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26 April 2013

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
BY EMAIL: legcon.sen@aph.gov.au

Dear Secretary

Submission: Public Interest Disclosure Bill 2013

We write to support, in principle, the Public Interest Disclosure Bill 2013. We believe that an important dimension of the web of administrative law mechanisms that ensure integrity and accountability of government conduct is the adequate protection of persons who make disclosures about inappropriate behaviour by public officials. By providing adequate protection, the government encourages disclosures by those who are most likely to be privy to inappropriate behaviour, that is, those within the public sector.

Persons making public interest disclosures are extremely vulnerable. They face a bewildering range of civil, criminal and administrative liabilities and if the protection offered in this legislation is uncertain or unnecessarily complex then the object of encouraging disclosures and promoting accountability will be undermined. In its 2009 report on secrecy laws[1] the Australian Law Reform Commission (ALRC) identified 506 secrecy provisions in 176 pieces of primary and subordinate legislation. Of these approximately 70% created criminal offences, and around three quarters of those were indictable offences.[2] Equitable obligations of confidence[3] common law obligations of fidelity in employment, and public service regulations and codes of conduct,[4] all impose duties not to disclose information that has been obtained or generated by public officials. If those duties are breached by making unauthorised disclosures s 70 of the *Crimes Act 1914* (Cth)provides a criminal

1 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia,* Report No 112 (2009), Chapter 3.
2 Ibid [3.20 – 3.21].
3 *Commonwealth v Fairfax* (1980) 147 CLR 39.
4 *Public Service Act 1999* (Cth) s 13(10); *Public Service Regulations 1999* (Cth) reg 2.1.

sanction with a penalty of imprisonment for up to two years. High profile s 70 cases, such as the conviction of Commonwealth Customs officer, Allan Kessing,[5] represent a system committed to secrecy that is in urgent need of reform. The protection against these liabilities offered to disclosers by this Bill needs to be comprehensive and easily understood. With this in mind, we applaud the government's decision to introduce wider protection to persons making public interest disclosures than had previously been provided by s 16 of the *Public Service Act 1999* (Cth).

We agree with concerns that have been expressed elsewhere about the exclusion of the conduct of Ministers, the Speaker of the House of Representatives and the President of the Senate from the definition of disclosable conduct (cl 31); and the exclusion of conduct that is connected with intelligence agencies (cl 33).[6] History has demonstrated that it is often the conduct of these officials that transgresses appropriate boundaries.

In this submission we will not reiterate those concerns, but instead focus on other serious concerns that we hold about the Bill. We believe the objects in cl 6 have been carefully formulated to emphasise the importance of encouraging disclosures and supporting and protecting those who make such disclosures.

However, we have serious concerns about the support and protections that are actually provided to whistleblowers by the Bill as it is currently drafted. We have identified five key areas of the Bill that we believe do not encourage bona fide disclosures. These are explained, in turn, below. At the end of the submission we will consider two constitutional questions about the reach of the provisions of the Bill.

1. Protecting and supporting persons making bona fide disclosures

We are concerned that the internal disclosure process does not achieve the Bill's object of *encouraging* and *facilitating* the making of public interest disclosures.[7]

(a) Person to whom disclosure is made

In order to be a 'public interest disclosure', an internal disclosure must be made to an 'authorised internal recipient'. [8] Authorised internal recipients are authorised officers of agencies, the Ombudsman and IGIS.[9] For disclosures to an agency, authorised officers are a principal officer or a person appointed in writing as an authorised officer.[10] We are concerned that the Bill offers no protection for an initial disclosure made to someone other than an authorised internal recipient.

A person who wishes to make a disclosure, but is unfamiliar with the requirements of the Act, might naturally approach their supervisor, manager, or a person with responsibility for the matters to which the disclosure relates. Such a person may not be an authorised internal recipient. The 'Whistle While

5 *Kessing v The Queen* (2008) 73 NSWLR 22.

6 See, eg, Suelette Davis, 'Keeping Us Honest: Protecting Whistleblowers' in *The Conversation* (2 April 2013), http://theconversation.com/keeping-us-honest-protecting-whistleblowers-13131.

