Australian Government

Department of the Prime Minister and Cabinet

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Ms Julie Dennett
Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Inquiry into the Public Interest Disclosure Bill 2013

I refer to emails received on 9 and 10 May 2013 seeking responses to questions in relation to the Public Interest Disclosure Bill 2013.

The Department's responses to the questions are attached.

I confirm that I will appear on behalf of the Department at the hearing on 24 May 2013, together with Ms Maia Ablett, A/g Assistant Secretary, Legal Policy Branch.

Yours sincerely

Renée Leon
Deputy Secretary, Governance

20 May 2013

Questions received 9 May 2013

Consultation

Q1. In his second reading speech the Attorney-General said (House Hansard, 21 March 2013, p. 2898):

> **Given the complex nature of the issue I also consider that consultation should continue on the content and structure of the bill. If it becomes clear that the whistleblower scheme would benefit from legislative amendment I will be happy to bring them forward if this bill progresses.**

What consultations took place in relation to the Bill prior to its introduction into the parliament? Is the Department continuing its consultation on the Bill? Is the Department considering any specific amendments to the Bill at this stage?

A1. The Bill was developed with wide consultation across agencies, including departments, integrity agencies, intelligence agencies and federal courts. There was no public exposure draft Bill. The Department has not consulted outside government.

The Bill implements the framework outlined in the Government's response to the House of Representatives Standing Committee on Legal and Constitutional Affairs report, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector* ('the Whistleblower Protection report'). The Whistleblower Protection report was informed by extensive consultation.

The Department is continuing to consult with Government agencies.

The Minister for the Public Service and Integrity, the Hon Mark Dreyfus QC MP, and his Office have been undertaking consultations on the Bill.

The question of whether any amendments will be made to the Bill is a matter for the Government.

Drafting

Q2. Submissions comment on the complexity of the Bill (see, for example, Dr Suelette Dreyfus, Submission 14, p. 2; Mr Howard Whitton, Submission 25, p.3).

How is the complexity of the Bill's drafting consistent with the objective of the Bill 'to encourage and facilitate the making of public interest disclosures by public officials' (subclause 6(b))?

A2. The Bill implements a framework to apply broadly across the Australian Government public sector and necessarily incorporates a range of definitions to support the framework outlined in the Government's response to the Whistleblower Protection report.

A number of measures in the Bill will assist public officials to make a public interest disclosure.

- Principal officers must take reasonable steps to ensure that the number of authorised officers is sufficient to ensure that they are readily accessible by public officials who

belong to the agency (clause 59(3)(b)), and to ensure that public officials who belong to the agency are aware of the identity of each authorised officers (clause 59(3)(c)).

- Where an authorised officer has reasonable grounds to believe that information could concern disclosable conduct, the authorised officer is required to inform the individual that the disclosure could be treated as an internal disclosure for the purposes of the Act and to explain what the Act requires in order for the disclosure to be a protected internal disclosure for the purpose of the Act (clause 60).
- The Ombudsman (for non-intelligence agencies) and the Inspector-General of Intelligence and Security (IGIS) (for intelligence agencies) have functions which include assisting public officials and former public officials in relation to the operation of the Act (clauses 62(a)(iii), (iv) and 63(a)(iii), (iv)) as well as conducting educational and awareness programs (clauses 62(b) and 63(b)).
- Principal officers must establish procedures for facilitating and dealing with public interest disclosures relating to the agency that must comply with standards issued by the Ombudsman (clause 59(1)).
- A public official who makes a disclosure and who is contactable will be notified at key points in the handling of the disclosure (notice of the agency or agencies to which the disclosure has been allocated, notice that the principal officer is required to investigate, notice of a decision not to investigate and the reasons for that decision, provision of a copy of a report on completion of an investigation).

Dr Dreyfus cites three examples as having potential 'to confuse a whistleblower' and to thereby discourage them from making a disclosure (Submission 14, p. 9). Some comments are made against each of those examples.

