



**Re: *Public Interest Disclosure (Whistleblower Protection) Bill 2012, etc***

Civil Liberties Australia thanks the House Social Policy and Legal Affairs Committee for the invitation to make a submission on the Review of the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* and the *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012*, and to contribute to the debate of public interest disclosure (PID) legislation. The following will be confined to the *Public Interest Disclosure (Whistleblower Protection) Bill 2012*.

The *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (the Bill) is necessary.

CLA believes that the focus of PID legislation is to lay out the special measures required for protecting and managing people who possess crucial information about Australian Government wrongdoing, but who face great disincentives against revealing it. We argue that the primary objective of PID legislation should be to encourage the reporting of wrongdoing. CLA strongly believes that whistleblowers fulfil an important role in a modern western liberal democracy like Australia, a role that benefits both the Australian Government and the Australian people.

Within government, whistleblowers improve the integrity of the organisation by making problems known early and ameliorating the deleterious effects of corruption, misconduct, incompetence and maladministration. Where the system fails, public whistleblowing positively affects the wider public by providing information that vested interests would prefer not be exposed, therefore enabling citizens to take a more meaningful part in public debate, and voters to make more informed voting choices.

PID legislation operates at the flexible junction between public and sensitive information held by governments. To achieve the proper objectives, PID legislation must appropriately balance competing interests and distinguish between leaking, whistleblowing and 'selling secrets'. CLA congratulates the Honourable Andrew Wilkie MP on developing a Bill that calibrates the balance, whilst achieving greater transparency, openness and accountability.

Mr Wilkie's recognition of the need for legislation to implement systems to manage whistleblowing more effectively is supported by CLA. This Bill's establishment of minimum standards of procedures for internal disclosures and the utilisation of external oversight agencies are supported, as are the comprehensive definitions and provisions providing for disclosures to third parties. We are especially pleased that the Bill addresses the current lack of practical remedies available for public officials who incur damages to their reputations and careers as a result of making a disclosure in the public interest.

CLA believes that genuine whistleblowers who act in the interest of the public ought to be honoured for their altruism and protected from harm arising from their legitimate actions. We congratulate Mr Wilkie for defining the responsibilities of employers regarding the welfare of employees in exercising their duty of care to prevent harm and minimise adverse outcomes.

We agree with the *Whistling While They Work* project that the foundation of the protection of public whistleblowing lies in both the duty of loyalty and freedom of speech. We recognise that public officials have a duty of loyalty to the public and to the Australian Government to report perceived wrongdoing that they become aware of. Concurrently, people who become aware of wrongdoing have the freedom to discuss political matters, and the public sphere may be an appropriate forum to do that. Ultimately, any failure to expose wrongdoing diminishes the integrity of the Australian Government and deprives the public of accurate information to make voting decisions, and ensure a government run on best practices.

It is pleasing to see the comprehensive definition of public interest disclosure in s 8 which provides greater certainty and clarity. We recognise that the inclusion of “property” in s 9(b)(ii) is an improvement on the recently introduced PID legislation introduced in the ACT. Furthermore, the detailed meanings of *corrupt conduct*, *maladministration* and *misuse*, contained in s 9, provide greater certainty and clarity. Similarly, the inclusion of “a person employed under the *Members of Parliament (Staff) Act 1984*” in s 11 is recognised as significant.

The detailed meaning of *sensitive defence, intelligence or law enforcement information* contained in s 15, combined with the limitations contained in ss 20 and 33(2)(b), provide certainty and clarity in an especially sensitive aspect of PID. We submit that these provisions better enable the delineation of protected public interest disclosures from disclosures that ought not to be publically disclosed.

The meaning of *detrimental action* provided in s 40 is welcomed as providing greater certainty and clarity. The remedies of injunction, reinstatement and damages represent best practice and strongly supported. CLA also supports the loss of protection provisions contained in s 40 as providing an appropriate limitation.

In regard to Part 5, we submit that where an adequate avenue does not exist, where it is not reasonably possible to utilise the internal avenues and existing reporting avenues have failed to deal with the issue effectively, a public official ought to have an avenue for disclosing information that is in the public interest. The provisions of public interest disclosures to third parties contained in this Bill are best practice and we highlight the fact that disclosures are not limited to members of the legislative branch, or journalists. We argue that Part 5 is an effective mechanism for achieving the object of strengthening public integrity by encouraging and facilitating the disclosure of corruption, maladministration and other wrongdoing in the Commonwealth public sector.

CLA is pleased with the role the Ombudsman and Inspector General of Intelligence and Security (IGIS) will play under the Bill. We agree that the Ombudsman or IGIS should be responsible for:

- giving advice and assistance to agencies, public officials and the general public about public interest disclosures
- monitoring the management of public interest disclosures by agencies
- reviewing the way in which agencies investigate and deal with public interest disclosures generally, or particular public interest disclosures
- to report publicly and to agencies on the implementation of the Act, including procedures, arrangements and outcomes in respect of the management of public interest disclosures

We recognise the significance of including the functions:

- ensuring just outcomes for public officials who make public interest disclosures, including by preventing and remedying the effect of detrimental action or victimisation against people because of disclosures; and
- undertaking, or coordinating the undertaking of, education and training programs about public interest disclosures,

A further function of identifying any systemic issues or other problems with the operation of the Act and developing proposals for reform should be included.

CLA believes that the Australian Government's workplace responsibilities include a duty to ensure that detrimental acts or omissions do not occur, and to protect and support employees in the face of risks of detrimental action. Part 7 has our support, especially the provisions that an injunction to prevent detrimental action can be sought by the Ombudsman, the investigating entity that is dealing with the disclosure, the person making the disclosure or the person against whom detrimental action has been or is likely to be taken. This provision represents best practice, and we recommend that this model be adopted by other jurisdictions.

Finally, we acknowledge that the scheme that is implemented must provide protection for legitimate whistleblowing, whilst not providing a shield for disclosures the "whistleblower" knows are false, misleading or vexatious. We support the test contained in Part 7, and recognise that the Bill appropriately balances the competing interests.

CLA supports the introduction of the *Public Interest Disclosure Bill 2012* and we hope that both the Government and the Opposition will take action to make Australia a more open, transparent and accountable democracy. We are willing to further contribute to the whistleblowing debate and look forward to further co-operating with House Social Policy and Legal Affairs Committee in the future.

**CLA** Civil Liberties Australia Inc. A04043  
Box 7438 Fisher ACT Australia  
Email: [secretary \[at\] cla.asn.au](mailto:secretary[at]cla.asn.au)  
Web: [www.cla.asn.au](http://www.cla.asn.au)

*Lead author: Rhys Michie; associate author: Bill Rowlings*