

## Public Interest Disclosure Bill 2013

- 3.1 The inquiry into the Public Interest Disclosure Bill 2013 (the PID Bill) follows the Committee's inquiry into the Wilkie Bill in 2012.
- 3.2 The Senate Legal and Constitutional Affairs Committee is also conducting an inquiry into the Public Interest Disclosure Bill 2013. Where appropriate, the Committee has used submissions to the Senate inquiry. All the submissions to that inquiry can be found on that Committee's website.<sup>1</sup>
- 3.3 The Committee has focussed on the major issues of the PID Bill which were provided in evidence. Some of the issues that arose during this inquiry were previously raised during the inquiry into the Wilkie Bill and have been addressed in Chapter 2.

### Detail of the Bill

- 3.4 The PID Bill contains five parts:
  - introduction;
  - protection of disclosers;
  - investigations;
  - administrative matters; and
  - miscellaneous.

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1 Senate Legal and Constitutional Affairs Committee <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/index.htm)>

## Background

- 3.5 The Committee inquiry process leading to the introduction of the PID Bill into the House of Representatives on 21 March 2013 was outlined in Chapter 1.
- 3.6 Many participants in the inquiry express a view that the introduction of the PID Bill was long overdue.
- 3.7 Professor AJ Brown describes:
- ...it is now clear that current legal and administrative arrangements in the Commonwealth's public integrity system are not enough. Comprehensive legislative reform remains needed to establish the systems, set the standards for and remove the legal barriers that currently impede the encouragement and protection of public interest whistleblowing by Commonwealth officials, officeholders, contractors and contractor employees.<sup>2</sup>
- 3.8 Transparency International Australia state that they have urged successive Commonwealth governments to enact a comprehensive public interest disclosure Act covering all Commonwealth officials.<sup>3</sup>
- 3.9 The Tax Justice Network Australia (TJN Australia) believes there is a need for protection for whistleblowers in the public sector that is in line with OECD Working Group on Bribery's assessment and recommendations.<sup>4</sup>
- 3.10 Although there are protections contained within existing legislation, the Committee was told by several submitters that the current protections contained in section 16 of the *Public Service Act 1999* are wholly inadequate and that legislative reform is essential and long overdue.<sup>5</sup> This is discussed later in this chapter.
- 3.11 Professor AJ Brown considers there are 10 key principles that need to be reflected in any public interest disclosure legislation. These include:
- it must promote an 'if in doubt can report' attitude for public officials;
  - alleged public interest related wrongdoing in all areas of Commonwealth government should be covered;
  - any carve-outs or special procedures should be fully justified, not just blanket exclusions or exemptions;

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2 Professor AJ Brown, *Submission 14*, p. 2.

3 Transparency International Australia, *Submission 7*, p. 1.

4 Tax Justice Network Australia (TJN Australia), *Submission 11*, p. 3.

5 Community and Public Sector Union (CPSU), *Submission 9*, p. 1; *Blueprint for Free Speech*, *Submission 5*, p. 1, TJN Australia, *Submission 11*, p. 3.

- obligations on agencies to protect and support should be direct, proactive and preventative;
- implementation should be supported by a single oversight agency;
- oversight agency should be properly resourced to do the job;
- reporting and protection systems should not be complaint dependent;
- rules on when officials may/should disclose to the media should be clear and workable;
- compensation remedies should be clear, simple and accessible; and
- there should be basic safeguards against abuse/misuse of system.<sup>6</sup>

## PID Bill

- 3.12 The introduction of legislation for public interest disclosure has been generally welcomed by participants in the inquiry.
- 3.13 There are, however, concerns about some aspects of the PID Bill. These concerns range from aspects of drafting to the scope of the proposed scheme.<sup>7</sup>
- 3.14 Comments also detail that the proposed legislation is not entirely in line with the recommendations of the LACA Report and progress in state legislation.<sup>8</sup>
- 3.15 The Accountability Round Table submits that the PID Bill in its current form falls short of best practice and considers that it fails to meet its stated objectives.<sup>9</sup>
- 3.16 The National Tertiary Education Union states:
- The Union broadly supports protections for public officials who act as whistleblowers, we do not believe that this legislation adequately performs this task.<sup>10</sup>
- 3.17 Dr Suelette Dreyfus considers there are several problems with the PID Bill including that it is too confusing and complicated in parts and inhibits the discloser in making their disclosure. Additionally she notes that the PID Bill does not apply to politicians or matters concerning public policy.<sup>11</sup>

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6 Professor AJ Brown, *Submission 14*, p. 4.

7 Australian Broadcasting Corporation (ABC), *Submission 15*, p. 1.

8 See for example *Blueprint for Free Speech, Submission 5*, p. 1; Transparency International Australia, *Submission 7*, p. 1.

