Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into the Public Interest Disclosure Amendment (Review) Bill 2022

From

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I would like to thank the Committee for inviting me to make this submission. I do so on my own behalf and not that of the University of Melbourne.

The attention being given by the Parliament to the state of whistleblowing legislation is as welcome as it is overdue. The original Public Interest Disclosure Act was passed almost a decade ago and its deficiencies have been on public display in several high-profile cases.

Perhaps the most egregious were the cases of Witness K and his lawyer Bernard Collaery, arising from the bugging by the Australian Secret Intelligence Service of the East Timor cabinet office at the time Australia and East Timor were negotiating revenue-sharing from the oil reserves in the Timor Sea. Although the spying itself and the initial confidential disclosure of it took place before the Public Interest Disclosure Act was enacted in 2013, the decision to prosecute Witness K and Collaery was taken in 2018, five years after the Act came into effect. Clearly it offered them insufficient protection, although the prosecution of Collaery was eventually withdrawn by the present Attorney-General in 2022 on the grounds that it was not in the public interest for the matter to be further pursued.

Another whistleblower, David McBride, is about to be tried on five charges, including unauthorised disclosure of information relating to alleged war crimes by Australian soldiers in Afghanistan. His original intended defence using the provisions of the Public Interest Disclosure Act was withdrawn after lawyers for the Commonwealth made a public interest immunity claim over parts of Mr McBride's evidence. The Commonwealth claim was made on the grounds that the evidence would have been detrimental to national security if it was

released. It prevented Mr McBride from using the evidence of two experts he was relying on to seek immunity from criminal liability under the Public Interest Disclosure Act.

Yet another whistleblower, Richard Boyle, is arguing before a court in South Australia that he is protected by the present Act. If he fails, he faces trial on 24 charges relating to his blowing the whistle on the use of garnishees on the bank accounts of businesses and individuals by the Australian Tax Office to recoup unpaid tax. Attempts by the ATO to have suppression orders imposed on the proceedings were ultimately unsuccessful but showed how keen the ATO was to have information about these tactics suppressed. Mr Boyle has given evidence to the court alleging that he was victimised and bullied by the ATO because he had blown the whistle.

Pre-dating the 2013 Act was the conviction of a former Customs official, Allan Kessing, for blowing the whistle on security weaknesses at Sydney Airport. He wrote an internal report, was dissatisfied with the response and in 2005 gave the report to Anthony Albanese, as Opposition spokesman on transport. It later found its way into The Australian newspaper. A $220m security upgrade at the airport followed but that did not save Kessing from criminal prosecution and a nine-month suspended jail sentence. The former prime minister, Kevin Rudd, used the case as a basis for promising reform to whistleblower protections and the 2013 Act was the result.

That Act and the proposed Bill now under review share several structural weaknesses. One concerns reprisals.

The Bill under review adds some reinforcements to the protection of whistleblowers from reprisals, but they go nowhere near far enough. The opportunity to take reprisals is handed to agencies on a plate by the requirement that a whistleblower must blow the whistle inside the public service first, either to the agency itself or the Ombudsman. In the case of investigative or intelligence agencies it is even more of a closed loop.

On what is known from the public record, Kessing and Boyle followed the procedure for prior internal disclosure and ended up facing criminal charges after they blew the whistle externally, Kessing to a politician and Boyle to the media.

Because the opportunity to exact reprisals is so great, and the means of disguising them as mere administrative measures are so ready to hand, the Parliament should provide much stronger protection. Specifically it should establish an independent whistleblower protection agency to receive notification of internal disclosures and track the response within the agencies concerned, with particular regard to the treatment of the whistleblower. Its writ should run over the intelligence and investigative agencies too. This agency should report to the Parliament, in the manner of the Auditor-General, not to the executive government. This tracking and accountability function is not done by the Ombudsman. According to its website, the Ombudsman's roles in relation to whistleblowing are to oversee and report on the operation of the Public Interest Disclosure Scheme, promote awareness and understanding of the Act, and provide information to disclosers and agencies.

A second structural weakness is the absence of specific reference to journalists as people to whom external disclosures may be made. The Act and the Bill refer to "anyone". Who is anyone? In reality, effective external whistleblowing involves disclosure to journalists, and this is recognised in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (s 1317AAD). That law concerns whistleblowers in the private sector. Why one law for the public sector and another for the private sector? Presumably those who drafted the Treasury law recognised the importance of differentiating journalists from "anyone".

