had left the organisation.

This CMC claim to the media, that bad treatment of whistleblowers was a ***'myth'***, appeared to rely on the particular survey used by the Study where survey respondents self-nominated as whistleblowers. This survey, with its methodological limitations, came up with a figure that only 22% of whistleblowers met with bad treatment. In the Study's defence, however, two matters need reciting. Firstly, the Study did also do a survey of 'known whistleblowers', where, with the same methodological limitations, the percentage of known whistleblowers who received bad treatment was 66%. In compiling their claim of the bad treatment ***'myth'***, however, the CMC preferred the 22% figure from the self-nominating whistleblowers rather than the 66% figure from the known whistleblowers. Secondly, a principal researcher from the Study, years later, denied that any researchers on the Study ever claimed that bad treatment of whistleblowers was a ***'myth'***. That principal researcher also described the ***'myth'*** claim as ***'preposterous'***. It is unfortunate that that researcher's name appeared on the CMC claim.

Nevertheless, the ***'myth'*** claim was made at the time by the watchdog authority that served as chair on the Steering Committee for the Study, and the damage was done. QWAG submits that, while the WWTW Study did not survey terminated whistleblowers, the watchdog authorities such as the CMC have been approached by many whistleblowers in this circumstance, seeking protection. The watchdog authorities may have failed that Study by not addressing the shortcoming in the Study outcome, the flaw in its methodology, and the illegitimacy of particular statements made in the Study's report. The watchdog authorities may then have sought to benefit from the shortcoming by making the bad treatment ***'myth'*** claim, which claim was clearly ***'preposterous'***.

There appears to have been a second shortcoming in the Study that was made use of by the CMC in the bad treatment ***'myth'*** claim. Responsibility for this second shortcoming may be shared by the Steering Committee and the research Study. That may be the assumption made by that Study that the agencies of government are well-intentioned towards whistleblowers. This assumption was carried in the face of the results of the surveys conducted by this Study that reported the wide observations of serious wrongdoing in agencies, the fears held for retribution meted out by management that discouraged most would-be whistleblowers from reporting wrongdoing, and the high percentage of reported reprisals effected by the management of organisations against their whistleblowers. This Study appeared to be blind to the significance of its own survey results.

Discussion in the Study report of the possibility that agencies may be ill-intentioned towards whistleblowers was short and dismissive. The situation where agencies are ill-intentioned towards whistleblowers may be an indication that the agency is affected by systemic wrongdoing, QWAG submits. An ill-intentioned agency was a credible explanation for some high average figures (and the higher figures in half of individual agencies) obtained about wrongdoing by the Study. The friendly assumption that agencies were well intentioned towards whistleblowers, however, allowed the CMC to look for other explanations for the wrongdoing more friendly to the performance rating of the CMC.

For example, the CMC's bad treatment myth media release recited that an average 71% of public servants had observed wrongdoing in their agency in the last two years. This figure of 71% was only an average figure, not the worst result. This figure may approximate the percentage of people who watch the football during a match at a football stadium – for so many persons in an organisation to make such observations, the wrongdoing may likely have been open and widespread.

Again, the watchdog authorities may have failed that Study by not addressing the shortcoming in the assumptions made by the Study. The combined watchdog authorities had had the experience of major inquiries and Royal Commissions held into drugs, police corruption, paedophilia and child abuse, abuse of persons in health care and juvenile detention centres, abuses in military justice, malpractices in banking, corruption payments to overseas trade officials, the destruction of documents sought for litigation, and the non-enforcement of environmental conditions on mining releases. The combined watchdog authorities had had the experience of the difficulties and the failures by the watchdog authorities, allegedly, to affect corruption, as may have been indicated by repeated inquiries on the one area of government or government regulation. The principal example in the Federal sphere is Defence, which had 21 inquiries in 21 years into abuses of military justice. The principal example in Queensland is child abuse and paedophilia, with the Heiner, Kimmins, Forde, Carmody and Mason inquiries (two 2016 inquiries into the deaths of two children named Mason), and the continuing Royal Commission into Institutional Response to such abuse.

One may have expected that, with such an accumulation of experience with dealing with corruption on the Steering Committee, the Study may have been more open to the possibility that systemic corruption could also be a cause of such large average figures, and of larger figures for particular agencies and for parts of those individual agencies.

The summary for government from this bad treatment ***'myth'*** claim by a government watchdog may be that government in Australia may be looking at the level of corruption within its ranks using rose-coloured glasses. Governments and their watchdogs may be dismissing as a myth the bad treatment of whistleblowers whose disclosures may be showing the true colour of the government's agencies.

QWAG submits that the bad treatment ***'myth'*** claim by the CMC may be more than ***'preposterous'***, it may be a fraud upon the public, a trick played upon the public where honesty may have required an acknowledgement by the CMC of something that was stated clearly by the WWTW Study report, namely, that whistleblowers who had left the organisation had not been included in the survey.

QWAG's summary is that current governments may not be disposed to dealing with the corruption within their agencies. An average 71% of staff have seen wrongdoing. Governments and their watchdog authorities may be perceived to be engaged more often in cover-up of alleged systemic corruption rather than reform, and that the first victim of any cover-up will likely be the whistleblower.

Alleged reprisals against whistleblowers, and alleged suppression of independent advices from public servants that were in the public interest, may thus be a symptom of bad government in respect of both its political and bureaucratic components. Governments may now, allegedly, be too corrupted by their defence of their power, and by their reliance on their mode of exercising power in the 21st century. Governments may also be too disenabled by the levels and spread of alleged corruption within their political and bureaucratic organisations. An average 71% of public servants have seen wrongdoing. As a result, government leaders may now be more disposed to covering up that alleged corruption because it may be all beyond the capacity of the government to any longer control.

SERIOUS WRONGDOING

Information on alleged serious wrongdoing automatically comes to QWAG with the information provided about whistleblowing disclosures and the treatment received by whistleblowers and their supporters, including their lawyers.

The expansion of efforts by authorities to suppress disclosures has been alleged. Allegations have been received on the development of alleged tactics to dissuade persons from making disclosures and to dissuade persons from supporting whistleblowers. The effectiveness of these alleged expansions and developments in controlling whistleblowing disclosures, and in effecting the removal of whistleblowers, may have been increasingly felt by whistleblowers and their supporters.

Where the authorities appear to be losing control, however, is with the spread, expansion and development of serious wrongdoing. Too many persons exercising authority have allegedly been involved in the alleged suppressions of disclosures and terminations of whistleblowers – former Prime Minister Tony Abbott, for example, publicly asserted that the problem with the infamous Heiner Affair in Queensland is that half of the authorities in Queensland are now implicated in the matter.

> ***You know that I think that the Heiner Affair stinks. The problem is that half the Queensland establishment is implicated.*** [19 Feb 2010]

The destruction and/or disposal and/or manufacture of evidence, in cases taken by persons against the Queensland Government, may allegedly now be routine amongst most authorities in government. This may now be the case whether or not the matter is of a whistleblowing nature or of a non-whistleblowing nature, Agencies and watchdog authorities may have been disenabled from preventing this form of serious wrongdoing, because those agencies and watchdog authorities may have themselves been involved in such activities regarding the Heiner and the "*Rainbow*" whistleblower cases.

The ostracising of whistleblowers in their employment may be another example. Such ostracisations may be allegedly so widespread and so developed as a practice that ostracisation can now be applied to anyone, be they a whistleblower or not a whistleblower. A process of ostracisation may have even been imposed upon a Chief Justice of the Supreme Court of Queensland, according to the Queensland media, who called for a Royal Commission into the behaviour of the Supreme Court and of the wider legal profession (eg, *Courier Mail*, 26 May 2015). QWAG supported that call. The particular Chief Justice, when acting as a Commissioner of an Inquiry into Child Abuse, made a finding that the destruction on 5 March 1990 by the Goss Cabinet of the Heiner documents may have been a breach of section 129 of the *Criminal Code 1899* (Qld). Published comment in the media has made much of the role that this decision by the Commissioner may have figured in his rise to Chief Justice and in his fall. Members of the judiciary and legal profession have claimed that the opposition to the Chief Justice was based on his suitability for the position and was undertaken for the good of the justice system. One judge, who had allegedly recommended her husband for the role, confirmed the fact of a campaign against the Chief Justice, but held it to be a stand for judicial independence.

As a further example of developments assisting the spread of serious wrongdoing, the termination of whistleblowers disclosing corruption may now be facilitated, allegedly, by the whistleblower legislation. The revised legislation now allows the use of an undefined '*reasonable management action*' to terminate whistleblowers. An instrument purportedly for the protection of whistleblowers

may thus have been transformed by government into a pathway for the legal reprisal of whistleblowers.

It may be that the effectiveness of such practices for combating whistleblowing, rather than protecting whistleblowers, may be facilitating the spread of uncontrolled corruption, it is proposed.

This proposition can be more strongly advanced to authorities and to the community, it is understood, with the support of further examples of suspected cases. QWAG has thus a strategic interest in gathering those examples on selected types of allegations of corruption. Your Committee, by comparison is disarming itself by dissuading whistleblowers from submitting their cases to your Inquiry. It is the cases that demonstrate the problem, the causes, and the retreat of law and justice from this battlefield.

CORRUPTION

'Corruption' is a term widely used with respect to the public interest disclosures made by whistleblowers. Aspects to corruption that are important to the effectiveness of whistleblowing for achieving justice to all parties include:

- Categorisation of Corruption
- Definition and Description of Corruption

Categorisations of 'Corruption'

One categorisation of corruption that may be useful for the whistleblower (or potential whistleblower) to consider, is the White – Grey – Black categorisation of corruption.

White corruption is where both the community and the government or government agency regard the matters disclosed, if proven, to be a form of corruption. Individuals selling government approvals may be a form of 'white' corruption according to the current government and the current community in Queensland. This may not be the case for some forms of government approvals in other jurisdictions in other countries.

Black corruption occurs when both the government and the community give disregard to the illegality or waste alleged in the whistleblower's disclosure. Mistreatment of minority groups feared or disliked by the larger community may be an example of black corruption.

Grey corruption occurs where the government or government agency has a view different to that held by the community about whether or not the activities disclosed constitute corruption.

Grey Type II corruption occurs where the community regards the activities disclosed as corruption, but the government or the government agency do not agree. Unfortunately, certain treatments imposed on whistleblowers in Queensland, such as punitive transfers in the public service, may be an example of Grey Type II corruption in the Queensland and Australian jurisdictions. Grey II corruption is typified by an associated excuse or incorrect legal opinion given in support of the decision not to enforce the law on Grey II corruption matters. The rationale is only available to the government because the government holds the public purse, and the affected community members cannot match the funds necessary to take the rationale before an independent court … an example of such an excuse

is, say, that the systemic failure to enforce the law is not corruption because it is widely known that that law is not being enforced, or because enforcing the law would not be in the public interest.

An appreciation as to why the government or government agency is defending the alleged wrongdoing can be useful in developing preparations for making the disclosure or dealing with alleged reprisals. Whistleblowers need to be careful to find evidence of this rationale before incorporating this into their disclosure, as the assertion of this rationale without a reasonable basis for this belief may reduce (or be used to reduce) the credibility of the total disclosure. The rationale is often political, but it can be operational (for example, an Ombudsman Office is not provided with enough funds to address all complaints directed to it, and so it discards large numbers of complaints without proper investigation). The rationale can also be strategic (for example, a dam construction agency is running out of economic sites for, say, hydro-electric or flood mitigation dams, and, for its survival, acts to falsify the figures on economic analyses for new sites, so as to gain approvals and funding for the building of further dams, and thus for the continued survival of the agency).

[An example of Grey Type I corruption, where the government regards the activity as corruption, but large sections of the community may not, can be certain forms of tax avoidance].

POLITICISATION OF THE PUBLIC SERVICE

As a cause proposed for the rise of alleged corruption in the public sector, and for the rise of the whistleblowing response to such corruption, politicisation of the public service needs some definition.

In the terms of an independent public service as per the Westminster system, any politicisation of appointments in the bureaucracy may be seen as corruption. The United States political system, however, utilises a rationale that executive government does need to work with principal appointees that have the confidence of the Executive to carry out the Executive's policies. This logic allegedly was used by the Goss Government when it came to power, in forcing hundreds of senior public servants into "gulags", and appointing chiefs whom Goss had confidence would implement the policies of the Goss Cabinet. This logic may have been tested when the Goss Cabinet ordered the destruction of the Heiner documents.

The problem with politicised appointments is that, from somewhere in the system, the Executive needs to obtain fearless advice in order to serve the public interest. A public service supportive of government programs, if that public service loses the capability to provide fearless advice, reduces itself or is reduced to a subservient service, and is no longer a supportive public service, it is proposed.

Minister Russ Hinze used to value fearless advice from his public servants. If and when he wanted to act opposite to that advice, he would get the advice that he wanted from a private sector consultant, and then take action based on the consultant's advice. Significantly, Minister Hinze did not move against his public servant advisor offering the advice that the Minister rejected. Minister Hinze appeared to value the advice and the benefit that it provided to him in informational terms. Minister Hinze, however, was not a Minister during the operation of the *Freedom of Information* Act. This FOI legislation, if in force and in accord with robust accountability processes now expected in 21st century governance, would have allowed others (like the Opposition and media) to access the fearless opinion offered by the public servant. The discovery of advice contrary to the action taken by the Minister, may have caused political embarrassment.

In a system where the separation of powers is most pronounced, the US Government have a system of Congressional public hearings with respect to the most senior appointments made by the Executive. By this technique, the US system seeks, in public view, to ensure that an appointee has the experience and skill sets to fill an appointment with capability. The US Federal system also has more effective whistleblower protection laws. This includes a separate whistleblower protection body, and legislation that entitles whistleblowers to a significant portion of the savings that the whistleblower's disclosures provide to the government. Australian governments have refused repeatedly to adopt any of these systems. It can occur then in Australia, that the first 'hearing' into the capabilities of a political appointee can happen during the Senate Inquiry into the alleged corruption disclosed by a terminated whistleblower. The Australian system appears to pretend that what has been a political appointment has been made within the Westminster system – the pretence is then that the selected candidate has sufficient independence and capability, with the skills and experience, to offer the same quality of independent advice that the merit processes of the Westminster system were designed to provide.

A criteria by which a politicised bureaucracy acting (purportedly) in the public interest might be distinguished from a politicised bureaucracy (allegedly) affected by corruption, may be the degree to which ***'fear and favour'*** processes impact upon the operations of the bureaucracy.

An activity within a ***'fear and favour'*** environment, that may be an indicator of corruption, may be the activities of ministerial advisors with respect to reports being written within the agency for the agency's CEO to then present to the Minister. Australia needs a new word to describe public servants and contractors who lose their jobs in a bureaucracy because they refuse entry to a Ministerial advisor to their office when preparing a report, and/or refuse to change their report as suggested/directed by the Ministerial advisor before the report goes to the public servant's general manager and CEO. These behaviours by Ministerial advisors may reflect a fear by the politicised bureaucracy that the expert report may be accessible by others through Right to Information legislation. The politicised CEO may be well disposed or more disposed, by their politicisation, not to protect their public servant from this type of intimidation, for fear of wash-back on themselves from their political masters.