- *Only allowing internal disclosure to 'disclosure officers'. This has the potential to leave a discloser without protection where, for example, they raise their concern with their immediate boss.*

An internal disclosure may be made within an agency to an authorised officer, who is the principal officer of the agency or a public official who is appointed by a principal officer for the purposes of the Act. The designation of authorised officers in this way should assist to avoid uncertainty in identifying whether a public interest disclosure has been made or whether a public official is otherwise reporting. A supervisor would be able to re-direct a public official to an authorised internal recipient if appropriate.

- *Not guaranteeing a discloser anonymity when making an internal disclosure. When a disclosure is allocated, the person (under Clause 44) is revealed. The Bill should when encouraging disclosure seek to do this by protecting the discloser from reprisal. One of the key methods of achieving this can be anonymity.*

A disclosure may be made anonymously (cl. 28(2)). There is no requirement for a discloser to provide contact details. A discloser could maintain anonymity, and still receive information about the handling of a disclosure, through the use of pseudonyms.

- *The discloser is forced to choose whether or not to disclose externally based on the adequacy of the investigation into their disclosure, when there is no ongoing obligation to inform the discloser of the progress of that investigation.*

As noted above, the Bill provides for certain mandatory notifications at key points. A discloser would be notified of a decision to allocate the disclosure to an agency (cl. 44(1)), that the

principal officer is required to investigate the disclosure or notify of a decision not to investigate and the reasons for that decision (cl. 50). As soon as practicable after starting an investigation, the discloser is to be given an estimate of the likely duration of the investigation (cl. 55). A discloser is also to be given a copy of the report of the investigation (cl. 51(4)). In addition to the mandatory notification requirements, there is nothing to prevent an agency from taking additional steps to keep a discloser informed of the handling of their disclosure.

Q3. Why wasn't the approach of the Public Interest Disclosure (Whistleblower Protection) Bill 2012, which draws on the current best practice drafting approach adopted by the ACT Government, taken in the government's bill? (see Dr AJ Brown, Submission 14 to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the Bill, p. 3).

A3. The Bill implements the Government's response to the Whistleblower Protection report and is drafted to apply broadly to the Australian Government public sector. The Bill adopts the Commonwealth drafting style.

Immunity provisions

Q4. A number of submissions argue that clause 11 should only operate where the individual knowingly made a false or misleading statement (see, for example, CPSU, Submission 5, pp 5-6; ACTU, Submission 6, p. 2; ABC, Submission 12, p. 2; Law Council of Australia, Submission 24, p. 6).

Why is clause 11 not limited to cases where an individual has knowingly made a false or misleading statement?

A4. Clause 11(1) provides that clause 10 (which establishes protections where a qualifying public interest disclosure is made) does not apply to civil, criminal or administrative liability, including disciplinary action, for making a statement that is false or misleading.

The absence of a qualifying reference to 'knowingly' making a false or misleading statement is an omission.

Offence provisions

Q5. It is argued that the penalties for the offences in clause 19 are 'relatively weak' compared with other Australian jurisdictions, where the penalty for analogous offences is a maximum of two years imprisonment. (see, Dr Appleby, Dr Bannister, Ms Olijnyk, Submission 9, p. 5).

What is the argument against stronger penalties, which would seem to be consistent with the other Australian jurisdictions?

A5. The penalties in the Bill have been drafted in line with the government's criminal law policy as outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which is that a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. The offences in Part 2 of the Bill which relate to taking reprisals against a discloser have a maximum penalty of 6 months imprisonment or 30 penalty units, which is consistent with similar offences for intimidation or victimisation, such as section 216 of the *Radiocommunications Act 1992*, section 47 of the

Productivity Commission Act 1998 and section 40YA of the *Australian Federal Police Act 1979*.

The unlawful disclosure offences in Part 4 of the Bill have a maximum penalty of 2 years imprisonment or 120 penalty units, consistent with other offences of unlawful disclosure such as subsection 67(8) of the *Australian Hearing Services Act 1991* and subsection 16(2) of the *Customs Administration Act 1985*.

Q6. The ABC and Joint Media Organisations express concerns in relation to clause 20 – and the possibility of media organisations being criminally liable for disclosing identifying information in the course of news gathering (Submission 12, p. 8-9; Submission 19, p. 6, respectively).

