

Submission to the
House Standing Committee on Social Policy and Legal Affairs
and
Senate Standing Committee on Legal and Constitutional
Affairs

Public Interest Disclosure Bill 2013

30 April 2013



The West Australian



ABOUT THE PARTIES TO THIS SUBMISSION

This submission is supported by AAP, APN, ASTRA, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Limited, SBS, Sky News and West Australian Newspapers.

Free speech, free press and access to information are fundamental to a democratic society that prides itself on openness, responsibility and accountability.

This includes the public's right to know how they are being governed, including the right to be informed about potential corruption or maladministration within governments – in this instance, the Commonwealth. The disclosure of such matters should be facilitated in an expansive and inclusive manner.

EXECUTIVE SUMMARY

The parties to the submission welcome the opportunity to make a submission to the House Standing Committee on Social Policy and Legal Affairs, and the Senate Legal and Constitutional Affairs Committee regarding the *Public Interest Disclosure Bill 2013* (the Bill).

This submission addresses the following issues:

1. The restrictive criteria for protected external disclosures;
2. The criminal offences that may lie against the media for using or disclosing confidential source information during the course of responsible news gathering;
3. Inappropriate exclusions to the scheme; and
4. Other issues associated with disclosable conduct.

1. The scope for external disclosures, including to the media, is too restrictive

The parties to this submission believe that the scope of disclosures to external parties (including the media) is far too narrow. It has the potential to limit the free flow of information to the public and undermines freedom of speech. A number of amendments are recommended to address this issue.

The parties to this submission recognise the need to balance certain factors in determining whether a disclosure should attract the protection of proposed clause 10. Making such a disclosure is a serious matter and must be appropriately regulated, however the Bill must give primacy to the public's right to know how it is governed and the decisions that are being made in its name. The Bill's primary goal must be open government. The requirements at clause 26 of the Bill are onerous and set too many limitations on disclosure. This is not in the public interest.

i. Clause 26(3) – Assessing whether disclosure is contrary to the public interest

Item 2 of clause 26 contains a list of nine requirements which must all be satisfied to enable a whistle-blower to provide information to the media (or anyone other than a foreign public official) and claim the protections offered by the Bill. This includes a requirement that the disclosure is not, on balance, contrary to the public interest (Item 2(e) of clause 26(1)).

Clause 26(3) of the Bill then contains a list of factors to take into account to determine whether a public disclosure is not, on balance, contrary to the 'public interest'. However all of the factors listed indicate when it would be contrary to the public interest. The framing of this list skews the outcome against external disclosure, because there is not a complementary list of factors that can be used to determine whether such a disclosure is in the public interest. Balancing such matters in the context of whistle-blower disclosures will invariably involve complex and competing factors, and it is essential that guidance in favour of disclosure is also provided as part of the provisions.

As an alternative to the provision of such guidance, clause 26(3) may be deleted.

ii. Clause 26(1) – Emergency disclosures are limited

The Bill only authorises disclosure to the media (or other persons) without first making an internal disclosure and waiting for an internal investigation to complete in very limited circumstances. Overall, the requirements for such 'emergency disclosures' should be far less restrictive to facilitate disclosures that are in the public interest.

Item 3 of the clause 26 confines the opportunity to make an 'emergency disclosure' only where that disclosure concerns a '*substantial and imminent danger to the health or safety of one or more persons*' (clause 26(1), Item 3 (a)). We recommend extending the scope of allowable emergency disclosures beyond health and safety circumstances where a person may be endangered. For example, the current wording would not include instances where there is an immediate threat to the environment, animals, or a cultural site of significance. It is therefore recommended that a broader formulation, such as the one at clause 43H(1) of the *Public Interest Disclosure Act 1998* (UK) be considered (that the relevant failure is of an "exceptionally serious nature").

We are also concerned by the requirement that '*the extent of information disclosed is no greater than is necessary to alert the recipient to the substantial and imminent danger*'

(clause 26(1), Item 3 (c)). It is conceivable that this restriction could result in significant unintended consequences, including an elevated risk of the activity occurring. For example, if restricted information was presented to media outlets, it is likely to be the case that further investigation would be required before notifying the public of what is a matter of substantial public interest. It is recommended that Item 3 (c) be replaced with the existing provision of clause 26(1) Item 2 (f), that *“No more information is publicly disclosed than is reasonably necessary in the public interest.”*

Furthermore, there must be *‘exceptional circumstances’* to justify the whistle-blower’s failure to disclose the information internally, or make the external disclosure before the disclosure investigation has been finalised. There is no explanation or justification for such restrictions. If an emergency disclosure is by its very nature, a time critical issue and it is not reasonable to include such restrictions in conjunction with the increased public interest threshold. If such a requirement is to be included, it should be accompanied by some examples of what would be considered exceptional circumstances, including a reasonable apprehension that internal disclosure would not result in sufficiently timely action, could result in harm to the discloser or others, or the concealment of evidence.