7 Cl 6.

8 Cl 26.

9 Cl 34.

10 Cl 36.

They Work' project headed by AJ Brown found that the vast majority of disclosures were made to immediate supervisors. Accordingly:

> effective public sector procedures for dealing with whistleblowing should be focused on anyone who has a supervisory role. The pattern appears so strong that procedures stipulating that only certain officers in the organisation can receive disclosures, perhaps removed from the immediate workplace of many employees, are unlikely to shake the frequency of this behaviour. ... Strategies that rely only on designated people other than supervisors to receive disclosures are not ... likely to prove effective for the management of reports ...[11]

We recommend that the definition of 'authorised officer' of an agency be broadened.[12] Section 15(1)(c) of the *Public Interest Disclosure Act 2012* (ACT) could serve as a model. That paragraph provides that, if the discloser is a public official, a public interest disclosure may be made to:

(i) a person who, directly or indirectly, supervises or manages the discloser; or

(ii) for a public sector entity that has a governing board—a member of the board; or

(iii) a public official of the entity who has the function of receiving information of the kind being disclosed or taking action in relation to that kind of information.

Examples—subpar (iii)

1 the chief financial officer of a public sector entity in relation to a disclosure about the substantial misuse of public funds by an employee of the entity

2 a workplace bullying and harassment contact officer for a public sector entity in relation to a disclosure about an employee of the entity threatening physical violence against another employee

3 a public official on a clinical standards committee for a public hospital in relation to a disclosure about medical malpractice at the hospital that was causing or likely to cause a substantial danger to public health

(b) Bona fide, but false or misleading disclosures

Clause 11(1) of the Bill provides that the protection of s 10 does not extend to protection from liability for making a statement that is false or misleading. A provision of this kind is undoubtedly necessary in order to prevent abuse of the protection that the Act will provide. However, cl 11 as currently drafted means that there is no protection for a person who makes a disclosure, genuinely believing it to be true, but which turns out to be false or misleading. The nature of 'whistleblower' disclosures means that the discloser may not be in a position to fully verify the facts before making the disclosure.

All of the State and Territory whistleblower laws deal with false or misleading disclosures, either by denying protection to such disclosures or by creating an offence or both; but only if the discloser

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11 Marika Donkin, Rodney Smith and AJ Brown, 'How Do Officials Report? Internal External Whistleblowing' in AJ Brown (ed), *Whistleblowing in the Australian Public Sector* (2008), 83, 92.

12 We are not suggesting any changes to the provisions for making internal disclosure to the Ombudsman or an investigative agency. We recommend retaining those provisions in their current form.

knows that[13] the disclosure is false or misleading.[14] Further, the 2009 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the protection of whistleblower legislation should be lost only 'where a disclosure is found to be *knowingly* false.'[15]

For these reasons, we recommend that a discloser should be deprived of the benefit of the Act only when they know that the information is false or misleading.

(c) Information about external disclosures

Under cl 60 of the Bill, an authorised officer to whom a disclosure is made must inform the discloser about the internal disclosure procedure. We support this provision, but note that there is no requirement for the discloser to be informed about the *external* disclosure process. We are concerned that, under the current provisions of the Bill, a discloser who is dissatisfied with an internal investigation is left with no guidance on further steps they might take.

We understand the reasons why internal disclosure is preferred to external disclosure, and that the Bill establishes internal disclosure as the primary mechanism by which disclosures will occur. However, the Bill recognises that, in circumstances where the internal disclosure process has not adequately dealt with a disclosure about serious disclosable conduct, external disclosure adds an important 'additional layer of accountability'.[16] Informing the discloser that protection may be available for an external disclosure would further the Bill's object of promoting the integrity and accountability of the Commonwealth public sector.[17] This would not undermine the preference given to internal disclosure, as the discloser would be made aware that the protection of the Act would only extend to external disclosures in limited circumstances, and where internal processes had proved inadequate.

We therefore recommend that the Bill be amended to require that the discloser be informed of the possibility of making an external disclosure, and the requirements for such a disclosure to enjoy the protection of the Bill, either at the stage of making the disclosure, or at the completion of the internal investigation.