9 Accountability Round Table, *Submission 2*, p. 2.

10 National Tertiary Education Union, *Submission 6*, p. 3.

11 Dr Suelette Dreyfus, *Submission 12*, p. 2.

3.18 Mr Howard Whitton submits that due to the complexity of the PID Bill:

It is likely that most intending whistleblowers will need a lawyer at their elbow to understand the many procedural steps required for a disclosure to be granted 'protection' and even then it is not possible to be certain *ab initio*<sup>12</sup> that a given disclosure will in fact be protected.<sup>13</sup>

3.19 Civil Liberties Australia considers the role of public interest disclosure legislation is to encourage the reporting of wrongdoing but criticise the PID Bill as not representing best practice.<sup>14</sup>

3.20 The National Whistleblowers Information Centre regard the bill with some concern. They state:

Unless there are very dramatic and significant improvements to this Bill, it will do little to promote public confidence in the legislation and do nothing to encourage whistleblowers to come forward or to protect whistleblowers when they do so.<sup>15</sup>

3.21 The Rule of Law Institute of Australia state:

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.<sup>16</sup>

3.22 In contrast, the Ombudsman is supportive of the introduction of a public interest disclosure scheme and the role that the PID Bill proposes for the office of the Commonwealth Ombudsman.<sup>17</sup>

3.23 The IGIS also supports the objectives of the PID Bill and considers that the oversight and investigative functions allocated to the IGIS appear to align well with the current role of the IGIS.<sup>18</sup>

3.24 In spite of their concerns with the bill the National Whistleblowers Information Centre contend that the PID Bill must become law. They contend:

It is easier for public opinion or political policy to fix ineffective public interest disclosure legislation than it is to force any

12 *Ab initio* from the time when a law comes into force

13 Mr Howard Whitton, Submission no. 25 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 3.

14 Civil Liberties Australia, *Submission 18*, p. 1.

15 National Whistleblowers Information Centre, *Submission 22*, p. 4.

16 Rule of Law Institute of Australia, Submission no. 8 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 4.

17 Office of the Commonwealth Ombudsman, *Submission 1*, p. 9.

18 Inspector-General of Intelligence and Security, *Submission 8*, p. 4.

Government to introduce legislation which would promote public sector accountability, public interest disclosures and whistleblower protection.<sup>19</sup>

## Introduction

- 3.25 This section of the PID Bill provides details on the commencement, objects, provides an overview and also defines terms.
- 3.26 Dr Kim Sawyer comments that the proposed legislation is over-focussed on defining terms such as public official, agencies, detrimental actions and general penalties. He considers that this is an excessively bureaucratic approach which is likely to be ineffective.<sup>20</sup>
- 3.27 The National Whistleblowers Information Centre is unsure why the bill does not use the term 'whistleblower', considering it incomprehensible that individuals who make a public interest disclosure are not referred to as whistleblowers. They believe this is another example of systemic public sector discrimination and prejudice against whistleblowers.<sup>21</sup>
- 3.28 Professor AJ Brown considers that the PID Bill could benefit from being further simplified for maximum clarity and certainty. He contends that the current 'simplified outline' sections such as those in clauses 9 and 25 may be misinterpreted to indicate that the PID Bill does more than it actually does.<sup>22</sup>

## Protection of disclosers

- 3.29 The protections to disclosers offered under the PID Bill are covered in Part 2 of the bill. The PID Bill ensures that an individual who makes a public interest disclosure is not subject to any civil, criminal or administrative liability for making the disclosure. This does not apply to false or misleading statements by the individual making the public interest disclosure.
- 3.30 The proposed legislation provides support and protection through a combination of deterrence and compensation. This includes orders under

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19 National Whistleblowers Information Centre, *Submission 22*, p. 4.

20 Dr Kim Sawyer, *Submission 2*, p. 1.

21 National Whistleblowers Information Centre, *Submission 22*, p. 5.

22 Professor AJ Brown, *Submission 14*, p. 5.

the Federal Court and Federal Circuit Court as well as remedies under the FWA.

- 3.31 The bill provides direct support by the creation of a criminal offence for reprisals, and avenues for civil remedies. The bill highlights that prosecutions relating to reprisals will focus on the individual making the reprisal, rather than attempting to prove that a public interest disclosure was made.
- 3.32 Under the PID Bill it will be an offence to identify an individual who makes a public interest disclosure.

