

## **Public Interest Disclosure (Whistleblower Protection) Bill 2012**

*Introduced into the House of Representatives on 29 October 2012*

*By: Mr Andrew Wilkie MP*

1.2 This bill provides for a framework to facilitate public interest disclosures by public officials and provides those officials with protections by providing for:

- processes for who can make a public interest disclosure and to whom;
- the conduct of investigations;
- public interest disclosures to third parties;
- the obligations of agencies;
- legal protections of disclosers; and
- oversight of the disclosures.

1.3 The bill defines a public interest disclosure as the disclosure under certain circumstances of 'disclosable conduct', which is defined by section 9 as meaning corrupt conduct carried out by any public official or agency, or by any person in relation to a public official or agency; serious and substantial maladministration; misuse of public money or public property; danger to public health; danger to the environment; and detrimental action towards anyone as a result of a public interest disclosure.

### *Compatibility with human rights*

1.4 The bill is accompanied by a statement of compatibility which states that:

'This bill advances human rights by establishing procedures for the disclosure of corruption, maladministration and other wrongdoing in the Commonwealth public sector. It protects public officials making such disclosures.'

The statement lists a number of rights which the bill is said to promote including the right to privacy and reputation (article 17, ICCPR), by protecting the privacy of those involved in making public interest disclosures; and the right to freedom of (political) expression, guaranteed under the Commonwealth Constitution but also by the article 19 of the ICCPR. The statement also notes that the bill promotes the enjoyment of the right to work by ensuring that a person who makes a disclosure will not be victimised or subject to reprisals as a result of making a protected public interest disclosure.

*Right not to be subject to unlawful or arbitrary interference with one's reputation or privacy (article 17 ICCPR)*

1.5 The making of a public interest disclosure, involving as it does an allegation of corrupt conduct, maladministration, or other conduct that would harm the reputation of the person who is alleged to have engaged in it, engages the right of a person not to be subject to arbitrary or unlawful interference with their reputation in accordance with article 17 of the ICCPR. The statement of compatibility recognises this interference, but notes that the procedures set out in the bill for disclosure are ‘robust provisions [that] protect personal information about individuals involved and ensure that appropriate confidentiality is observed at all times.’ It may be noted that, in addition to disclosures made within government and public agencies, the bill does permit a person to make a public interest disclosure to a journalist, subject to certain limitations (clauses 31, 32 and 33). The right to make a disclosure to a journalist arises only when a disclosure has been made within government, but has not been dealt with in accordance with the procedures laid down in the bill, so that the internal avenues have proved ineffective for resolving the issue or keeping the discloser informed.

1.6 The bill creates an offence of victimisation; a person who victimises a person because of a public interest disclosure commits a criminal offence (clause 46). It is not necessary that the person victimised has actually made or may make a disclosure; it is sufficient if it is shown that the alleged offender ‘believes or suspects that a person has made, or may make a public interest disclosure’ (explanatory memorandum, para 69).

*Right to be presumed innocent (article 14(2), ICCPR)*

1.7 The statement of compatibility notes that the criminal offence of using or divulging protected information is created by clause 58 and that this offence is subject to a defence that the use or divulging of the information has taken place under Commonwealth law (clause 58(3)). The defendant bears an evidential burden in relation to the establishment of this defence. This is a limitation of the right to be presumed innocent, and must be justified as a reasonable encroachment if it is to be permissible. The statement of compatibility argues that:

‘Were the evidentiary burden not placed on the defendant, the prosecution would be forced to prove a negative: that no act or legal instrument exists that would cause the offences or offences not to apply. By placing the evidentiary burden on the defendant, the defendant is able to indicate which act or legal instrument they believe causes the offence or offences not to apply. This method appears in other investigation enabling laws, and is a reasonable and proportionate response to the operational problem caused by the nature of the offences described in clause 58.’

*Freedom of expression (article 19, ICCPR)*

1.8 Human rights jurisprudence has consistently attached great importance to the right to freedom of expression, which is protected in article 19 of ICCPR and

encompasses the right to both receive and impart information. In general, political expression is afforded the greatest protection, with less rigorous principles being applied to artistic and commercial expression.

1.9 Whistleblowing, particularly in the context of public sector employment, will often have a connection with political communication and expression and/or have a strong public interest element. It is therefore likely to be regarded as being at the top end of the scale in terms of the sort of expression which is subject to protection. The UN Special Rapporteur on Freedom of Expression, for example, has endorsed the need for countries to take steps to protect individuals from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.<sup>1</sup>

1.10 While it may be premature to say there is a positive obligation to enact laws to protect whistleblowers, the draft laws under consideration would promote the effective exercise of the right to freedom of expression.

**1.11 The committee considers that the provisions of the bill appear to be compatible with human rights.**

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<sup>1</sup> Report of the United Nations Special Rapporteur on Freedom of Expression, (2000) UN Doc. E/CN.4/2000/63, January 18, paras 43, 44.