19 January 2023

The Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
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The Public Interest Disclosure Amendment (Review) Bill 2022

I welcome the Federal Parliament's move towards implementing some of the recommendations of the 2016 *Review of the Public Interest Disclosure Act 2013* by Mr Philip Moss AM (Moss Review). Generally speaking, these are significant and sensible legislative reforms which ought to help improve and strengthen the ability of the *Public Interest Disclosure Act 2013* ('The Act') to achieve its statutory purpose.

In particular I note that the *Public Interest Disclosure Amendment (Review) Bill 2022* sets out (among other things) to

- provide increased protections for disclosers; *and*
- enhance oversight of the scheme by the Office of the Commonwealth Ombudsman (Ombudsman),

There are, however, aspects of The Act that I believe remain unacknowledged and unaddressed by the proposed changes which mitigate both these specific statutory aims and the purpose of The Act as a whole.

I therefore make this submission in the hope it might encourage the Senate Legal and Constitutional Affairs Committee to consider using the opportunity it now has by the referral of *The Public Interest Disclosure Amendment (Review) Bill 2022* to it to consider proposing some further legislative refinements and improvements.

My own knowledge of, and interest in, The Act stems from my experience of submitting three Public Interest Disclosures ('PIDs') between 2016 and 2018 concerning actions and omissions I witnessed during my time as an employee of Australian National University (ANU).

This experience has led me to hold serious concerns about the way The Act establishes, devolves, and enforces (or indeed fails to enforce) various Agency responsibilities that, to my mind, seriously undermine the effectiveness of The Act. In particular, **s26 (1)** states that The Act seeks to promote the integrity and accountability of the Commonwealth public sector by:

- encouraging and facilitating the making of disclosures of wrongdoing by public officials
- ensuring that public officials who make protected disclosures are supported and protected from adverse consequences relating to the making of a disclosure
- ensuring that disclosures are properly investigated and dealt with .
  (ss 6, 7).

If my experience, and that of others I know, is any guide, The Act is current failing to deliver across all these stated outcomes. Fundamentally, The Act does not take into account the foundational risks that come with any integrity or accountability process that relies heavily on self-administration and assessment. I need not draw this Committee's attention to, say the, recent Banking Royal Commission to demonstrate how such self-regulation can, and frequently does, fail.

I believe that The Act thus needs to be further amended to ensure that it not only *empowers*, but *obligates*, an Agency handling a PID to:

a) deal with a submitted PID in an appropriate period of time

b) provide detailed and reasonable grounds to justify a decision in relation to a PID and/or any decisions made about the handling of it. When an Investigation is deemed inadequate, there needs to be a statutory means to holding the Agency to account.

c) mandate that an Agency does not just claim, but also demonstrates, that there was no apparent or real conflict of interest in its handling of a PID.

Furthermore, The Act

d) must also provide further protections for an external disclosure

I discuss these four aspects briefly in turn below.

a) The Agency must deal with a PID in an appropriate period of time,

If the objects of the PID Act include encouraging and facilitating the making of public disclosures by public officials (s 6(b)), then it stands to reason that inordinate delay or a failure properly to engage with a discloser will serve to undermine a chief object of the PID Act.

This is a very real problem. In my case, I had submitted a Public Interest Disclosure in 2016, and one of the many disappointing aspects of my experience of the PID process was that it took my subsequent three years of lobbying for the ANU finally to agree to fulfil its statutory obligation to investigate that disclosure, and even then it did so in a manner that the Ombudsman's Office acknowledged to me in in writing was inadequate and did not justify the findings it claimed.

This was despite what seem otherwise to be clear statutory obligations under the Act (such as s52) that compel an agency to investigate disclosable issues if the PID has been allocated to it for investigation by the Commonwealth Ombudsman within a reasonable time period.

Lacking, as I do, any evidence or reasoning to the contrary I could only conclude that this was an attempt by this particular agency to weaken the efficacy of the PID Act and the chances of my disclosures being investigated properly and fairly.

There needs to be clear consequences for an Agency and its Authorised Officer (and clear remedial mechanisms for a disclosure) who, without good cause, delays or otherwise obstructs an investigation.

b) The Agency must provide detailed and reasonable grounds to justify a decision in relation to a PID and/or any decisions made in relation to the handling of it. When an Investigation is deemed inadequate, there needs to be a statutory means to holding the Agency to account.

