To: Senate Legal and Con. Cttee from Civil Liberties Australia CLA

Submission on the *Public Interest Disclosure Bill 2013*

Civil Liberties Australia (CLA) thanks the Senate Standing Committee for Legal and Constitutional Affairs for the invitation to make a submission on the Inquiry into the *Public Interest Disclosure Bill 2013*, and contribute to the debate of Public Interest Disclosure (PID) legislation. The following will be confined to the *Public Interest Disclosure Bill 2013*.

CLA agrees with the Attorney-General that an open and transparent government is a key feature of a healthy democracy. We believe that the Government should introduce Public Interest Disclosure legislation to remedy the unsatisfactory position that presently exists at the federal level. We support the Attorney-General's view that a pro-disclosure culture that facilitates the disclosure and investigation of wrongdoing and maladministration in the public sector is in the interests of the Australian community. However, the *Public Interest Disclosure Bill 2013* proposed by the Attorney-General is insufficient and does not represent best practice.

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 that benefits both the Australian Government and the wider public. Within government, whistleblowers improve the integrity of the organisation by making problems known early and ameliorating the deleterious effects of corruption, misconduct and maladministration. Where the system fails, public whistleblowing positively affects the wider public by providing information that interests would prefer not be exposed, therefore enabling voters to make more informed voting choices.

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 Australian Government and the public 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 a government run on best practices.

This Bill's establishment of minimum standards of procedures for internal disclosures and the utilisation of external oversight agencies are supported. 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.

PID legislation operates at the junction between public information and confidential and sensitive information held by governments. In order to achieve the proper objectives, PID legislation must appropriately balance competing interests and distinguish between leaking, whistleblowing and 'selling secrets'. CLA supports the protections provisions contained in Division 1 as these are the essential skeleton upon which an effective PID scheme can be built. These provisions represent best practice. We submit that the *Public Interest Disclosure Bill 2013*sets tests that fail to achieve a balance that will yield a pro-disclosure culture as described by the Attorney-General in his second reading speech. In CLA's view, the expiration of a 90-day waiting period before any external disclosure can be made to an person other than a foreign official contained in the proposed Bill does not fully accord with the principle in *Guja v Moldova* that '[i]t is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public' (*Guja v Moldova* [2008] ECHR 144 at [73]). CLA submits that the scheme must have the capacity to deal with the most significant forms of corruption and the requirement that a person who has a reasonable belief that they possess information either wait 90 days where it is reasonably apparent that there is an inadequate investigation and/or response to an investigation, or that there exist a situation of *substantial and imminent danger to the health or safety of one or more persons* is not satisfactory. CLA submits that the Bill should be amended to provide that where a person has made a disclosure and the person believes on reasonable grounds that it is apparent that the entity empowered under the Bill to investigate the disclosure does not intend to adequately deal, or has not adequately dealt with, the issue, and alternative channels are not appropriate, or exceptional circumstances are present, then a person may make a disclosure under Part 2 Division 2 Sub-division D without waiting for 90 days to expire.

CLA submits that Section 38 (b) should be amended and the words *a reasonable period* should be replaced with a discrete timeframe. We believe that 90 days would be appropriate.

The definitions should be amended to provide clear and concise definitions of: *corrupt conduct*, *maladministration*, *misuse,* and *sensitive defence or intelligence information*. We submit that Section 30 (1) should be amended to expand the definition of a *public official* to include *a person who is or has been: a Senator, a Member of the House of Representatives, and staff employed under the Members of Parliament (Staff) Act 1984*. It is unacceptable that the people who occupy positions where the nation's most critical information is most openly provided and discussed are not covered by PID.

CLA submits that the table contained in Division 2, Subdivision A Section 26 Public Interest Disclosures should be amended to remove Item 2, Column 3 (i) *None of the conduct with which the disclosure is concerned relates to an intelligence agency*. We believe that a blanket exclusion of all aspects of the administration of intelligence agencies is not consistent with the object of creating a pro-disclosure culture that facilitates the disclosure and investigation of wrongdoing and maladministration in the public sector as stated by the AG. CLA advocates for a balance to be achieved whereby information which relates to an intelligence agency that does not cause reasonable damage to the security of the Commonwealth, defence of the Commonwealth or the international relations of the Commonwealth, should be capable of being disclosed.

CLA submits that a legislative amendment should be put be put forward to provide for that Division 2 Section 23(a) damage should be amended to *reasonable* damage. CLA does not believe that minor or inconsequential damage (such as mere embarrassment) should prohibit a disclosure, and that a court should have guidance through an objective reasonableness test in making a determination as to whether the damage is sufficient.

Alternatively, the Government could, at any time, support the *Public Interest Disclosure (Whistleblower Protection) Bill 2012* and the *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012* already before the House.

The introduction of whistleblower legislation at the federal level is welcomed by CLA and we support the efforts taken by the Government to change the culture of the public service. We believe that the Australian community should have access to information in order to make informed voting choices, and commend the Committee for inviting submissions. We are willing to further contribute to the whistleblowing debate and look forward to further co-operating with Committee in the future. For further information, please contact:

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