2. Strengthening Protection from Reprisals

Preventing reprisals from being taken against a person who intends to make, or has made, a disclosure is a fundamental aspect of a public interest disclosure regime. We see two weaknesses in the proposed regime under the Bill:

(a) Clause 13(3)

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13 Or, in WA, is reckless as to whether.

14 *Public Interest Disclosure Act 2012* (ACT) s 7(2)(a), s 37; *Public Interest Disclosures Act 1994* (NSW) s 28; *Public Interest Disclosure Act* (NT) s 14(4)(b); *Public Interest Disclosure Act 2010* (Qld) s 66; *Public Interest Disclosures Act 2012* (Tas) s 54; *Whistleblowers Protection Act 1993* (SA) s 10; *Protected Disclosure Act 2012* (Vic) s 72, s 39(2);*Public Interest Disclosure Act 2003* (WA) s 24.

15 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector* (2009), Recommendation 12 (emphasis added).

16 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector* (2009), [8.78].

17 Cl 6(a).

Clause 13(3) of the Bill provides that administrative action that is reasonable to protect a discloser from detriment does not amount to a reprisal. As the Explanatory Memorandum makes clear, this provision will allow, for example, for a discloser to be transferred to another section if they have made a disclosure about work practices in the section in which they work. While the inclusion of some such provision is sensible, cl 13(3) as currently drafted is open to abuse. It may be difficult to tell the difference between reasonable action to protect a discloser from detriment, and action which is, in substance, a reprisal. While there appears to be only one parallel to cl 13(3) in another Australian jurisdiction,[18] the Queensland and Western Australian legislation allow a discloser who fears reprisal to *request* relocation to another workplace.[19]

In order to prevent abuse, cl 13(3) could be amended to require that the discloser request, or at least consent to, the administrative action.

(b) Clause 19 – Offences

The Bill makes it a criminal offence to take a reprisal against another person, or to threaten to take a reprisal.[20] The penalty is 6 months imprisonment or 30 penalty units, or both. Compared to other, comparable, legislation the penalty is relatively weak. In most other Australian jurisdictions, the penalty for the analogous offence is a maximum of two years imprisonment.[21] In 2011 Victoria introduced a bullying offence with a penalty of up to 10 years imprisonment.[22] As both a normative statement, and to assist in the important deterrent effect of the provision, we would recommend the penalty be increased to a maximum of two years imprisonment or 120 penalty units.

3. External Disclosures

(a) Adequacy of Internal Disclosure as a precondition

An external disclosure is defined in cl 26, item 2. Paragraph (d) requires that:

> Either or both of the following applies:
>
> (i) if the disclosure investigation was an investigation under Part 3 – the investigation was inadequate;
>
> (ii) in any case – the response to the investigation was inadequate.

We raise three concerns with 'inadequacy' as a requirement for an external disclosure.

First, for a person making a public interest disclosure to be satisfied that the disclosure investigation or the response to the investigation was 'inadequate', that person must be kept informed of the status of the investigation. The legislation makes provision for disclosures to be made anonymously.[23] Indeed, it could be anticipated that in some instances, a person may see safety in anonymous disclosures and particularly for internal disclosures. However, in order to be informed of

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18 Section 45 of the *Public Interest Disclosure Act 2010* (Qld) permits 'reasonable management action'.

19 *Public Interest Disclosure Act 2010* (Qld) s 47; *Public Interest Disclosure Act 2003* (WA) s 15B.

20 Clause 19.

21 *Protected Disclosures Act 1994* (NSW) s 20(1); *Protected Disclosure Act 2012* (Vic) s 45(1);*Public Interest Disclosure Act 2010* (Qld) s 41(1); *Public Interest Disclosure Act 2003* (WA) s 14(1); *Public Interest Disclosure Act 2002* (Tas) s 19(1); *Public Interest Disclosure Act 2008* (NT) s 15(2).

22 *Crimes Act 1958* (Vic) s 21A.