### Existing protections

- 3.33 There are existing protections for public servants contained in section 16 of the *Public Service Act 1999* which has been in place for over a decade.
- 3.34 This framework provides explicit protection for APS employees from victimisation and discrimination for reporting suspected breaches of the APS Code of Conduct. In addition, the Public Service Regulations provide a framework for the investigations of such reports.<sup>23</sup>
- 3.35 The Australian Public Service Commission (APSC) notes that these provisions will be amended from 1 July 2013 when the *Public Service Amendment Act 2013* and the *Public Service Regulation 2013* come into force. Some aspects of the scheme will be clarified ensuring that a complaint made by an APS employee will be handled under the framework that is best able to provide an appropriate outcome.<sup>24</sup>
- 3.36 The APSC observes that the government has announced its intention to introduce a bill to make consequential amendments in support of the PID Bill, including the repealing of section 16 of the *Public Service Act 1999* and the *Parliamentary Service Act 1999*.<sup>25</sup>
- 3.37 The APSC raises the concern that the proposed legislation does not consider the statutory responsibilities of statutory office holders. Specifically the APSC notes that the PID Bill does not oblige the Ombudsman and IGIS to transfer matters which are the statutory responsibilities of the Public Service Commissioner or the Merit Protection Commissioner to those office holders.<sup>26</sup>
- 3.38 The APSC considers that this could present a risk where providing multiple means to make disclosures could result in forum shopping. The

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23 Australian Public Service Commission (APSC), *Submission 3*, p. 1.

24 APSC, *Submission 3*, p. 1.

25 APSC, *Submission 3*, p. 1.

26 APSC, *Submission 3*, p. 2.

APSC warns that this could have the unintended consequence of undermining confidence in public administration.<sup>27</sup>

- 3.39 In contrast, the Ombudsman considers that the PID Bill does recognise the existing integrity framework and role of the investigative agencies.<sup>28</sup>
- 3.40 The Ombudsman indicates that as there are already existing mechanisms for the investigation of most serious problems, the nature of the problem should determine the means of investigation.<sup>29</sup>
- 3.41 For example the Ombudsman suggests that a public interest disclosure about fraud should be dealt with under the Fraud Control Guidelines and a disclosure about a code of conduct violation should be investigated in accordance with the procedures of the Australian Public Service Commission.<sup>30</sup>
- 3.42 The Ombudsman believes that having a flexible approach to investigating public interest disclosures means that existing investigative processes, experiences and expertise are recognised and can be appropriately utilised.<sup>31</sup>

## False and misleading statements

- 3.43 Clause 11 of the PID Bill provides that an individual who makes a public interest disclosure that is false or misleading, will not be protected under the provisions of this bill.
- 3.44 A wide range of submitters question the wording of this clause and express concern that the specific language used limits protection.
- 3.45 The ABC believes that protection should only be lost for disclosures which are 'knowingly' false or misleading. They note that, as currently drafted, a whistleblower would not be protected by this scheme if the information they disclosed turns out to be false or misleading, despite their having made the disclosure on reasonable grounds.<sup>32</sup>
- 3.46 The Joint Media Organisations<sup>33</sup> and the Special Broadcasting Service (SBS)<sup>34</sup> agree that protection should not be provided for knowingly making a false and misleading statement.

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27 APSC, *Submission 3*, p. 2.

28 Office of the Commonwealth Ombudsman, *Submission 1*, p. 7.

29 Office of the Commonwealth Ombudsman, *Submission 1*, p. 7.

30 Office of the Commonwealth Ombudsman, *Submission 1*, p. 8.

31 Office of the Commonwealth Ombudsman, *Submission 1*, p. 8.

32 ABC, *Submission 15*, p. 2.

33 Joint Media Organisations, *Submission 20*, p. 9.

34 Special Broadcasting Service (SBS), *Submission 21*, p. 1.

- 3.47 The Accountability Round Table consider that the definition of what constitutes a public interest disclosure is too strict and could lead to a potential whistleblower acting in good faith, losing protection if their disclosure is subsequently found to be false, mistaken either wholly or partly or misleading.<sup>35</sup>
- 3.48 A range of other submissions<sup>36</sup> support the inclusion of the term 'knowingly' in clause 11.
- 3.49 Several submitters<sup>37</sup> suggest that the term 'recklessly' should also be included. However Professor AJ Brown cautions that the term 'recklessly' should be avoided, as it is too uncertain and in his view could raise doubts in the mind of the discloser as to whether the PID Bill will really protect them at all.<sup>38</sup>

## Protection from reprisals

- 3.50 An individual who makes or plans to make a public interest disclosure will be protected from reprisal action under the PID Bill.
- 3.51 The National Whistleblowers Information Centre states from the outset that taking action to stop a reprisal or detriment or a threat of this is not a protection, it is remedial action. The whistleblower has already suffered the action, therefore in the opinion of the National Whistleblowers Information Centre, they cannot be protected from something that has already happened.<sup>39</sup>
- 3.52 The TJN Australia would like to see better protections for those who make public interest disclosures in the public sector. They contend that there needs to be comprehensive protection against victimisation, discrimination, disciplinary actions, and employment sanctions for legitimate whistleblowing actions.<sup>40</sup>
- 3.53 The Law Council considers that the protection provided by the PID Bill is so qualified that it is unlikely to provide encouragement to individuals to make public interest disclosures in many situations.<sup>41</sup>

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35 Accountability Round Table, *Submission 2*, p. 8.