The appointment to replace the terminated 'reportblower', (if this 'new" descriptor sufficiently differentiates from its cousin word, 'whistleblower'), may then be given as a ***'favour'*** to a politicised public servant, or contractor (such as the contractors that Minister Hinze may have used). The ***'favour'*** is returned, in the form of the desired report content. A ***'fear and favour'*** environment in a politicised agency finds its way down to the lowest level of report writer in the agency, usually the lowest level of independent expertise in each specialisation within the primary functions of the agency.

In this environment, for the 'reportblower' to then blow the whistle, may not only hasten the demise of the ***'fearless'*** public servant, it may also diminish public confidence in government. This type of politicised agency is thereby disenabled and/or denied access to fearless advice, and higher levels of expertise may also have been lost in the politicised drive to secure a subservient public service, an agency open to freestyle interference by Ministerial advisors and other political influences.

RULE OF LAW

This is a primary corruption issue where the ***'fear and favour'*** politicisation of the bureaucracy is extended to include enforcement processes – decisions regarding those against whom the law is enforced or not enforced. The ***'fear and favour'*** system can also be extended to include how legal

advice is used in the administration of enforcement, and/or to include how judicial processes are managed to ensure that only the guilty pay damages or go to prison.

In a properly functioning liberal democracy, every person, irrespective of status or wealth, should be equal before the law. The law should be applied to all consistently in materially similar circumstances. Position should not allow a person or a group to stand above the law.

Rogue ***'fear and favour'*** legal opinions, inconsistent with the established law, should not be used within government to avoid the application of any established law against the government. The law should not be used as a weapon of fear against whistleblowers, nor should it be a provider of favours (of non-enforcement) to elected officials or favoured public servants.

Powerful industries and/or unions and/or media organisations should not be readily enabled to apply their own alleged ***'fear and favour'*** tactics upon elected officials, or indeed upon the decisions of agency CEOs or of the CEOs of corporations and Not-for-Profits (NFPs), if this has occurred. Such sources of ***'fear and favour'*** should also not be applied to ridicule whistleblowers who disclose wrongdoing, QWAG submits. This position is based on the premise that no one is above the law.

SEPARATION OF POWERS

The corruption issue arises here where the politicisation by ***'fear & favour'*** is extended so as to bridge the separation between the executive of government and the judiciary. These two arms of government, under the Westminster system to which all parties claim to pay respect, are required to act so as to preserve and promote the independence of the judiciary.

Judicial independence can be perceived to be under attack through a number of mechanisms, including:

1. The behaviour of appointees in those few, key, government positions where responsibilities are held jointly by the same appointment within both of these spheres of government;
2. The selection of persons to the judiciary because of an alignment with the political party in power more than on the merit of the candidate's skills and experience in the law;
3. Actions taken by the Executive arm of government with respect to the activities and decisions taken by lawyers and/or members of the judiciary as a part of judicial or quasi-judicial proceedings;
4. Use of the prosecution and judicial system to imprison political opponents; and
5. Use of executive powers in ways adverse to lawyers and or members of the judiciary where the law requires that judicial or parliamentary powers and procedures are required to adversely affect lawyers and the judiciary.

The Courier Mail advocated the establishment of a Royal Commission into the conduct of the judiciary in Queensland, following the alleged behaviour of judges towards, and the removal from office of, a Chief Justice of the Supreme Court. The separation of powers was a primary issue used to support this call. The appointment processes used to select members of the judiciary by both political parties were also featured in the media's concerns.

Such a Royal Commission or other suitable inquiry would allow any allegations of ***'fear & favour'*** within the judiciary, or towards members of the judiciary, to be aired in public under privilege. The alleged operations of the Legal Services Commission in Queensland, an entity which falls under the arm of the Executive, may be another area where a concern for maintaining the separation of the powers of the judiciary from the ***'fear and favour'*** of the executive may draw submissions to an appropriate inquiry … actions taken with respect to alleged disclosures about the misbehaviour of lawyers and members of the judiciary may feature in those submissions.

QWAG is concerned as to whether or not actions taken by the Office of the LSC may or may not be influencing, directly or indirectly, the matters brought before or not brought before, and / or the matters pursued by or not pursued by, Royal Commissions in general. QWAG has addressed its concerns in this regard by written submission to the Government and Opposition, and to the Royal Commission currently underway, namely, the Royal Commission into the Institutional Response to allegations of paedophilia and child abuse. The Royal Commission has decided not to publish, in redacted or unredacted form, the QWAG submission. Other legal voices have now expressed concern about what this Royal Commission is not pursuing. And the principle of Separation of Powers is being used by the government to refuse to interfere with what the Commission may not be addressing.

QWAG maintains its call for a Royal Commission into Queensland's judiciary, and for an inquiry into dissatisfactions with how past inquiries have been conducted.

IMPACT ON CAPABILITY

The other outcome, from the government's alleged successes in suppressing whistleblowing and in terminating whistleblowers, may be a loss of capability by the agencies of the governments, from which agencies the whistleblowers were terminated.

There may be cases where the loss of capability may be directly related to the termination of the whistleblower(s) and thus the loss of their skills. For example, when Queensland Mines Department whistleblower, Jim Leggate, was removed from his role as an inspector of mines, he had already obtained international acclaim for his work on the environmental management of the Ranger Uranium mine. An attempt by his colleagues to reappoint him to the agency was allegedly intercepted.

It is more likely, however, that the impact from the termination of whistleblowers is indirect rather than direct. This may occur through both of the following consequences arising from the termination of a professionally capable whistleblower whose professionalism includes providing fearless advice:

1. The remaining capability may be intimidated towards providing the advice and reports that are desired; and,

2. Any intent by the agency to hire loyal or compliant replacements for those who are terminated, and for those who leave the corrupted entity because of the corruption.

The consequent selection of replacements whose talents are perceived to lie in that loyalty and in that compliance, may not also be providing the skills and experience necessary to regain the lost capability when the whistleblowers and others departed.

There is no longer a need for the skills and knowledge sets used by the departed talent, because the conclusions of advices and reports may thereafter be determined by other means.

Mapping of examples of significant losses in capability in the public sector, or in private or not-for-profit sectors, is thus of interest to QWAG. Again, the interest is a strategic interest.

Examples of public sector functions that may be under inspection or may have been under inspection by government as to whether or not an alleged loss of professional capabilities may have been experienced, may include:

1. The project management of a computerised wage and salary system;
2. The resource management of passenger train programs, schedules and timetables;
3. The management of pollution from abandoned mine sites;
4. The control of fire ants;
5. The establishment of communications and signals systems for public transport facilities;
6. The protection of persons in care (children, aged, handicapped, persons in custody) from abuse and sexual abuse;
7. Police investigations into abductions and abuse of children;
8. The operation of dams during flooding;
9. The management of hospitals;
10. The conduct of prosecutions leading to the imprisonment of persons subsequently released, and the release of accused due to flaws in the preparations of prosecutions;
11. The preservation of water supplies during drought

TOR (a): ADEQUACY OF GOVERNMENT'S LEGISLATION IN PARTICULAR

QWAG's thesis is that the survival of the whistleblower is essential to all strategies for fighting corruption and for maintaining integrity in public service. If the whistleblower survives, then so too does the disclosure, the evidence and the potential for others coming forward to corroborate the whistleblowers's witness. If the whistleblower does not survive, the disclosure is forgotten, the evidence is lost, and the possibility of others coming forwards is suppressed.

The material in the earlier part of this submission may indicate the concerns that QWAG holds, from its accumulated experience of State and Federal jurisdictions, about the strength of any genuine intent to deal with corruption found by any Australian government in its own ranks. The primary indicator that the National Integrity Commission initiative is on that same path is the absence of any direction towards a separate body tasked only with the protection of whistleblowers.

The Whistleblower organisations in Australia have all adopted ***'the Sword and the Shield'*** policy for whistleblower protection. The National Integrity Commission will be what is termed a Sword organisation, tasked with fighting corruption. Sword organisations like the CCC, ICAC and Commonwealth Ombudsman Office have been most unsuccessful in protecting whistleblowers. QWAG supports the need of a second organisation, independent of the first, tasked and empowered and resourced solely for the purpose of protecting whistleblowers, to ensure that the whistleblower survives (and that thus integrity can be preserved).

The Sword and the Shield Policy document is attached, and is QWA's leading piece of advice to your Committee should your Committee seek for any National Integrity Commission [NIC} to be successful. Any NIC will not be successful without whistleblowers. It thus will not be successful without a Whistleblower's Protection Body. A Sword type NIC body may be turned into a process for corruption if whistleblowing is not encouraged and if whistleblowers do not survive.

Any such Sword or Shield body, if established, will immediately be challenged by the inadequacy of the legislation on whistleblower protection. Again, please allow an analysis of the longer standing legislation from Queensland as well as the young legislation from the Federal jurisdiction.

QUEENSLAND'S WHISTLEBLOWING LEGISLATION

The current whistleblowing legislation is the *Public Interest Disclosure Act 2010*. It replaced the *Whistleblower Protection Act 1994*.

Context

There is a spectrum of corruption situations in which whistleblowing can occur. Two of these are offered in Figures 1 and 2 below. Figure 1 describes the situation where the corruption is *ad hoc*, local, relatively small in terms of the entity in which the corrupt practices are occurring.

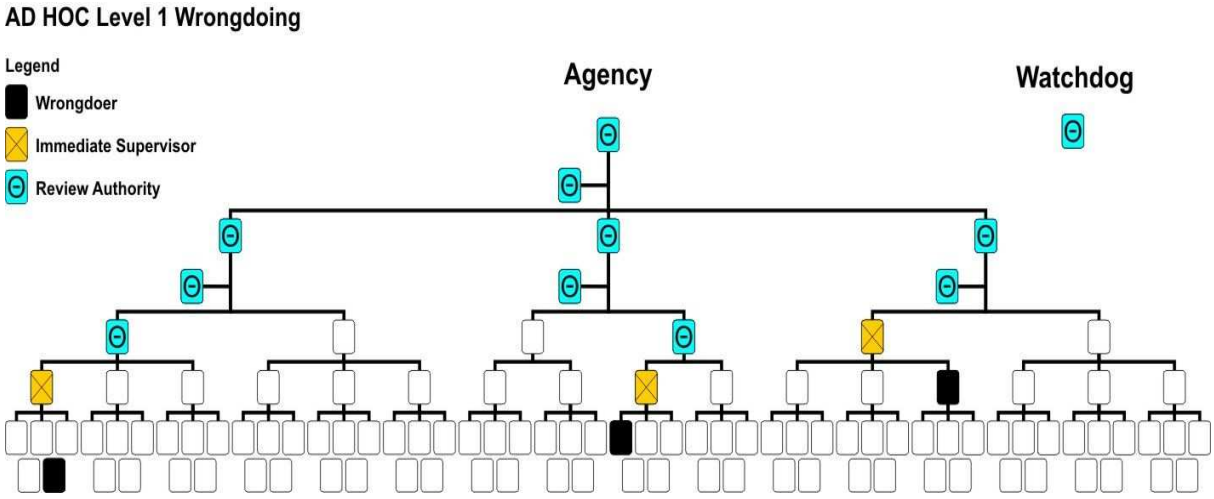


Figure 1: The Profile of Corruption and Integrity where Corruption is *'Ad hoc'*, Local, Small Scale

Figure 2 is the other end of the spectrum, where systemic corruption exists within the entity, and the watchdog has been captured and turned away from addressing corrupt practices in the entity.

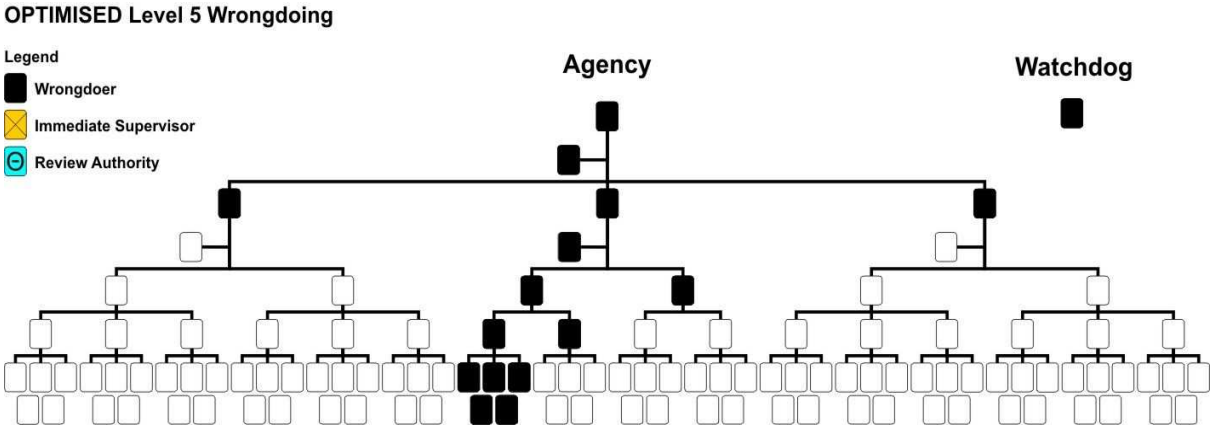


Figure 2: The Profile of Corruption and Integrity where Corruption is Systemic or 'Optimised'

The Sword and the Shield policy towards managing corruption, by the protection of whistleblowers and their disclosures, has been designed to support efforts to dismantle systemic corruption.

The legislators in Queensland, however, appear to have assumed, when designing Queensland's *Public Interest Disclosure Act 2010* [*PID Act*], that corruption is only *ad hoc*, local and relatively small in scale. Watchdog authorities in Queensland, such as the Office of Ombudsman and the crime commissions (CJC/QCC/CMC/CCC) appear to share this view. This was strongly indicated when these watchdogs and others from Federal and other State jurisdictions, served on the Steering Committee for the Whistle While They Work research project – that study assumed that watchdogs were doing a good job (and had not been captured), and that agencies were well intentioned towards whistleblowers, not retaliatory. These assumptions were made even of the Australian Defence Force, one of the agencies that participated in the Study, which agency has had 21 inquiries into abuse of the military justice system in 21 years.

Analysis of the legislation and of watchdog practices associated with the corruption and the whistleblowing circumstance may thus be best served by two 'passes' in logic over these laws, practices and procedures:

> **The First Pass** is done with the **assumption** that corruption is *ad hoc*, and that agencies are well intentioned (any retaliation is an error in understanding, say, born of a lack of training, say), and the watchdogs, the Ombudsman's Office, the crime commission and the like, are actively and independently addressing issues as they arise.
>
> This First Pass and its happy assumption makes sense of, for example, the practice by the crime commission of returning nearly all disclosures against agencies back to those agencies to investigate themselves, because those agencies are well-intentioned and can be trusted with that duty, under the logic of this first pass.
>
> 1. Provisions in the *PID Act* specifically allowing 'reasonable management action' to be taken against the employment of the whistleblower is itself reasonable, on this first pass, because any such actions taken will be well-intentioned, it is assumed;
>
> 2. Provisions allowing the entity to decide not to investigate disclosures (on the logic of this first pass) will only be implemented in good faith by a well-intentioned agency

– any investigation already conducted would have been carried out reasonably by well-intentioned public officials, according to the first pass assumption;

3. Provisions requiring entities to take steps to ensure that individuals involved in the *ad hoc* corruption do not carry out reprisals against the whistleblower will provide another layer of protection to the whistleblower (on the logic of this first pass). The Ombudsman's oversight of these steps will ensure quality management of these procedures – yet another layer of protection, it is assumed; and

4. The provision allowing the whistleblower to go to the media after six months if the agency does nothing about the *ad hoc* corruption – (on the logic of this first pass) how powerful a measure this will be in ensuring that the whistleblower's disclosure is actioned.

