Australian Government
Australian Law Reform Commission

Emeritus Professor Rosalind Croucher AM
President

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

10 February 2017

Dear Secretary,

Parliamentary Joint Committee on Corporations and Financial Services inquiry into whistleblower protections in the corporate, public and not-for profit sectors

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to the inquiry being conducted by the Parliamentary Joint Committee on Corporations and Financial Services into whistleblower protections in the corporate, public and not-for-profit sectors. This submission focuses on whistleblower protections as they apply to the public sector, referring to prior work of the ALRC, to provide information and assistance to the Committee.

In our 2009 report *Secrecy Laws and Open Government in Australia* (ALRC Report 112), the ALRC sought to strike a fair balance between the public interest in open and accountable government and adequate protection for Commonwealth information that should legitimately be kept confidential, acknowledging that a robust public interest disclosure regime is an essential element of effective open government.

With respect to the public sector, existing whistleblower protections are contained in the *Public Interest Disclosure Act 2013* (Cth). This Act applies to disclosures relating to all government agencies, a position which the ALRC supported in a 2004 report.[1] Whistleblower protections sit within a broader framework requiring secrecy of government information. In the Secrecy Report we recommended that criminal sanctions should only be imposed when the disclosure of government information is likely to cause harm to essential public interests.[2] The ALRC also recommended the tightening of administrative obligations on public officials to keep information secret. In particular, the ALRC recommended that:

- the express prohibition on the disclosure of confidential information contained in reg 2.1 (4) of the *Public Service Regulations 1999* (Cth) should be removed,[3] and reg 2.1(3) should be amended to prohibit the disclosure of information that is reasonably *likely* to prejudice the effective working of government;[4] and
- the *APS Values and Code of Conduct in Practice* should provide further guidance on what is meant by 'reasonably likely to prejudice the effective working of government'.[5]

1 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) rec 3-1.
2 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) recs 5-1, 8-1.
3 Ibid rec 12-3.
4 Ibid rec 12-1. Regulation 2.1(3) as currently drafted is broader. It imposes a duty not to disclose if ít is reasonably *foreseeable* that the disclosure *could be* prejudicial to the effective working of government ...'.
5 Ibid rec 12-3.

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The ALRC limited its consideration of whistleblower protections to the interaction between secrecy laws and public interest disclosures. We noted that secrecy offences can cover a broad range of people, with a significant number of specific secrecy offences applying to 'any person'. We recommended that the categories of people covered by public interest disclosure schemes should be consistent with those covered by existing general offences[6] and, where possible, should also cover individuals subject to specific secrecy offences.[7] We suggested that this could be achieved by requiring that one consideration in determining whether to deem an individual a public official should be whether the person is subject to a secrecy offence. The ALRC notes that, unlike the *Public Interest Disclosure Act 2013* (Cth), the model contained in the *Fair Work (Registered Organisations) Act 2009* (Cth)—as amended by the *Fair Work (Registered Organisations) Amendment Act 2016* (Cth)—does not include a deeming provision. It limits the categories of people who may be a 'discloser' to a defined list.

The ALRC also suggested that disclosures to third parties such as the media should be adequately protected.[8] In particular, the ALRC recommended that protection should be extended to a third party who discloses information received by way of a protected public interest disclosure.[9] The model contained in the *Fair Work (Registered Organisations) Act 2009* (Cth), does not extend protection to disclosures to third parties such as the media.

Finally, the ALRC recommended that agencies should develop and administer training and development programs which provide information about how employees can raise concerns and make public interest disclosures.[10]

I trust the ALRC's Secrecy Report will assist the Committee in its inquiry.

Regards

Emeritus Professor Rosalind Croucher AM

6 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) rec 7-3.
7 Ibid rec 10-5.
8 Ibid [7.125].
9 Ibid rec 7-3.
10 Ibid rec 15-1.