House of Representatives Standing Committee on
Social Policy and Legal Affairs
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Parliament House
CANBERRA ACT 2600
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19 April 2013

Dear Members of the Committee

Re: Submission on '*Public Interest Disclosure Bill 2013* (Cth) (PID Bill)

I would first like to congratulate the Federal Government for following through on the recommendations of the Dreyfus Committee Report and presenting the PID Bill to the parliament and this committee. Public interest disclosure legislation is imperative in the suite of legislative protection necessary for open and transparent government and the constant vigilance needed against corruption and wrongdoing. I would also like to take this opportunity to thank the members of the committee for allowing me to present this submission.

Background

I am a Research Fellow in the Department of Computing and Information Systems at The University of Melbourne. My research interests include digital whistleblowing, health informatics, computer security, and technology-based organisational change.

As part of my role at the University of Melbourne, I am the principal researcher for the World Online Whistleblowing Survey (**WOW Survey**) with Dr. AJ Brown of Griffith University. For further information on this, please go to the website at https://www.whistleblowingsurvey.org. The purpose of this survey (as explained on the website) is to determine:

- *Attitudes to the value of whistleblowing*
- *The impact of new technologies and social media on the role and nature of whistleblowing*
- *Differences in attitudes to whistleblowing in different social or cultural contexts*
- *Citizens' propensity to 'blow the whistle' on wrongdoing, particularly to the media*
- *Citizen preferences regarding how to blow the whistle on wrongdoing, including issues of anonymity, communication and trust when dealing with the media.*

In addition to this research, I am a former newspaper journalist and have spent a great deal of time engaging in empirical research both with journalists and whistleblowers. As such, I have an excellent understanding of when it is appropriate for whistleblowers to go to the media, how to deal with such cases and the importance of public interest disclosure. In addition to the research work I am doing for our current international study, I have also researched the reporting of errors and incidents in Australian hospitals, and how information technology has impacted on this.

I have read the PID Bill as tabled and consider that there are several fundamental problems that need to be rectified before it is passed by this parliament. I will expand on these issues below but for the sake of summary, they are:

1. the ability for a discloser to make their disclosure external to the organisation is limited;
2. the exception for intelligence agencies in the bill is inappropriate;
3. the Bill is too confusing and complicated in part and inhibits the discloser in making their disclosure; and
4. the Bill does not apply to politicians or matters concerning public policy.

When discussing the deficiencies of the Bill, I will discuss important recent cases of whistleblowing in Australia and highlight how these brave people who have come forward will not be protected by this Bill as presently drafted.

External Disclosure

At the outset, I wish to acknowledge that the Bill takes a sensible approach in encouraging, at first instance, a discloser to go internally before they seek to disclose externally. This method is favoured by disclosers and it often reflects their genuine intention to resolve the wrongdoing about which they are complaining. However, this should not mean that a discloser is restricted from disclosing information externally in appropriate circumstances.

It is paramount to the success of any public interest disclosure law that a whistleblower or discloser has the ability in appropriate circumstances to disclose wrongdoing externally to their organisation. This is especially important where:

- there is endemic corruption within an organisation and the people to which the wrongdoing is to be reported are complicit in that wrongdoing;
- reporting channels within an organisation are not capable of investigating or dealing with the wrongdoing;
- the immediacy or gravity of the wrongdoing necessitates that it be revealed publicly or to someone outside the organisation.

This PID Bill as currently drafted places several restrictions on the ability for a discloser to reveal information externally. For example, the Bill creates a requirement that the discloser first make their disclosure internally and only when (on an objective basis) the investigation into their wrongdoing is not adequately dealt with are they able to disclose externally. By this point, the discloser might have already faced reprisal or the wrongdoing to which they intended to expose has become worse or irreversible.

There is strong public support for whistleblowing externally. This has been highlighted by a random sample poll of Australians last year, based on questions from the WOW Survey instrument. When asked if whether someone in an organisation who has inside information about serious wrongdoing should be able to use a journalist, the media, or the internet to draw attention to it, **87% of people in Australia** and **88% of people in the UK** believe that this should be allowed[1]. This figure rises to 90% in a similar poll in Iceland in 2013. Thus not

[1] n = 1211 in Australia, n =2000 in the UK, n=809 in Iceland. All sample sizes were valid, and weighted to be demographically representative.

only is there strong support in Australia for such whistleblower protections – this support cuts across different cultures in a similar manner, with remarkably similar levels of public support.