What is the Department's response to the concerns expressed in those submissions?

A6. The purpose of the offence in clause 20 is to provide a strong safeguard for the protection of the identity of a discloser. The offence is not limited to public officials and may apply to any person if the grounds for the offence are met.

The ABC submits the exceptions '…do not recognise the way confidential source information might be used and disclosed during the course of responsible journalism and may create undue pressure on journalists to reveal their source's identity or face imprisonment'. By example, the ABC says a journalist who is proposing to use unattributed information in a news story, while honouring an assurance of confidentiality to protect the source's identity, may be required to disclose identifying information internally as part of the decision-making process about the reliability of the information. The Joint Media Organisations give similar examples.

The offence could have application in the example described. The offence would not apply if an exception is enlivened. Particularly relevant exceptions in the examples given are if the discloser has consented to the disclosure or use of the identifying information (cl. 20(3)(e)) or the identifying information has previously been lawfully published (cl. 20(3)(f)). It would be prudent for the receiver of information to obtain the fully informed consent of the discloser for the disclosures and use of their identifying information.

Q7. Some submissions argue that contractors are not protected under clause 22 of the Bill which applies the General Protections in the Fair Work Act 2009 to the making of a public interest disclosure by a public official who is an employee (CPSU, Submission 5, p. 5; ACTU, Submission 6, p. 2). Why is clause 22 restricted to a public official who is an 'employee'?

A7. The intention is that the *Fair Work Act 2009* (FWA) would not be given any extended operation in its interaction with the Bill. If a public official (as defined under the Bill) did not have a remedy under the FWA, the remedies in cl. 15, 16 and 17 of the Bill could be applied. The term 'employee' has been used in clause 22 to be consistent with the definition of the relevant paragraph of 'workplace law' in section 12 of the FWA. Under paragraph (d) of that definition, a workplace law means 'any other law of the Commonwealth … that regulates the relationships between employers and employees'. The 'workplace right' protections in Part 3-1 of the FWA will apply if a person is able to take certain actions, such as initiate a process or proceeding under a 'workplace law' (s. 341 FWA). For the purposes of a 'workplace law' the

FWA defines 'employee' to have its 'ordinary meaning'. It is intended that 'employee' in the Bill have that meaning.

Public officials

Q8. The Australian Government's response to the House of Representative's Standing Committee on Legal and Constitutional Affairs Committee's report on Whistleblower Protections stated:

> **Disclosures will not be able to be made under the scheme about Members of Parliament. Allegations of wrongdoing by Members of Parliament should be addressed by the Parliament.**

Please explain why the Australian Government has adopted this approach, particularly given that Mr Wilkie MP's private member's bill, the Public Interest Disclosure (Whistleblower Protection) Bill 2012, and the earlier private Senator's bill introduced by then Senator Andrew Murray, the Public Interest Disclosures Bill 2007, both explicitly include(d) Members of Parliament, as well as persons employed under the Members of Parliament (Staff) Act 1984, as public officials.

A8. It is the Government's policy position that the Bill will not apply to disclosures about Members of Parliament as stated in the response to recommendation 4 of the Whistleblower Protection report. The response states allegations of wrongdoing by Members of Parliament should be addressed to the Parliament.

Internal disclosures

Q9. Should the Bill include a provision such as in paragraph 15(1)(c) of the Public Interest Disclosure Act 2012 (ACT) that disclosures may be made to a person who, directly or indirectly, supervises or manages the discloser? If not, why not?

A9. The approach in the Bill, that an internal disclosure be made within an agency to an authorised officer, is intended to avoid uncertainty that could otherwise arise if it is unclear whether an officer is making a public interest disclosure or otherwise reporting.

As noted above, principal officers of agencies are required to take reasonable steps to ensure that the number of authorised officers is sufficient to ensure they are readily accessible by public officials who belong to the agency and that they are known. Principal officers are also required to ensure that public officials who belong to the agency are aware of the identity of each authorised officer of the agency. An authorised officer may, in some cases, also be a discloser's supervisor.