The Second Pass through the above matters, then, makes the alternative assumption that the corruption is systemic – the corrupt practice is part of the business plan for the agency or for the industries in the agency's portfolio of responsibilities … or is a product of a ***fear-and-favour*** type politicised corruption in which the agency operates … or a major cover-up of a financially significant fraud or waste, where for these circumstances the watchdog has been drawn into a passive or active complicity.

Consider the case, under **the second pass assumption**, when the crime commission receives disclosures from a whistleblower, seeking reasonably a review of an alleged cover-up 'investigation' by the whistleblower's agency of disclosed corruption at that agency. In this second pass circumstance, the crime commission's practice of referring this application for a review back to the allegedly corrupted agency who conducted the first 'investigation', is a simple corralling of the whistleblower – every allegation goes back to the agency, from which the procedures allow no escape. In short, the whistleblowers are caught by the agency, whether going away (via a referral to the crime commission) or coming back (via a referral by the crime commission back to the corrupted agency). Also:

1. The provisions in the legislation allowing the agency to exercise reasonable management actions to transfer, send for psychological assessment, deploy, make redundant, terminate, etc, (on the logic of this second pass) have been given to the managers of the corrupted agency, who are in a serious conflict of interest situation, and who may have already taken reprisals against earlier whistleblowers;

2. Provisions in the PID Act allowing the entity to decide not to investigate disclosures (on the logic of this second pass) have been given to the managers of the corrupted agency who are in a serious conflict of interest situation, and who may have already sustained the systemic corruption by previous cover-ups of disclosures made by earlier whistleblowers;

3. The provisions in the PID Act requiring agencies to establish steps to prevent <u>individuals</u> making reprisals against whistleblowers (on the logic of this second pass) are an irrelevancy when it is the systemically corrupted <u>agency</u> that is taking the retaliatory action; and

4. The ability to go to the media (on the logic of this second pass) is only available after six months – this is more than enough time to compose adverse performance appraisals, send the whistleblower to the agency's 'gunslinger' psychiatrist for psychological vilification with report, transfer the whistleblower to a lower classification position without much work at a desk half in the corridor, and, if the whistleblower does not resign, make the whistleblower redundant and unceremoniously frog-march him/her to the carpark.

Thus, the tenet upon which the effectiveness of the *PID Act* depends is whether or not the agency at issue is systemically corrupted or its management are well-intentioned towards whistleblowers. This issue may be resolved by inspection as to whether or not there are whistleblower cases in the records of the entity and by how those cases were resolved.

It is against the stated purpose of your Committee to discourage whistleblowers from submitting their stories to you, in QWAG's view. This discouragement deprives your Committee of demonstrations of agency behaviour towards whistleblowers. Your committee may be leaving the field to WWTW researchers to 'inform' your Committee on this critical determinant, when those reaearchers may simply have assumed the situation before any survey was initiated.

It has been QWAG's allegation that there is an accumulation of credible allegations tending to suggest that agencies in the Queensland jurisdiction and their watchdog regulators may have, prior to 2010 (the date of enactment of the PID legislation), and/or may be now, showing indicators that these agencies and watchdogs may have been affected by systemic corruption. The watchdog regulators in Australia promoted an opposite view, using the WWTW reports, by declaring the principal whistleblower cases in Australia to be ***'mythic tales'***. In short, by definition, the ombudsman offices and the crime commissions are simply asserting that these whistleblowing narratives are purely fictitious.

If cases of systemic corruption have been demonstrated, and this possibility has not been catered for in the design of legislative provisions and associated practices pertaining to whistleblower disclosures and protection, then those practices and that *PID Act* may be showing insincerity by the jurisdiction that established and implemented that legislation and those practices. Queensland's history of:

a. the Fitzgerald Inquiry (police);

b. the Davies Inquiry (health care);

c. the Matthew's Inquiry (mining);

d. the Commissions of Inquiry into dam operations and flooding (engineering)

e. the Heiner, Forde and Carmody Inquiries (children in care, justice, protection of official records);

f. the Senate Inquiry into Unresolved Whistleblower Cases (reprisals against whistleblower); and

g. the Connolly/Ryan Inquiry (watchdog regulators)

amongst other inquiries, may not justify assumptions that the watchdogs are properly performing their roles. This history of these inquiries may not justify the assumption that agencies are well intentioned towards public interest disclosures and towards those who make such disclosures.

Insincerity has the character of dishonesty, according to the Oxford Dictionary. This is the allegation that may be reasonably made, QWAG submits, about the *Public Interest Disclosures Act 2010* (Qld).

Some noteworthy points about the legislation at the time of writing (December 2016) include:

> s3(b) asserts that an objective of the legislation was '***to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with***'. That 'assessment' step is where, it is alleged, that agencies and watchdog regulators may have intercepted and prevented *prima facie* allegations going to an investigation and resolution.
>
> s12(1) (d) allows any person, not just a public official, to make disclosures of alleged reprisals, other conditions being met.
>
> S12(1)(a) and s13(c) allow any person to disclose danger to health and safety only of a person with a disability, not to any person. That is a restriction compared to the national legislation which allows any person to disclose a danger to the health and safety of **anyone**, not just a disabled person.
>
> s30 facilitates the refusal of investigations, such that a purported object of the *PID Act* is thereby readily avoided. A principal clause for facilitating such an avoidance is s30(1)(a) where any previous 'appropriate process' that 'dealt' with the disclosure has been effected. This earlier process is usually the agency response, which can be marked by a lack of thoroughness, a lack of fairness, and/or a lack of impartially. The Ombudsman Office has not accepted disclosures until they have been processed by the agency, and the crime commissions have referred disclosures made to those commissions about the agency back to the agency to process. The disclosures are corralled back to the agency who conducted the first process, and then that agency's first process can be used to deny a proper investigation.
>
> S 30(2) requires that written reasons be given to the whistleblower for decisions made on that first process (and subsequent processes). The abuse of this requirement by agencies, and the acceptance of the breach of this rule by watchdog authorities, is the principal demonstration that the clauses of the *PID Act* can be simply ignored by the agencies and the watchdogs– either a document giving decisions can be produced or it cannot be produced. Such blatant breaches of the Act render the agency's first process an inappropriate process, where the *PID Act* intended that an 'appropriate process' be both provided by the agency and enforced by the regulatory watchdogs.
>
> S32(5) places disclosures made to the crime commission outside of the provisions of this *PID Act*. Disclosures made to the crime commission are managed under the legislation directing the operations of the crime commission.
>
> s34 sets out that a member of Parliament (the Legislative Assembly) has no role in investigating any disclosure made to the member of Parliament, for the purposes of the

PID Act. The effect again may be perceived to be corralling any disclosure back to the agencies against whom the public interest disclosure has been made.

s36 Immunity from liability – 'a person who makes a public interest disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, for making the disclosure'. This provision, however, may recently have been interpreted by lawyers in various capacities as not extending to disciplinary procedures available through arms of the executive. The immunity against discipline may now have been interpreted to refer only to agency disciplinary proceedings against the employees of that agency. If the employee or person is a member of a profession which needs to be registered under a law of Queensland, and that registration body has powers of discipline over registered professionals, then the immunity s36 may not apply. It may have been proposed and implemented that such disciplinary processes are neither civil nor criminal nor administrative in nature, and thus avoids the protections provided by s36.

s43 provides for vicarious liability of the public sector entity for reprisals made against whistleblowers. This is important. It enables the whistleblower to take civil action against the agency, rather than or as well as against a public servant(s) of modest means. S43(2), however, allows the agency to escape that liability if the agency can prove, *'on the balance of probabilities, that the public sector entity took reasonable steps to prevent the employee'* from effecting the alleged reprisal. The term, 'reasonable steps', like 'reasonable management action' (s45) is nowhere defined in the *PID Act*. As with earlier comments, the structure of this section does not contemplate the systemically corrupt agency where it is the corrupted agency that is reprising the whistleblower. In the latter situation, where contributions to the reprisal may allegedly have come from the supervisor, the HR manager, the agency investigation officer, a general manager and other actors in the agency's corporate framework, the number of individuals against whom the whistleblower may need to initiate proceedings exposes the whistleblower to very wide legal preparations. Such legal preparations place the whistleblower at considerable risk of financial ruin if the action is lost and costs are incurred for defending counsel for all of the individuals named.

s58 appoints the Office of the Ombudsman as the *oversight agency*. This fight was fought and lost by QWAG when the Ombudsman Office relieved the Public Service Commission [PSC] of this responsibility. The PSC is also subject to allegations, but the PSC showed signs of effort at integrity that may not have been seen amongst the actions of the Office of the Ombudsman:

1. The PSC referred allegations of suspected official misconduct to the crime commissions, something that the Office of the Ombudsman/Office of the Information Commissioner may not to have done allegedly on many occasions, despite the apparent obligation to do so as stated by the crime commission;

2. Officers in high positions in the PSC may have been disciplined for alleged improper conduct or behaviour with respect to disclosures and reprisals; and

3. Allegations of wrongdoing by the PSC may have been made about the decisions of officers imported into the PSC for particular hearings, officers who had held office in other watchdogs. Complaints against such decisions have been rejected by the PSC.

FEDERAL WHISTLEBLOWING LEGISLATION

Revised Legislation is Pending

At the time of writing (December 2016), notice has been provided that whistleblower protection legislation is to be reformed in the Federal/Commonwealth jurisdiction. A rewrite of this section may thus be merited once the terms of this reformed legislation have been enacted and tested by whistleblowers.

Comments here are offered on the pre-November 2016 legislation as whistleblowers have come to understand and experience that legislation.

The Sword and the Shield

The legislation, as it existed prior to 2013, had the elements of the Sword and the Shield structure advocated by the whistleblower groups of Australia. This was because the Shield function (the protection of whistleblowers) rested with the Fair Work Commission rather than with the Sword bodies such as the Office of the Ombudsman. This structure was also in compliance with the Australian Standard on Whistleblowing, and such compliance is understood to have been the force behind structuring whistleblower protection in that way.

In Queensland, however, an advocacy effort convinced the Federal Government in 2013 to assign responsibility for whistleblower protection to the Office of the Ombudsman. This separation of the Sword and Shield function became compromised. The Fair Work Commission still has a role, so some residual benefit may remain, but the basis for truly effective whistleblower legislation may have been lost.

Withdrawal from the Role as the Reviewer of Last Resort

It appears that the pressure of ever increasing complaint loads may have caused the Office of the Ombudsman to significantly abandon a major part its original role as 'the reviewer of Last Resort.' This Office refers three out of four complaints against agencies back to the agencies to investigate themselves. Purportedly, in order to justify this abandonment, various rationales have been put forward by the Office, both at the macro level of Office strategy, and also at the micro level of dismissing complaints.

At the Macro level, the Office has promoted itself for its efforts at prevention by working with agencies to improve their procedures. The most controversial, if not notorious, of these partnerships has been with Defence. This prevention role has long been the province of the Public Service Commission and equivalents, such that now there are two agencies on the preventative role and no agency adopting the authoritative role designated as 'the Reviewer of Last Resort'.

At the Micro level, several rationales and/or tactics may have been applied. One may have been to tell the current applicant that the Office has been taking a long term view with the agency at issue, and was not going to affect that process by assisting the applicant at that stage of the long term plan. A different tactic may have been simply not to address the issue where the case against the agency is strong, as though the complaint had not been raised in the first place. This tactic forces the applicant either to walk away from the original complaint or to make a complaint about the Office of the

Ombudsman. The Office of the Ombudsman rejects the complaint because the applicant has not provided any 'new' information – only the old information that the Office of Ombudsman ignored or did not address in the first investigation. The second application means that there are now two unsuccessful complaints made against the Commonwealth, not one, and this can be sufficient for the Office of the Ombudsman and/or the agency to raise adverse psychological aspects about the whistleblower's behaviour.

It has been alleged that, once that complaint against the Ombudsman has been made, the whistleblower's name may then have been placed within a category of complainant on a national database. The Commonwealth Ombudsman's Office has been promoting a national database on complainants with other watchdog authorities. Further, the Office may have conducted and promoted, within agencies, workshops on how agency HR operatives can deal with particular categories of whistleblowers and other complainants who decide not to walk away from their original application. The Office and/or the agencies may then have attributed adverse characterisations to the whistleblower due to the whistleblower's persistence.

The Office's tactic, if the relevant procedures alleged have been fairly described, demonstrate a flaw in the prevention strategy. No matter how finely tuned the procedure introduced into the agency may be, if the agency and the Office ignore breaches of the procedure, there then has been no gain. Consequently, the new procedure and the existing procedure both have the potential to adversely impact on providing justice to the whistleblower – this is because it is not any flaw in either of the procedures that is a cause for complaint, it is rather that neither procedure is being followed by the agency or by the Office of Ombudsman. On the other side, the systemic immunity thereby gained by (alleged) wrongdoers may likely only encourage wrongdoing in both the short and also the long term.

Both the strategy and the tactic, if proven, are a direct attack upon the purpose of the *Public Interest Disclosure Act 2013* (PID 2013), which purports to facilitate disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector. The alleged strategy and the tactic by the Ombudsman Office are effecting a premature and/or unwarranted closedown on disclosures and investigations, thereby neutering the purposes that the PID 2013 legislation was designed to facilitate.