36 Australian Council of Trade Unions (ACTU), *Submission 10*, p. 2; CPSU, *Submission 9*, p. 7; Transparency International Australia, *Submission 7*, p. 1; Law Council, *Submission no. 24 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013*, p. 6; Professor AJ Brown, *Submission 14*, p. 13.

37 ACTU, *Submission 10*, p. 2; CPSU, *Submission 9*, p. 7.

38 Professor AJ Brown, *Submission 14*, p. 5.

39 National Whistleblowers Information Centre, *Submission 22*, p. 12.

40 TJN Australia, *Submission 11*, p. 5.

41 Law Council of Australia, *Submission no. 24 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013*, p. 5.

- 3.54 The Accountability Round Table suggests that the use of the term ‘reprisals’ is not appropriate, as in their opinion it describes situations where physical force is used to cause physical injury or take property in retaliation for a perceived wrong.<sup>42</sup>
- 3.55 The CPSU is pleased that the PID Bill explicitly states that reprisal action is a matter covered by the FWA. They consider this provides an option for a resolution process that is less formal and more easily accessible as an alternative or prior to Federal Court Action.<sup>43</sup>
- 3.56 The Accountability Round Table state that they believe that the penalty for the offence of taking or threatening a reprisal are very low, and should be raised from six months to two years.<sup>44</sup>
- 3.57 The Law Council contends that the PID Bill provides very little protection from reprisal for contractors, particularly in respect to the gaining of repeat business from an agency which can be a significant aspect of a contractor’s financial viability.<sup>45</sup>

## Compensation

- 3.58 The bill provides that the Federal Court or Federal Circuit Court may make an order for compensation if an individual suffers loss, damage or injury as a result of reprisal or reprisal that is threatened.
- 3.59 Professor AJ Brown welcomes the PID Bill’s provision that an aggrieved person who suffers adverse treatment in the course of their employment may seek appropriate remedies under the FWA. In addition, he praises the intent of the PID Bill to protect whistleblowers from adverse consequences and not just deliberate reprisals.
- 3.60 He recommends that a number of amendments are made to ensure that the PID Bill is able to achieve both these outcome and meet other criterion of best practice. Examples of these include:
- the full nature of damages suffered by employees who fail to be supported and protected properly are reflected in the compensation provisions;
  - the Federal Court remedies should be supported by exemplary damages and costs provision as per the FWA; and

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42 Accountability Round Table, *Submission 2*, p. 14.

43 CPSU, *Submission 9*, p. 7.

44 Accountability Round Table, *Submission 2*, p. 15.

45 Law Council, Submission no. 24 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 12.

- the criminal penalties available in the PID Bill are weaker than in all other Australian jurisdictions and could imply that the Commonwealth does not value protecting whistleblowers as much as the State governments.<sup>46</sup>
- 3.61 The CPSU<sup>47</sup> and the ACTU<sup>48</sup> raise concern about the disparity of coverage between the PID Bill and the FWA. Clause 22 of the PID Bill limits the making of a public interest disclosure as a process or proceeding under a workplace law for employees whereas the general protections of the FWA are broader and apply to employees and independent contractors.
- 3.62 The ART would like to see best practice in terms of compensation. This would include the PID Bill providing more detail of the protections available under the FWA and removal of any caps on compensation.<sup>49</sup>
- 3.63 Blueprint for Free Speech is very clear that an individual who makes a public interest disclosure under this scheme should not have any compensation to which they are entitled capped. Additionally, they want the individual making the disclosure have available to them the cost protections of section 570 of the FWA.<sup>50</sup>
- 3.64 The CPSU<sup>51</sup> and the ACTU<sup>52</sup> would like to see the PID Bill amended to include the 'no costs' provision of the FWA.
- 3.65 The CPSU would like to see explanatory and educational material provided to support the legislation that explains the different available remedies and procedures and clearly emphasises the more accessible FWA remedies where applicable.<sup>53</sup>
- 3.66 Many submitters<sup>54</sup> to the inquiry suggested that a compensation system similar to that of the UK should be further considered.

## Protection of identity

- 3.67 The PID Bill makes it an offence to identify an individual who has made a public interest disclosure. However, clause 44 of the bill provides that a

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46 Professor AJ Brown, *Submission 14*, p. 12.

47 CPSU, *Submission 9*, p. 7.

48 ACTU, *Submission 10*, p. 2.

49 Accountability Round Table, *Submission 2*, p. 15.

50 Blueprint for Free Speech, *Submission 5*, p. 6.

51 CPSU, *Submission 9*, p. 8.

52 ACTU, *Submission 10*, p. 2.

53 CPSU, *Submission 9*, p. 8.

54 See for example Professor AJ Brown, *Submission 14*, p. 12, Mr Howard Whitton, *Submission no. 25* to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 8, Accountability Round Table, *Submission 2*, p. 1, Blueprint for Free Speech, *Submission 5*, p. 6.

disclosers name and contact details are to be provided, if known, to the principal officer of the agency which has been allocated the handling of the disclosure.

