ABC
Australian
Broadcasting
Corporation

ABC submission on the Public Interest Disclosure Bill 2013

April 2013

Introduction

The ABC welcomes the opportunity to make a submission to the House and Senate Committee inquiries into the *Public Interest Disclosure Bill 2013*. The introduction of whistleblower protection legislation is an important step for promoting integrity and accountability across the Commonwealth public sector.

The ABC is subject to the whistleblower protection scheme in two ways: first, as a "prescribed authority" which would be required to establish and administer a whistleblower protection scheme for its staff; and second, as a news organisation authorised under the Bill to receive disclosures about misconduct occurring in other public sector entities. The ABC recognises that agencies are often best placed to investigate and respond to a staff member's concern, and that internal reporting should be encouraged. The ABC also recognises that there must be alternative channels available to whistleblowers where, for instance, an agency does not adequately address serious misconduct or where there are public safety or other reasons justifying more immediate external disclosure in the public interest.

The Bill as currently drafted has a number of shortcomings which require clarification or amendment if the appropriate balance sought by the Bill is to be achieved. These relate to:

- the scope of the proposed scheme – coverage should be clarified, simplified and extended to enable and encourage individuals to report their concerns about unlawful and other misconduct in the public sector, wherever it occurs, including by Ministers and Members of Parliament;
- disclosure to journalists and other third parties – there are significant gaps in the current scheme, the effect of which denies protection for whistleblowers who have legitimate concerns about unlawful and other misconduct by intelligence and law enforcement agencies, or about matters which – if not addressed promptly – may have a serious impact on the community or the environment;
- criminalising use and disclosure of identifying information – as drafted, the Bill can result in journalists being pressured into revealing the identity of their

confidential sources or face imprisonment – the Bill should be amended to acknowledge the responsible newsgathering practices that occur in media organisations when handling confidential source information without compromise to the source's safety or wellbeing;

- suspending laws relating to recording, use and disclosure of information when investigating disclosures – without greater clarity and more precise drafting, such a provision has the potential to be intrusive in a way that is not necessary or proportionate to whatever it is that is legitimately sought to be achieved.

The detail underpinning these concerns follow.

Definitions and scope

Protection should only be lost for disclosures which are "knowingly" false or misleading

As currently drafted, a whistleblower loses the protection of the scheme if the information they disclosed turns out to be false or misleading, despite their having made the disclosure on reasonable grounds. Consistent with the Government's response[1] to the Dreyfus report,[2] the protection should only be lost where the false or misleading statement is made "knowingly". The Government acknowledged in its response that there may be occasions where even knowingly false disclosures should nevertheless receive protection, including where the disclosure reveals other disclosable conduct and the person is at risk of being victimised as a result of making the disclosure.

Inserting "knowingly" into s 11(1) would also be consistent with s 11(2), which recognises criminal liability only attaches to situations where a false or misleading statement is knowingly made, documents and information are produced with knowledge that they are false or misleading and forged documents are used knowing them to be false.

Protection for individuals with "insider's knowledge" should be clarified

The Bill allows protected disclosures to be made by individuals who do not belong to an agency but who have information about disclosable conduct (s 70). Although neither the Bill nor the accompanying Explanatory Memorandum explain who this provision is intended to

[1] 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, available at http://aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/reports.htm.

[2] House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, Report of the Inquiry into whistleblowing protection within the Australian Government public sector (Chaired by Mark Dreyfus QC MP), February 2009, http://aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/whistleblowing/report.htm.

apply to, the Government's response to the Dreyfus report does when it states that this protection is intended to cover persons "who have an 'insider's knowledge' of disclosable conduct under the legislation and who may not fall within the definition of public official... This may include, for example, persons covered by the *Commonwealth Volunteers Protection Act 2003*." The Explanatory Memorandum could usefully be amended to indicate that this is the Government's intention.

Pseudonymous disclosures should be expressly permitted and protected

The Bill expressly allows for anonymous disclosures in s 28(2). This should be extended to enable disclosures to be made pseudonymously.[3] This would enable the notification requirements[4] to be more readily applied to whistleblowers who do not wish to disclose their "real world" name, but who provide other details (e.g., a Twitter name or email account) that would enable them to be contacted. Some of these notification obligations are essential to be conveyed to the whistleblower if they are to assess whether an investigation has been completed or was unreasonably delayed, or if the investigation or responses to the investigation were inadequate. These matters must be established before an external disclosure can be made to the media or other persons (see item 2(b)(c)–(d) of s 26(1)).

