

Helen
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Senator Nita Green
Committee Chair, Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Green

Submission to Senate Standing Committee Inquiry into the Public Interest Disclosure Amendment (Review) Bill 2022

Thank you for the opportunity to make a submission to this inquiry.

Reforms to Australia's whistleblower protection laws are a necessary next step to strengthen the Government's integrity framework following the establishment of the National Anti-Corruption Commission (NACC). Uncovering corruption in the public sector will rely on large part on whistleblowers referring such matters to the NACC without fear of reprisal. In exchange for this bravery, whistleblowers must be guaranteed the strongest possible protections.

Where once Australia's whistleblower protection laws set the international standard, they have since become limited, out of date and inconsistent. In 2019 a Federal Court judge described them as 'technical, obtuse and intractable'.¹

The Public Interest Disclosure Amendment (Review) Bill 2022 (**the Bill**) is a welcome first step to reforming Australia's whistleblower laws so they can once again adequately serve the public interest both for disclosures to the NACC and across the public sector. These protections must be in place before the NACC commences operations in mid-2023.

I support the provisions of the Bill that enable the NACC to fulfil its function to investigate serious or systemic corruption, such as providing officers with greater discretion to refer appropriate matters to the NACC for investigation. This provides greater flexibility to agencies in how they handle disclosures, and makes sure the matter is dealt with by the most appropriate agency.

I also support the Bill's expansion of the definition of 'detriment' so that the full spectrum of potential reprisals and collateral damage can now attract a remedy. Currently, only official work-related or employment actions, such as dismissal, are used as examples of 'disadvantage' amounting to detriment. Expanding the definition of detriment allows remedies to be available for other impacts of whistleblowing, such as reputational or financial damage, and any form of discrimination,

¹ *Applicant ACD13/2019 v Stefanic* [2019] FCA 548 at [17] (Griffiths J).

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harassment or psychological harm. Expanding the definition of detriment now brings the definition in line with remedies available to union and corporate whistleblowers.²

However, these reforms are nowhere near sufficient on their own. I attach a copy of the report *Protecting Australia's Whistleblowers: The Federal Roadmap (the Roadmap)* to this submission. On 23 November 2022 I co-launched the Roadmap alongside Griffith University's Centre for Governance & Public Policy, the Human Rights Law Centre and Transparency International Australia.

The Roadmap clearly sets out important reforms to ensure whistleblower protections laws can be effectively administered and enforced, are consistent, offer best practice protections and provide workable thresholds and limitations. I strongly recommend the Committee review it during this inquiry as it provides a useful guidance.

The Bill enacts some of the Roadmap's recommendations but does not adequately cover many. Considerable work is needed if Australia is once again going to reach the international standards of whistleblower protection, and give whistleblowers the protection they are entitled to. While the Government has committed to more whistleblower protection reforms later this year, I urge the Committee to consider recommending the Government bring forward the below reforms into this Bill, or commit to implementing them in the next tranche of reforms. Implementing these reforms should not be an onerous task, given that many of the Roadmap's recommendations are similar to the recommendations made by the 2017 Parliamentary Joint Committee on Corporations and Financial Service's inquiry into whistleblower protections across the corporate, public and not-for-profit sectors, and the 2016 Review of the PID Act conducted by Mr Phillip Moss AM (the Moss Review).

I make the following additional comments based on the Roadmap's recommendations, which I sincerely hope are given their full consideration by this Committee.

Establish a whistleblower protection commission

Whistleblower protection laws are complex. The formation of an independent whistleblower protection commission is critical to support whistleblowers who are navigating the legal system. This was a key pillar of my 2020 Australian Federal Integrity Commission Bill and received support in the Advisory Report for the Joint Select Committee examining the NACC Bill.³ A Whistleblower protection commission would operate similarly to the Fair Work Ombudsman or human rights commissions, and should provide legal support to whistleblowers, enforce whistleblower protection laws and implement whistleblower protections.

Protection for private sector whistleblowers

The Parliament must enact a single law covering all non-government whistleblowers. Currently, Australian private and not-for-profit sector organisations are subject to incomplete and inconsistent whistleblower protections laws. For example, unions, aged care providers and National Disability Insurance Scheme whistleblowers are all subject to different laws, some of which are out of date. A single consolidated law for all private and not-for-profit sector whistleblowers is necessary, with consistency between public and private sectors where possible.

² Under s 337BA(2) of the *Fair Work (Registered Organisations) Act* and s 1317ADA of the *Corporations Act*.

³ Advisory Report on the Advisory report on the provisions of the National Anti-Corruption Commission Bill 2022 and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022, [1.369].

Immunities from prosecution

There are currently significant legal gaps and uncertainties about what immunity is available to whistleblowers from civil, criminal and administrative liability. Legal reform of these immunities is necessary to ensure legal actions, whether they be civil or criminal; do not drag out for years.

Other recommendations

I urge the Committee to further consider other recommendations laid out in the Roadmap that are necessary to ensure Australia's whistleblower protection laws are once again best practice:

- Create a 'no wrong doors' approach through a coordinated referral process and inclusion of all relevant regulatory agencies in the whistleblowing framework;⁴
- Provide greater powers and resources for training and oversight for staff, supervisors and authorised officers;⁵
- Simplify and upgrade proof requirements for whistleblowers who have suffered unjust detriment to access civil remedies and compensation;
- Enforce a positive duty on employers to protect whistleblowers, by making them liable if they fail to do so;
- Vest the Fair Work Commission with new jurisdiction to conciliate whistleblowing claims against public and private employers to ensure easier, consistent access to remedies;
- Amend confidentiality requirements to make it easier for agencies, employers and oversight bodies to properly respond to whistleblowing cases, and for unions and professionals to provide support and representation;⁶
- Make external and emergency disclosure provisions simpler and more consistent to properly protect public and third-party whistleblowing by simplifying the public interest test. This would assist protection for national security whistleblowers who choose to disclose to the media, parliamentarians or other third parties.

Thank you again for the opportunity to make this submission to the Inquiry.

Yours faithfully

Helen Haines MP

Independent Federal Member for Indi

⁴ The Bill goes one step towards creating a 'no wrong doors' approach by providing greater flexibility to agencies in how they handle disclosures. It allows officers to use their discretion to refer a disclosure if it will be more appropriately investigated under another power e.g. the NACC. However, the Roadmap calls for this to go further by applying it to the private and not-for-profit sector.

⁵ New subsection 59(7)-(8) requires a principal officer to take reasonable steps to provide ongoing training and education to public officials about the PID Act relating to integrity and accountability and any training necessary to support supervisors to carry out their functions under the PID Act. However, this requirement should also extend to the private and not-for-profit sector.

⁶ The Bill enhances information-sharing between agencies by repealing the general secrecy offence in the *Public Interest Disclosure Act*, to ensure agencies can share information appropriately. However, further reforms are necessary to enhance information-sharing and provide whistleblowers with further support.