- 3.68 The issue of the protection of the identity of the discloser is a concern for the Accountability Round Table. They consider that there should be an exception to providing the name and contact details of the discloser to the authorised officer.<sup>55</sup>
- 3.69 Blueprint for Free Speech share this concern, considering that this creates a risk of reprisal and is out of step with international best practice. They would like to see a disclosure's identity only revealed when consent has been given.<sup>56</sup>
- 3.70 Transparency International Australia considers that this raises risk for adverse consequences for the discloser and question the need for this provision.<sup>57</sup>
- 3.71 The ABC<sup>58</sup> and the Joint Media Organisations<sup>59</sup> propose that along with anonymous disclosures, disclosures should be able to be made 'pseudonymously'. They consider this would enable contact but without having to provide identifying information.

### **Criminal liability for the use of anonymous source information**

- 3.72 The ABC raises the concern that under the current provisions of the PID Bill, media could be presumed criminally liable for using or disclosing confidential source information as part of their usual work. They would like to see an amendment to the PID Bill to prevent this.<sup>60</sup>
- 3.73 The Joint Media Organisations also oppose the presumption of criminal liability for the use and or disclosure of identifying information in the course of news gathering.<sup>61</sup>

### **Public interest disclosures**

- 3.74 Part 2 of the PID Bill defines public interest disclosures, and the types of conduct that may warrant a public interest disclosure.

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55 Accountability Round Table, *Submission 2*, p. 14.

56 Blueprint for Free Speech, *Submission 5*, p. 9.

57 Transparency International Australia, *Submission 7*, p. 2.

58 ABC, *Submission 15*, p. 4.

59 Joint Media Organisations, *Submission 20*, p. 5.

60 ABC, *Submission 15*, p. 10.

61 Joint Media Organisations, *Submission 20*, p. 6.

- 3.75 This section outlines who may make a public interest disclosure and what it may consist of. It also provides details of the information that should not be in a public interest disclosure.
- 3.76 Importantly, the bill specifies that conduct is not considered disclosable if it relates only to government policies that an individual disagrees with.
- 3.77 Public interest disclosures are categorised into internal, external and emergency disclosures and a legal practitioner disclosure. The conditions for each disclosure vary.
- 3.78 This section outlines how a disclosure may be escalated from an internal to an external or emergency disclosure.

## Public interest disclosures

- 3.79 The definition of a public interest disclosure is defined by the circumstances under which it is made. The Explanatory Memorandum states:
- A disclosure will be an internal disclosure if made to an authorised internal recipient... and the discloser believes on reasonable grounds that the information concerns one or more instances of disclosable conduct.<sup>62</sup>
- 3.80 External disclosures and emergency disclosures have a more specific set of requirements, as does a legal practitioner disclosure.
- 3.81 The PID Bill has a range of exceptions for what can be considered a public interest disclosure. These include:
- whether the disclosure is contrary to the public interest;
  - no more information is disclosed than is reasonably necessary in the public interest;
  - the disclosure is not contrary to a designated publication restriction;
  - it does not consist of or include intelligence information; and
  - none of the conduct to which the disclosure is concerned relates to an intelligence agency.

## External disclosures

- 3.82 The PID Bill outlines a list of factors that need to be considered before an external disclosure could be considered a public interest disclosure.
- 3.83 The CPSU appreciates that the scheme allows external disclosures where an internal disclosure has been made but not sufficiently acted upon as well as in emergency situations. They consider, however, that the PID Bill

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62 Public Interest Disclosure Bill 2013, Explanatory Memorandum, p. 14.

is not sufficiently clear about the requirements that need to be fulfilled before an external disclosure may be made which may lead to uncertainty on the part of a discloser.<sup>63</sup>

3.84 Additionally the CPSU notes that the prerequisites for an external disclosure are based on an objective test, whereas they propose a subjective test. Blueprint for Free Speech also considers a subjective test is more appropriate for an external disclosure rather than an objective test.<sup>64</sup>

3.85 Professor AJ Brown explains:

In general, an external disclosure (other than an emergency disclosure) will only retain protection if an investigation and/or response to an internal disclosure is 'inadequate'. The tests for this are objective, and based on overly high legal standards (e.g. 'no reasonable person would consider that the action ... in response to the recommendations is adequate'). These standards are also inconsistent with the 2010 Government Response (Recommendation 21) which undertook that protection would still apply to an external disclosure if a sufficient subjective standard was met, i.e. 'the discloser has a reasonable belief that the response was not adequate or appropriate'.<sup>65</sup>

3.86 Professor AJ Brown regards the public interest test in clause 26(3) as being inappropriate and with the Accountability Round Table<sup>66</sup>, the Joint Media Organisations<sup>67</sup>, the ABC<sup>68</sup> and the CPSU<sup>69</sup> raises the concern that the test lists 13 factors mitigating against disclosure, and none mitigating in favour of disclosure.