COMMENTS

Against these overview descriptions (partly based on allegations as yet unaddressed), some comments and notes on the provisions of the *Public Interest Disclosure Act 2013* are offered.

s6 Objects. The fourth object is to ensure that disclosures by public officials are properly investigated and dealt with. These last three words can legitimise the slippery track by which disclosures may be dealt with but not be investigated, and the claim may be made that the failure to investigate is in accordance with the legislation (because the complaint has been 'dealt' with).

s8 Definitions provide a definition of **'internal disclosure'** but not of the 'external disclosure', a more dangerous avenue for the whistleblower. The lack of a comprehensive-cum-inclusive definition can discourage the potential whistleblower from this path.

s13 defines **a reprisal** in terms of actions taken by an individual. The more dangerous situation, where it is the organisation or the government that is effecting the reprisal against the whistleblower, is not contemplated by the Act. It is therefore open to argue that this flaw in the comprehensiveness of the definition tends to render the Act largely irrelevant in regard to whistleblower protection.

s13(3) and s14(2) facilitates the taking of a reprisal by the organisation, by allowing the organisation to take **administrative action that is reasonable to protect the whistleblower** from detriment. So in one case it has been alleged that the agency suspended without pay a whistleblower for in excess of a year, with directions that the whistleblower was not to enter the workplace or attempt to contact any officer of the agency during work hours or outside of work hours, and this was justified in part - allegedly with the Ombudsman's clearance - by the fact that this would prevent reprisals against the whistleblower.

s14 on Compensation may not set out the **onus of proof** carried by the parties in an action for compensation. Precedents from any earlier cases (if there are any) may be instructive.

s22 defines the **interaction between the *PID Act* and the *Fair Work Act*** regarding whistleblower protection. Without any allegations now held, but just from a trust issue and a discipline of managing risk, it is advisable to obtain legal advice on this interaction if the venue through the *Fair Work Act* is to be used.

s26 allows **external disclosures** and emergency disclosures to be made in circumstances wider than those applying to internal disclosures.

s28 allows for **a disclosure** to be made even though the disclosure is made without use of the whistleblower terminology or references to the *PID Act.*

s47 uses definite language to purport that disclosures must be investigated, but s48 provides a list of discretions by which an investigation can be avoided. In a case of systemic corruption, s47(1) directs that the allegedly corrupted agency must investigate. When the whistleblower seeks a review from the Ombudsman's Office of an allegedly self-serving 'investigation' lacking thoroughness, fairness and/or impartiality, the Office can use s48(1)(e) discretion to refuse a review on the basis that there is already a completed investigation by the agency against which corruption is alleged.

s49 excuses watchdog authorities with their own investigative powers from compliance with the *PID Act* regarding the investigation.

s51 requires that a report of the investigation be given to the whistleblower. It is not clear, however, that the whistleblower will be shown the evidence and statements of evidence considered by the investigation. Where the latter is the case, the whistleblower is required to trust that the investigation is a fair report of the evidence provided. This plainly is a risk to the whistleblower in situations of alleged systemic corruption where the allegedly corrupted agency has conducted the investigation. QWAG has seen a case where allegedly the statements of evidence from witnesses were denied to the whistleblower, and the report was allegedly caught out for misreporting the contents of the statements on a substantial matter of an alleged physical threat.

s52 sets time limits for investigations. Three months is quoted, but s52(3) allows the Ombudsman to extend the time limit by a period in excess of 90 days. The Office of the Ombudsman has allegedly

taken a year to decide to refuse to act on a disclosure, and to have accepted justifications by agencies for taking more than five years to complete investigations. Effectively, this tends to mean that there is no time limit to investigations. This may be, allegedly, just another aspect of procedure that agencies and the Office of the Ombudsman ignore or treat as unimportant or unenforceable behind the exercise of a so-called "discretion".

It should be remembered in this relevant context that the High Court has ruled on how a so-called "statutory discretion" must be exercised. French CJ cited Kitto J words in ***R v Anderson; Ex parte Ipec-Air Pty Ltd*** [1965] HCA 27; (1965) 113 CLR 177 (28 May 1965) at 89 who, in turn, referred to ***Sharp v Wakefield*** [1891] AC 173: (Quote)

> *"...a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion, according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself".*

s53 allows investigations to be conducted as the agency thinks fit and proper. This provision allegedly has allowed investigations to avoid evidence, or to show wilful blindness to disclosures, if the agency thinks this is fit and proper.

s54 allows investigations to adopt the findings of other investigations. Where one whistleblower was able to cause an investigation to be put aside because of demonstrated and perceived bias by the investigation officer, the re-investigation adopted findings of the previous investigation affected by the accepted bias.

s59(3)(a) requires that the principal officer of an agency must take reasonable steps to protect public officials who belong to the agency from detriment, or threats of detriment, relating to PIDs by those public officials. As explained previously, in practice, with the acceptance or non-interference of the Office of the Ombudsman, reasonable steps may include suspension without pay of the whistleblower and banning of the whistleblower from all contact with work colleagues for periods in excess of a year.

s62 and s64 are among the provisions that give oversight of whistleblower protection to the Office of the Ombudsman. One function is the setting of standards for procedures such as the conduct of investigations. The flaw with this function, as explained earlier, is the propensity alleged by whistleblowers for the Office of the Ombudsman to ignore or accept breaches of the provisions of the legislation, let alone breaches of any standards written by the Office of the Ombudsman.

The experience and the allegations of whistleblowers provide information tending to show that the *PID Act* and its implementation by agencies and responsible watchdog authorities may be characterised by insincerity.

s78(c) may be the mark that goes to the character of the *PID Act*. It allows liability for any detriment imposed upon a whistleblower to be avoided by the agency where the agency has acted in “good faith”. This good faith exception has allegedly allowed agencies to impose reprisals upon whistleblowers based on internally generated, rogue legal opinions that are incorrect in law. Basing the reprisal on the legal advice, albeit that the legal advice is erroneous, may have allegedly been taken as acting in “good faith”, where the law determined by the High Court is that ignorance of the law is no excuse for a criminal act (See *Ostrowski v Palmer*). This application of the legislation as alleged

may thus be a demonstration of legislation being designed and used to get around the stated intent of the law, so as to render reprisals against whistleblowers as available to agencies with immunity from liability.

Indicators. Two indicators of how well or badly the legislation may have performed might be gained from two sets of information:

1. The fate experienced by notable whistleblowers
2. The priority needs existing now for inquiries into unaddressed alleged wrongdoing

WHISTLEBLOWER CASES

Whistleblower cases are a primary source of learning about the health of the anti-corruption system within government, and within the private and not-for-profit sectors, including learning about the threats to the protection of whistleblowers.

Your Committee may be limiting the effectiveness of your Inquiry by refusing submissions based on individual whistleblower cases. It is the whistleblower cases that demonstrate what agencies and watchdog authorities, such as any National Integrity Commission, can do without attracting the attention of the authorities, or penalty under the enforcement regime for existing legislation.

QWAG comes by such information from those non-members who contact QWAG for information or assistance, from members and non-members who relate developments in their cases at meetings of the Group, and from specific research on particular cases that are seen to have strategic value or to be providing strong insight into particular aspects of the whistleblower situation.

Particular cases that have been the subject of monitoring, and/or the subject of continuing monitoring, include the following:

THE FITZGERALD INQUIRY WHISTLEBLOWERS

The transition from police corruption around illegal gambling and prostitution towards continuing and new areas of alleged corruption may have been initiated before the end of that Commission of Inquiry. Whistleblowers who disclosed matters occurring within and around the conduct of that Inquiry include:

THE SENATE UNRESOLVED WHISTLEBLOWING CASES

The Senate Select Committee on Public Interest Whistleblowing report, "*In the Public Interest*", dated August 1994, lists nine cases from Queensland:

A further two cases were added to the list by the Senate Select Committee on Unresolved Whistleblower Cases in its October 1995 report, "*The Public Interest Revisited*":

There was also a submission from another not included in the Senate list:

WHISTLEBLOWING CASES OF NATIONAL SIGNIFICANCE

Three of the five cases holding this status in Australia are from Queensland

More will be said of these cases later in this submission

ENVIRONMENTAL WHISTLEBLOWERS

This is an example of where monitoring whistleblowing disclosures pertaining to an issue, widespread across more than one industry or one legislative jurisdiction, can yield insights regarding alleged systemic corruption that are relevant to emerging issues of the same genre:

1. – disclosures of alleged non-enforcement of lease conditions on mining operations, leading to environmental harm to aquifers, coastal rivers and the Great Barrier Reef;

2. – disclosures of alleged waste or misuse of funds for the control of fire ants, leading to the spread of fire ants and the closure of recreational facilities for the serious risk to health of children;

3. Whistleblower who wishes to remain anonymous – disclosures of alleged mismanagement of water supply operations and misallocations of water, contributing to environmental harm of flora and fauna in downstream regions and diminution and degradation of their water supplies;

4. – disclosures of alleged mismanagement of flood operations through dams, placing downstream communities at risk in future floods.

WHISTLEBLOWERS FROM WITHIN ONE INDUSTRY OR LEGISLATIVE JURISDICTION

The accumulation of the cases over time of whistleblowing in single industries or particular legislative jurisdictions can provide insight into the causes of alleged corruption in that industry or jurisdiction. For instance, the first whistleblower to make disclosures of alleged mismanagement in the hospital system within the Bundaberg Region was one of the 1994 Senate Unresolved Whistleblower Cases, Director of Nursing, A decade later, Queensland had to face up to the Morris QC then Davies QC Inquiry into hospital treatment in Bundaberg and several other hospitals in Queensland.

The accumulation of whistleblower cases in the Queensland Health system include:

LEARNINGS

The earlier of these groupings of whistleblower cases can provide benchmarks against which current whistleblower situations can be compared. For example, the last of the eleven Senate whistleblower cases to be terminated from the self-proclaimed reformed Queensland Government occurred in 1999, after several months in an alleged gulag. This was less than five years after the Senate issued its report on these cases in Queensland Government, and less than four years after the Senate returned to these cases in a further effort to resolve the situation for these public servants. How long does it take now for whistleblowers to experience termination? Of all the above whistleblowers who were working for a government, only one was not terminated in that employment, and that whistleblower was one of three whistleblowers who gained the personal commitment of different State Premiers to protect their employment – the other two lost their employment after their protecting State Premiers moved out of the premiership.

The more recent cases can indicate any alleged expansions to the forms of corruption alleged by earlier whistleblowers, and indicate the additions to the measures allegedly adopted by the authorities to suppress the disclosures and to move against the whistleblowers and their supporters, including their lawyers, if such allegations can be substantiated.

Alternatively, the comparisons can show the positive impacts of any reform program by the government or by its watchdog authorities.

THE PRIORITY INQUIRIES REQUIRED IN FEDERAL AND STATE JURISDICTIONS

Below are the priorities derived by QWAG for inquiries and royal commissions, given the state of knowledge of QWAG, its members and networks about the health of the existing legislation (and institutional and policy) frameworks in Australia and Queensland.

THE FIVE HIGHEST IN THE FEDERAL JURISDICTION

1. **BANKS and BANKING**
   Issue: Allegations broadly based over several decades from many types of customers of allegedly systemic unfair and disadvantageous treatment of customers, where all previous attempts to turn the bank industry to still profitable but ethical banking practices may have been unsuccessful or have been perceived to be unsuccessful.

   Recommended Inquiry: A Royal Commission by a panel of three independent persons from banking, whistleblowing, law and customer service backgrounds, with bipartisan endorsement of the panel members selected from three of these fields, each being free of any reasonable claims of any conflict of interest.

2. **AUSTRALIAN DEFENCE FORCE AND VETERANS AFFAIRS**
   Issue: Institutional response to disclosures of abuse and rough justice in the Australian Defence Force, including the performances of the Office of the Defence Force Ombudsman, the Office of the Chief of the Defence Force, the Office of the Service Chiefs, and the Offices of the Inspectors General; and to practices used in veterans affairs damaging to veterans during the processes of application for assistance with injuries sustained and/or aggravated during their service for Australia.

   Recommended Inquiry: A Royal Commission by a panel of three independent persons from trade union, whistleblowing, law and defence service at company/squadron/ship level, with bipartisan endorsement of the panel members selected from these fields, each being free of any reasonable claims of any conflict of interest.

3. **CARE of the AGED**
   Issue: Institutional response to disclosures of assault and other crimes against the elderly in care, including the Commonwealth Ombudsman's Office, State and Federal Police, State and Federal Hospitals, Government Departments and other agencies such as Guardians and Charities.

   Recommended Inquiry: A Royal Commission by a panel of three independent persons from police, whistleblowing, law and/or nursing care backgrounds, with bipartisan endorsement of the panel members selected from three of these fields, each being free of any reasonable claims of any conflict of interest.

4. **CONDUCT OF INQUIRIES AND ROYAL COMMISSIONS**
   Issue: The poor performance of inquiries and Royal Commissions in addressing the matters of public interest that have led to the establishment of those inquiries, for the purpose of identifying procedures for the establishment and conduct of such inquiries in the future, procedures that will influence a fair, proper and thorough process and prevent any manipulations of such inquiries towards a biased or otherwise ineffective result.

   Recommended Inquiry: A Royal Commission by a panel of three independent persons from the parliament, from whistleblowing, from law and/or from the community, with bipartisan endorsement of the panel members selected from three of these fields, each being free of any reasonable claims of any conflict of interest.

5. GOVERNANCE of TRADE UNIONS AND NOT-FOR-PROFIT ORGANISATIONS

Issue: Institutional response to disclosures of practices used in the governance of trade unions and not-for-profit organisations, including the Fair Works agencies and Federal and State trade union courts, tribunals, commissions, departments and other agencies.

Recommended Inquiry: A quasi-judicial inquiry by a panel of three independent persons from financial auditing, from whistleblowing, from law and/or from trade unionism, with bipartisan endorsement of the panel members selected from three of these fields, each being free of any reasonable claims of any conflict of interest.

Other candidate issues proposed by members and by the whistleblower network that are not currently rated as high as the above include Care of Persons in Offshore Detention, Deaths and Bashings and Abuse in Custody, and Treatment of East Timor.

THE FIVE HIGHEST IN THE QUEENSLAND JURISDICTION

1. THE QUEENSLAND JUDICIAL SYSTEM AND THE JUDICIARY

Issue: Allegations broadly based over recent years from different stakeholders against the performances and behaviours of members of the judiciary and of judicial institutions, including the Legal Services Commission and practitioner societies, the Office of the Crown Solicitor, and the Office of the Director of Public Prosecutions.

Recommended Inquiry: A Royal Commission by a panel of three interstate retired senior judges approved by the Queensland Legislative Assembly, each from different States or Territories, with bipartisan endorsement of the panel members, each being free of any reasonable claims of any conflict of interest.

2. FLOOD STUDIES AND INQUIRIES

Issue: Insufficiencies in certain flood inquiries and flood studies conducted in Queensland since 2010, and the omission of upgrades to Wivenhoe Dam and Somerset Dam from priority infrastructure programs, with regard to the issues of dam safety, the role of the Bureau of Meteorology and the responsibilities and ethics of professional organisations;

Recommended Inquiry: A quasi-judicial inquiry by a panel of three independent persons from risk management, from whistleblowing, from law and/or from dam safety, with bipartisan endorsement of the panel members selected from three of these fields, each being free of any reasonable claims of any conflict of interest.

3. DESTRUCTION and DISPOSAL OF EVIDENCE

Issue: The accumulation of allegations of destruction or disposal by government agencies of documents sought by citizens for intended litigation or litigation already afoot. A decision by a Cabinet two decades ago in the Heiner Affair, may have become a routine practice amongst middle level bureaucrats. Entities may be using practices, unaffected by the attention of law enforcement agencies already compromised or confused by the example set by institutions when the destruction of the Heiner documents was disclosed;

Recommended Inquiry: A Royal Commission by a panel of three independent persons from trade union, whistleblowing, law and parliamentary service, with bipartisan endorsement of the panel members selected from these fields, each being free of any reasonable claims of any conflict of interest.

4. TRANSFERS OF WHISTLEBLOWERS

Issue: Institutional response to disclosures of transfers of public officers and private sector employees after they make public interest disclosures of suspected wrongdoing by their public sector or private sector employer, including but not limited to those who can demonstrate that they received such a transfer within one year of the date of their disclosure, or within one year of any subsequent action taken by them associated with that disclosure or any form of application alleging suspected reprisal as a result of that disclosure.

