

House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600
By email: spla.reps@aph.gov.au

17 December 2012

Dear sirs

Re: Comments on 'Public Interest Disclosure (Whistleblower Protection) Bill 2012 (PID Bill) and Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012 (CA Bill)'

Thank you for the opportunity to provide comments on both the PID Bill and the CA Bill.

Until Andrew Wilkie MP introduced both the PID Bill and the CA Bill in November 2012, protection afforded to whistleblowers in the Commonwealth public sector was contained in section 16 of the *Public Service Act 1999* (Cth). This protection is completely out of step with the recommendations of the Report of the Inquiry into Whistleblowing Protection within the Australian Government Public Sector (**Dreyfus Committee / Dreyfus Report**), progress made in various states and territories around Australia and international best practice. If enacted as presently tabled, the PID Bill would be a shining example of public interest disclosure legislation worldwide and would finally enact the recommendations of the Dreyfus Report.

Blueprint for Free Speech (**Blueprint**) unequivocally supports the PID Bill for the reasons set out below with the qualifications as provided.

1 Implementation of the Dreyfus Committee Report

The Dreyfus Report clearly provides that whistleblower protection legislation is needed for the commonwealth public service. The report sets out a series of recommendations for such legislation. Without repeating each recommendation verbatim, Blueprint relies on table provided with Professor AJ Brown's submission to this committee dated 30 November 2012, which sets out how the PID Bill is wholly congruent with the recommendations of the Dreyfus Committee.

Importantly, Blueprint stresses that the implementation of the following recommendations of the Dreyfus Committee by the PID Bill is critical to whistleblower protection legislation:

- (a) Recommendation 3, which extends the definition of a person who can make a public interest disclosure from Australian Public Service (**APS**) employees to contractors engaged by the commonwealth public sector, employees of those contractors, members of the

Australian Defence Forces, the Australian Federal Police, parliamentary staff, former employees of the APS and anonymous persons likely to be in one of the above categories. This ensures disclosure of all disclosable conduct in the public interest. This recommendation is implemented by Clauses 10 and 11 of the PID Bill;

- (b) Recommendation 7, that the subject matter for disclosure include illegal activity, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to health, public safety and the environment, official misconduct and adverse action against a person making a public interest disclosure. This is implemented by the definition of disclosable conduct in Clause 9 of the PID Bill;
- (c) Recommendations 9 and 10, which provide that a PID Bill establish an objective and subjective test for a public interest disclosure. This is important as it allows protection irrespective of the motive of the whistleblower if indeed the disclosure is in the public interest. This is implemented by Clause 8 of the PID Bill;
- (d) Recommendation 13, which makes a public interest disclosure a 'workplace right' for the purposes of the *Fair Work Act 2009* (Cth) (**FWA**). This is implemented by sections 40-45 of the PID Bill and the CA Bill amending the FWA. The implementation of this recommendation is paramount for ensuring that a whistleblower is able to access effective compensation remedies. This is expanded on below; and
- (e) Recommendation 21, which allows for the disclosure of wrongdoing to a third party, including the media, in instances where the matter has been disclosed internally and "has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety." This recommendation is implemented in part 5 of the Bill. Blueprint notes that these provisions do not go far enough and qualifies its support of these sections below.

2 Importance of effective compensation provisions

Blueprint strongly supports the introduction of effective compensation provisions for whistleblowers under the PID Bill, as part of a regime aimed at protecting a whistleblower against reprisal for exposing wrongdoing in the public interest.

A whistleblower may take on serious risk to their financial position, reputation and personal safety when disclosing wrongdoing in the public interest. After making a disclosure, a whistleblower may be subject to reprisal from their employer, fellow employees or another person as a result of that disclosure. Accordingly, it is appropriate to have not simply protective measures for that whistleblower, but also to allow for effective compensatory remedies to return them to a position they would otherwise have been in but for the making of the disclosure and any resulting reprisal taken against them.

The PID Bill and the CA Bill allow a whistleblower, who has been unfairly dismissed or has had detrimental action taken against them, access to the compensation provisions triggered by Part 3-1 (Adverse Action) and Part 3-2 (Unfair Dismissal) of the FWA. By amending the definition of *workplace law* in the FWA, a whistleblower has standing in Fair Work Australia, the Federal Court or the Federal Magistrates' Court to seek effective and uncapped compensation. This is congruent with the Dreyfus Report's recommendations and essentially mirrors the largely successful system in the United Kingdom under the *Employment Rights Act 1996* (UK).