It is recommended that that clause 26(1) Item 3 (a) – (f) be replaced with the existing provision of clause 26(1) Item 2 (f) *“No more information is publicly disclosed than is reasonably necessary in the public interest”*, along with a requirement that the failure is of a serious nature.

iii. *Clause 26(1)(c) Item 2(c) and (d) - internal investigation must be completed and inadequate or unreasonably delayed*

Clause 26(1)(c), as currently drafted, only enables external disclosure (other than an ‘emergency disclosure’), where an internal investigation has completed, or has been unreasonably delayed. However, the Bill does not explicitly allow for external disclosure where:

- an internal disclosure is unreasonably refused at allocation (clause 43(2)); or
- the allocation of an internal disclosure has been unreasonably delayed (clause 43(5)); or
- the allocation of an internal disclosure is made to another agency who in turn refuses to accept the allocation (clause 43(6)).

In all of these circumstances the Bill should specify that external disclosure is available.

Further, the investigation or response to the investigation must be ‘inadequate’. This is currently expressed as an objective test. However the discloser (and any media the discloser provides information to) will not necessarily be entitled to all the facts of an investigation sufficient to determine whether the investigation was adequate. For this reason, a test based on the subjective belief of the discloser should be applied.

iv. *Clause 70 – Lack of consideration for external disclosure where disclosures by those with ‘insiders knowledge’ are not deemed to be ‘public officials’*

The Bill allows for a person with ‘insider’s knowledge’ (but not belonging to an agency) to be determined to be a ‘public official’ and therefore provided with protections under the Bill. However, clause 70(3)(b) also enables a request to be determined a ‘public official’ to be refused.

In the instance that such a request is refused, the options to make a public disclosure are not available under the currently drafted clause 26 and therefore none of the protections apply.

It would be reasonable that the scheme be extended to enable such persons to make public disclosures where it is reasonable for that course of action to be taken under the existing provisions.

- v. *Clause 26 – it is not clear that disclosure to ‘any person’ includes (but is not limited to) the media and journalists*

As it is currently drafted, clause 26 does not explicitly state that the media and journalists, and Members of Parliament, or others are categories of people to whom external and emergency disclosures can be made.

We recommend that the Bill be amended to specify that ‘any person’ at clause 26 can include the media or journalists or Members of Parliament as examples.

The parties to this submission recommend that the restrictions associated with public disclosure be significantly reduced. Specifically:

RECOMMENDATION 1 – Amend clause 26(3) to include a list of factors to determine whether a public disclosure is, on balance, in the ‘public interest’. If this approach is not accepted, then the existing clause 26(3) should be deleted.

RECOMMENDATION 2 – Requirements for emergency disclosures should be less restrictive. This can be achieved by replacing clause 26(1) Item 3 (a) – (f) with the existing provision of clause 26(1) Item 2 (f): *No more information is publicly disclosed than is reasonable necessary in the public interest*, along with a requirement that the failure is of a serious nature.

RECOMMENDATION 3 – The Bill should be amended to explicitly include the availability of external disclosure in circumstances where an allocation of internal disclosure has been unreasonably refused or delayed, or the allocation to another agency has been refused.

RECOMMENDATION 4 – The Bill should be amended to enable disclosure in circumstances where the discloser has a reasonable belief that the investigation, or response to the investigation, was inadequate. Such an assessment should be subjectively based and should not be based on the extremely high threshold set in the current clauses 37, 38 and 39 that ‘no reasonable person’ could have reached the relevant findings or would consider the actions taken adequate.

RECOMMENDATION 5 – Extend the scheme such that those with ‘insider’s knowledge’ that are not determined to be ‘public officials’ are able to make public disclosures and claim the protections of the Bill as appropriate.

RECOMMENDATION 6 – Amend clause 26 so it explicitly states that disclosures to ‘any person’ can include (but not be limited to) the media and journalists, and Members of Parliament. If this is not undertaken, it should be, at a minimum, included in the Explanatory Memorandum.

