Protected disclosure?

According to who?

Driving a truck through purported Aged Care “whistleblower protections”.

[redacted]

Former community aged care systemic advocacy worker in a role funded by Department of Health and Aged Care

Bullied out of my job in 2015, have been on workers compensation ever since, liability accepted, complying agreement

SUMMARY:

The short version is that if you accidentally make your disclosure as a workplace health and safety disclosure to a work health and safety authority, which would be the obvious and **mandatory** way to report a work safety issue, it is excluded from being a protected disclosure.

The proposed whistleblower protections will be ineffective, and only serve as a cruel trap for anyone naïve enough to believe any assurances about protections against reprisals for disclosures.

The word "bullying" appears in the exposure draft zero times. Yet every disclosure you receive is going to have an element of workplace bullying involved.

RATIONALE:

The reason I am bothering to write this submission is that having been through a similar experience myself, I am very concerned that a dangerous ambiguity exists in the proposed whistleblower protections which create an unacceptable risk to staff and service participants.

Worse, the provisions create the impression that staff are safe from reprisals if they report unsafe practices and/or and unsafe workplace. This impression is false.

The risk exists that disclosures will be made in good faith, even though good faith is not a requirement, which will in fact not be protected.

I suggest that almost no disclosure will receive the protection which the whistleblower expects.

There is also a time problem. Two time problems-

- Do disclosure protections apply to reported EVENTS that occurred after the start of the new provisions? Or can protected disclosures relate to the past? If so how far back? Does anyone nearing retirement get to tell their stories before they leave? Or are providers going to be pardoned for all their past sins? Pick one.
- **At what point in time does the whistleblower receive the protection of the protected disclosure provisions?** At the time it is made? Or five years later when they get a court ruling saying the disclosure was protected which was disputed by the employer? Whether a disclosure is protected is a matter of opinion, unless there is a mechanism whereby protections can be confirmed in some way.

I would argue that there has to be way in which a person can be assured that the disclosure that they have made or want to make is protected from a particular point in time.

Otherwise what will happen is that the disclosure is made, but the employer proceeds on the basis that the disclosure is not protected.

Where does the authority lie to make any particular disclosure a protected disclosure? In the way the proposed whistleblower protection is structured, the authority for protecting a disclosure lies in the courts.

This means that a disclosure becomes a protected disclosure after the fact, years later, after protracted legal battles and after the whistleblower has had their life destroyed, as mine was.

I made what would be a protected disclosure under the proposed model in April 2015. It was not until January 2017 that I received an apology from [redacted] for doing nothing. It was not until November 2023 that I received an apology from [redacted] for doing nothing. I also received an apology from parliament. But the perpetrator succeeded in permanently ending my working life, and ive been left to rot. So I am greatly disturbed that people are going to be told that there will be robust protections for whistleblowers, that is a dangerous promise and reading the exposure draft that is not what you are offering here.

There is nothing in the proposed model to stop an employer asserting that a particular disclosure was not a protected disclosure, which is trivially easy to do, just say that the disclosure does not disclose reasonable grounds for a suspicion that the reported information indicates that an entity may have contravened a provision of the Aged Care Act because –

- Provider asserts it was not a disclosure. (disclosure is undefined in the Act), let alone a qualifying disclosure. Especially as disclosures can be verbal or in writing. Disclosures can be dismissed as gossip, unremarkable inquiries etc.
- Provider asserts Lack of reasonable grounds
- Disclosure fails to identify a relevant provision of the Aged Care Act
- Disclosure relates to something outside the Aged Care Act (such as a state-based workplace safety act)

The employer will then proceed on the basis that:

- Contractual provisions are enforceable
- Administrative action can be taken

Quite obviously the next thing that happens will be that the person makes a workers compensation claim for bullying and psychological injury caused by unlawful retaliation.

And guess who PAYS for this baked in disaster? The state based workers compensation system. The Commonwealth is cost shifting the results of this time bomb onto the States.