Disclosable conduct

Wrongdoing and maladministration should be internally and externally reportable across all areas of government, including where misconduct involves the judiciary, Ministers or other Members of Parliament

The Bill protects whistleblowing by individuals belonging to a broad range of public sector agencies and authorities and contracted service providers (s 69). All arms of government—the Executive, the Legislature and the Judiciary—should be accountable and their integrity promoted through the protection of whistleblowers who wish to disclose wrongdoing or maladministration.

While it is understandable that disagreements with government policy choices might not fall within the domain of whistleblower protection, the section excluding policy-making from "disclosable conduct" appears overly broad. Section 31(b) expressly excludes protection for whistleblowers who seek to report misconduct by Ministers. That exclusion is broadly worded

[3] Note, this extension would be consistent with the recent changes to the federal *Privacy Act 1988* which have expanded the anonymity principle (previously, National Privacy Principle 8) to enable pseudonymous transactions (now Australian Privacy Principle 2).

[4] E.g., notification is required where the discloser is "readily contactable" to advise that the disclosure has been allocated (s 44(2)) or the reasons for not allocating the matter and other avenues available (s 44(3)); the fact that the disclosure must be investigated and the reasons for any decision to not investigate or to not investigate further (s 50); notice of how long the investigation is likely to take (s 55) and of any extension of time granted by the Ombudsman (s 52(5)); and providing a copy of the report at the end of the investigation, including any findings, recommended actions to be taken, and evidence of detrimental action taken against the discloser and the agency's response to that (s 51(4)).

to exclude any action taken or proposed to be taken by a Minister, and the public policy justification is not apparent in the Bill or in the Explanatory Memorandum. If the legislative intention was to avoid disclosures by individuals who do not support a public policy decision taken or proposed or who disagree with proposed expenditures relating to such policies, then that is already achieved by sections 31(a) and (c). As drafted, s 31(b) insulates Ministers from whistleblowing about an abuse of their power as well as unlawful and other wrongdoing. To illustrate, if a whistleblower had a reasonable belief that a Minister—or a Member of Parliament—authorised unlawful phone tapping or a break-in of a political party's office or a misuse of public funds to pay for home renovations, the whistleblower would not be protected for disclosing their concerns under this Bill as it is presently drafted.

Similarly, if a whistleblower had a reasonable belief that any judicial officer improperly received payments or other benefits from a litigant or defendant in a case before them, the whistleblower would not be protected because any conduct relating to the exercise of a judicial power is excluded from the scheme by s 32. Whistleblower protection should be available to facilitate and encourage reporting of any misconduct or misuse of position, including by judges in the exercise of their judicial power.

Section 31(b) also excludes protection for whistleblowers from reporting misconduct by the Speaker of the House of Representatives and the President of the Senate—again, without justification and in an overly broad way. As currently drafted, the section does not strike the appropriate balance between the need to carefully define "disclosable conduct" and the public interest in promoting transparency in all areas of Government. Section 31(b) should be removed and the conduct of Members of Parliament should be reportable.

Program-related decisions and expenditures by prescribed authorities should not be regarded as "disclosable conduct"

Whistleblower protection is properly directed at encouraging the reporting of maladministration and wrongdoing. The Bill recognises that the scheme is not designed for individuals who simply wish to disagree with a policy or proposed policy of the Government or who disagree with the amounts, purposes or priorities of expenditure relating to such policies (s 31(a) and (b)).

The ABC supports this approach and seeks an extension of s 31 to ensure the scheme does not apply where a person simply disagrees with the policy and funding decisions made by prescribed authorities such as the ABC. The ABC relies on public funding to deliver programming and digital media services to the community. Determining which programs and services to offer, and deciding are matters that appropriately fall within the responsibility of ABC management who have regard to a range of factors which affect how best to deliver broadcasting and digital media services to the community. Such decisions may not always be universally embraced and have, at times, been the subject of robust public debate. But they are not the concern of whistleblower protection.

