

**Committee Secretary**  
**Senate Legal and Constitutional Affairs Committee**  
**PO Box 6100**  
**Parliament House**  
**Canberra ACT 2600**

*Per email:* legcon.sen@aph.gov.au

19 January 2023

Dear Senate Committee

**Submission re Public Interest Disclosure Amendment (Review) Bill 2022 – Sharon Kelsey**

I commend the Committee on progressing much needed Public Interest Disclosure (PID) reform. I thank you for the opportunity to make this submission.

My submission focusses on two key issues, namely

- 1. The underlying premise of proposed reform to PID process and**
- 2. Whistleblower protection.**

**Background**

I am the former Chief Executive Officer of the Logan City Council (Qld) and a public interest discloser. I have previously been employed as an executive at the Victorian Independent Anti-Corruption Commission (IBAC). I make this submission in my personal capacity.

- 1. The underlying premise of proposed reform to PID process**

The proposed reform to PID process outlined in the Public Interest Disclosure Amendment (Review) Bill 2022 (the Bill) provides only a partial response to much needed PID reform. This limited approach does not appear to recognise the imperative of PID as a critical underpinning of good

government and democratic process. The Bill lacks active inducement and the requisite strength of protection to encourage or mandate disclosure. It also appears to rely on the general fallacy that the risk of criminal prosecution will dissuade acts of reprisal action against whistleblowers.

The Bill appears to be premised on disclosures coming from the rank and file of Agency personnel, assumes the subject conduct is generally contained within a single Agency and that the discloser is not the Principal Officer. In short, it appears to focus on low-hanging fruit, rather than broad-scale systemic fraud or corruption enabled by others in positions of power or external to a single Agency.

Amendments to the Bill should recognise public interest disclosing as a fundamental human right and value it as a central tenet of good government. Consideration should be given to mandating all public servants to make public interest disclosures (as applicable) or in the least, actively encouraging, genuinely protecting and reasonably rewarding those that step forward to make them.

The Bill should be amended to recognise that interests and enablers in systemic fraud and corruption often reach beyond a single Agency. The Bill should also include clear and safe passage for Principal Officers to make disclosures.

## **2. Whistleblower Protection**

Whistleblowing or public interest disclosing is often the final check and balance on good government. Unfortunately, history shows that the risk of whistleblowing is overwhelmingly borne by the individual when the interest they serve is clearly a greater public one. The current mechanisms at state and federal level to encourage and protect whistle-blowers has failed. Despite the prevalence of allegations of reprisal coming from whistleblowers, research conducted by the Human Rights Law Centre into public interest disclosure cases over the last thirty years shows that only a single whistleblower received any compensation for detrimental action.<sup>i</sup> Further, the experience of state anti-corruption agencies shows the bar to successful prosecution in respect to

retaliatory action is incredibly high, arguably even insurmountable. These facts should disturb us and warrant stronger reform than that proposed in the Bill.

### ***Anti-reprisal provisions***

The Bill offers little expansion on the ‘traditional’ and arguably, unsuccessful anti-reprisal provisions. Without a comprehensive whistleblower protection regime, weak stand-alone provisions suggest protection when in practice, little protection exists. Individuals will act in full reliance on provisions that in practical application have little ability to protect them. This may present an increased risk to the discloser.

The reliance on the risk of potential prosecution to dissuade one person from taking reprisal against a person who has made a PID, remains a fundamental flaw in the Bill. The risk of criminal prosecution is not sufficiently dissuasive. Arguably, the bar to successful prosecution is too high.

### ***Positive duty to protect whistle-blowers***

The Bill establishes a limited positive duty to protect whistleblowers. This falls to the Agency where the disclosure was made. It assumes that any reprisal is limited to the confines of that Agency.

Broad-scale corrupt conduct is often enabled by others, resulting in interests that almost certainly go beyond the reach of a single Agency. The Bill needs to be amended to address the limits of a single Agency’s reach.

There should be a broad positive duty to protect whistleblowers that extends to agencies, government bodies and government affiliated organisations that become aware of the disclosure or the identity of the discloser. There should also be obligations on agencies that ‘handle, investigate or ultimately prosecute’ matters arising from the disclosure. Some anti-corruption agencies have acted under a misconception that they had a duty to protect whistleblowers, later to find by Independent Inquiry that they owed no such duty.<sup>ii</sup> If such agencies do not owe the whistleblower a duty of care, whistleblowers will continue to be harmed by the act of assisting investigations.

***World's best whistleblower protection regime***

The Federal Parliament should aspire to lead the world in whistleblower protection. Without a full and effective whistleblower protection regime, whistleblowers remain exposed to potential harm in undertaking their public interest role. Unfortunately, this harm is all too often realised.<sup>iii</sup>

The Bill should be amended to establish a whistleblower protection regime that includes:

- establishing a dedicated Whistleblower Protection Authority
- effective “shield” laws to protect public interest journalism and third-party disclosures
- recognition of whistleblower rights as fundamental human rights
- provision of legal support to pursue protection rights
- reciprocal recognition of rights at an international level, e.g. seeking asylum
- simplification and ease of access to legal remedies
- whistleblower care and welfare
- consideration of a reward scheme.

I would welcome the opportunity to assist the Committee with this important reform.

Yours sincerely

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Sharon Kelsey

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<sup>i</sup> Kieran Pender Human Rights Law Centre as reported in “The Cost” (2022) see **YOUTUBE:** <https://youtu.be/ALY8gXxba0>

<sup>ii</sup> Commission of Inquiry relating to the Crime and Corruption Commission 2022 (Queensland)

<sup>iii</sup> Samantha Mangwana Shine Lawyers as reported in “The Cost” (2022) see **YOUTUBE:** <https://youtu.be/ALY8gXxba0>