Additionally, the ability to seek compensation under the FWA provisions has two important cost implications for a whistleblower. Firstly, it allows a whistleblower to bring an action in Fair Work Australia, which is a less formal forum with less evidentiary rules and other administrative processes for a whistleblower applicant. Consequently, it creates a much less expensive method for an applicant whistleblower to assert their rights. Second, if a whistleblower brings an action under the FWA provisions, section 570 of the FWA applies, meaning that a whistleblower will only have to pay the respondent's costs (irrespective of the success of their action) in very limited circumstances. This of course means that there is less risk for a whistleblower seeking to enforce their civil rights and protections.

Public interest disclosure should be underpinned by an acknowledgement that it is often very difficult and risky for a whistleblower to come forward and expose wrongdoing. Effective compensation and favourable costs provisions only seek to encourage the exposure of wrongdoing by making the path to such disclosure easier for a whistleblower.

3 Expansion of ability to disclose to third parties (the media and members of parliament)

Blueprint considers it paramount to the effective operation of public interest disclosure legislation that a whistleblower has the option to disclose wrongdoing in the public interest to third parties and the media if it is inappropriate to do so through internal channels.

Recommendation 21 of the Dreyfus Report and part 5 of the PID Bill set out the circumstances in which a whistleblower may make a public interest disclosure to a third party (outside of the organisation, or to one of the oversight bodies). Blueprint considers that the external provisions do not go far enough to enable a whistleblower to go to the media for two reasons.

First, the time restrictions on allowing an external disclosure do not reflect the necessary immediacy in some circumstances of public interest disclosure. Blueprint notes with approval the submission of the Commonwealth and Public Sector Union at page 6 "The Bill does not however deal with the possibility of third party disclosures where there is a threat of immediate serious harm to public health and safety. This is a deficiency in the Bill and should be reconsidered." Importantly, the legislation should be as clear as possible and empower a whistleblower acting in good faith to make a public interest disclosure in a manner to which they see fit. This means that if the whistleblower thinks it appropriate or necessary in whatever circumstances to disclose to a third party then they should be afforded the protections of the Bill. The current draft, whilst it should encourage internal

disclosure in the first instance, should create no practical barrier to a whistleblower seeking protections under the Bill where they believe it is necessary to disclose to a third party at first instance.

Recommendation: clause 31 of the PID Bill be amended to include a clause 31(3) “this Part also applies if a public official honestly believes on reasonable grounds that a failure to disclose under this Part would pose a serious and immediate threat to public health and safety.”

Second, the PID Bill does not expressly allow for disclosure to members of parliament. Parliamentarians have historically been an important recipient for public interest disclosures and this should be reflected in the Bill. As Bronwyn Bishop MP noted in the first public hearing for the Bill¹:

“I do not think enough is made of the power of a member of parliament to represent and get justice for individuals. It is hugely powerful. Without disclosing a current case that I am dealing with, there is a real need for a remedy for a particular constituent that I have. As (a) member of parliament, I get access to people that an ordinary person cannot, and I really can put the case strongly and really can get outcomes. Far from trying to paint members of parliament, as is popularly done, as pariahs in some way, I think that the ability of members of parliament to represent and get justice for their people and to use the sort of reach that we have needs to be more broadly known.”

A path to make a public interest disclosure to a member of parliament is easily created by amending clause 17 of the PID Bill “to whom may a public interest disclosure be made?”. Accordingly, Blueprint makes the following recommendation:

Recommendation: clause 17 of the PID Bill is amended to include a clause 17(b)(viii) “a member of the Commonwealth House of Representatives or the Senate”

We hope that these suggestions are useful and we would be happy to discuss them further should the committee require.

Yours faithfully

Simon Wolfe

Head of Research

E: simon@blueprintforfreespeech.net

Copyright Blueprint For Free Speech
PO Box 87, Fitzroy VIC Australia 3065

¹ Transcript of Standing Committee on Social Policy and Legal Affairs - 30/11/2012 - Public Interest Disclosure (Whistleblower Protection) Bill 2012 Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012