Specific Cases

Consider, for example, the case of Peter Fox[2]. NSW Detective Chief Inspector Peter Fox blew the whistle on an alleged cover-up of child abuse by Catholic priests in the Hunter region. Mr Fox claimed that the church in the New South Wales Hunter region covered up evidence about pedophile priests. Further, he claimed that the church went so far as to hinder and sometimes silence police investigations regarding child abuse. His **public and external** claims contributed to the Prime Minister announcing the creation of a royal commission into institutional responses to child sexual abuse.

Recently, DCI Fox said that the New South Wales Police Force denied him immunity under the State's legislation designed to protect whistleblowers, stating that some of his publicly aired concerns were not protected as public interest disclosures. Under the state's laws, they said, public officials are protected when reporting corruption, maladministration and other matters, whether within public agencies or to the Ombudsman[3].

This same exception would be applicable under the external disclosure provisions of this Government Bill. Peter Fox is a brave man who came forward with information about wrongdoing so grave and important that the Prime Minister called a Royal Commission over the matter. Yet under this proposed Bill the absurd consequence for him, were he a Commonwealth and not a state officer, is that he would not be protected for making this disclosure as it would not have complied with the requirements set out. This should be particularly relevant for this government, as it is the same government that called this national royal commission. It is therefore safe to assume that this government sees the value in the information that formed part of Fox's disclosure.

In the course of working on our three-university major research project, I have interviewed whistleblowers, as well as investigative journalists who interact with them. In some instances, it was patently clear to the whistleblower that they could not blow the whistle internally in the first instance because corruption was so all pervasive inside their organisation.

In some cases the culture of corruption took on a very sinister timber, causing the whistleblower to live in fear of their safety and even their lives once their whistleblowing became known. One whistleblower explained quite calmly that the only reason they are still alive today is because they went to the media. They had been hidden in a safe house for an extended period of time however it became clear that it would not be possible to keep their location secret forever. Their fears were born out in a fellow colleague who had blown the whistle, and who was shot and nearly killed over the matter.

[2]See for example http://www.theaustralian.com.au/national-affairs/in-depth/policeman-peter-fox-who-revealed-abuse-cover-up-not-covered-by-whistleblower-laws/story-fngburq5-1226611640005
[3]http://www.abc.net.au/news/2013-04-03/church-abuse-whilstblower-fears-legal-backlash/4606646

We think these things cannot happen in Australia, but they can and have. History provides a powerful data set of examples:

- The Bjelke-Peterson Government
- The NSW police at the time of the Wood Royal Commission
- The Department of Corrections in NSW under Rex "Buckets" Jackson
- The WA Premier's office during WA Inc.

These are but a few examples. And they remind us very clearly that sometimes external avenues, such as the media, are a necessity, not just an option.

Forcing a whistleblower to only use internal channels, as this proposed Bill would do, to report the corruption in the above settings would clearly have been fruitless, and in some cases, potentially dangerous for the whistleblower. In each of these examples the corruption was deeply entrenched in the power structure - with tentacles all the way to the top echelons of the organisations. In each of these cases, the media played an incredibly important role. These real cases illustrate why a whistleblower must be able to determine, using a test of reasonableness and honest beliefs, if they must go to the media.

I should add that qualitative research gathered for our study points to whistleblowers often having to cross a high barrier in their own minds in order to go to an external avenue. This is to be expected: most people feel a strong loyalty to colleagues at work and often to their institutions. These whistleblowers expressed the desire to simply get some kind of action about the wrongdoing, preferably one that will make it stop. It is often a very large leap for them to abandon their group of work friends and colleagues, and their institution, in order to go to the media for example. Needless to say this is not done lightly. The pressure to stay inside an organization, continuing on as part of the 'clan', is often very strong.

