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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Inquiry into the Public Interest Disclosure Bill 2013

The Rule of Law Institute of Australia (RoLIA) thanks the Committee for the opportunity to make a submission to its inquiry into the *Public Interest Disclosure Bill (2013)* (the Bill).

The Institute is an independent and not-for-profit body. It does not receive any government funding.

The objectives of the Institute include:

- Fostering the rule of law in Australia, including the freedom of expression and the freedom of the media
- Reducing the complexity, arbitrariness and uncertainty of Australian laws
- Promoting good governance in Australia by the rule of law
- Encouraging truth and transparency in Australian Federal and State governments, and government departments and agencies
- Reducing the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

The Institute makes the following submission on the Bill:

SUBMISSION

Underlying principles

The rule of law relies upon freedom of speech and expression. Without such freedoms, the ability of the community to question and scrutinise the actions of government is greatly compromised.

The media plays a crucial role in this scrutiny. Without it, wrongdoing by government agencies that lack the will, the resources or the integrity to subject themselves to close internal or external examination, or that exercise influence over their minders, would not be brought to light.

The need for whistleblower protection

Inquiries into police corruption, such as the Fitzgerald Inquiry in Queensland, the Beach Inquiry in Victoria and the Wood Royal Commission in New South Wales, would not have been established without agitation from the media, whistleblowers and independent parliamentarians challenging the power of politicians, their staffers, governments and the executive.

For that reason, RoLIA welcomes the prospect of whistleblower legislation that provides a clear path for whistleblowers to report suspicious activities within Commonwealth government agencies, have their concerns investigated, their identity protected, and be kept safe from reprisals.

However, RoLIA is concerned that the legislation is inadequate in its coverage, unduly complex and overly restrictive in its prescription of the circumstances in which whistleblowers will be protected if they take their concerns to the media.

Narrow definition of "public interest disclosure"

Division 1 of Part 2 of the Bill appears to provide individuals with broad protections in the event that they make a "public interest disclosure". However, these protections only apply where the disclosure meets the narrow definition of a public interest disclosure as set out in Division 2 of Part 2 of the Bill, which seems largely intended to exclude conduct from public scrutiny.

Members of Parliament and their staff

The disclosure must concern "disclosable conduct" which is defined in clause 29. That definition does not include conduct by members of parliament and their staff. In RoLIA's view, the definition should be expanded to include them. Their absence from the scope of the Bill raises the worry that wrongdoing will not come to light because no individual is willing to be exposed to the risks of disclosure. This presents a significant limitation to the application of the Bill, and presents a missed opportunity to encourage greater faith in the political process through enhanced accountability.

Intelligence agencies

Clause 33 excludes the conduct of an intelligence agency from the definition of disclosable conduct. The rationale for this exclusion as set out in the Explanatory Memorandum is that "the clause is necessary as in certain circumstances intelligence agencies are authorised to engage in conduct in a foreign country, in the proper performance of a function of the agency, which might otherwise be inconsistent with a foreign law or, in certain circumstances, Australian law".

This explanation does not justify the broad exception for intelligence agencies. In RoLIA's view, there is no reason why intelligence agencies should be beyond the reach of the whistleblower law. It is fundamental to the rule of law that no person or organisation is beyond the law. This is of particular importance in relation to intelligence agencies that deal with highly sensitive material and often possess sweeping powers. Any concern about interference with an agency's activities in relation to a foreign country or law can be dealt with by way of a special process within the legislation or, at least, a tightly drafted exception rather than this overly broad exemption for all the "proper" activities of intelligence agencies.

Reasonable grounds and disclosable conduct

In order for a disclosure to constitute a protected public interest disclosure, the discloser must believe on "reasonable grounds that the information may concern one or more instances of disclosable conduct".

While it remains to be seen how courts will interpret reasonableness in this context, RoLIA is concerned that potential whistleblowers may be dissuaded from making a disclosure if they are unable to present a strong case that they are aware of disclosable conduct. This, coupled with the further difficulties described below, may act as a disincentive to disclose despite the fact that the objects of the Act as set out in s.6 include encouraging and facilitating the making of public interest disclosures by public officials and ensuring that disclosures are properly investigated and dealt with.