Recommended Inquiry: A quasi-judicial inquiry by a panel of three independent persons from an organisational management consultancy, whistleblowing, law and/or regulatory watchdog authority, with bipartisan endorsement of the panel members selected from three of these fields, each being free of any reasonable claims of any conflict of interest.

5. GOVERNMENT AS A MODEL LITIGANT

Issue: Behaviours by government lawyers or agencies acting under legal advice, in response to litigation taken by individuals against the Queensland Government or its agencies.

Recommended Inquiry: A Royal Commission by a panel of three independent persons from the community, from whistleblowing, from law and/or from public service, with bipartisan endorsement of the panel members selected from three of these fields, each being free of any reasonable claims of any conflict of interest.

Other candidate issues proposed by members or by the whistleblower network, that are not currently rated as high as the above, include Rights to the Use and Enjoyment of Land, Abandonment and non-Rehabilitation of Mine Sites, Politicisation of the Queensland Public Service, and Pollution of the Great Barrier Reef.

Sufficient examples may exist which may indicate a lack of performance of watchdog authorities and law enforcement in dealing with decades of past public interest disclosures. Governments may be invested in the continuation of existing responses, it has been alleged.

Learnings. The pattern that may be emerging from the above two lists is that the issues for the Federal Jurisdiction are mainly (80%) belonging to agencies and industries, while for Queensland the issues mainly (80%) pertain to the justice framework. QWAG attributes that difference in significant part to the impact of Sword organisations in Queensland on the justice system, largely by non-enforcement of the law, tricks played upon whistleblowers seeking investigation of disclosures, and actions taken that denied proper consideration of matters before the Courts.

TOR (a)(i): THE EFFECTIVENESS OF AGENCIES AND COMMISSIONS

Again QWAG requests that your Committee consider the accumulated experience of whistleblowers within the jurisdictions of both Queensland and Australia

Below QWAG provides a summary of alleged tricks and ploys adopted by Sword organisations to the detriment of whistleblowers attempting to use purported corruption-fighting watchdogs and their procedures as a lawful means for making disclosures and for protection from detriment imposed because of those disclosures.

Separate headings have been given to particular barriers imposed on whistleblowerrs and on the public interest in a just outcome, namely :

1. Non-enforcement;
2. Conflict of Interest; and,
3. Obstacles at Courts

WATCHDOG AUTHORITIES

Corruption can become rife where the watchdog authorities made responsible for combating corruption and maladministration become ineffective or become captured (that is, act to protect the agencies involved in the alleged corruption).

The following are a list of examples of allegations made by whistleblowers of actions that may have been taken by watchdog authorities in Queensland and in the Federal jurisdiction. The practices are described as alleged practices, because in almost all instances the government entities have denied any wrongdoing in the actions taken or decisions made.

Thus the need to monitor the performances and tactics employed by watchdog authorities, and to be alerted where a watchdog authority may be genuinely attempting to meet their responsibilities and / or struggling with ineffective legislation.

MATERIAL NOT ACCEPTED

MATERIAL NOT ACCEPTED

MATERIAL NOT ACCEPTED

B. FEDERAL JURISDICTION

Commonwealth Ombudsman.

Alleged practices include:

1. This Office may have withdrawn from its original role as the independent reviewer of last resort. It moved to a preventative role in competition with the Public Service Commission. It involved itself in assisting agencies, like the Defence Force to new military justice procedures, and boasting to authorities such as the Senate of the Ombudsman's Office success in this preventative approach. The flaw in the approach is where agencies do not follow their own procedures or the law, however grand those procedures are, and individual whistleblowers, in good faith, make application to the Ombudsman's Office for investigation of these breaches of the Ombudsman's procedures and of the law. These applications tend to undermine the self-praise by the Ombudsman's Office, and expose the naivety of that Office. In this situation the Ombudsman's Office:

    a. May have allegedly informed the applicant that the Office was taking a long term view about the agency under allegation, and would not adversely affect that long term program just for the whistleblower; and
    b. Allegedly may have provided to authorities, such as the Senate, false answers to questions put to the Ombudsman's Office about applications made against agencies.

2. This Office served on the Steering Committee, with other watchdog authorities, for research into whistleblowing that simply assumed at the start that watchdog authorities including the Ombudsman's Office were meeting their responsibilities towards whistleblowers, rather than include this issue in the research;
3. Allegedly this Office may have failed to investigate complaints against agencies;
4. Allegedly this Office may have referred complaints against agencies to those same agencies to independently and impartially investigate themselves; and
5. Allegedly this Office may have moved from just profiling agencies for the number and types of complaints made against agencies, to profiling complainants for the complaints that have been made, thus raising concerns that this profiling allegedly may be used, rather than the merits of the complaints, in deciding whether and how to respond to the complaints from complainants already profiled.

Military Justice Agencies

These agencies include entities such as Offices of the Inspector-General, Investigation Service and Whistleblower Schemes, acting directly in the role or advising Commands, Formations and / or Units. Alleged practices include:

1. Allegedly write excuses for alleged reprisals into the terms of reference for inquiries into these alleged reprisals;
2. Allegedly take several years to undertake investigations;
3. Allegedly appoint inquiry officers with conflicts of interest in the matter under investigation;
4. Allegedly assign investigations or inquiries of allegations against Chiefs and senior officers to subordinate officers, or to career officers of much lower rank;
5. Allegedly refuse the whistleblower access to witness statements, and make claims about the whistleblower or the disclosure made by the whistleblower that may be a distortion of the content of those statements;
6. Allegedly require the whistleblower to refuse protections against alleged reprisals if the disclosed wrongdoing is to be investigated;

7. Allegedly fail to investigate matters alleged, or act to investigate in lieu matters not alleged;
8. Allegedly trick whistleblowers into general matter or scoping interviews, with the promise of a future detailed interview, but then refuse the detailed interview, with the claim that the member already had received an interview;
9. Allegedly refuse detailed reasons for findings, and/or force whistleblowers to other military procedures for which a right to detailed reasons does not exist;
10. Allegedly force whistleblowers to court action to obtain procedures already required of the military authorities by military regulations and instructions;
11. Allegedly engage in psychological vilification of whistleblowers based on rough justice findings against the whistleblower (e.g. findings made without any formal process and without a hearing to which the whistleblower was given an opportunity to give evidence or rebut allegations);
12. Allegedly categorise a whistleblower as a serial whistleblower on the basis of two disclosures made from eight to thirty years apart;
13. Allegedly banning whistleblowers from whole career employments purportedly not because they were whistleblowers but because they were serial whistleblowers; and
14. Allegedly refusing whistleblowers the protection of a case officer, or a case officer of sufficient rank, where disclosures of alleged wrongdoing have been made about Chiefs and/or former Chiefs holding prestigious public positions.

Commonwealth Ombudsman & Military Justice authorities

Alleged practices include:

1. Allegedly, the refusal by one authority to investigate a disclosure on the basis that a second authority was investigating the matter, and a refusal by the second authority to investigate the matter on the basis that the first authority was investigating the matter.

NON-ENFORCEMENT

The allegations of cover-up of disclosures and of reprisals against whistleblowers usually involve allegations of non-enforcement of the rule of law. In short, double standards are more often than not at play, which may involve wilful blindness by the watchdog authority as to the wrongdoing that is before it. The type of defences used by watchdog authorities, that may, allegedly, have been intended to avoid the force of the law on favoured government appointments, include some alleged rationales that themselves may define the depth of corruption to which the agency, the watchdog and the government are prepared to descend:

1. Enforcing the law is not in the public interest;
2. The non-enforcement of the law is a matter of policy, not of law;
3. Everyone knows that the law is not being enforced by the government, so no misconduct is involved.

What can be instructive of this aspect of alleged corruption of the government is to obtain, through Right to Information processes, the job applications for senior positions within watchdog authorities. The responses to selection criteria about the work of those positions can be inspected as to whether

the applicant expresses an attitude to be energetic in investigating breaches of the law, or whether the applicant expresses an intention to 'be practical' or face up to 'political realities' or with other words express an agility with respect to the response taken to breaches of the law.

Identifying the answer given by the applicant chosen for the position can be an indicator as to the leadership culture of that watchdog authority.

CONFLICTS OF INTEREST

The appointment of investigators or inquiry officers to examine public interest disclosures by whistleblowers, where it may be in the interests of that decision-making officer to make findings or recommendations in their own interest, is an important tactic that allegedly may have been used by watchdog authorities and agencies seeking to suppress disclosures.

The practice used by watchdog authorities, of referring allegations made against agencies back to those same agencies to investigate, may allegedly be totally dependent on conflicts of interest to secure a suppressed outcome.

Recent examples where the conflict of interest issue arose with quasi judicial inquiries may indicate the variety of situations that can arise and the variety of responses that decision-makers can take to reduce concerns about conflicted interests:

a. The Queensland Floods Commission of Inquiry. Here one of the three Commissioners had acted as a consultant for one of the agencies under inspection by that Inquiry. The Commissioner was suspended from hearing matters related to that agency.
b. Presiding Commissioner Carmody of the **Queensland Child Protection Commission of Inquiry**, was selected to inquire into the Heiner Affair where earlier, as the head of the Queensland Crime Commission [QCC] in 2001, he faced allegations regarding the treatment of public interest disclosures about the Heiner Affair. Commissioner Carmody failed to disqualify himself from hearing the Heiner matters. In doing so, Commissioner Carmody ruled that he avoided any contention that he was in a conflict of interest situation by examining only the actions by elected officers of the government (i.e. the political Executive, the Cabinet) and by not examining the actions by appointed public officers such as he had been when head of the QCC.

   The implications, for any appointed officer named in the Heiner allegations, arising from Carmody's findings about the actions of elected officers, may have pointed to a continuing perception of a conflict of interest[1] in his findings about the (shredding) actions of Premier Goss and the 5 March 1990 Goss Cabinet in his 1 July 2013 Report[2]. These matters, however, were put to Commissioner Carmody directly during the recusal hearing on 24 July 2012 but he rejected this argument by adopting a strict narrow interpretation of what the term "government" was to mean. Contrawise, lawyers for whistleblower Lindeberg argued that the term had to mean "*whole of government*" to properly understand what the Heiner affair was all about.

[1] ***Ebner v Official Trustee in Bankruptcy***; ***Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd*** (2000) 205 CLR 337; and ***R v Sussex Justices; Ex Parte McCarthy*** [1924] 1 KB 256 at 259 per Lord Hewart CJ
[2] http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0019/202627/3e-Report-FINAL-for-web.pdf

More recently, the CCC undertook, in writing on 2 March 2015 to the Heiner whistleblower, Kevin Lindeberg, that the CCC would use an **interstate** senior judge to assess the allegations made about certain sitting Queensland judges, and others, associated with the destruction of the Heiner documents and the alleged cover-up. *Inter alia*, the shredded documents concerned child abuse and child sexual abuse in their contents. This was an undertaking by the CCC so as to reassure the whistleblower and the public interest that any conflicts of interest that may exist or may be perceived to exist would be properly avoided. Without telling the whistleblower and in conflict with its undertaking, however, the CCC then appointed a retired Queensland senior judge to do the preliminary inquiry.

Where a government regularly or repeatedly ignores this conflict of interest issue in clear situations, confidence may be lost that the government is even considering the conflict of interest issue at all. The perceptions gained by the public from the accumulation of such allegations over repeated cases may lead to a change of confidence in the judicial and inquiry systems overall.

Conflicts of interest situations, repeatedly created by government watchdogs and agencies for the conduct of inquiries, investigations and reviews, may too easily create a vulnerability in those inquiry processes. That vulnerability may have a tendency that undermines effective whistleblower protection, let alone the impartial administration of justice. Conflicts of interest involving apprehensions of bias in decision-makers must always be assiduously avoided. When the corruption being suppressed is allegedly so serious, governments may appear to lack the confidence to undertake investigations unless their outcome has been 'pre-determined', and/or rendered safe by a ***'fear & favour'*** appointment. Specific provisions in whistleblower legislation strictly prohibiting the appointment of conflicted persons or entities to investigate public interest disclosures, including disclosures of reprisals, may be required. When that decision-maker person appointed may have a real or apprehended conflict of interest in the matter under review, an injunction process paid for by the agency or a Whistleblowers Protection Body which then bills the agency, may greatly deter agencies and watchdogs from an alleged tactic upon which governments allegedly may now seem to place great reliance.

THE OBSTACLES AT COURTS

The courts are supposed to operate as the avenue to justice for aggrieved citizens, in Queensland, for state law, and in Australia, for federal law. The costs of legal representation have long been seen as a barrier for middle and low income people to access justice by and through the Courts.

Watchdog regulators, such as the Ombudsman Offices and the Offices of Public Service Commissions, were supposed to return an affordable avenue for justice to most people aggrieved by the government or by government agencies. The alleged capture of these watchdog regulators by the agencies that the watchdog regulators were required to be 'watching', may have denied this avenue for affordable justice to most workers, already vulnerable because they are funded only by their wages and salary from employment with those same agencies. Their unions do not normally offer adequate, if any, financial support, with the Police Union being an exception for some whistleblowers.

The temptation, then, to attempt a return to seeking justice through the courts, needs to consider, in any planning and preparation for that course of action, the following risks that are the subject of allegations by whistleblowers:

a. The evidence may be, firstly, disposed of or destroyed, lost or pretended to be lost, and secondly, populated by new 'evidence' manufactured for the court action.

b. The work history of the whistleblower may be scoured for any fault or error, and any such finding may then be used to argue that the disadvantage in employment at issue would have been imposed in any case because of the new findings about the person's performance.

c. The government and/or the agency will not behave as "a model litigant" and act reasonably in the course of the adversarial proceedings, but may force the whistleblower to use separate court proceedings to achieve every step of the adversarial process … this example is one impacting on the costs of the legal proceedings to the whistleblower, amongst many other tactics that bring all kinds of stress to the whistleblower and their family.

d. The court may appoint to the bench members of the judiciary with a conflict of interest in hearing the whistleblower's matter, and similar appointments may be made for court-directed mediation.

e. While the whistleblower's legal proceeding may be against the actions by one person, other agency officers may claim that they are impacted by the legal proceedings and obtain standing before the court, with their own publicly funded solicitor and barrister. This raises considerably the damages to be paid by the whistleblower if the whistleblower loses the legal action. This pressure may tend to cause the whistleblower to withdraw, or to accept a small settlement which may not see justice fully met.

f. The court may send the whistleblower to mediation after the Crown has been given discovery, but before the whistleblower has been given discovery, and before any claims regarding destruction of evidence or disposal of evidence have been heard by the judge … this example is one impacting on the whistleblower's confidence in the court, confidence in the appointment made to hear the legal action, and confidence in the judicial process, amongst other tactics from the bench that bring all kinds of cumulative stress to the whistleblower and their family.

g. The whistleblower's lawyers may be approached by the government or agency lawyers to dissuade the whistleblower from pursuing the litigation, and the whistleblower's lawyers may add pressure on the whistleblower to withdraw or to take a token settlement. This home lawyer pressure may arise from the impact of the whistleblower's legal action on the lawyers' relationship with a large provider of legal business (the government or the agency). The home lawyer pressure may also arise from a concern that biases and/or conflicts and/or mischief are already at play in the legal processes, and that previous advice on chances of success given to the whistleblower did not take into account these biases, conflicts and mischiefs. The home lawyer pressure may also arise from a genuine concern for the impacts of the accumulating stress on their client.

h. The whistleblower's own lawyers may put the whistleblower's case at significant risk. For example, the home lawyers can demand huge additions to their fees on a day or days before, or during, critical legal proceedings (such as an application by the government to strike out the whistleblower's claim), or else the whistleblower will be sacked by the lawyers as their

client … then the whistleblower will need to obtain a new solicitor and brief a new solicitor, in very short time, if the judicial appointee allows a postponement of the legal proceedings.