This is doubly so in closed investigative or enforcement agencies, such as law enforcement, the military and intelligence organisations, as well as in the medical field. When it comes to blowing the whistle externally, it is possible to view the (self) 'regulation' system that often happens inside these sorts of whistleblowers themselves as demanding equal or sometimes higher thresholds than what may be imposed by legal or state regulatory requirements. People in these types of positions frequently seemed to take great pride in their work and their institutions, and to place a high value on genuinely serving the greater good of society. Thus the threshold they must cross in blowing the whistle externally is very high indeed. It risks all of this including a job that may define their very identity and be virtually irreplaceable after a decision to 'go external' with the serious wrongdoing.

The Bill should of course encourage disclosure internally where this is appropriate. However given a long enough time frame, there will be circumstances when it is necessary to take concerns externally, and particularly to the media. The safety and sanctity of children surely is one of those and the Peter Fox scenario demonstrates the importance of protecting a discloser who sees no other choice than to disclose externally.

Intelligence Agencies Exception

This Bill falls well short when it comes to protecting discloser from revealing wrongdoing involved in the conduct of intelligence agencies and the revelation of any information classified as 'intelligence information'.

It is naturally wise to keep some types of information secret for the purposes of protecting the national interest, however intelligence agencies and the information attached to them should not be excluded simply by reason of this fact. Typically, in organisations where by design there is less publically available information, there is the greatest opportunity for wrongdoing.

This Bill does two main things, which should be amended.

- First, it excludes any conduct which relates to an intelligence agency. This means that any lawful conduct, which might be authorised as lawful by someone within that organisation might at the same time constitute wrongdoing but remain ineligible for disclosure under the Bill.
- Second, it precludes 'intelligence information' from ever being disclosed externally, under any circumstances. A sensible approach to this complicated issue is dealt with appropriately in the Wilkie Bill introduced last year, which creates a causal link between the risk of harm to security or operations with the need to have information in the public interest. Under that proposal, if the information poses no immediate risk to ongoing operations or carries no risk of harm to others but its revelation of wrongdoing is in the public interest, those who make that disclosure will be protected.

The Wilkie Bill's wording on this matter is not only sensible, it is clearly brings to bear Andrew Wilkie's own extensive experience working in the military and intelligence areas. He is well placed in this regard to provide advice on the correct thresholds for these provisions in such legislation.

The Kessing Case

Real cases also provide good testing grounds for the proposed provisions. Consider the case of Alan Kessing, whose disclosure would most likely be classified under 'intelligence information' as it related to security issues of Sydney International Airport[4]. In June 2007 Kessing was given a nine-month suspended prison term after being found guilty of leaking a "protected" report that exposed ongoing security problems at Sydney Airport.

Kessing, an Australian Customs officer, blew the whistle back in 2005 after the report was leaked to *The Australian* newspaper. He wrote the report as an Australian Customs Service officer and identified a series of serious breaches in security at Sydney Airport, ranging from claims of drug trafficking and other offences by staff at Sydney airport to concerns about negligent antiterrorism security at the nation's airports. It was suppressed within Customs and supposedly was not acknowledged by the Minister until it was leaked - an action for which Kessing denies responsibility ' around 30 month after it was written.

The Howard Government announced a major inquiry into airport crime and security a week after the leak occurred. British aviation expert Sir John Wheeler conducted the inquiry, which led to a $200 million upgrade in airport security. The upgrade resulted in what was possibly the most extensive overhaul of Australian airport security ever undertaken.

Under the Bill, as drafted, it is arguable that Kessing's disclosure would not be covered and as a result, the disclosure may never have taken place, or if it had taken place, the man who with courage came forward in the national interest would not be rightly protected. This again

[4] http://www.crikey.com.au/2009/09/14/allan-kessing-my-side-of-the-story/

demonstrates the need to strike a balance between protecting sensitive information and the need to disclose information, which is in the public interest. Kessing's action produced an enormous public good – a dramatic upgrade in the safety of the nation's airports (including its busiest hub).

Security Clearance Falsifications

Consider another case relating to the importance of capturing intelligence information and intelligence conduct in the Bill – the security clearance scandal where 20,000 security clearances were said to be fraudulently manipulated. As with the Kessing case, the disclosure here has in fact been of benefit to ensuring national security.