It will also be aged care workers and their families who pay the price for believing the misrepresentation that disclosures are protected.

I don't see any provision in the exposure draft for the Commonwealth being held financially accountable by whistleblowers, states, or anyone else, when the whistleblower protections fail.

There are fines in the Act, which will quite obviously never be implemented because the perpetrator will simply claim that retaliation against whistleblowers was for some other reason.

It is also trivial that the onus of proof be on the employer, they will just conjure up a document that states it was for some other reason.

The reality is that you would be doing everyone a favour if you just didn't have whistleblower protections, than if you lie to people and let them believe they will be protected, when under the proposed provisions they absolutely will not.

Recommendation 1: Section 355 (a) must include Safework NSW or the applicable workplace safety organization in that state or territory

The first place workers are going to make disclosures about an unsafe workplace is to….

…drumroll…

..the workplace safety system.

In fact those workplace safety systems LEGALLY REQUIRE THEM TO DO SO..

Legislating to exclude the workplace safety system from protected disclosures is an unfathomable oversight unless you are deliberately trying to trap people.

I suspect you might be, to cost shift your problem onto the states.

There can be no claim of state-federal jurisdictional issue if complaints to the police are protected disclosures.

Does your average cop know that they can even take work safety reports about aged care and that they are protected disclosures? Unlikely.

***Recommendation 2*: Consider defining a "disclosure" in section 7**

***Recommendation 3*: recognize and acknowledge that workers are unlikely to read the aged care act before making a disclosure, and that therefore the definition of a protected disclosure that "*the discloser has reasonable grounds to suspect that the information indicates than an entity may have contravened a provision of this Act*" is unworkable.**

I suggest it instead state "any relevant workplace safety or aged care Act"

Or simply making clear that intention is not a relevant element in whether a disclosure is protected or not.

It is weird that you removed good faith but kept intention.

***Recommendation 4*: recognize and acknowledge that staff are not lawyers, and will tend to make protected disclosures in ordinary language, without reference to the Aged Care Act.**

The reality is that governments have no choice but to make laws for the lowest common denominator. You are not doing that here, these provisions are made for lawyers. You are laying the groundwork for the next Four Corners episode about how whistleblowers were not protected, again.

It would not take much imagination to write in advance exactly how that Four Corners episode will go. The only question is which year is it going to air.

***Recommendation 5*: recognize and acknowledge that unmanageable workloads can be simultaneously workplace bullying, a workplace safety issue, and a breach of the quality standards**

If my grandma is being looked after by someone with an unmanageable workload, neither the worker nor grandma is safe. I would hope that the worker had already reported it, and not left that job to myself or grandma.

***Recommendation 6*: recognize and acknowledge that workers being forced to perform tasks not normally associated with their role can be simultaneously workplace bullying, a workplace safety issue, and a breach of the quality standards.**

***Recommendation 7*: recognize and acknowledge contraventions of the Aged Care Act in a workplace will not be occurring in isolation from an unsafe**

workplace, an unsafe environment for service participants, and workplace bullying

Recommendation 8: recognize and acknowledge that an aged care workplace where workplace bullying reports are being made is one which is highly likely to also be in breach of the aged care act and in urgent need of quality oversight.

Recommendation 9: ***The commonwealth should indemnify state workers compensation systems for any costs incurred by those nominal insurers where the making of a protected disclosure led to a claim against that workers compensation system.***

Workers who make protected disclosures are at mortal risk of being pushed onto state based workers compensation systems by employers (mortal because of what it does to that persons life expectancy). The only way to trust the commonwealth that it isn't going to turn a blind eye to cost shifting of its problems onto workers comp is for the commonwealth to pony up its own money where that occurs.

Recommendation 10: recognize and acknowledge that section 361, concurrent operation of state and territory laws, means there is absolutely no reason for excluding disclosures made as a work safety disclosure to a state entity from being protected disclosures (unless you deliberately want to trap people who made disclosures).