3.87 The Joint Media Organisations state:

The framing of this list skews the outcome against external disclosure, because there is not a complementary list of factors that can be used to determine whether such a disclosure is in the public interest.<sup>70</sup>

3.88 Professor AJ Brown goes further to propose the relevant section of the PID Bill should simply be deleted, since there already is general public interest test regarding public (external) disclosures at clause 26(2)(f) which states

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63 CPSU, *Submission 9*, p. 6.

64 Blueprint for Free Speech, *Submission 5*, p. 4.

65 Professor AJ Brown, *Submission 14*, p. 10.

66 Accountability Round Table, *Submission 2*, p. 12.

67 Joint Media Organisations, *Submission 20*, p. 3.

68 ABC, *Submission 15*, p. 6.

69 Blueprint for Free Speech, *Submission 5*, p. 6.

70 Joint Media Organisations, *Submission 20*, p. 3.

that no more information is publicly disclosed than is reasonably necessary in the public interest.

3.89 Mr Andrew Wilkie MP states:

The current PID Bill weaves a web of extraordinarily complicated decisions to negatively frame the circumstances in which public interest disclosures are protected...The result is the legislation is both complex and ambiguous.<sup>71</sup>

3.90 The Accountability Round Table also consider that the definition does not address the situation where there is no safe avenue to make an internal disclosure.<sup>72</sup>

3.91 The National Tertiary Education Union states:

The effect is that a whistleblower must first navigate through a complex framework to determine whether it is safe to make an external disclosure, else risk potential jail terms or loss of employment.<sup>73</sup>

3.92 Mr Andrew Wilkie MP suggests that the provisions in the current PID Bill place extreme and unrealistic limitations on external disclosures, which in his opinion, effectively ensure that external disclosures would very rarely be protected.<sup>74</sup>

3.93 Blueprint for Free Speech comments that it is not always possible to make an internal disclosure before an external disclosure, as required by the provisions of the PID Bill.<sup>75</sup> They suggested the wording of the *Public Interest Disclosure Act 2012 (ACT)* as being more suited to what they consider is the balance the Government is trying to achieve.

3.94 The CPSU recommends that if the PID Bill passes, further information and guidance is required for those covered by the legislation regarding when it is appropriate to make an external disclosure.

3.95 Dr Suelette Dreyfus states:

...the PID Bill creates a requirement that the discloser first make their disclosure internally and only when (on an objective basis) the investigation into their wrongdoing is not adequately dealt with are they able to disclose externally. By this point, the

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71 Mr Andrew Wilkie MP, *Submission 19*, p. 2.

72 Accountability Round Table, *Submission 2*, p. 7.

73 National Tertiary Education Union, *Submission 6*, p. 3.

74 Mr Andrew Wilkie MP, *Submission 19*, p. 1.

75 Blueprint for Free Speech, *Submission 5*, p. 3.

discloser might have already faced reprisal or the wrongdoing to which they intended to expose has become worse or irreversible.<sup>76</sup>

## Emergency disclosures

- 3.96 The Accountability Round Table consider that the list of requirements for an emergency disclosure is too limited as it is confined to imminent as well as substantial danger to health and safety of one or more persons. They believe that the requirement of imminence should be removed.<sup>77</sup>
- 3.97 The Joint Media Organisations recommend expanding the scope of allowable emergency disclosures beyond that of just health and safety circumstances where a person may be endangered.<sup>78</sup>
- 3.98 Professor AJ Brown questions the restrictive and onerous nature of the grounds for an emergency disclosure. He states that the likely result is an increase in the risk of dangers manifesting into actual harm as it requires that someone must actually be on the brink of harm before the disclosure is protected.<sup>79</sup>
- 3.99 The Law Council state that the external and emergency categories of public interest disclosures have significant cumulative requirements and preconditions.<sup>80</sup> They consider that the provisions for these categories do not adequately support disclosures in the public interest as they do not give sufficient clarity about when there will be protection.<sup>81</sup>

## Legal practitioner disclosure

- 3.100 Westmead Hospital Whistleblowers raise the important point that often the whistleblower may not realise that they are actually whistleblowing and may not seek legal advice or check the legislation to ensure that they disclose to the correct person about the correct information in an approved manner.<sup>82</sup>
- 3.101 Dr Gabrielle Appleby, Dr Judith Bannister and Ms Anna Olijnyk raise concern about the difficult legal questions which must be determined before protections of the bill will apply in a particular circumstance. They consider that the government should make funding available for people

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76 Dr Suelette Dreyfus, *Submission 12*, p. 2.