23 Cl 28(2).

the status of the investigation, the discloser must be 'readily contactable'.[24] It would appear, therefore, in order to make an external disclosure, the discloser must first have made a non-anonymous internal disclosure. This is particularly problematic where the discloser holds genuine fears about the potential for victimisation and reprisals within his or her workplace because of the disclosure. We would recommend that the Bill be amended to include an exception to this requirement that anticipates this situation.

This position under the current Bill can be contrasted with that in the previous Bill introduced by Andrew Wilkie, the Public Interest Disclosure (Whistleblower Protection) Bill 2012 (the 'Wilkie Bill').The Wilkie Bill made provision for public interest disclosures to be made to various internal persons in cl 17. It then included cl 31(2):

> This part [Public interest disclosure to third parties] also applies if a public official honestly believes on reasonable grounds that:
>
> (a) the public official has information that tends to show disclosable conduct; and
>
> (b) there is a significant risk of detrimental action or victimisation to the public official or someone else if a disclosure is made to a person mentioned in section 17;
>
> (c) it would be unreasonable in all the circumstances for the public official to make a disclosure to a person mentioned in section 17.

Second, cls 37-39 define when an investigation under Part 3 and responses to investigations are inadequate. These definitions use legalistic tests that will be difficult for lay persons to interpret. We draw the Committee's attention particularly to the statements in cls 37(c), 38(1)(c) and 39(1) about 'no reasonable person' being able to reach the findings set out in the report, or consider that the action has been taken or is to be taken is adequate. The use of legalistic tests sends a strong signal deterring individuals from making disclosures. If protection against what may be serious consequences for a discloser hangs on the satisfaction of complicated legal tests, disclosers are more likely to choose non-disclosure.

We would therefore recommend that these tests are removed and replaced with tests more easily understood by a lay person. For example, in the Wilkie Bill, disclosures could be made to third parties where a number of objectively determined non-legalistic criteria are met (see cl 31(1)). The *Public Interest Disclosure Act 2010* (Qld) similarly has a set of criteria before disclosure is authorised to a third party; s 20 states:

> **20 When disclosure may be made to a journalist**
>
> (1) This section applies if—
>
> (a) a person has made a public interest disclosure under this chapter; and
>
> (b) the entity to which the disclosure was made or, if the disclosure was referred under section 31 or 34, the entity to which the disclosure was referred—
>
> (i) decided not to investigate or deal with the disclosure; or

[24] See notification requirements in cls 50 and 51(4).

(ii) investigated the disclosure but did not recommend the taking of any action in relation to the disclosure; or

(iii) did not notify the person, within 6 months after the date the disclosure was made, whether or not the disclosure was to be investigated or dealt with.

Similar criteria apply under s 19(3) of the *Public Interest Disclosures Act 1994* (NSW).

Alternatively, these could be substituted with subjective tests, for example, that 'the discloser honestly believes on reasonable grounds' that the investigation or the response to the investigation is inadequate. For example, the *Whistleblowers Act 1993* (SA) includes a subjective test in s 5(2):

> A person makes an appropriate disclosure of public interest information for the purposes of this Act if, and only if—
>
> (a) the person—
>
> *(i) believes on reasonable grounds that the information is true; or*
>
> *(ii) is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated;* and
>
> (b) the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure. (emphasis added)

Third, if a response to an investigation involves action taken by a Minister, Speaker or President it will never be inadequate, and in those circumstances the external disclosure provision will not be triggered.[25] Whether Ministers', Speakers' and Presidents' own conduct should be excluded from the definition of disclosable conduct has been raised above and discussed elsewhere, but there is a significant difference with this exclusion. In this context, the investigation is of public officials' conduct; preventing external disclosure because a response to an investigation involves ministerial action has the potential to severely limit the important safety net that external, ultimately public, disclosure provides. We therefore recommend that clauses 38(2) and 39(2) be removed.