External disclosures

Q10. Submissions comment that the requirements for an external disclosure are too difficult to ascertain, and will deter potential disclosures by public officials (see, for example, CPSU, Submission 5, pp 4-5; Law Council of Australia, Submission 24, p. 10). How does the Department respond to this criticism of the Bill?

A10. The emphasis of the scheme is on disclosures of wrongdoing being reported to and investigated within government. This emphasis is designed to ensure that problems are identified and rectified and, in doing so, will promote the integrity and accountability of the

Australian government public sector. A discloser could also seek assistance from the Ombudsman. A discloser can obtain legal advice if the criteria for a legal practitioner disclosure are met in clause 26 of the Bill.

Q11. Dr Appleby, Dr Bannister and Ms Olijnyk (Submission 9, pp 6-7) argue that the test in clauses 37-39 as to when an investigation under Part 3, or a response to an investigation has been inadequate, 'use legalistic tests that will be difficult for lay persons to interpret'. These submitters suggest that the following examples are tests that would be more easily understood by the lay person:

clause 31(1) of the Public Interest Disclosure (Whistleblower Protection) Bill 2012;
section 20 of the Public Interest Disclosure Act 2010 (Qld); and
subsection 19(4) of the Public Interest Disclosures Act 1994 (NSW).

What advantages do the tests in clause 37-39 have over these examples?

A11. The approach under the Bill is that an external disclosure should not be necessary where a public interest disclosure is properly investigated and proper action has been taken in response to the recommendations of an investigation report.

The main difference between the approach in the Bill and the legislation cited is that the Bill has a greater focus on inadequacy in an investigation or as a response to an investigation as a criterion for a protected external public interest disclosure. For example, under s. 20(1)(b)(ii) of the *Public Interest Disclosure Act 2010* (Qld) a criterion for external disclosure is that an entity has investigated the disclosure but did not recommend the taking of action in relation to the disclosure. The criterion does not require consideration to be given as to whether the absence of a recommendation to take action is justifiable. In contrast, under clause 37(d) of the Bill, an investigation is inadequate if the report of the investigation does not set out findings or recommendations that could reasonably be expected to have been made on the basis of the information obtained in the course of conducting the investigation.

Q12. Alternatively, submissions suggest that a subjective test should be used to determine whether the prerequisites for external disclosure are met, such as the discloser 'has a reasonable belief' (see, for example, CPSU Submission 5, p. 4; Dr Appleby, Dr Bannister, Ms Olijnyk, Submission 9, p. 7).

Why has an objective test been used in relation to these prerequisites?

A12. Application of some of the grounds for inadequacy in clauses 37 and 38 will be factual. For example, the investigation has not been completed within the required time period (for the purposes of an inadequate investigation, clause 37(a)), or no action has been taken in response to recommendations in an investigation report and a reasonable period has passed since the report was prepared (for the purposes of an inadequate response, clause 38(1)(c)(ii)).

Application of other grounds incorporate objective elements: findings in a report are such that no reasonable person could have reached them on the basis of the information obtained in the course of conducting the investigation (for the purposes of an inadequate investigation, clause 37(c)), or no reasonable person would consider that the action that has been taken in response to recommendations is adequate (for the purposes of an inadequate response, clause 38(1)(c)).

The approach taken in the Bill is intended to provide clear rules as to when an investigation or response is taken to be inadequate. Objective elements provide a clearer basis for giving guidance on when a discloser could have a reasonable belief that an investigation or response to an investigation is inadequate.

Q.13. The Australian Government's response to the House of Representative's Standing Committee on Legal and Constitutional Affairs Committee's report on Whistleblower Protections stated (p. 15):

> **While the Government does not consider Members of Parliament should be authorised recipients under the scheme, it may be that they will from time to time become aware of a matter which is a public interest disclosure.**

The Bill provides for external disclosures to 'any person other than a foreign public official' – does that cover disclosures to Members of Parliament? Why doesn't the Bill expressly provide for external disclosures to specific groups such as Members of Parliament or journalists/ media?

A13. Yes, an external disclosure could be made to a Member of Parliament. It is a simpler approach to permit disclosure to any person (other than a foreign public official) for the purposes of an external disclosure.