The Victoria Barrack's army establishment in Brisbane's Petrie Tee was at the center of a national security scandal in 2011 involving fabricated clearance documents used by the Australian Security Intelligence Organisation (ASIO)[5]. The Department of Defence admitted that up to 20,000 security clearances might have needed to be reviewed after fake information was used to fast-track the process with up to 5000 of the suspect clearances being classified as "top secret".

The breaches would have probably have gone unnoticed had it not been for the courage of civilian contractors working in the security clearance area who blew the whistle. The whistleblowers claimed that they received direct instruction by senior Defence staff to regularly fake information, like addresses or previous workplaces, on security documents. They said that a large backlog of applications began to build up and pressure was mounting to process the security clearances faster. It was this pressure that led to what they believed were up to 20,000 falsified security checks, with fabricated information to fill in gaps on security application, including top secret clearances sent to ASIO.

They went to the (Federal) Ombusdman but that didn't get them anywhere[6]. After that the group took their concerns to their then local MHR Brett Raguse, who wrote to Defence. This put them at risk because they were subject to the Secrecy Act. A Defence investigation stalled.

The turning point however was when the whistleblowers went to the media to reveal the serious wrongdoing. They had tried to blow the whistle internally, had been bullied and pressured by Defence, and had met utter inaction and cover up with regard to the wrongdoing. Reports on ABC's Lateline[7] and in daily newspapers changed that landscape. It moved from one of inaction to one of action. Further, it did so in a timely fashion that was necessary given the size and nature of the problem.

This case is a perfect example of the public interest of the disclosure far outweighing the need for secrecy of the information. If these disclosers had not proceeded in the manner they did, the damage to intelligence and security would have been far greater. It proves, essentially, that a broad brush approach as has been taken by the current draft of this Bill is inappropriate.

[5] see this and the following media sources http://www.theaustralian.com.au/national-affairs/defence/defence-admits-20000-security-clearances-suspect/story-e6frg8yo-1226171207813
[6] http://www.couriermail.com.au/ipad/the-security-breach-defence-tried-to-hide/story-fn6ck620-1226287784790
[7] http://www.abc.net.au/lateline/content/2011/s3218543.htm

It also illustrates something very powerful: no matter how much screening and security is put in place, there will still be systems failures.

One would hope that the extensive screening activities required for a security clearance would eliminate the likelihood of fraud or corruption inside these sorts of agencies. However as the public clearly saw in this case, sometimes even the most rigorous processes fail – and do so catastrophically. If information could be fabricated on such a large scale – affecting tens of thousands of security clearances – then no government agency can truly call itself immune from risk. Thus, whistleblower protection legislation must apply to ALL such organisations.

The fact that the whistleblowing did not even come from the Defense establishment, but rather that it had to come from civilians to call attention to the serious security breach – and that they had to turn to the media (external channels) to get action about the problem – is strong real world evidence yet again of the need for the legislation to cover all of the Commonwealth, including intelligence agencies.

I note that it also highlights the importance of covering contractors and subcontractors, current and previous, in all the whistleblowing protections offered by this Bill.

This Bill needs to reflect the need for secrecy and confidentiality where appropriate, but it should also recognise that there will always be situations – across all of government without exception - where the revelation of wrongdoing to the public is paramount to the public interest.

Confusion and complication

In order to have a properly functioning public interest disclosure bill, it is extremely important that the provisions are easy to understand and that they function to encourage people to make disclosures. This Bill falls short in several places where it serves to confuse a whistleblower and consequently discourage them from making that disclosure. Some examples of this include:

- 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.
- 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.
- 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.

Toni Hoffman

Consider the case of Toni Hoffman as proving that confusion and complication for the whistleblower can lead to unnecessary and dangerous consequences when making their disclosure.

Ms Hoffman was the head nurse at Bundaberg Hospital's Intensive Care Unit. She began to raise doubts about the ability of Dr Jayant Patel with hospital management and other staff. An investigation took place after Ms Hoffman complained about the large number of procedures performed by Dr Patel which had led to serious complications. As it stands, many deaths may have occurred due to the failure to investigate her concerns more thoroughly. According to the findings of the inquiry, as many as 86 tragic deaths have been linked to Dr Patel's alleged malpractice at Bundaberg Hospital.