77 Accountability Round Table, *Submission 2*, p. 7.

78 Joint Media Organisations, *Submission 20*, p. 3.

79 Professor AJ Brown, *Submission 14*, p. 11.

80 Law Council, Submission no. 24 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, pp. 9-11.

81 Law Council, Submission no. 24 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 10.

82 Westmead Hospital Whistleblowers, *Submission 13*, p. 4.

seeking legal advice to determine whether a disclosure would be protected under the scheme.<sup>83</sup>

- 3.102 They would also like to see the range of who could provide advice widened to include groups such as unions.<sup>84</sup>

## Disclosable conduct

- 3.103 The CPSU believes that an individual contemplating a public interest disclosure needs to have an understanding of the types of conduct that may be the subject of a disclosure and is pleased that the PID Bill provides this function to the Ombudsman.<sup>85</sup>
- 3.104 The Committee received a range of evidence which indicates that the PID Bill does not provide sufficient clarity on the types of wrongdoing that is covered.
- 3.105 For example, the TJN Australia questions why a public interest disclosure may be restricted from protection if it may damage relationships between a State and Territory and the Commonwealth. They do not think it is an adequate reason to restrict the reporting of a public interest disclosure.
- 3.106 The TJN Australia raises concern about the high threshold for what constitutes a public disclosure in the PID Bill and suggests that the PID Bill should be more aligned with UK legislation.<sup>86</sup>
- 3.107 The National Whistleblowers Information Centre describe the bill as being more like a 'public sector protection bill' than a public interest disclosure bill. They believe that the bill should describe the matters which must be disclosed in the same detail that it lists grounds for non-disclosure.<sup>87</sup>
- 3.108 The Rule of Law Institute of Australia expresses concern with the terminology around the categories of disclosable conduct. They consider that this terminology places the focus on the beliefs of the discloser rather than whether it appears there is disclosable conduct.<sup>88</sup>
- 3.109 Professor AJ Brown proposes that the PID Bill should be amended to provide protection for a public servant who makes a disclosure which

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83 Dr Gabrielle Appleby, Dr Judith Bannister and Ms Anna Olijnyk, Submission no. 9 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 10.

84 Dr Gabrielle Appleby, Dr Judith Bannister and Ms Anna Olijnyk Submission no. 9 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 10.

85 CPSU, *Submission 9*, p. 3.

86 TJN Australia, *Submission 11*, p. 7.

87 National Whistleblowers Information Centre, *Submission 22*, p. 6.

88 Rule of Law Institute of Australia, Submission no. 8 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 3.

concerns disclosable conduct, on an objective test, but who did not actually realise the nature or significance of what they were disclosing.<sup>89</sup>

### Maladministration

- 3.110 One term contained within the definition of disclosable conduct is maladministration.
- 3.111 The Accountability Round Table raise the concern that the only guidance provided to define maladministration is a list which focuses on the individual misconduct of individual officials. They consider that the inclusion of such a list in the PID Bill may lead to the assumption that behaviour not listed is not contained in the definition of maladministration.<sup>90</sup>
- 3.112 This view is supported by Professor AJ Brown who considers that the current definition could be misinterpreted as only applying to active and deliberate 'conduct' that can be sourced to individuals, and not necessarily institutional failures.<sup>91</sup> He proposes that a definition of maladministration similar to those used in Ombudsman's offices would be preferred.<sup>92</sup>
- 3.113 The CPSU notes that some of the terms used to define maladministration may have a legal definition which may not be apparent to the average person and may need clarification.<sup>93</sup>
- 3.114 Professor AJ Brown states that the definition of corrupt conduct contained in the PID Bill is also not clear.<sup>94</sup>

### Disagreement with government policies

- 3.115 The PID Bill provides that conduct is not disclosable conduct if it relates only to the government policy or action to be taken by a Minister, the Speaker of the House of Representatives or the President of the Senate.
- 3.116 The ABC considers that the section of the PID Bill that excludes policy-making from disclosable conduct appears overly broad.<sup>95</sup> They contend that the section does not strike an appropriate balance between the need to

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89 Professor AJ Brown, *Submission 14*, p. 13.

90 Accountability Round Table, *Submission 2*, p. 7.

91 Professor AJ Brown, *Submission 14*, p. 13.

92 Professor AJ Brown, *Submission 14*, p. 13.

93 CPSU, *Submission 9*, p. 5.

94 Professor AJ Brown, *Submission 14*, p. 5.

95 ABC, *Submission 15*, p. 4.

carefully define 'disclosable conduct' and the public interest in promoting transparency in all areas of government.<sup>96</sup>

- 3.117 Blueprint for Free Speech questions whether this section needs to be included, stating that if it is required that any disclosure be made in the public interest, that test should prevent any misuse that this section is attempting to cure. They consider it 'a superfluous addition to an otherwise functioning regime'.<sup>97</sup>
- 3.118 In addition Blueprint for Free Speech caution that this section could be used to inappropriately classify information as public policy that should otherwise be exposed.<sup>98</sup>
- 3.119 Dr Suelette Dreyfus is unsure whether there is sufficient distinction made between the public policy and the implementation of public policy where there may be some type of wrongdoing. She warns that this lack of distinction may lead to the corrupt implementation falling within the public policy exclusion.<sup>99</sup>