External reporting should not be precluded for "intelligence information" where the disclosure relates to unlawful and other serious misconduct

If a public interest disclosure involves intelligence information, it can only be disclosed internally to the agency, the Commonwealth Ombudsman or IGIS. The Bill expressly prohibits

such information being disclosed externally—even where there is a substantial and imminent danger to individual or public health and safety, and regardless of the identity of the recipient, whether they be journalists, Members of Parliament, or legal practitioners. The type of information captured by the definition of "intelligence information" in s 41 is extremely broad. For instance, information cannot be disclosed if the information:

- was received from or originated with an intelligence agency (s 41(1)(a))—regardless of how innocuous the information is or whether it has already been lawfully published;
- reveals technologies or methods used by an intelligence agency or law enforcement agency (s 41(1)(b) and 41(2)(b))—regardless of whether those methods are unlawful or in breach of human rights under domestic or international law.

Such restrictions on disclosure could, if enacted, mean that whistleblowers have nowhere to go if an internal disclosure is not properly dealt with and their concerns relate to such things as extraordinary rendition, unlawful interception of citizens' phone calls, the use of torture in interrogations of detainees, or humiliating and degrading treatment of prisoners. The Bill should be amended to permit whistleblowing in the public interest to ensure that intelligence and law enforcement agencies are held accountable for unlawful and other serious misconduct.

References to "designated publication restrictions" could unnecessarily impede the making and investigation of public interest disclosures

The requirement throughout s 26(1) that a disclosure must not be contrary to a "designated publication restriction" appears to be misguided or unnecessary as most of the listed "designated publication restrictions" in s 40 restrict ***publication to the world*** and do not restrict or prohibit ***disclosure.*** In fact, one of the restrictions (referred to in s 40(k)) already authorises disclosure for the purposes of inquiring into complaints or allegations of corruption.[5] Presenting publication restrictions as if they restricted disclosure may create confusion and uncertainty such that whistleblowers are deterred from making disclosures that include this type of information and disclosure investigations are unnecessarily impeded. The public interests underpinning the publication restrictions—protecting a person's safety or reputation, ensuring a fair trial, safeguarding national security—can be accommodated through other obligations in the Bill which require careful handling of information during the course of a disclosure investigation and in redacting sensitive information from a report of the investigation before it is published. Where disclosures are made to external persons—such as to the media—existing suppression orders and other publication restrictions will apply to ensure that protected information is not published to the world.

[5] Section 40(k) refers to section 29B of the *Australian Crime Commission Act 2002*. Section 29B(2) of that Act provides that the disclosure restriction in s 29B(1) does not prevent disclosure to the Ombudsman for the purpose of making a complaint under the *Ombudsman Act 1976*, or to the Australian Law Enforcement Integrity Commission for the purpose of referring an allegation or information that raises a corruption issue.

Disclosure to journalists and other individuals

The Bill provides for external and emergency disclosures (including to the media) in limited circumstances, but with too many exceptions and other restrictions.

External disclosure when allocation has been unreasonably delayed or refused

Protected disclosures have to go through two stages, once they are made by the whistleblower to an authorised officer of an agency. First, the recipient agency must allocate the matter to itself or to another agency for handling (s 43). Second, the agency must investigate the disclosure (s 47). External disclosure is only available where an internal investigation has completed or has been unreasonably delayed (item 2(c) and s 26(1)(c)). The Bill does not, however, allow whistleblowers to make an external disclosure in cases where their disclosure is unreasonably refused at the allocation stage (s 43(2)), the allocation has been unreasonably delayed (s 43(5)), or the allocation is to another agency who has refused to accept it (s 43(6)). Consideration should be given to amending s 26 to allow for external disclosures in these circumstances, where in all the circumstances it is reasonable for the external disclosure to be made.

Disclosures by those with "insider's knowledge" who have not been deemed a "public official"

The Bill allows an individual who does not belong to an agency but who has information about disclosable conduct to be deemed a "public official" (s 70). That determination can only be made by an authorised officer and must be in writing. Protection under the scheme is only available to public officials or individuals deemed to be a public official.

The Bill does not provide protection to insiders if the authorised officer unreasonably refuses to determine they are a public official. Without the status of a "public official", none of the disclosure options under s 26 are available to the whistleblower and none of the protections under the Act apply. At a minimum, consideration should be given to extending the protection of the scheme to enable such individuals to make emergency and legal practitioner disclosures where it is reasonable in all the circumstances for them to do so.

Emergency disclosure should be more broadly permitted to cover other serious failures

The Bill authorises direct disclosure to the media (or other persons) in limited circumstances. Under item 3 of s 26(1), a whistleblower is not required to have first made an internal disclosure. If an internal disclosure was made, they are not required to wait for the investigation to be completed. However, they must establish that "exceptional circumstances" justified their not making an internal disclosure or awaiting its investigation. There is no indication in the Bill or Explanatory Memorandum of what might qualify as "exceptional". Consideration should be given to including examples of exceptional circumstances, e.g. the whistleblower reasonably believes that, if she made an internal disclosure, she would be victimised or evidence would be concealed or destroyed.