Hoffman was awarded an Order of Australia medal for her exposure of Jayant Patel. She also received the 2006 Australian of the Year Local Hero Award for her role as a whistleblower in informing Queensland.

Hoffman told the press that her career - not to mention her health and psychiatric wellbeing - were badly affected based on the treatment of her by bureaucrats and successive ministers[8]. She took legal action against Queensland Health for gross negligence in failing to care for her. Hoffman was finally awarded compensation in a private settlement in early March 2012[9].

The failure to have a system free of complication and confusion meant that Hoffman was left out in the cold in circumstances where she was later recognised as a hero. A public interest disclosure bill should have the foresight to protect these people rather than reward their bravery many years after the fact, when they are forced in the meantime to endure significant personal hardship.

Politicians and policy matters

The PID Bill flatly excludes disclosures made about politicians and policy matters. Whilst Australians place (rightly) great faith and trust in their elected officials, there has been and always will be examples of corruption, maladministration and wrongdoing at all levels of government, including those perpetrated by elected officials. A properly enacted public interest disclosure bill should account for this possibility.

A failure to include politicians and policy matters has many negative consequences, some of which include:

- Those ministerial staffers or others working within this realm of administration may be prevented from obtaining protection notwithstanding that they are in a special position of knowledge with respect to potential wrongdoing;
- An exclusion based on 'policy matters' could lead to abuse whereby potential wrongdoing is classified as a matter of course as a 'policy matter', thus removing the protection otherwise available to the person revealing the wrongdoing;
- There is no distinction made between the actual public policy itself (which might be perfectly transparent and with good intention) and the *implementation* of that public policy which might be embroiled in some type of wrongdoing. This lack of distinction may lead to the corrupt implementation falling within the 'public policy' exclusion.
- A real potential, or at least a perceived potential that our democratically elected government is less transparent than it should be.

[8] http://www.theaustralian.com.au/news/investigations/patel-whistleblower-treated-like-a-leper-by-queensland-health/story-fn6tcs23-1226223423898

[9] http://www.couriermail.com.au/news/queensland/patel-nurse-queensland-health-settle-claim/story-e6freoof-1226294131009

The issue of whether or not politicians should be captured by this Bill is perfectly highlighted by the Securency scandal that has recently emerged thanks to Brian Hood[10].

Hood, a former company secretary of Note Printing Australia (**NPA**), claims to have held concerns about bribes for a long time. According to Hood, these claims were repeatedly ignored and were known by the Reserve Bank of Australia (**RBA**) as far back as 2007.

RBA was at the time a shareholder in NPA and Securency, NPA's sister company. The allegations are that NPA and Securency paid bribes to win banknote-printing contracts with foreign governments. Eight former executives of NPA and Securency are charged with foreign bribery offences[11].

There are serious question marks around how much and when the RBA, including governor Glenn Stevens, knew about claims of kickbacks involving foreign agents. The charges include paying alleged kickbacks in the form of inflated commissions worth millions of dollars to foreign agents and officials, including a Malaysian arms dealer, to secure bank-note contracts overseas.

This is a political scandal of the highest order and a risk that it might be excluded from the Act insofar as it would not apply to public policy or politicians is an eventuality which must be avoided. Politicians and policy matters should, without doubt, be included in the Bill. A failure to do so would compromise not only the operation but also the intention of the Bill to assist in improving openness and transparency in government. This really should mean all levels of government.

Further, members of Parliament should also be included as appropriate recipients of disclosures. Often it can be the case that MPs are in a special position to assist a disclosure with access to the right people, the right information or be able to provide special assistance to a discloser in another way. The Bill should reflect this special position of MPs.

Thank you again for allowing this submission. With some amendments, this Bill can lead the world in public interest disclosure legislation and we should not fall short in the attempt to reach this goal.

Yours faithfully

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[10] The summary in this document draws from this and the following media report references: http://www.abc.net.au/news/2012-09-14/whistleblower-outlines-bribery-allegations-in-securency-case/4262502
[11] http://www.smh.com.au/business/whistleblower-told-to-shut-up-20120913-25v8t.html