Internal disclosure has been made

Q14. While agreeing that internal disclosure in the first instance is preferable, some submissions argue that there should be a pathway, in limited circumstances, for external disclosures to be made without the need for a prior internal disclosure (see, Dr Suelette Dreyfus, Submission 14, pp 4-8; Blueprint for Free Speech, Submission 13, pp 4-5; Accountability Round Table, Submission 17, p. 7).

What are the arguments for not including the suggestions by these submitters in the Bill?

A14. The emphasis of the scheme is on disclosures of wrongdoing being reported to and investigated within government. This emphasis is designed to ensure that problems are identified and rectified. Where a discloser does not wish to make a disclosure to their own agency the disclosure could be made to the Ombudsman or the IGIS (if the conduct involved an intelligence agency) or to a prescribed investigative agency that has power to investigate the disclosure otherwise than under the Bill. The criteria for an emergency disclosure permit disclosure without prior internal disclosure if there are exceptional circumstances justifying such a disclosure (and the other criteria are met).

Disclosure is not, on balance, contrary to the public interest

Q15. A number of submissions comment on the factors to be taken into account as to whether a disclosure is not, on balance, contrary to the public interest. In particular, submissions note that the list is focussed on circumstances when disclosure would be contrary to the public interest and does not set out examples of when the public interest would favour disclosure (see, for example, CPSU, Submission 5,

p. 4; Dr Appleby, Dr Bannister, Ms Olijnyk, Submission 9, pp 7-8, ABC, Submission 12, p. 7).

Was any consideration given to including circumstances which would favour disclosure?

A15. The Government considered a range of options.

Intelligence information

Q16. Submissions comment on the exclusion of intelligence information from being the subject of an external disclosure (see, for example, ABC, Submission 12, pp 4-5; Dr Suelette Dreyfus, Submission 14, pp 2-4).

What is the justification for the exclusion of all intelligence information from external and emergency disclosures?

A16. Inadvertent or inappropriate disclosure of intelligence information may compromise national security and potentially place lives at risk. Australian intelligence agencies have obligations to their foreign partners to maintain confidentiality of information shared for the purpose of assisting those agencies to fulfil their national security functions.

A discloser who is dissatisfied with the handling of public interest disclosure by an intelligence agency could make a complaint to the IGIS.

Emergency disclosures

Q17. Why are emergency disclosures limited to information concerning 'a substantial and imminent danger to the health and safety of one or more persons'?

A17. This criterion for a protected 'emergency disclosure' implements the Government response to recommendation 21 of the Whistleblower Protection report. If a disclosure does not meet the 'emergency disclosure' criteria (clause 26(1), item 3), a 'substantial' but not 'imminent' threat to public safety may be disclosable conduct for the purposes of a protected 'external disclosure' providing the criteria are otherwise met (clause 26(1), item 2).

Q18. Item (3)(c) of clause 26 requires that there are 'exceptional circumstances' justifying the discloser making an emergency disclosure without having first made an internal disclosure. What is meant by 'exceptional circumstances' in this context?

A18. The concept of 'exceptional circumstances' arises in the context of the criteria for the purposes of an emergency disclosure. A set of circumstances which could give rise to an emergency disclosure would be if a public official had made an internal disclosure that procedures for the storage of hazardous material had not been complied with. In this case, the Bill allows emergency disclosure if there are exceptional circumstances justifying the disclosure being made before an investigation is complete. For this purpose an exceptional circumstance could be that the investigation into the disclosure was taking too long to complete having regard to the risk to the health or safety of any person.

Disclosures to the Ombudsman

Q19. Why is Clause 34, Item 1(c), making a disclosure to the Ombudsman, conditional on the discloser believing 'on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman'? (see, Law Council of Australia, Submission 24, p. 7)

A19. The approach to who may receive a disclosure is focused on disclosures being made at first instance to the discloser's agency. If the Ombudsman decided that a disclosure made directly to the Ombudsman could properly be handled by another agency, including the discloser's agency, the Ombudsman could allocate the disclosure to the other agency and give notice to the discloser of that allocation under clause 43.