The whistleblower may face a combination of several, if not all or nearly all, of the above.

QWAG has joined other voices, from the media, from the law, from academia and from the community, in advocating that a Royal Commission be conducted into the performance and independence of the Queensland Judiciary and of the Queensland judicial processes.

In summary, the whistleblower faces the risk of the public purse being used to the full by the government and/or the agency in defending the disclosure of suspected criminal reprisal against the whistleblower. This explains the strategic importance to an effective whistleblowing regime of either ensuring that the watchdog regulators maintain their integrity in the investigation of allegations of criminal reprisal, and/or that civil action by a whistleblower alleging damages from *prima facie* reprisals also obtains the support of the public purse from the government or the agency under allegation.

TOR (a)(ii): INTERRELATIONSHIP BETWEEN FEDERAL & STATE AGENCIES & COMMISSIONS

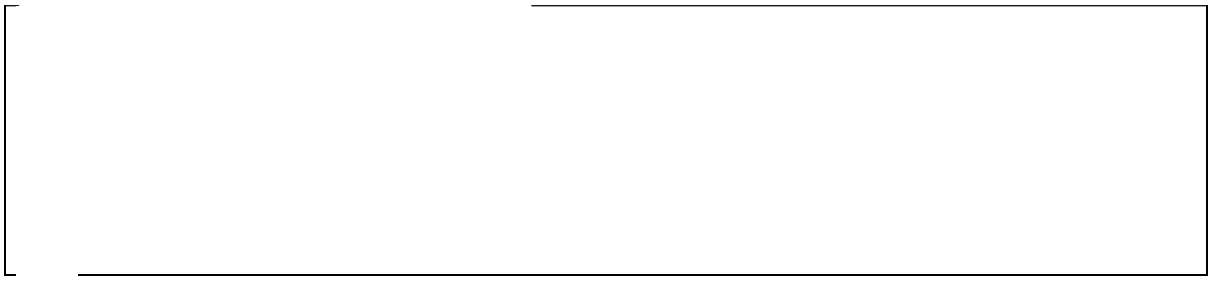
Of all the whistleblower cases that have occurred in Queensland in the last 25 years, three have been nominated and accepted by other whistleblower organisations in Australia, as Whistleblower Cases of National Significance.

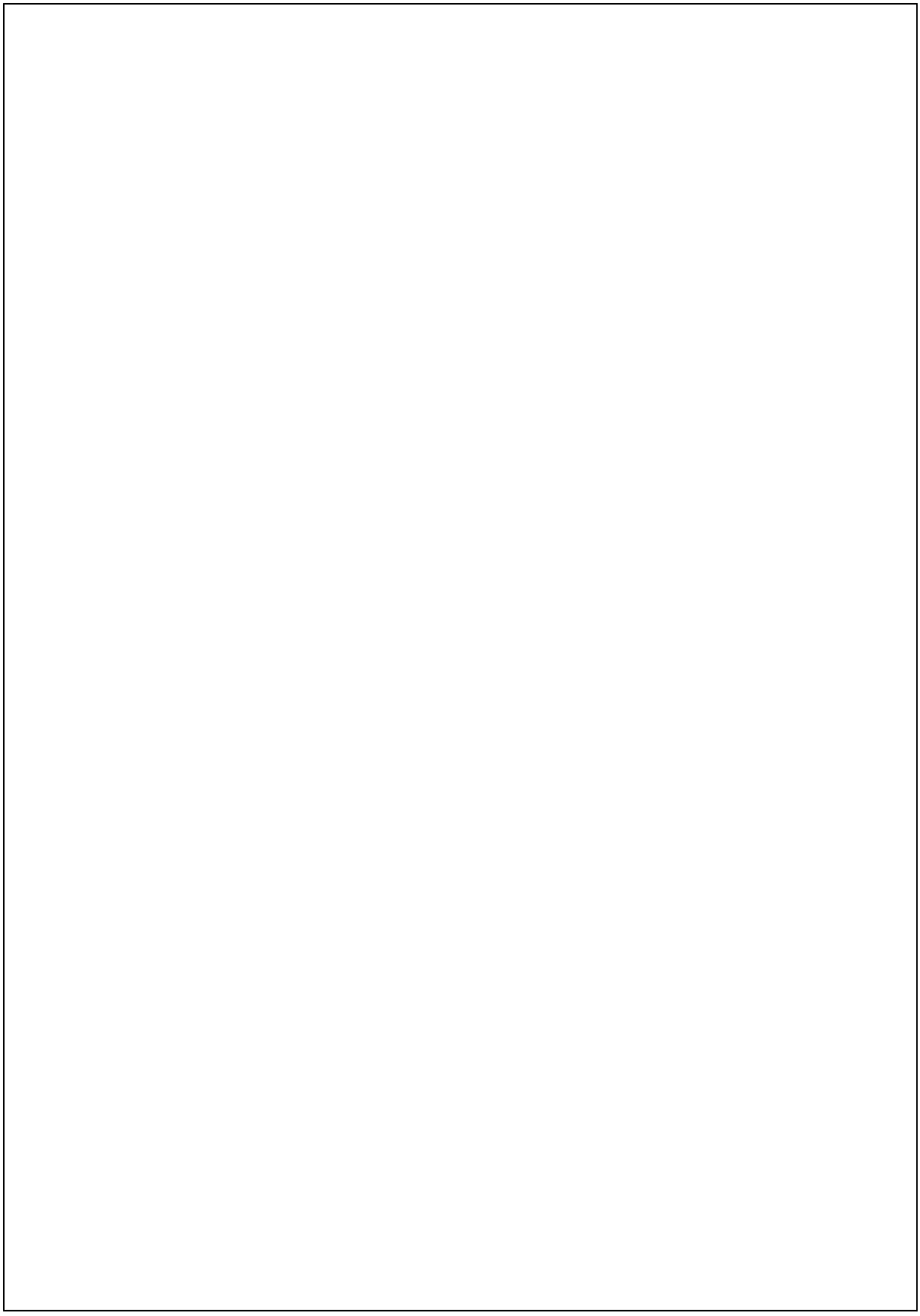
Your Committee needs to read and study these three cases (and the two other cases from other States) so as to understand the worst behaviours that self-purported 'integrity' or 'justice' bodies have perpetrated, allegedly, in the name of their Government.

These cases have a national impact that QWAG would seek to bring to any Federal Sword body such as a National Integrity Commission. This submission would be sought because the source of any alleged corruption in the Queensland jurisdiction is seen to be so powerful as to be beyond the practical reach of Queensland corruption agencies. Those sources are the Queensland Police Force, the Mining Industry, and the Queensland Judiciary & Justice system. Current events with matters that have followed those three original disclosures, evidence the harm to the public interest that the failures to properly address the original disclosures have brought to Australia.

WHISTLEBLOWING CASES OF NATIONAL SIGNIFICANCE

There are five cases agreed by the whistleblower groups and organisations of Australia as Whistleblowing Cases of National Significance
[http://www.bmartin.cc/dissent/contacts/au_wba/wbns.html]





TOR (b)(ii): LEGISLATIVE AND REGULATORY POWERS

Whistleblowers, before or after making their PIDs, will inevitably find themselves wrestling with the law over this large and treacherous landscape of official corruption. The issues will arise from whether or not the matters disclosed were indeed unlawful, to whether or not the authority itself may be acting - or did act - lawfully in handling those PIDs.

For example, it won't take long before a whistleblower will run into what is commonly known as "statutory discretion". This is when the decision-maker decides either that sufficient evidence does not exist to substantiate the allegation, or that the PID does not meet the threshold of reasonable suspicion of official misconduct for a range of reasons. These decisions may have been stained by such factors as:

a. the offending agency and/or public official(s) claiming to have acted on legal advice in good faith, notwithstanding that the legal advice is erroneous advice;

b. evidence known to exist is claimed to be missing or destroyed;

c. undeclared conflicts of interest held by the decision-maker;

d. wilful breaches of the doctrine of the separation of powers;

e. wilful blindness by the decision-maker;

f. the authority dishonours an agreement with or promise to the whistleblower, say, by claiming that the authority secretly changed its mind about that agreement or promise

A decision is then taken to do nothing further.

If there is one thing that drives most whistleblowers in making their PIDs, it is that they desire the law to be applied consistently, reliably and equally. Double standards are an anathema to whistleblowers. The instrument of "statutory discretion", however, in the hands of unethical decision-makers, can stand in the way of that happening. Where the PID is more serious with respect to its impact on the higher levels of government, the more likely it may be for double-standards in the law to be applied to the advantage of the government … this is the experience of many whistleblowers.

The following are principles of relevant case law that should be incorporated into legislation, so as to reinforce their application in the practice of law pertaining to whistleblowers and to their rights under legislation.

A. THE PROPER EXERCISE OF A "STATUTORY DISCRETION"

While QWAG accepts that it is lawful for decision-makers to exercise their "statutory discretion" on occasions, they may not do so in a manner which is not honest in the prevailing circumstances. At all times, a statutory decision-maker is obliged to act ethically, impartially and in the public interest, otherwise such conduct may be considered to be "dishonest". If this were to be proven, the decision would be open to challenge, as would the conduct be open to potential adverse legal ramifications for the decision-maker himself /herself. (See section 329 of the *Crime and Corruption Act 2001*). Also the

Queensland Criminal Code[3] and the Commonwealth Criminal[4] Code have provisions for punishing public officers acting dishonestly. However, these provisions are rarely, if ever, applied.

In ***Minister for Immigration and Citizenship v Li*** [2013] HCA 18 (8 May 2013) at 24 French CJ cited Kitto J words in ***R v Anderson; Ex parte Ipec-Air Pty Ltd*** [1965] HCA 27; (1965) 113 CLR 177 (28 May 1965) at 89 who, in turn, referred to ***Sharp v Wakefield*** [1891] AC 173: (Quote)

> ***"...a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion, according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself".***

B. THE IMPORTANCE OF THE PUBLICATION OF INFORMATION ABOUT THE CONDUCT OF GOVERNMENT IN A DEMOCRACY

On too many occasions, QWAG has found that governments, along with their law enforcement authorities, attempt to censor information concerning their activities, so as to prevent it becoming known to the public. This unacceptable practice denies the people their democratic right to know what their governments are up to, especially when it concerns information relating to PIDs.

QWAG believes that government secrecy is incompatible with openness and transparency in governments purportedly functioning in accordance with the rule of law.

In ***Australian Capital Television Pty Ltd and Ors & State of New South Wales v the Commonwealth of Australian and Ors*** (1992) 177 CLR at 38 [No.2] Mason CJ, in the context of the freedom of communication, said that the supply of government information to the people was an indispensable part of representative democracy. He observed:

> ***"…Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of this freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative."***

In ***Lange v Australian Broadcasting Corporation*** ("Political Free Speech case") [1997] HCA 25; (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818 (8 July 1997), the High Court found: (Quote)

[3] Section 92A
[4] Section 142

> "... ***this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter***."

C. CONDUCT WHICH MAY BE UNCONSCIENABLY FALSE AND DECEPTIVE

It is quite clear that conduct by any statutory decision-maker which is knowingly false and deceptive in character and content cannot be acceptable in a democracy governed by the rule of law.

That is, those who rely on and seek lawful assistance and relief from government and its agency in respect of examining their grievances, including PIDs, may not be knowingly deceived into a false state of things to their known disadvantage.

The law does not normally permit government to "opt out" of its fiduciary duty to be honest in **all** its activities, unless unequivocally stipulated in law.

Of particular relevance to whistleblowers, in matters concerning the conduct of the Queensland Government, CCC or PCCC, no 'opting out' provision exists under the *Crime and Corruption Act 2001*, or the *Criminal Code 1899* (Qld) from acting honestly, impartially and in the public interest. These Acts specifically bind the Crown in all its different emanations because they do not specify otherwise.

It is possible to commit a fraud against the administration of justice through false and deceptive conduct by a party to an understanding involving a course of justice. In ***Lazarus Estate Ltd v Beasley*** [1956] 1 QB 702, [1956] 1 All ER 341, Lord Denning said: (Quote)

> ***"No Court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever…"***

In ***Bropho v Western Australia*** (1990) 71 CLR 1 at 18, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ. pointed out that the rationale against the presumption against the modification or abrogation of fundamental rights (e.g. for government to opt out from fundamental principles *et al*) is to be found in the assumption that it is:

> ***"...in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."***

Deane J in ***A v Hayden*** *(1984)* CLR 532 said: (Quote)

> ***"…neither the Crown nor the Executive has any common law right or power to dispense with the observance of the law or to authorise illegality."***

D. THE OFFENCE OF DESTROYING EVIDENCE

It should be remembered that, when dealing with PID's, it not only inevitably involves the existence of public records, but involves also their **continuing** existence. These records, as a first priority, are protected under the *Public Records Act 2009*. They may not be destroyed without the prior approval of the State Archivist, otherwise an offence will have been committed.

This "whole of government" Act also recognises, under its published relevant disposal/retention guidelines, the twin protection of public records under the *Criminal Code 1899* (Qld), as well as the Discovery/Disclosure Rules of the Supreme Court of Queensland. These protections apply to public records, when the public records are known to be required as evidence for either pending or impending/anticipated judicial proceedings. Impending / anticipated judicial proceedings include proceedings for which there is a realistic possibility in the future.

The best authority on this offence against the administration of justice is found in ***R v Ensbey; ex parte A-G (Qld)*** [2004] QCA 335 on 17 September 2004. It has relevance to proceedings which fall within the definition of "judicial proceedings" found in Chapter 16 - **Offences relating to the administration of justice** - section 119 of the *Criminal Code 1899* (Qld) which says:

> ***"In this chapter – 'judicial proceeding' includes any proceeding had or taken in or before any tribunal, or person, in which the evidence may be taken on oath."***

In other words, if destruction of evidence were to occur regarding a whistleblower's PID lodged with the CCC and perpetrated by a government department and/or official for the purposes of preventing any such book, document or thing being used as evidence, it would enliven section 129 of the *Criminal Code 1899* (Qld) which states:

> ***"Damaging evidence with intent***
>
> ***A person who, knowing something is or may be needed in evidence in a judicial proceeding, damages it with intent to stop it being used in evidence commits a misdemeanour. Maximum penalty—7 years imprisonment."***

In ***Ensbey*** at 15, Their Honours , Davies, Williams and Jerrard JJA, relevantly said: (Quote)

> ***"…It was not necessary that the appellant knew that the diary notes would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence at the time the offence was committed. It was sufficient that the appellant believed that the diary notes might be required in evidence in a possible future proceeding against B, that he wilfully rendered them illegible or indecipherable and that his intent was to prevent them being used for that purpose."***

Their Honours in ***Ensbey*** confirmed the legal correctness of Judge Samios' direction to the District Court jury (which found Pastor Ensbey guilty of the crime of destroying evidence some 6 years **BEFORE** the relevant judicial proceedings commenced) which was as follows:

> ***"...Now, here, members of the jury, the words, 'might be required', those words mean a realistic possibility. Also, members of the jury, I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence. There does not have to be something going on in this courtroom for***

someone to be guilty of this offence. If there is a realistic possibility evidence might be required in a judicial proceeding, if the other elements are made out to your satisfaction, then a person can be guilty of that offence."