(c) Public Interest Requirement

An external disclosure must satisfy a number of requirements under cl 26(1) item 2 including (e): 'The disclosure is not, on balance, contrary to the public interest'. Subclause 26(3) provides a list of matters that must be considered before determining whether disclosure is contrary to the public interest including: cabinet information, international relations, security and defence. Our concern that all the factors listed weigh against disclosure will be discussed below, but we question the need for this test at all. The balancing of competing public interests to determine whether disclosure is contrary to the public interest is a process familiar from public interest immunity cases before the courts[26] and freedom of information legislation.[27] Assessing the public interest in these contexts

25 Clauses 38(2) and 39(2).
26 *Sankey v Whitlam* (1978) 142 CLR 1.
27 *Freedom of Information Act 1982* (Cth).

involves a discretionary value judgment[28] and is a task usually undertaken by judges and trained freedom of information officers. This is a difficult assessment for a would-be discloser to make and in our view adds an unnecessary layer of complexity before an external disclosure can be made. We believe that there is no need for this test. External disclosure is the accountability process of last resort in this legislation,[29] and the Government will have ample opportunity to maintain secrecy of sensitive information by conducting effective and timely internal investigations when public interest disclosures are made. The public interest is appropriately served by the internal investigation procedures. We recommend that cl 26(1) item 2 (e) be removed.

If a public interest test is to be retained, it should incorporate a subjective test, for example, that the discloser honestly believes on reasonable grounds that disclosure is not, on balance contrary to the public interest, or a requirement that disclosers 'satisfy themselves, on reasonable grounds, that the public interest in disclosure of the particular disclosable conduct outweighs the public interest in protection of the … information'.[30]

Subclause 26(3) provides a list of matters that the discloser *must* have regard to before determining whether disclosure is contrary to the public interest. The list includes a range of matters familiar from freedom of information legislation that are all grounds for exempting documents from disclosure. Cabinet information, international relations, interstate relations, security and defence, legal professional privilege and the administration of justice are all there. No factors in favour of disclosure are listed, in contrast to the approach now adopted in the pro-disclosure freedom of information regimes.[31] Listing only factors weighing against disclosure in this way sends a message to would-be disclosers that areas of government that have traditionally maintained secrecy are still out of bounds.

If a public interest test is to be retained, we recommend that factors in favour of disclosure be listed to assist with the complex process of balancing competing public interests. Objects weighing in favour of disclosure could include the objects of the legislation and the seriousness of the disclosable conduct.

There is also a public interest element in clause 26(1) item 2 (f) which requires that 'no more information is publicly disclosed than is reasonably necessary in the public interest'. It is important that no more information is disclosed than is necessary to achieve the objects of the legislation, but requiring the discloser to make an assessment of the public interest here is another unnecessary burden. Section 27(4)(a) of the *Public Interest Disclosure Act 2012* (ACT) could serve as an alternative model:

> (4) In making a disclosure under this section, the person
>
> > (a) must disclose sufficient information to show that the conduct is disclosable conduct, but not more than is reasonably necessary to show that the conduct is disclosable…

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28 Exercise of the discretion is confined by the subject matter, scope and purpose of the legislation: *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275, 323; *Osland v Secretary to Dept of Justice (No 2)* (2010) 241 CLR 320, 329.

29 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector* (2009), [8.35 – 8.36].

30 See, for instance: Public Interest Disclosure (Whistleblower Protection) Bill 2012 (Cth) cl 33(2)(b) (Wilkie Bill).

31 See, for example: *Freedom of Information Act 1982* (Cth) s 11B.

(d) External Disclosure to any person and self-publishing

An external disclosure is defined in clause 26(1). Item 2 states it can be made to 'any person other than a foreign public official'. Private disclosure to a foreign public official is clearly inappropriate and we make no further comment on that, other than to note that when disclosure is made to a journalist and then published to the world, foreign public officials will become aware of it along with everyone else.