The Ombudsman's Office Agency Guide to the PID Act Version 2 clearly and repeatedly advises Agencies to act in a manner that helps ensure a discloser has confidence in the process. Paragraph 2.7.7.1 of this guide goes on to state the following issues may lead to a finding that an investigation has been inadequate:

2.7.7.1 When is an investigation or subsequent action inadequate?

The PID Act does not define when an investigation or action taken by an agency as a result of the investigation is inadequate. However, *an investigation is likely to be considered inadequate if*:

- the investigator showed bias or there was a strong apprehension of bias in how the investigation was conducted
- information that was reasonably available, relevant and materially significant was not obtained
- the findings or recommendations set out in the report were unreasonable on the basis of the information obtained during the investigation
- the investigation report did not set out findings or recommendations that should reasonably have been made on the basis of the information obtained.

Some of the pitfalls for agencies to avoid when investigating a disclosure include:
(...)

- not pursuing obvious lines of enquiry

In my experience, the Ombudsman's Office confirmed to me in writing on a number of occasions that the relevant Agency was in breach of one or more of these standards, but its ultimate response was merely to confirm it was the Agency's responsibility, and it was unable to enforce them.

I strongly suspect the ANU was aware of the anaemic standards of accountability around The Act, and behaved accordingly. Currently the whole system therefore seems hopelessly weighted against the possibility of a reasonably fair and honest investigation.

The Act needs to spell out more explicitly what makes for an inadequate investigation or action, and both outline possible adverse consequences for an agency, and possible means of recourse for a discloser to be able to seek a truly independent review of such an investigation or action.

c) The Agency must not just claim, but also be able to demonstrate, that there was no conflict of interest in the handling of a PID.

Currently The Act operates on the basis of what I might respectfully state to be an overly optimistic view of the capacity for a Commonwealth Agency (and in particular the appointed 'Authorised Officer' for the purposes of The Act) to carry out their functions in an open and unbiased fashion.

Authorised officers are officers of an agency authorised in writing by the principal officer for the purposes of the PID Act (s 36). They have a range of decision-making, notification and other responsibilities under the PID Act, including:

- informing the discloser of the allocation decision (s 44(2))
- advising the discloser of a decision not to allocate, the reasons why and any other course of action that may be available under Commonwealth law (s 44(3)).

Time and time, however, again I encountered decisions made by the appointed public officer or their sub-agent (such as an appointed third-party consultant) which were charactered by actual bias or about which it was reasonable to allege a serious conflict of interest. On several occasions this situation was also acknowledged by Ombudsman's Office staff but once again with to practical consequence beyond generic and vague statements that the Office would provide feedback to the Agency (the ANU) about how they might improve their handling of PIDs in the future.

The Act should explicitly mandate an Agency undertaking investigations of PIDs referred back to it in a manner that is truly at arms length from all those who have an obvious or perceived interest in the outcome, and provide for significant sanctions if this does not occur.

d) The Act must also provide further protections for an external disclosure

I note that Schedule 1, Part 3 of the proposed amendments to The Act extends protections for disclosers and provides witnesses with the same protections from reprisal from civil, criminal and administrative liability as a discloser.

This is an appropriate and sensible extension of the existing protections for disclosers.

Currently, however, the proposed reforms to the Act do not contemplate extending similar protections to third parties who report or otherwise republish details of a PID that has met the threshold to be an 'external disclosure' as outlined in the table of subsection 26 (1) of The Act.

The mere existence of such doubt as to whether an external disclosure can be publicly reported, however, in effect disables the ability of a discloser to draw wider public attention to their matter, and thus severely restricts the efficacy of such a disclosure and the associated risk to an Agency that might otherwise wish to cover up alleged wrong-doing.

The Act should extend the protections that vest in an external disclosure to include any public reporting of it..

I am of course willing to provide more detail or supportive evidence about any of the above should it be of use to the Committee. For now, I am grateful for the opportunity to make this contribution to its work.

Yours sincerely,

Professor Peter Tregear OAM
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