More generally, so far as possible these laws should be harmonised and, best of all, consolidated so it is clear to everyone what Australia's overall federal whistleblowing scheme looks like. Having the private-sector whistleblower laws buried amonog Treasury laws is confusing and bizarre.

Related to the question of singling out journalists as people to whom protected disclosures can be made is the issue of defining who is a journalist and what is a news medium. The definition of a journalist in the Treasury laws differs from the definition in that part of the Commonwealth Evidence Act containing the shield laws (s126K). There, "journalist" means "a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium". And "news medium" means "any medium for the dissemination to the public or a section of the public of news and observations on news". These are the simplest, broadest

and best definitions of their kind to be found in Australian law, and should be incorporated into the whistleblowing legislation, public-sector and private.

A third structural weakness concerns the concept of the public interest. Very often there are competing public interests involved in whistleblower cases. For instance, blowing the whistle on security failures at Sydney Airport draws public attention to the existence of these weak points, yet remedying them in the end required exposing them, with the risk that some malefactor might exploit them. However, the public interest in exposing them turned out to greater than the public interest in keeping them secret because it got them fixed. In the three cases mentioned at the outset, the public-interest case was strong: Australia's spying on a friendly nation to steal a march in revenue negotiations; Australian soldiers allegedly committing war crimes; the Tax Office taking exceptionally aggressive measures to recoup tax. However, public-interest arguments have played a surprisingly small role in the way these cases have played out. This suggests the concept is underdone in the law's design.

The whistleblower laws need to offer much more guidance than they do at the moment in both the Act and the Bill about the factors to be weighed in assessing the public-interest justification for an act of whistleblowing. Once again, the shield laws offer an example of how this might be done. They require a balance to be struck between the public interest in the administration of justice and the public interest in disclosure of information and in journalists being able to obtain information. In a whistleblowing case, if there is evidence that the misconduct was real and that an internal disclosure got nowhere, the balance would tilt decisively in favour of disclosure through external whistleblowing, and the stronger the public interest, the more decisive the tilt.

The Bill under review contains basically a cut-and-paste table from the existing Act where the public interest gets an important mention. This table appears in s26 of the existing Act and sets out matters concerning disclosers, recipients and requirements for public interest disclosures. Column 3 of that table states a requirement that "the disclosure is not, on balance, contrary to the public interest". This convoluted double negative, which itself invites a minimalist reading of the concept, leaves unstated what considerations ought to be weighed in that balance. It is easy to imagine embarrassment to the Government or the agency as being considered contrary to the public interest. This consideration should be explicitly

excluded, just as similar considerations are excluded in laws dealing with applications to courts for suppression orders.

A separate issue concerns the relative priority to be given to the interests protected under the PID legislation compared with competing interests, as in the McBride case, where a public-interest immunity, based on a claim of detriment to national security, deprived McBride of his primary defence. Surely these competing public-interest claims should be more highly contestable than that.

There are a couple of less complex yet important issues arising from the Bill.

First, the threshold for seriousness of the conduct on which the whistle may be blown seems to have been raised in the proposed Bill. The existing Act sets the threshold at “conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official”. The proposed Bill replaces this with “conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action resulting in the termination of the official’s engagement or appointment”. So instead of conduct attracting merely disciplinary action it would now become conduct serious enough to make it a sackable offence. What is the justification for raising the threshold of seriousness?

Second, Members of Parliament and their staff have been added to the classes of persons excluded from the definition of “public official” under subsection 70(3A). The current Act excludes only judicial officers and members of a royal commission. The exclusion of judicial officers and royal commission members is explicable under the principle of the separation of powers and I suppose the same argument can be made for MPs and their staffs. However, events concerning the workplace culture inside Parliament House that have come to light in recent years raises the question of how the whistle might be blown on their misconduct. Perhaps the provisions of the NACC legislation will provide the answer, but for now it remains an open question.

Finally, as a general proposition whistleblowing is bound up with organisational culture, particularly in relation to transparency, and to the extent possible it would be desirable for whistleblowing legislation to be expressed and contextualised in a way that encourages a culture of openness and accountability. Fundamentally there is a question whether the PID

procedures are robust enough to contribute to the development of such a culture. The weaknesses described in this submission suggest they are not.

I feel privileged to have been asked to make this submission and am willing to assist the Committee further if required.

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