In New South Wales and the Australian Capital Territory external disclosures may be made to members of Parliament or journalists.[32]In the Wilkie Bill external disclosure was conceived in terms of disclosure to journalists publishing in a news medium.[33] In an age of converging media we commend the approach adopted in the current Bill that allows disclosure to any person, rather than to a journalist. This avoids further layers of uncertainty for a discloser who would have to deal with definitions of 'journalist' and 'news medium' when these are fluid concepts. Disclosure to journalists means, ultimately, accountability through public disclosure. The Wilkie Bill did not confine disclosure to journalists, but allowed disclosure to any person the discloser reasonably believed could assist 'to ensure that appropriate action is taken in relation to the disclosable conduct', which of course included journalists.[34]

However, in the current Bill there still seems to be a presumption that there will be disclosure to another person who will assist with taking action and ultimately publication. The Internet has enabled everyone to be a publisher and there is no longer any practical need to use a conduit. We recommend that external disclosures in 26(1) item 2 be allowed to any person, other than a foreign public official, *or* by publication.

4. Disclosable conduct: *'Conduct that is an abuse of public trust'* (cl 29 item 6)

Under cl 29 Item 8 of the Bill, 'disclosable conduct' includes 'abuse of public trust'. We recommend that this phrase be removed from the Bill. Our concern is that would-be disclosers may understand the phrase in a colloquial sense, rather than in its legal sense. This may lead to misunderstanding about the scope of the Act's protection. Further, we note that the phrase 'abuse of public trust' is not widely used in Australian law. It is also difficult to envisage conduct that would be an 'abuse of public trust' but would not fall under one of the other kinds of disclosable conduct, such as corruption[35] or contravention of a law.[36] While in principle we support the broad and flexible reach of 'disclosable conduct' under the Bill, we believe that the phrase 'abuse of public trust' may simply create unnecessary confusion.

32 *Public Interest Disclosure Act 2012* (ACT) s 27; *Public Interest Disclosures Act 1994* (NSW) s 19.
33 Public Interest Disclosure (Whistleblower Protection) Bill 2012 (Cth) cl 32 – 33.
34 Ibid cl 32(2).
35 Cl 29 Item 3(b).
36 Cl 29 Item 1.

5. The need for legal and professional assistance

(a) Legal and professional assistance in determining whether to make a disclosure

As the above discussion at 1, 3(a), 3(b) and 4 demonstrates, the Bill often presents a would-be discloser with difficult legal questions that must be determined before it can be ascertained whether the protections of the Bill will apply in their particular circumstances. We have recommended above that these tests be simplified and, where possible, a subjective reasonableness element be introduced.

The Bill anticipates that a potential discloser may be concerned whether their actions would be protected under the regime. Clause 26, Item 4, makes provision for a discloser to disclose information to a legal practitioner 'for the purpose of obtaining legal advice, or professional assistance, from the recipient in relation to the discloser having made, or proposing to make, a public interest disclosure'. We would make two comments on this.

First, we are very concerned that the costs associated with seeking legal advice about whether a particular disclosure would be covered by the regime, would be prohibitive, and therefore not 'encourage and facilitate the making of public interest disclosures by public officials' as required by the objects clause. Although removing some of the ambiguity and legal complexity of the tests may somewhat reduce the need to seek legal advice, this would not completely allay our concerns. Therefore, we would recommend that the government make funding available for people seeking legal advice to determine whether a disclosure would be protected by the regime. We recommend this rather than that the government make independent legal advisers available to assist would-be disclosers on the basis that a would-be discloser may be distrustful of government sponsored advisers, and be seeking advice that will potentially put the legal adviser in a position of legal conflict with the government.

Second, we would also recommend that the potential recipients of this type of advice be expanded. It is not understood why the disclosure to seek 'legal advice, *or professional assistance*' ought to be limited to a legal practitioner. Would-be disclosers may seek professional advice from elsewhere. The example that comes most readily to our minds is a union representative – particularly in light of the costs that may be associated with seeking advice from a legal practitioner. As such, we would recommend that Legal Practitioner Disclosure be changed to 'Professional and Legal Advice Disclosure', and the recipients be expanded to include, at the least, a designated union official.

(b) Legal assistance in bringing and defending claims

The Bill provides significant protection to disclosers from liability under Part 1, Division 1. The protections include protections from civil, criminal or administrative liability and also against a contractual or other remedy being enforced or exercised against the discloser (cl 10(1)). Despite these protections, often a discloser will have to expend considerable time and money in bringing or defending actions to which this protection applies. The potential for being involved in protracted legal proceedings before the protections are finally determined may act as a deterrent to disclosers.