Designated publication restrictions

Q20. The Chief Justice of the Family Court has expressed concerns with the manner in which non-publication and suppression orders made under section 121 of the Family Law Act 1975 are covered in the Bill, in particular in relation to legal practitioner disclosures and reports of investigations made for the purposes of clause 51 of the Bill (Submission 4, p. 2).

What is the Department's response to this concern?

A20 Chief Justice Bryant comments that while the Bill 'goes a considerable way to avoiding the potential for conflict between the Bill and s. 121 [of the *Family Law Act 1975*]', inconsistencies may arise, for example, a protected legal practitioner disclosure is not subject to the designation publication restriction criterion and no provision is made to permit a principal officer to delete information from a report that would infringe s. 121 or order made under it.

We note the comment that a designated publication restriction criterion does not form part of the criteria for a protected legal practitioner disclosure.

Under clause 51, a principal officer is required to give a copy of the report of the investigation to the discloser if they are readily contactable and for that purpose may delete any material if certain criteria a met, including if inclusion of the material would result in the copy being a document that is exempt for the purposes of Part IV of the *Freedom of Information Act 1982*. Under that Act, a document is an exempt document if public disclosure would be in contempt of court or be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath or infringe the privileges of the Parliament (s.46). That provision could be applied to delete material from a report that might infringe an order made under s. 121 of the Family Law Act.

Parliamentary privilege not affected

Q21. Why is clause 81 included in the Bill given, as the Clerk of the Senate points out (Submission 1, pp 2 and 5-7), the Bill does not apply to Senators and Members of the House of Representatives?

A21. In recommendation 24 of the Whistleblower Protection report, the House Standing

Committee on Legal and Constitutional Affairs recommended that nothing in the Act affect the immunity of proceedings in Parliament under section 49 of the *Constitution* and the *Parliamentary Privileges Act 1987*. The House Committee received submissions from the then Clerk of the Senate, Mr Harry Evans, and the then Acting Clerk of the House of Representatives supporting the inclusion of a such a provision (see further A22 below). Clause 81 of the Bill implements recommendation 24 which was agreed by the Government in its response to the report for 'the avoidance of doubt'.

Q22. If clause 81 is included as an 'avoidance of doubt' provision, how does the Department respond to the argument in the Clerk of the Senate's submission that such a provision is not necessary, and 'may lead to doubt and confusion about the powers, privileges and immunities of the Commonwealth Houses where none now exists' (Submission 1, p. 2)?

A22. The House Committee received submissions from the then Clerk of the Senate, Mr Harry Evans, and the then Acting Clerk of the House of Representative supporting the inclusion of a such a provision. In his submission to the House Committee inquiry (Submission 67), Mr Evans submitted that where a Bill provides for public interest disclosures to members of either House of the Parliament it is 'vital' that a provision also be made that 'nothing in [the Act] affects the immunity of proceedings in Parliament under section 49 of the Constitution and the Parliamentary Privileges Act 1987 (subclause 6(1)).' Mr Evans indicated that 'without such a provision there is a danger that the legislation would be interpreted as partly extinguishing parliamentary privilege attaching to the disclosure of information to members of the Parliament'. The Bill provides for a protected external or emergency public interest disclosure to be made to 'any person other than a foreign official', which could include a disclosure to a Member of the Parliament, if the criteria for those disclosures are met in clause 26.

Additional questions received 10 May 2013

Q1. Is the option to provide disclosable conduct to an MP to raise in Parliamentary proceedings still available to members of the public irrespective of whether they follow the processes laid out in the bill?

For instance, where material is given to a Member of Parliament with the purpose of it being used for parliamentary proceedings, s. 16(3) of the Parliamentary Privileges Act effectively prevents any legal recourse against someone who has made an unprotected disclosure. As an example if the person arranged with an MP to table the information in Parliament with no prior internal disclosure, or there was a substantial and imminent danger not relating to health and safety or it involved any intelligence information.