E. THE CONSEQUENCES OF ACTING ON ERRONEOUS ADVICE, INCLUDING LEGAL ADVICE EMANATING FROM THE CROWN AND ITS VARIOUS EMANATIONS

The most recent authoritative High Court of Australia case on "*ignorance of the law not being an excuse*", is found in ***Ostrowski v Palmer*** [2004] HCA 30 (16 June 2004). This concerned a Western Australia crayfisherman who obtained advice from the Western Australia Fisheries Department, acted on it but which was later found to be erroneous. He was charged and found guilty of the relevant offence. Their Honours Callinan and Heydon JJ said: (Quote)

"…A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it…"

In ***R v Cunliffe*** [2004] QCA 293, McMurdo P, McPherson JA, Mackenzie J state this*:* (Quote)

"…Misinterpretation of the law equates to ignorance of the law and is not an excuse."

F. THE IMPORTANCE TO THE AVOIDANCE OF APPREHENDED BIAS IN AUTHORISED DECISION MAKERS

If and when a concern, regarding a perception and/or reality of apprehended bias in respect of the impartiality/independence of the decision-maker, exists in the mind of a whistleblower, it should be raised by the whistleblower as a matter of first priority.

Furthermore, an ethical/legal requirement rests on official decision-makers, particularly under the *Crime and Corruption Act 2001* (*CC Act*), to declare any conflict of interest, even by perception, to the complainant, as he (i.e. the decision-maker) knows might exist **before** proceeding with the examination and report as the decision-maker.

That is to say, **all** CCC officials (whether permanent or pro-temporary) are obliged to act in an ethical, impartial and honest manner in the course of the duties. Deceit has no place in such proceedings. A failure to declare may be seen as a major breach of the *CC Act*, and of procedural fairness. At the very least, this may render any judgement null and void.

If the concern is raised at a tribunal, the application and submissions are normally heard in public and the decision is made public. Such a decision would normally be open to judicial review.

Amongst other considerations, public confidence in our justice system is best and long founded and sustained when played out in public. The perception of apprehended bias is judged against what an ordinary person in the street, acquainted with the facts, might reasonably believe about the impartiality of the decision-maker.

By majority decision, Their Honours, Gleeson CJ, McHugh, Gummow and Hayne JJ of the High Court of Australia in ***Ebner v The Official Trustee in Bankruptcy*** [2000] HCA 63; (2000) 205 CLR 337, reaffirmed the principles to be applied in matters associated with apprehended bias in a decision-maker: (Quote)

> ***"...Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), the governing principle is that, subject to qualifications relating to waiver or necessity, a judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial."***

The High Court in ***Ebner*** laid down a method of applying the apprehension of bias principle which involves three steps:

- ***First, one must identify what it is said might lead a judicial officer to decide a case other than on its legal or factual merits. For example, "the judge has shares in the respondent bank" or "the judge has a brother who is a partner of the solicitor acting for the respondent".***
- ***Second, there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. This articulation of the logical connection is essential because only then can the reasonableness of the asserted apprehension of bias be assessed.***
- ***Third, an assessment must be made whether, having regard to the identified matter and its logical connection with the case being decided other than on its merits, a fair-minded observer might reasonably apprehend that the case might not be decided impartially.***

In ***Vakauta v Kelly*** *(1989)* 167 CLR 568 F.C. 89/040 Dawson J said:

> ***"…The relevant principle is that laid down in Reg. v. Watson; Ex parte Armstrong (1976) 136 CLR 248, at pp 258-263, and applied in Livesey v. New South Wales Bar Association (1983) 151 CLR 288, at pp 293-294, namely, that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."***

The bias rule is subject to the doctrine of necessity (i.e. no other more suitable decision-maker is available) but its applicability in matters concerning the handling of PIDs would be very rare. The interests of impartiality service the administration of justice in a manner which instils public confidence in the process and in the outcome, and these are always prime considerations.

It does not necessarily follow, however, that the decision-maker will instantly accede to any recusal application and stand aside. In fact, she or he may not disqualify herself or himself.

Be that as it may, it is always important that any such application is lodged on sound grounds and is not done capriciously. The important point to remember is that, if and when sufficient grounds exist, then a concern about the suitability of the decision-maker hearing the matter should be raised **immediately**.

Not only will this save time and money for all the parties concerned, the concern will be publicly recorded even if the application is eventually rejected.

Normally, the decision-maker sets out his reasons in a public record for not standing aside. But, to re-emphasis, any such application should be raised as soon as possible once the apprehension is known.

QWAG strongly suggests that it must not be done during the course of the inquiry just because the decision-maker is suddenly disliked, because it will inevitably fail. This is a matter to be raised as first priority once the decision-maker is known, or, a prejudicial utterance by the decision-maker during examination could lead a reasonable person to believe that he/she is biased, for example, with an attitude of prejudgement. Equally, the decision-maker, once he/she knows the matter on which his/her impartial decision is expected in the public interest according to law and sound ethics, must disclose any potential conflict of interest **immediately**.

Case Study

A whistleblower initiated legal proceedings which included allegations that documents important to the proceedings had been destroyed and disposed of post the initiation of legal proceedings and prior to expansion of the scope of those proceedings for more recent events. Separately, the whistleblower, through his lawyer, made application in general terms that the Chief and one member of that Court not be appointed to hear the proceedings. The detailed basis for this application was the alleged involvement of the Chief and one member of that Court in the government's response to the Heiner Affair, when both were lawyers before their appointment to that Court. The whistleblower was concerned that the whistleblower's proceedings involved similar fact allegations to the destruction of documents allegations at the centre of the Heiner Affair.

The member of the Court objected to by the whistleblower was appointed to hear the whistleblower's proceedings. On the date of the hearing through his barrister, the whistleblower raised the application (that that member of the Court not be given that appointment and stand aside) made prior to the appointment of that member of the Court to hear the proceedings. The member of the Court asked for the reasons. The whistleblower's barrister explained the prior involvement by the member of the Court in the government's response to the Heiner allegations. Consequent upon this explanation, the member of that Court recused himself from hearing the whistleblower's proceedings.

G. CONDUCT WHICH MAY CONSTITUTE WILFUL BLINDNESS

QWAG has long been concerned about the "limited" view investigative bodies like the CCC and Ombudsman may take in considering allegations captured in PIDs. The PIDs, at the time of their lodging by the whistleblower, may not have the benefit of all the available evidence having been accessed by the whistleblower, because the capacity to do so was not present. The point of significance is that those authorities are not restricted from accessing all the relevant evidence, and to follow leads. Often times, PID's point the direction towards even greater alleged wrongdoing or to where the evidence might be found.

This type of conduct is more commonly known as "wilful blindness" on the part of inquirers-cum-decision makers. Insofar as the authorities might like to believe that a "discretion" exists permitting them to only investigate in a PID what has been put before them, QWAG suggests that to exercise a "statutory discretion" in such a limited manner may not be considered honest.

QWAG believes that unless 'turning a blind eye' is highlighted or not allowed to go unchecked, it seriously disadvantages whistleblowers and the community at large from knowing the whole truth of a matter, instead of just the half-truths which can be quite misleading and deceptive.

The law has long had something to say about this type of conduct. Lord Edmund-Davies in ***Reg. v. Caldwell*** [1982] A.C. 341 at 358 relevantly said: (Quote)

> **"*...A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter.*"**

The High Court of Australia in ***R v Crabbe*** (1985) 156 CLR 464 at 470 observed: (Quote)

> ***"…When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring.*"**

H. THE STATE ACTING IN ACCORDANCE WITH 'MODEL LITIGANT PRINCIPLES' AT ALL TIMES.

Sir Samuel Griffith CJ of the High Court of Australia, in ***Melbourne Steamship Co Ltd v Moorehead*** (1912) 15 CLR 333 at 342, said:

> ***"The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings.***
>
> ***I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken."***

The Queensland Government purports to operate in litigation as "the model litigant." This is a bold claim. On the Queensland Department of Justice and Attorney-General webpage, it provides this public undertaking which was last revised on 4 October 2010:

> ***"These principles have been issued at the direction of Cabinet. The power of the State is to be used for the public good and in the public interest, and not as a means of oppression, even in litigation. However, the community also expects the State to properly use taxpayers' money, and in particular, not to spend it without due cause and due process. This means that demands on the State for compensation for injury or damages should be carefully scrutinised to ensure that they are justified."***

Out of an abundance of caution, QWAG warns whistleblowers who may feel that their route to justice is best achieved through litigation, that what the Queensland Government promises against what it actually delivers can turn out to be two different things.

For example, the recorded propensity for evidence (i.e. public records) to be either deliberately destroyed or disappear without trace in clear contravention of the relevant provisions of the *Public Records Act 2009*, *Criminal Code 1899* (Qld) and the Discovery/Disclosure Rules of the Supreme Court of Queensland are salutatory lessons which ought not to be ignored by any reasonable person, especially whistleblowers. This alleged propensity may be information

tending to show a *prima facie* example of the lack of respect held by the Executive for the doctrine of the separation of powers.

Notwithstanding one's own legal costs, if unsuccessful in the court action, the additional (highly probable) imposition covering the Crown's costs can be highly debilitating, if not totally crippling.

But, of course, all litigation is problematic even in the best of circumstances. It is, however, always highly stressful.

While QWAG does not, and would not advise anyone from not embarking on their respective course of justice through the courts, it ought not to be entered into with an expectation that the government or its agencies will act reasonably or fairly as so-called 'model litigants'.

In conclusion, QWAG strongly suggests to whistleblowers and would-be whistleblowers to take heed of the best available advice **before** commencing legal action against the State, including against bodies such as the CCC. Their resources come from a bottomless public purse, not their own pockets, and their timeline can be endless, now 26 years for the Dillon, Heiner and Leggate cases.
Whistleblower experience shows that they will exploit these advantages ruthlessly.
On the other side though, truth and the public interest are always powerful allies.

TOR (c): ANY RELATED MATTERS

The following matters are addressed relevant to this TOR:

1. Academia and Research
2. False Claims Legislation
3. Class Actions and Accumulations of Wrongdoing
4. Performance of the Fair Work Commission regarding whistleblowing

ACADEMIA and RESEARCH

There is a natural interest, positively held in academia, for analysing problems such as the treatment of whistleblowers and their disclosures. Academic studies can be breakthroughs in the appreciation of the whistleblower circumstance, and in fact, QWAG arose out of the whistleblowers who participated in the University of Queensland 1992-94 whistleblower research project by Dr Bill de Maria, Cyrelle Jan and Tony Keyes.

The alleged problems with bullying, discrimination and rough justice in the Australian Defence Force is perceived to be being strongly defended by the hierarchy … twenty-one inquiries in twenty-one years, and the Defence procedures appear to be worsening … yet an academic study at the Australian National University sponsored by a personnel branch within Defence may have escaped any controls, and produced figures and illustrations that supported concerns about the treatment of one allegedly disadvantaged group – reservists.

The most infamous whistleblower case in Queensland, the Heiner Affair, has benefitted greatly with respect to credibility because of the standing that the destruction of documents by the Goss Cabinet has in Queensland, National and International academic publications … the Heiner Affair is rated as one of the thirteen worst cases of destruction of public records in the world, during the last century …other cases in the thirteen include the instances from apartheid in South Africa and from Nazi Germany. The study of the destruction of the Heiner documents is included on the syllabus for grade 11 students in Queensland.

Whistleblowing needs more whistleblowers, once they have recovered, to undertake doctorate level research into whistleblowing.

The academic area has not always favoured sound inquiry into whistleblowing, however. The "Whistle While They Work" (WWTW) program, having a Steering Committee of watchdog regulators from around the country, chaired by Queensland's Crime and Misconduct Commission, occupied the academic space in Australia for several years. The purported research accepted, without inquiry or survey, that watchdog regulators were doing a satisfactory job in the handling of whistleblowing, and assumed that agencies were well-intentioned in their treatment of whistleblowers within their own agency. The purported research then described cases that were amongst the worst whistleblower cases in Australia as ***'mythic tales'***, and the Chair watchdog authority on the Steering Committee for the research claimed that bad treatment of whistleblowers was ***a myth***.

The bad treatment ***'Myth'*** criticism relied on survey results from the research Study derived by asking existing members of an agency whether or not they had been terminated. If they had been terminated, they would not have been present at the agency to answer the question. In technical jargon, the WWTW did a cross-sectional survey of what was a longitudinal phenomenon, of disclosure and reprisal. Dr Pam Swepson, who made the disclosures about the suspected mismanagement of the fire ant control program, was one whistleblower who was allegedly refused the opportunity to answer the WWTW survey, because she was no longer a public officer.

The ***'Whistle While They Work'*** study [WWTW], served by the watchdog regulators of Australia (e.g. Ombudsman Offices, Crime Commissions) on the WWTW Steering Committee, assumed that the watchdog authorities were doing a good job, and that relevant agencies were well intentioned with respect to the treatment of whistleblowers. That is, there was no systemic wrongdoing, and valid dissent whistleblowing was not expected. Working from such a premise, the WWTW did not test the validity of these assumptions about whistleblowing in the scope of the survey based research used by WWTW in reaching its conclusions.

The survey results, however, showed that 76% of PIDs were made against superiors, not against colleagues, and 71% of employees had seen wrongdoing in the last two years (61% had seen serious wrongdoing), not 29%. These figures are very high, and, as average figures, they are not the highest figures recorded for the worst agencies. It is therefore obviously open to suggest that these results from the WWTW's own surveys may indicate that the intentions of agencies and the performance of watchdog regulators should also have been studied, and not assumed, as part of that research.

The WWTW also used the nature of the business in which wrongdoing had been disclosed, rather than the nature of the wrongdoing in that business activity, in order to test for any cause and effect relationships. One business activity for which the WWTW looked at wrongdoing was with respect to information activities within an agency. This meant that a lesser number of incidents of destruction of information requested by parties for court litigation (i.e. always a potential serious criminal offence against the administration of justice) was mixed in with and diluted by the greater number of incidents of misrepresentations in agency advertising and media releases (minor maladministration).

Information then on the relationships between whistleblowing outcomes and the seriousness of the wrongdoing disclosed by the whistleblower could not be gained from such mixtures of the survey data.

The WWTW study has been soundly criticised by whistleblowers around Australia. Only one of the agencies that contributed to the survey is known, namely, the Australian Defence Force. The assumption that the Australian Defence Force is well-intentioned towards its whistleblowers may be hard to accept, given the 21 inquiries into military justice that were conducted by Australian authorities in 21 years.