The disclosure can only concern a "substantial and imminent danger to the health or safety

of one or more persons". It is not enough that the risk is inevitable or that the eventual harm might be lessened or prevented if prompt action is taken; the danger must be about to happen (imminent). It is not enough that the harm is only "serious"—it must be "substantial"—or that it is repeated or widespread. So, for instance, it is questionable whether an emergency disclosure could be made about an individual who repeatedly molests children, or an institution that condones such behaviour, unless the abuse reached some level that was regarded as "substantial" and it was apparent that the abuse of the next child was "imminent". Emergency disclosures are not authorised outside of the health and safety arenas. So, for instance, it would not be available for reports about significant harm to the environment or to animals, such as concerns about the likelihood or impact of a massive oil spill.

Consideration should be given to adapting the model used in the United Kingdom for disclosure of exceptionally serious failures. Section 43H(1) of the UK *Public Interest Disclosure Act 1998* provides that a disclosure can be made if "the relevant failure is of an exceptionally serious nature, and in all the circumstances of the case, it is reasonable for [the whistleblower] to make the disclosure." The legislation does not limit disclosures to health and safety but allows other matters that are "exceptionally serious" to be disclosed. The UK legislation also has a safeguard that does not appear in the Government's Bill—one that inherently promotes disclosure to responsible news agencies rather than to persons who might not routinely engage in responsible journalism before publishing to the world. The UK legislation provides in s 43H(2) that, in determining whether it is reasonable to make the disclosure, "regard shall be had, in particular, to the identity of the person to whom the disclosure is made."

The Bill also restricts the amount of information a whistleblower can disclose to the media to that which is "no greater than is necessary to alert the recipient to the substantial and imminent danger". Such a limitation seems contrary to the public interest. It could hamstring a responsible media organisation in its endeavours to properly assess the credibility of the report; the scale, seriousness, likelihood and impact the danger might have; the possibility that there may be other public interests to take into account—all of which enables the media organisation to ensure it reports the matter accurately, fairly, with sufficient context, and having taken account of all relevant public interests. The requirement should instead follow the wording used elsewhere in s 26(1) that "no more information is publicly disclosed than is reasonably necessary in the public interest".

Factors relevant to assessing whether disclosure is, on balance, in the public interest

Disclosure to journalists and other external parties under item 2 in s 26(1) requires, among other things, that the disclosure is not, on balance, contrary to the public interest. Section 26(3) sets out the factors which must be taken into consideration when determining where the public interest lay. Essentially, all of the factors listed indicate when it would be *contrary* to the public interest to disclose. The list should also include factors *in favour* of disclosure. At a minimum, s 26(3) should require consideration of whether disclosure would promote the objects of the Act in s 6.

Criminal liability for use of anonymous source information

The media should not be presumed criminally liable for using or disclosing confidential source information during the course of responsible news gathering where that use or disclosure does not adversely affect a person's safety or create a risk of their being victimised

Sections 20(1) and 20(2) of the Bill criminalise the use or disclosure by any person of identifying information obtained by a public official that allows a whistleblower to be identified unless one of the exceptions in s 20(3) can be proven. Failure to establish the exception could result in a fine or imprisonment for up to 6 months.

The offence provisions would apply to the ABC as well as to other media organisations who use or disclose information identifying a whistleblower where that identifying information had been obtained by a public official. The provisions may be more widely applicable to the ABC given that it is both subject to the Act as a prescribed authority and has a duty to ensure the accuracy and impartiality of news it gathers and presents. The exceptions to criminal liability, as currently drafted, 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. To illustrate:

Say a whistleblower makes a public interest disclosure to a journalist. The journalist *uses* the whistleblower's identifying information during the course of newsgathering to, e.g., work out who else they should contact to verify information received from the whistleblower or to gather further information. The journalist proposes to use unattributed information in a news story while honouring an assurance of confidentiality given to protect the source's identity. Journalists employed by the ABC are required to comply with the ABC's Editorial Policies,[6] which requires them to upwardly refer any proposal to use unattributed information obtained from a confidential source as the basis of a story prior to its publication or broadcast. The ABC's related guidance note on dealing with anonymous sources makes clear that identifying information may be required to be disclosed or used as part of the upward referral process.[7] A journalist might, for instance, be required to *disclose* the source's identity to an editorial manager as part of the decision-making process relating to whether the ABC is sufficiently confident in the reliability of the information to publish the information without attribution. Other responsible media organisations may also use or disclose information in similar ways during the newsgathering process. Any such use or disclosure is presumed to be unlawful under ss 20(1) or (2) of the Bill unless an exception is made out. This could put pressure on a journalist to reveal a confidential source's identity if it is necessary to establish the exception that the source consented (s 20(3)(e)) or that the use or disclosure is for the purposes of the *Public Interest Disclosure Act* if this requires proving that the disclosure satisfied all the criteria

[6] See section 5.9 of the ABC's Editorial Policies which require that an appropriately senior ABC person must approve in advance, having consulted ABC Legal, any proposal to broadcast or publish without attribution information that forms the basis of a report and the ABC is to be committed to protect the identity of the source of the information.

[7] See the "Mandatory referrals" section of the ABC's Editorial Policies Guidance Note, Attribution / Anonymity of Sources, which states that it is mandatory to disclose a source's identity, if sought, to an appropriately senior ABC person.

in s 26 (that is, the disclosure was made by a whistleblower fitting the definition of "public official", who had already made an internal disclosure which was not adequately investigated or responded to, etc.).

Media organisations (and other external persons) do not appear to be liable under s 20 when they are the first "port of call" — i.e., when a whistleblower has not made an internal disclosure to a public official but has gone directly to the media to make an emergency disclosure under item 3 of s 26(1). However, the ABC appears to remain liable in these cases because it is a public broadcaster and its journalists and other staff are "public officials". Under the Bill, an ABC-employed journalist falls within the meaning of "public official" in s 69 (item 6), as they are a member of staff of a "prescribed authority" (s 72(1)(b)). The whistleblower's identity would therefore have been obtained by a "public official". So, the ABC may be liable more broadly than other authorised external recipients.

Consideration should be given to amending s 20(3) to include an exception that recognises that authorised recipients can use or disclose identifying information for the purpose of inquiring into the whistleblower's concerns where that use or disclosure does not adversely affect a person's safety or create or increase a risk that a person will be victimised. Where the recipient is a media organisation, such an exception would acknowledge and promote the use of responsible journalism in gathering and presenting news reports relating to the whistleblower's concerns, while ensuring the whistleblower's identity is not used in manner that would cause them harm.

Telephone interception and other laws against secret recording should not be suspended during the course of a disclosure investigation

Section 75(1) provides that any Commonwealth law prohibiting recording, use or disclosure of information does not apply in connection with the conduct of a disclosure investigation and in relation to the performance of other functions under the Bill. Section 75(2) makes clear that this applies to all current and future laws unless the legislation contains an express provision to the contrary.

It is not clear what the legislative intention is for this section. On its face, s 75 appears to be overly broad and vague in its reach. For instance, the *Telecommunications (Interception and Access) Act 1979* prohibits unauthorised interception (including listening to or recording) of telephone conversations (ss 6 and 7), and unauthorised access (including reading or recording) of email communications (ss 6AA and 108). The *Surveillance Devices Act 2004* restricts who is permitted to use surveillance devices to record the conversations and activities of individuals (Parts 2 and 3 of that Act), and how information obtained through the use of surveillance devices can be used (ss 37-39). The *Privacy Act 1988* regulates how personal information — including credit information and sensitive information about a persons' health and political views — may be used and disclosed by public and private sector entities. The potential effect of s 75, as presently drafted, appears to sweep away all of the judicial and other protections currently in place regulating when, e.g., phones can be intercepted, surveillance devices used, and medical and financial records accessed and disclosed. The potential impact of this provision on individuals' privacy could be profound. If phone conversations with, or records of, journalists are monitored or accessed, this could have

serious implications for freedom of expression.

The potential impact of this section has not been flagged or addressed in the Statement of Compatibility with Human Rights (prepared under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*), contained in the Explanatory Memorandum to the Bill. On its face, s 75 appears to interfere with these human rights in a way that is inconsistent with the *International Covenant on Civil and Political Rights* and no justification has been provided in the Explanatory Memorandum to indicate whether such a wholesale waiver of privacy protections is legitimate, necessary, or proportionate in the circumstances. Section 75 should not be passed in its current form.