A1. The Bill is not intended to interfere with the ability for members of the public to give information about alleged wrongdoing in the Commonwealth public sector to a Member of Parliament. The Bill includes clause 81 to make it clear that the Bill does not affect the power, privileges and immunities of the Parliament, its members or its committees, under section 49 of the *Constitution* or the *Parliamentary Privileges Act 1987*.

Q2. Can the Department please provide a summary of the interaction between parliamentary privilege and the bill?

A2. As stated in A1 above, the Bill is not intended to interfere with the ability for members of the public to give information about alleged wrongdoing in the Commonwealth public sector to a Member of Parliament.

A public official (within the meaning of the Bill) may make a protected external disclosure to a Member of Parliament if the criteria in the Bill are met. It would be open for the member to raise the information in proceedings in the Parliament. Clause 81 confirms that the law relating to parliamentary privilege is not affected in such a case. Further, the discloser would not lose any of the protections under the Bill in this circumstance if the disclosure to the Member at first instance met the criteria for an 'external disclosure' or an 'emergency disclosure'.

Q3. With the criminal penalties for disclosing identifying information in clause 20, how does the department expect this to work in practice? Namely, would the prosecuting authorities proceed or abandon their investigations on the basis of whether the discloser (or second person) wanted them to prosecute or not?

For context, there would be many occasions where an identified discloser may have no problem with being disclosed as part of a journalist's process of checking the validity of the source with their senior editor? This was alluded to in the ABC and Joint Media Organisations' submissions.

A3. The purpose of the offence in clause 20 of the Bill is to provide a strong safeguard for the protection of the identity of a discloser. For that reason, a discloser could be expected to have the highest interest in laying a complaint that clause 20 has been infringed.

Where an external disclosure has been made, for example to a person in the media, the question of whether the offence has been committed would most likely arise in the context of

whether the consent exception applies. It would therefore be prudent for a recipient to ensure they have the full and informed consent of a discloser to any proposed disclosures or uses of the discloser's identity in connection with a public interest disclosure the discloser has made.

Q4. Subclauses 30(1) and (2) are written in the present tense and would not protect those who no longer work for the contracting party, but were employed at the time the disclosable conduct occurred. Similarly it does not appear to apply where the contract is no longer in effect (either through performance or termination). Is this intentional or a drafting oversight?

A4. The Bill is intended to have application to former employees or officers of a 'contracted service provider for a Commonwealth contract' and a contracted service provider when the contract has been complete. Subclauses 30(1) and (2) should be read together with clauses 26(1)(a) and 70.

The protections under the Bill will apply to a person who has made a qualifying 'public interest disclosure'. One of the criteria to qualify as a public interest disclosure is that the disclosure is made by a person who is, or was, or has been a public official (clause 26(1)(a)). The term 'public official' includes an individual who is a contracted service provider for a Commonwealth contract, and an officer or employee of a contracted service provide for a commonwealth contract and provides services for the purposes of the Commonwealth contract (clause 70(1), items 15 and 16). Subclauses 30(1) and (2) give other definitional context.

Q5. Did the Department give due consideration to the effect that by creating a restrictive process to qualify for a protected disclosure, that it will actually be easier for a 'tarnished' agency to seek legal retribution against a whistleblower than would currently be possible with no formal structure? If so, in what ways was this accommodated for?

A5. The Bill establishes safeguards against unlawful reprisal action through the right given to the maker of a qualifying public interest disclosure to seek remedies in the Federal Court or Federal Circuit Court under clauses 14, 15 and 16, or alternatively under Part 3-1 of the FWA (clauses 22 and 18). A person who has made a disclosure could also make a complaint to the Ombudsman and the IGIS (in respect of intelligence agencies) who would be able to review the agency's conduct and make a report.

Q6. Was there any attempt to balance intelligence agencies' obligations to conform with the external disclosure requirements or was the decision to exclude all activities made from the outset?

A6. From the outset, the scheme's focus has been on reporting and handling of public interest disclosures within government. The Government response to recommendation 21 of the Whistleblower Protection report identified that no protection would apply for the external disclosure of intelligence-related information. The sensitivity of information of that kind is referred to in the response to question 16 above. The IGIS will have oversighting responsibilities for the application of the Bill to the intelligence agencies.