QWAG needs an authority to organise and fund the continuation of the Research approach undertaken by the University of Queensland – a Whistleblowers Protection Body or NIC might achieve this:

Unshielding the Shadow Culture,
Dr William de Maria and Cyrelle Jan
Queensland Whistleblower Study Result Release One,
University of Queensland, Brisbane, April 1994.

Wounded Workers
Dr William de Maria and Cyrelle Jan
Queensland Whistleblower Study Result Release Two,
University of Queensland, Brisbane, October 1994.

Additionally, QWAG recommends that the following data needs to be accumulated, which need is beyond the capabilities of QWAG - a Whistleblowers Protection Body or NIC might also achieve this:

1. **A Good Story or Outcome** or other Event offering more Hope to whistleblowers.

2. **Destruction of Evidence** - incidents where documents or other materials sought from government or an agency is suspected of having been destroyed or disposed of or lost without a reasonable explanation.

3. **Tricks used by Watchdog Regulators** – incidents in the Queensland or Federal jurisdiction where watchdog regulators, such as a crime commission or ombudsman office or public service commission or information commission or legal services commission or archives office or other watchdog regulator, may have failed in their duty and is suspected of tricking or deceiving the whistleblower, resulting in the denial of an investigation or denial of relief from adverse treatment.

4. **Oppressive Tactics in Litigation** - the failures of the government and agencies to act as a Model Litigant in proceedings defending claims by whistleblowers, is a behaviour by government legal officers that QWAG seeks to record and map. This information may be used in submissions made in support of disclosures by whistleblowers from these government legal offices, of the unfair practices being used to win litigation by means other than on the merits of the opposing arguments.

5. **Loss of Capability** – instances of operational failures or project failures or other mistakes or waste generated or caused by the suspected wrongdoing that has been the subject of disclosures by the whistleblower, or caused by the removal of the whistleblower from particular responsibilities. This information will be provided in submissions advancing the benefits of effective whistleblower disclosure and protection schemes.

QWAG seeks to provide feedback, to academic institutions and to government agencies and the community, regarding QWAG's concerns about particular aspects of the Whistle While They Work reports steered by the Watchdog Regulators of Australia. QWAG seeks to distil the information from that project that is useful, but also offer a considered position where the results of the WWTW may be flawed and detrimental to the safety of whistleblowers in the real world. Examples of these efforts include:

1. Email exchanges between Dr Pam Swepson and Dr A Brown
   Re the alleged exclusion by WWTW of terminated whistleblowers from surveys used in researching whistleblowing including the termination of whistleblowers, International Whistleblower Research networks, 2015
2. Email exchanges between Professor P Mazerolle and G McMahon
   Re the claim by the CMC that the bad treatment of whistleblowers is a myth, International Whistleblower Research networks, June 2015

Your Committee too is now suffering the disadvantages of the poor constructions incorporated into the WWTW, where your Committee has no research data on the performance of Sword agencies, just their self-serving assertion, incorporated into academic research that simply missed the story that would have been available to us all with better structures and an interest in all relevant aspects.

FALSE CLAIMS LEGISLATION

This legislation emanates from the American Civil War, where corruption was so significant that the government's *False Claims Act* included a ***qui tam*** provision which awarded whistleblowers (then termed ***'relators'***) with a percentage of the savings that their disclosures of suspected wrongdoing (false claims) brought to the Treasury.

Qui tam provisions in fact go back to the 1300s in English history.

The concept has been considered by the Federal bureaucracy in Australia.

Whistleblower Dr Kim Sawyer, former associate professor in economics and finance at the University of Melbourne and a Victorian member of the Whistleblowers Information Network, is the expert on this initiative and what may be happening with this type of legislation in Australia. Please consider well any submission arriving from Dr Sawyer

QWAG recommends that this legislative initiative be taken as part of any Whistleblower Protection Body or NIC initiative.

CLASS ACTIONS & ACCUMULATIONS OF WRONGDOING

Class Action

Chances for justice can improve where the suspected wrongdoing disclosed is of a significant size and/or has impacted a significant number of persons, such that a class action before the courts, funded by a knowledgeable and well-resourced third party, may be a viable option. The third party

has the legal representation expertise for the case, and the funds necessary to last whatever legal tactics are used by the government and/or the agency. The third party undertakes the legal action on a *pro bono* basis for the affected parties who join the class action, but in return for this risk the third party may require a proportion of the damages won at court.

It needs to be appreciated, however, that the third party may have altruistic motives and/or may have commercial motives for initiating the legal proceedings. Where the motives are largely commercial, the third party undertakes the legal action for a share of the damages won. The third party may elect to accept a settlement from the government or agency on a confidential basis, such that there is no 'day in court' for the whistleblower nor any public disclosure/discussion/publication over the issues. This can be a disappointing result for the whistleblower, as it may be the case that the wrongdoing, as a result, is not exposed to the public, and the public interest, as a result, may not then be served. And this is to say nothing of the resultant opening for the wrongdoing to be repeated again and again.

QWAG recommends legislation that defines a pathway for whistleblowers to gain a reasonable benefit from class actions initiated from disclosures made by those whistleblowers, or by whistleblower organisations acting with the consent of such whistleblowers.

Class actions are not to be confused with no-win-no-fee arrangements that an individual whistleblower may be offered by a law firm. These arrangements have proved to be very problematic-cum-dangerous for the whistleblower, where clauses in the arrangement allow the law firm to switch the rules and the whistleblower then faces large expenses for which the whistleblower is unprepared. This can force the whistleblower into accepting a settlement that covers only the legal expenses and ends all further rights to claims of damages by the whistleblower. Legislation assisting whistleblowers to reasonable conditions from No-Win-No-Fee type arrangements is also recommended.

Accumulations

The most notable example here is abuse and sexual abuse of children. Sixty years of abuse within government and church and community institutions, allegedly protected from investigation by institutions that included the police, distinguished clergy, government care agencies and their ministers, and the courts. Eventually the volume of complaints and adverse impacts became so large as to bring a Prime Minister to announce a Royal Commission.

It appears that modern forms of communication may reduce the time taken for public knowledge of such volumes of accumulated wrongdoing to become an irresistible force capable of moving an otherwise immoveable object (i.e. government) into action. By any reasonable standard, the half century taken with child abuse is unacceptable.

Unfortunately, QWAG cannot yet be sure that all cases of alleged suppression and cover-up by all institutions, including police and judiciary, are to be pursued by the Royal Commission as strongly as the Royal Commission has pursued the highest Offices within churches.

PERFORMANCE OF THE FAIR WORK COMMISSION re its WHISTLEBLOWING RESPONSIBILITIES

QWAG is dissatisfied with the performance of the FWC in its dual Sword and Shield roles regarding whistleblowing. The reasons are set out below.

Introduction

The principal plank of the approach to protecting whistleblowers, agreed by whistleblower groups in Australia two decades ago, was that the Shield or protection-of-whistleblowers function be given to a Whistleblower Protection Body separated from the Sword authorities (such as the ombudsman offices and crime commissions type bodies) whose responsibilities it was to investigate the disclosures made by whistleblowers.

This principle was incorporated into the Australian Standard AS 8004 – 2003 titled ***'Whistleblower Protection Programs for Entities'***. The principle has not been incorporated into state legislation on whistleblower protection. State governments have been repeatedly lobbied by academics to give this responsibility to the ombudsman, much to the chagrin of whistleblowers and their interests.

Whistleblowers were appreciative that a Federal Government listened to the argument, namely that the state legislation was in breach of the Australian Standard in this regard. The Federal Government gave aspects of whistleblower protection to the Fair Works Commission (FWC). Some misgivings existed, because the FWC was also a Sword organisation, with its own investigative function with respect to unions and organisations (FedRO) registered under its own legislation.

Whistleblowers now have some experience of how the FWC has responded to whistleblower disclosures and to whistleblower requests for protection.

Feedback and deductions are herein offered concerning this partial innovation, tried within the Federal jurisdiction, ahead of any comparable attempt by the States.

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In law, the explanation for this type of 'domino' effect is open to be captured by Lord Denning's ruling in ***Lazarus Estate Ltd v Beasley*** [1956] 1 QB 702, [1956] 1 All ER 341, in which he stated:

'Fraud unravels everything'.
… it vitiates judgments, contracts and all transactions whatsoever…

Fraud is the matter about which the 'domino' document, and all subsequent efforts to cover it up, informs.

The issue then is what would be different about the National Integrity Commission (NIC), that it would have chosen, from the beginning forty years ago, to force, by disclosure to Parliament or other powers given to the NIC, chiefs and managers, naturally unwilling to find wrongdoing in their own organisations, to have this wrongdoing fully addressed and corrected.

Some pertinent questions for the Committee to answer are:

1. What will be the design of the NIC that it will want to look at the ‘domino’ document where the COO never did, and where the COO surrendered its integrity to wilful blindness?
2. What will be the design of the NIC so that it will want to obtain and preserve a copy of the ‘domino’ document when the COO has refused to do this, and surrendered its integrity to the standards of the lowest of the agencies that the COO overviews?
3. What will be the design of the NIC that it will accept argument and evidence on the basis that the evidence has substance, rather than find and / or rely on self-serving escape words to dismiss substantive evidence on the basis that it is not 'new', or other response that surrenders the integrity of the NIC to regulatory capture.

CONCLUSION

This submission provides a suite of proposals that can strongly influence the COO and any NIC to greater integrity.

The principal enabler for fighting corruption is that the Whistleblower MUST SURVIVE. If the whistleblower survives, so too does the disclosure and the witness, so too do the opportunities for fighting the corruption or wrongdoing.

A Whistleblower Protection Authority with appropriate powers, properly resourced and with access to the budget of offending agencies to cover costs of legal action, can greatly contribute to that cause. For protection to be effective, the assumption that agencies and watchdogs are well-intentioned towards whistleblowers must be abandoned, and instead accept that any agency, as an organisational unit, can be ill-intentioned towards those who make disclosures about that agency in the public interest.

This effort to establish a Whistleblower Protection Authority will be directed at defending the first and highest priority target of ill-intentioned agencies and watchdogs when wrongdoing in those agencies is disclosed, namely, getting rid of the whistleblower.

The supporting approach is to limit the known tactics of agencies and their watchdog authorities to defeat disclosures and neutralise whistleblowers with prejudice. This submission has mapped many of these tactics by agencies and watchdog authorities. The power to enforce these provisions should be given to a Whistleblower Protection Authority where the tactic has been used against the career and welfare of whistleblowers. In this conclusion, QWAG gives four primary examples, with some comment.

Destruction of documents. The principles in case law as to how courts are to give regard to plaintiffs claims when the defendant has destroyed or disposed of documents, should be incorporated into whistleblower protection legislation.

The Government being a Model Litigant. Each instance obtained, of where a government has used a deliberate administrative or litigation tactic so as to cause more costly and longer lasting litigation, needs to be counteracted. For example, the tactic of losing documents, and then finding them again when a plaintiff pursues the defendant for this loss, could be counteracted by the legislation causing any statement by any government authority that a document has been lost, or a failure to present any document for a period of three months, could initiate the procedures for ‘Destruction of Documents’

in actions to protect whistleblowers. An ability for the Whistleblower Protection Authority to invoice agencies in dealing with the treatment of whistleblowers, irrespective of the outcome of such actions, will influence agencies to deal with matters with less expense. The worst agencies will, however, spend without limit when the disclosure threatens serious repercussions for the agency and its principals.

Appointments having a Perceived Conflict of Interest. This tactic is very popular amongst ill-intentioned agencies. The principals of such agencies can become rattled by the fact that one of their number has blown the whistle on the wrongdoing systemically incorporated into the agency's strategic and/or operational planning. An ability by the Whistleblowers Protection Authority to take action to veto such appointments in actions affecting whistleblowers, at the agencies expense, would worry ill-intentioned agencies whose *modus operandi* is based on control - the agency would sense that it was losing control. The veto also would encourage more disclosures by other members of that agency.

The Requirement to Give Detailed Reasons. While the narrative of the 'domino' document does not have a happy history, it did, nevertheless, betray the effectiveness of the rules requiring decision-makers to give detailed reasons when rejecting disclosures of criminal offence and unacceptable behaviour. A tactic used by the Complaints Resolution Agency in Defence, was to advise commanders facing allegations from whistleblower disclosures, not to treat or progress those disclosures as a 'Redress of Wrongs' application – the Redress process is the process that required detailed reasons to be given. Commanders were advised to make comment in performance appraisals about the officer or soldier, and to force the officer or soldier whistleblower to seek 'Redress' as part of the procedure allowed with unfavourable Performance Appraisals. The advantage for the commander here was that the Performance Appraisal procedure did not require that the commander give detailed reasons for any decision. That demonstrates the difficulty to ill-intentioned commanders and their advisers of the 'detailed reasons' requirement and one of the major efforts to get around the requirement. There were others.

The decision by an Investigation Officer to find that the whistleblower in the 'domino' document narrative was mentally imbalanced, in part because of his persistence in pursuing his rights to detailed reasons including findings on the facts about a document that he had been shown, occurred during an inquiry into military justice by eminent Australian jurist, The Honourable Sir Laurence Street. In the 'Report on the Independent Review on the Health of the Reformed Military Justice System', this eminent jurist stated:

> ***As the final arbiters of many personnel performance decisions, commanders and managers must provide a clear 'Statement of Reasons' (SOR) for their executive decision making, indicating the factors that they have taken into consideration and any specific weightings that were used in making their executive decisions. These processes allow for executive decision making to be challenged and explained, providing a level of protection that should be reassuring for both the individual and the ADO.*** (underlining and highlighting added)

The word 'must' is strongly emphatic of the link between detailed reasons and protection.

Currently, the Australian Defence Force has removed the Defence Instruction requiring detailed reasons, and the explanation of what was meant by 'detailed reasons' and what was not meant by the same terms have also been removed.

The words in that defence Instruction, now removed, is an excellent example of the approach recommended by QWAG in dealing with the tactics known to be used by ill-intentioned commanders and commands (or executives or managers). Specific words were added to the Defence Instruction to tell Chiefs of Army and Defence Force Chiefs that they could not use vague statements of reasons. Another example - the *Public Service Act* (Qld) instructed that appeals must address the complaint actually made, because of the common tactic of hearing appeals that were not made in lieu of the appeal actually made. Both of these provisions were unsuccessful because the provisions would not be enforced by respective Offices of the Ombudsman. Decisions about claims of abuse in Defence can now be given without reasons, and the Defence whistleblower experienced that in 2016. Twenty-one inquiries into military justice in 21 years, and yet the credibility of military justice has deteriorated, rather than been improved, by all those inquiries. Those inquiries, at an enormous public expense, appear to have been used to refine methods for abusing members within the military, instead of to deliver justice.

Lieutenant General Morrison's saying that ***'the standard that you walk past is the standard that you set'***, is trivial, and fundamentally misses the key duty. Rather, the appropriate saying for commanders in Defence is that ***'the standard that you set is what you do, sir, when nobody else is allowed to see'***.

All this brings the Committee back to QWAG's rationale about the importance of a Whistleblowers Protection Authority. This could be a force for enforcement of laws within ill-intentioned agencies like Defence, the Commonwealth Ombudsman Office (COO) and other watchdog authorities like Queensland's CCC, for which this submission has mapped alleged improper performances.