2. A presumption of criminal liability should not lie against the media for using or disclosing identifying information during the course of responsible news gathering

The parties to this submission oppose the presumption of criminal liability for the use and/or disclosure of identifying information during the course of responsible news gathering.

Clause 20(1) of the Bill makes it a crime for any person to disclose information about a public interest disclosure that is likely to enable the identification of the whistle-blower – unless the defendant can prove an exception under clause 20(3). Furthermore, clause 20(2) of the Bill makes it a crime to use identifying information, unless the defendant can prove an exception under clause 20(3).

If an internal disclosure has been made in accordance with the processes outlined in the Bill, and a whistle-blower (anonymously or otherwise) decides for whatever reason to go to the media with the matter, it is likely that clause 20(1) and/or clause 20(2) will be satisfied – and therefore the member of the media is criminally liable for an offence unless an exception is able to be proved.

Examples of situations where this arises in the course of usual newsgathering: a media representative *uses* the information in the course of newsgathering to establish the veracity of the information and investigate a story; the media representative *discloses* the information in the course of internal editorial processes to decipher reliability prior to publication. In both of these situations, the media representative has not yet published a story, but may be criminally liable for the use and/or disclosure of identifying information.

Further, for the media representative to prove an exception, it may be the case that to do so would involve disclosing the identity of the confidential source, such as to prove the source consented at clause 20(3)(e); or to prove clause 20(3)(a) that the disclosure or use of the identifying information is for the purposes of the Act.

RECOMMENDATION 6 – The parties to this submission recommend incorporating an exception at clause 20(3) of the Bill to allow the media to use and disclose identifying information for the purpose of inquiring into and investigating matters raised by a whistle-blower in the course of responsible news gathering.

3. The scheme is too narrowly cast

The public interest disclosure scheme should apply to all areas of government, including the Executive, the Legislature and the Judiciary.

Division 3 of the Bill lists public sector agencies, authorities and contracted service providers, and the individuals belonging to these, whose whistle-blowing activities would be protected by the Bill.

It is of serious concern that this list is limited by broad exclusions which are outlined at clauses 31, 32 and 33 of the Bill.

i. Clause 31 – disagreements with government policies etc

In principle, it is reasonable that protection under the Act should not arise in relation to disclosures made in relation to policies (clause 31(a)), actions (clause 31 (b)) or expenditures (clause 31(c)) (actual or proposed) to which the whistle-blower merely disagrees.

However, the clause as it is currently drafted is unjustifiably broad.

In particular, the parties to this submission oppose the exclusion of protection of whistle-blowers who seek to report misdeed and misconduct by a Minister, the Speaker of the House of Representatives or the President of the Senate as conferred under clause 31(b). There is no justification for excluding people in these positions from being the subject of whistle-blowing. Such individuals should be subject to the same level of scrutiny and accountability as other government officials. Clause 31(b) should be removed from the Bill.

If it is intended that mere disagreement with government policies and associated expenditures does not satisfy the threshold of what constitutes disclosable conduct, those elements are adequately addressed by clauses 31(a) and 31(c). In any event, it is unlikely that such disclosures would satisfy the criteria for protection set out at clause 26.

ii. Clause 32 – Conduct connected with courts and tribunals

The parties to this submission do not agree that disclosures regarding conduct associated with Courts and Tribunals should be excluded. These government bodies should be held to the same standard of accountability as other agencies.

On face value, it may seem logical to exclude the judiciary and some associated staff from the application of the Bill. However, while it is acknowledged that those excluded by this section hold positions of direct authority or authority by association in the judicial realm, they are in fact human, and not beyond reproach.

Further, it is not justified why it is the case that disclosable conduct should not include conduct of: the judiciary; the CEO of a court or a member that person's staff when exercising the power of the court, or performing a function of a judicial nature or exercising a power of a judicial nature (clause 31(1)(b)); a tribunal member, the CEO of a tribunal or a member of that person's staff when exercising the power of the tribunal (clause 31(1)(c)).

iii. *Clause 33 – Conduct connected with intelligence agencies*

Again, there is no justification for a broad exclusion regarding disclosable conduct concerning intelligence agencies. There may well be instances where corruption or maladministration occurs in these agencies, the disclosure of which will not affect intelligence or security matters. These agencies, which are responsible for significant matters of public interest, should be subject to the same level of accountability as the rest of government.