We would recommend, therefore, that the Bill provide for legal assistance (again, we would recommend this be through funding rather than the appointment of lawyers) to a person who has purported to make a disclosure under the legislation and is involved in legal proceedings in relation to that disclosure. If the legal proceedings prove that the discloser was protected by the legislation,

or that the discloser had made a disclosure believing bona fide that it was protected by the legislation, the discloser would not be required to pay back any funding provided. If the legal proceedings prove that the disclosure not made bona fide, this amount could be recoverable.

We believe that government funded legal assistance upfront is preferable to a costs order after the fact to ensure that potential disclosers are not deterred by the prospect of litigation, and the costs that are inevitably associated with that.

Possible Constitutional Questions

In addition to our concerns about the adequacy of the protections afforded to persons making disclosures, we note two constitutional points that are raised by the Bill:

1. The operation of clause 24

Clause 24 of the Bill attempts to protect clauses 10, 14, 15 or 16 from future amendment unless a future provision 'is expressed to have effect despite this Part or that section'. We understand the reasons for including such a provision, and note the importance of ensuring protections afforded to persons making disclosures is as robust as possible. However, the High Court has on previous occasions held that legislative attempts to limit implied repeal by later enactments are ineffective.[37] Gibbs J explained in *Travinto Nominees Pty Ltd v Vlattas* that an ordinary piece of legislation, regardless of how important it may be in a particular area 'is not a fundamental or organic law to which other statutes are subordinate.'[38] As such, we would recommend the removal of the clause.

2. Immunities from operation of State/Territory legislation

We draw the Committee's attention to the need for the legislation to override State and Territory legislation in some respects. Clause 10 provides immunities for individuals who make public interest disclosures. This needs to override State/Territory legislation and the common law that may create such liability. This is necessary to achieve the objectives of the legislation. Legislation that provides immunity against State legislation has been found to create a constitutional inconsistency by the High Court in the past.[39] Clause 10(2) specifically mentions defamation and termination of contract, both state-based laws. It does not, however, expressly extinguish other State-based causes of action, for example, breach of confidence. While we are of the opinion that these may impliedly be extinguished, it may be prudent to insert the following words (in italics) in cl 10(1)(a): 'is not subject to any civil, criminal or administrative liability (including disciplinary action) *under the law of the Commonwealth and of the States and Territories* for making the public interest disclosure'.

We have concerns that cls 20 and 21 do not adequately address relevant State and Territory laws. Clause 20(1) and (2) make it an offence to disclose or use identifying information about a public information disclosure, unless one of the circumstances in 20(3) applies. This includes:

(a) the disclosure or use of the identifying information is for the purposes of:

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37 *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1, 35 (Gibbs J); *Rose v Hvric* (1963) 108 CLR 353; *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.

38 *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1, 35 (Gibbs J).

39 Section 109 of the Constitution provides that where there is an inconsistency between a law of a State and a law of the Commonwealth, the latter shall prevail.

(i) a law of the Commonwealth; or

(ii) a prescribed law of a State or Territory;

While we do not have further information at this stage about what State and Territory laws might be prescribed, there are a number of State/Territory laws that require disclosure in the course of court or tribunal proceedings.

Clause 21 expressly provides that identifying information is not to be disclosed to courts or tribunals. However, as a matter of statutory construction, this reference would be limited to federal courts or tribunals. The clause does not prevent disclosure being required by a prescribed State or Territory law under cl 20(3)(d) to a State court or tribunal. We would be concerned that if this were to occur, it would substantially undermine the objectives of cl 20 and the protection afforded to the identity of a discloser.

Because of the way the cross-vesting regime works in Australia, State courts are vested with federal judicial power. A litigant may chose to bring a federal action in a federal court (to which disclosure is not required under cl 21) *or* a State court (to which disclosure may be required under cl 20(3)(d)).

We therefore recommend that cl 21 be extended to disclosures to 'a federal, State or Territory court or tribunal'.

Yours sincerely

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