The table in clause 29 of the Bill sets out categories of "disclosable conduct". They include conduct that *perverts*, or *is engaged in for the purposes of perverting, or attempting to pervert*, the course of justice … or *involves, or is engaged in for the purpose of, corruption* of any other kind", that "*is based, in whole or in part, on improper motives*", that "*is an abuse of public trust*", that "*unreasonably results in a danger to the health or safety of one or more persons*" or that "*results in a danger to the environment*" [my emphasis].

The difficulty with this terminology is that it requires an individual who is concerned about such activity, to hold a belief "on reasonable grounds" that the conduct *is*, for example, *based on improper motives*. The purpose of disclosure is that there is a process for taking action about conduct that it is suspected to be based on improper motives. The discloser does not have resources or power to investigate the suspected conduct, the ability to determine if conduct is unreasonable nor the authority to reach a definitive conclusion about the conduct concerned. Moreover, the discloser's beliefs ought not to matter; the issue is whether it appears that there is disclosable conduct (see, for example, s.7(1)(a)(ii) of the *Public Interest Disclosure Act 2012 (ACT)* ("the ACT Act").

Internal disclosure

Clause 48 of the Bill gives wide discretion to the principal officer of an agency to decide not to investigate or continue to investigate a disclosure on grounds that include that "the information does not, to any extent, concern serious disclosable conduct" or that "the disclosure is frivolous, vexatious, misconceived or lacking in substance". While RoLIA accepts the need for some discretion to investigate, the range of grounds in clause 48, particularly the ones cited, could be inappropriately used, especially in the face of competing pressures from management or budgetary concerns. Section 20 of the ACT Act provides a preferable model in requiring the principal officer to justify the decision not to investigate on reasonable grounds. Indeed, the entire tenor of the ACT Act and its accompanying Explanatory Memorandum which stress the importance of disclosures and provide a clear path for their proper investigation rather than placing the onus the whistleblower to defend the disclosure (particularly if made externally, as discussed below) is much more consistent with rule of law principles that this Bill. Section 15 of the ACT Act also provides that a disclosure made to a Minister is an internal disclosure. While the Minister is then required to refer it to a disclosure officer, the importance of this provision is that the whistleblower will obtain the protections that come with an internal disclosure while alerting the particular Minister to the issue.

External disclosure

The Bill places very significant barriers in the way of making disclosures to the media and to other external parties (such as Members of Parliament).

In order to qualify for the protections offered by the Bill in Division 1 of Part 2, disclosure must be made only to "an authorised internal recipient", a legal practitioner in confined circumstances, or qualify as an emergency disclosure, unless it meets the nine requirements set out in Column 3 of the table in sub-clause 26(1). Those requirements include that the disclosure has already been made internally but the investigation or the response was "inadequate", and it meets a "public interest" test. Sub-clause 26(2) then sets out a further thirteen factors that must be taken into account in determining the public interest, the last of which is open-ended: "any other relevant factors". None of the factors include the asserted objects of the Bill such as accountability of the Commonwealth public sector and the encouragement and facilitation of public interest disclosures.

The meaning of "inadequate" is then further defined in clauses 37 to 39. A response to an investigation is only "inadequate" if "no reasonable person would consider that the action … [taken] is adequate" or "no action has been, is being, or is to be, taken in response to the recommendations" and a response is "not inadequate" if it involves action "that has been, is being, or is to be taken by" a Minister or the Speaker of the House of Representatives or the President of the Senate. As well as the impossibility of knowing whether action will actually be taken in the future, the definition of "inadequate" appears to put the onus on the potential discloser to make a series of judgement calls which he or she may not be in a position to do, and to make them accurately or to the satisfaction of any court that may be required to adjudicate on whether an external disclosure is subject to the protections of the Bill if it comes into law.