The Bill already contains a number of protections to ensure that disclosures concerning sensitive or potentially sensitive intelligence or security information will not attract protection.

iv. *Clause 41 – Meaning of intelligence information*

Again, this section is drafted very broadly, and stretches beyond the boundaries of intelligence information which may pose a risk to the security of the nation. To illustrate, clause 41(1)(a) precludes *'information that has originated with, or has been received from, an intelligence agency'* as precluded from disclosure.

v. *Definition of 'public official' (clause 69) must include staff of Members of Parliament and Ministers*

The parties to this submission note that the current definition of 'public official' does not include staff of Members of Parliament, including Ministers. As per the recommendation of the 2009 Report of the House of Representatives Inquiry into whistle-blowing protection within the Australian government public sector¹ (the 2009 Report), the legislation should also cover parliamentary staff².

There is no justification as to why staff of Members of Parliament should not be protected under the scheme, nor be the subject of the scheme.

The parties to this submission recommend that all areas of the Commonwealth Government should be covered by the Bill. Specifically:

RECOMMENDATION 7 – Delete clause 31(b) from the Bill, thus reinstating protection for whistle-blowers regarding disclosable conduct of Ministers, the Speaker of the House of Representatives and the President of the Senate.

RECOMMENDATION 8 – Delete clauses 32 and 33, so that disclosures regarding the judiciary and intelligence agencies can be protected.

RECOMMENDATION 9 – Delete clause 41(1)(a) from the Bill.

RECOMMENDATION 10 – Broad exemptions should not be the default for exemptions to the Bill. Therefore, to the extent to which exemptions or special procedures associated with the judiciary and intelligence agencies are necessary – particularly the nature of the information to be

¹ House of Representatives Committee in Legal and Constitutional Affairs, Inquiry into whistleblowing protection within the Australian Government public sector, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* Report, 2009 http://aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/whistleblowing/report.htm.

² Ibid,ix

exempted or subject to special procedure – those exemptions should be specifically and narrowly defined, therefore requiring amendment to clauses 32 and 33. Such exceptions should also be justified in an amended Explanatory Memorandum.

RECOMMENDATION 11 – The definition of ‘public official’ be amended to include staff of Members of Parliament, including staff of Ministers.

4. Other issues associated with disclosable conduct

i. Clause 11 – Liability for false and misleading statements etc. unaffected

This clause is uncertain, which acts as a deterrent for potential whistle-blowers to disclose. It is appropriate that protection is not provided for false and misleading statements that are knowingly made. Therefore, protections should only be lost for disclosures that are ‘knowingly’ false and misleading.

This matter is supported by the 2009 Report at Recommendation 12³, which states:

The Committee recommends that protection under the Public Interest Disclosure Bill not apply, or be removed, where a disclosure is found to be knowingly false.

Further, the Government’s response⁴ to the 2009 Report also contemplated that there may be instances whereby:

Circumstances may arise where protection could be appropriate, including where the knowingly false disclosure reveals other disclosable conduct and the person who made the initial disclosure is at risk of detrimental action as a result of the disclosure.

RECOMMENDATION 12 – Amend clause 11 to insert ‘knowingly’ prior to false and misleading.

5. Other matters

Pseudonymous disclosures should be expressly permitted and protected

The Bill explicitly allows for anonymous disclosures (clause 28(2)).

However, as the Bill contains a number of references to steps in the internal disclosure process whereby notification is required to be made where the discloser is ‘readily contactable’⁵ it is appropriate that disclosures are also able to be made under pseudonyms to facilitate notification more easily. Importantly, the process steps are requirements in external disclosures. Therefore the

³ Ibid, xxii

⁴ Government response to the House of Representatives, Standing Committee on Legal and Constitutional Affairs report, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, March 2010
http://aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/reports.htm.

⁵ For example: Clause 44(2) to notify that the disclosure has been allocated; at clause 44(3) to notify reasons for not allocating the matter and avenues available in that circumstance; at clause 50 to notify reasons for not undertaking an investigation; clause 55 to notify how long an investigation is likely to take; at clause 51(4) to provide a copy of the report at the end of the investigation including findings and recommendations.

facilitation of notifications via pseudonym (email addresses etc) is appropriate to assist the functioning of the scheme.

RECOMMENDATION 13 – The Bill be amended to explicitly allow for disclosures to be made pseudonymously.