Similarly, the prescription of the circumstances in which an "emergency disclosure" is permitted is couched in extreme terms. And if disclosure is made to a legal practitioner for the purposes of obtaining advice or assistance (which, given the complexity of the legislation would be advisable, although potentially expensive), it cannot include disclosure about intelligence information or information with a security classification unless the legal practitioner holds the appropriate security clearance (notwithstanding that the reason the potential whistleblower may be seeking advice is because he or she does not know what the Bill does and does not cover). In practice, what the Bill would appear to require is that practitioners tell clients before hearing about the information in question that they cannot get advice from them if the information includes intelligence information or has a security classification.

Alternative processes enabling external disclosure to be made

The immense barriers placed in the way of a whistleblower who honestly and reasonably believes that he or she has information that tends to show disclosable conduct, but that there are good reasons for it not to be the subject of an internal disclosure are inconsistent with the stated objects of the Bill.

RoLIA proposes as an alternative that the Bill enable an external disclosure to be made in the circumstances prescribed in s.27 of the ACT Act. They include that an internal investigation has not investigated the disclosure, or not kept the discloser informed or not taken action despite clear

evidence. Significantly, they also provide for external disclosure, without prior internal disclosure, where the discloser holds an honest and reasonable concern that internal disclosure would result in a significant risk of detrimental action to the whistleblower or someone else, and it would be unreasonable in all the circumstances to insist on an internal disclosure.

The Explanatory Statement describes that provision in the following way:

> "There is also one circumstance allowed under the … [ACT Act] for a potential discloser to go direct to the media or a member of the Legislative Assembly without lodging their … [public interest disclosure] with one of the people listed under … section 15. This is in the rare situation where it would be unreasonable to require the person to try to go to a public sector entity to have the matter resolved, and there is a risk of detrimental action or harm to a person if the … [public interest disclosure] was to be lodged.
>
> The intent of this section is to establish a mechanism through which a report about grand corruption can be made and protections afforded without the discloser being left in fear of retaliation. A disclosure to the media or members should be seen as an avenue of last resort. The intent of the provision is to cover instances of significant corruption or maladministration so seriously embedded that there is no chance of the discloser receiving a fair hearing by either the entity responsible or the oversight agencies".

A further option would be to provide for a certificate to be issued by, say, the Ombudsman or the Inspector-General of Intelligence and Security in the case of an intelligence agency (noting their roles as authorised internal recipients of disclosures) as set out in clause 34 of the Bill, stating that the grounds for an external disclosure have been met. This would obviate the grave difficulty that currently faces a whistleblower in navigating the multiplicity of factors and discretionary decisions that have to be satisfied by the whistleblower in order to justify an external disclosure being made.

As the Bill currently stands, even if the whistleblower did obtain legal advice about whether a disclosure could be made externally, it is unlikely that advice could express a definitive opinion and the fact that advice was obtained will not of itself invoke the protective provisions in Division 1 of Part 2 of the Bill.

A certification process would provide certainty to a whistleblower who finds himself or herself in the invidious position of possessing information of potentially serious wrongdoing by a public sector agency but is concerned for his or her own position. The personal distress that being caught in this kind of situation can cause to well-intentioned, responsible employees have been documented by whistleblowers in the past, and should be an important factor in the design of whistleblower legislation.

Conclusion

RoLIA submits that the Bill in its current form does not meet its objects. It is inconsistent with its stated intentions of encouraging accountability of government and facilitating disclosures. The blanket exclusion of parliamentarians, their members of staff and intelligence agencies is unsatisfactory. The barriers put in the way of potential whistleblowers who may be motivated purely by the public interest and have few resources, especially compared to those available to government, are multiple and expressed in complex terms.

The overall impression given is that the purpose of the Bill is not to facilitate disclosures but to ensure that they are tightly controlled and kept confidential, away from any media scrutiny and even legal advice in the case of disclosures that might be about intelligence information. Measured against rule of law principles, it discourages the making of disclosures to the media, thereby limiting its capacity to independently investigate matters of public concern; it is overly complex; and it potentially increases the opportunity for discretionary decision-making by executive government.

If RoLIA can be of any further assistance please do not hesitate to contact me.

Yours faithfully

Kate Burns
Chief Executive Officer