## Intelligence agencies

- 3.120 The PID Bill includes the Australian intelligence community within provisions relating to internal disclosures and excludes the intelligence agencies from the provisions relating to public/external disclosures.<sup>100</sup> The PID Bill also recognises the existing role of the IGIS in oversight and investigation.
- 3.121 Under the provisions of the PID Bill the IGIS is able to accept disclosures relating to intelligence agencies, investigate the matter directly or with the agreement of the agency, refer it to the agency for investigation.<sup>101</sup>
- 3.122 The IGIS is able to use separate investigative powers available under the *Inspector-General of Intelligence and Security Act 1986*. These include coercive powers for the conduct of inquiries.<sup>102</sup>
- 3.123 Some submitters to the inquiry challenge the status of intelligence agencies in the PID Bill.
- 3.124 Civil Liberties Australia does not agree with the blanket exclusion of all aspects of the administration of intelligence agencies and thinks it

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96 ABC, *Submission 15*, p. 5.

97 Blueprint for Free Speech, *Submission 5*, p. 5.

98 Blueprint for Free Speech, *Submission 5*, p. 5.

99 Dr Suelette Dreyfus, *Submission 12*, p. 8.

100 Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS), *Submission 16*, p. 2.

101 IGIS, *Submission 8*, p. 3.

102 IGIS, *Submission 8*, p. 3.

- inconsistent with the object of creating a pro-disclosure culture as stated by the Attorney-General.<sup>103</sup>
- 3.125 Professor AJ Brown would like to see full justification for carve-outs or special procedures with reference to the nature of the information requiring special treatment rather than blanket exclusions or exemptions.<sup>104</sup>
- 3.126 Mr Andrew Wilkie MP is also concerned with the blanket exemptions for intelligence agencies.<sup>105</sup>
- 3.127 The Rule of Law Institute of Australia does not consider that the explanation provided in the Explanatory Memorandum justifies the broad exception for intelligence agencies. They consider that it is fundamental to the rule of law that no person or organisation is beyond the law.<sup>106</sup>
- 3.128 A joint submission from the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS) supports the aims of the proposed legislation.
- 3.129 ASIO and ASIS support the definition of intelligence information in the PID Bill and consider that the definition provides clarity which would be important for an individual contemplating making a public interest disclosure. They clarify that without a clear definition, an individual seeking to make a public interest disclosure may inadvertently release intelligence information.<sup>107</sup>
- 3.130 The IGIS notes that with no provisions for external disclosures of intelligence information or conduct relating to an intelligence agency, additional emphasis is placed on the role of the IGIS to ensure that disclosures are handled appropriately and investigations by intelligence agencies are appropriate.<sup>108</sup>

## Authorised internal recipients

- 3.131 The bill specifies who is an authorised internal recipient for the purposes of making a disclosure.
- 3.132 A range of submitters drew attention to the fact that the bill excludes supervisors and managers. Some of their concerns are listed below.

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103 Civil Liberties Australia, *Submission 18*, p. 2.

104 Professor AJ Brown, *Submission 14*, p. 6.

105 Mr Andrew Wilkie MP, *Submission 19*, p. 1.

106 Rule of Law Institute of Australia, *Submission no. 8 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013*, p. 2.

107 ASIO – ASIS, *Submission 16*, p. 4.

108 IGIS, *Submission 8*, p. 3.

- 3.133 The Accountability Round Table notes that best practice legislation of disclosure recognises that often those in a supervisory or management position are the recipient of a public interest disclosure, as they are the person that is known and trusted. They consider that the limit to this provision in the PID Bill could act to discourage public interest disclosure.<sup>109</sup>
- 3.134 Professor AJ Brown states that the PID Bill doesn't specify whether protection applies to a disclosure made to supervisors or managers, if these happen not to be authorised officers and he considers that this uncertainty compromises the PID Bill.<sup>110</sup>
- 3.135 Blueprint for Free Speech notes the situation where if an individual raises concerns with their direct line manager and as a result of this the person faces reprisal against them, they will not be afforded the protections of this PID Bill.<sup>111</sup> They propose that the definition of a disclosure officer should be broadened.<sup>112</sup>
- 3.136 Transparency International Australia notes that the PID Bill is silent on whether protection applies to disclosures made to a supervisor who is not an authorised officer. They consider this could act as a disincentive to disclosure and should be addressed.<sup>113</sup>
- 3.137 Some evidence was also received that the scope of who can be an authorised internal recipient should be increased. The CPSU suggests that this should be considered.<sup>114</sup>
- 3.138 Blueprint for Free Speech states that Members of Parliament have historically been important recipients of public interest disclosures and supports the inclusion of Members of Parliaments as authorised internal recipients.<sup>115</sup>
- 3.139 This is supported by Dr Suelette Dreyfus<sup>116</sup> and the Westmead Hospital Whistleblowers.<sup>117</sup>
- 3.140 The TJN Australia would like to see the ability to disclose to a professional association or union for the purpose of seeking advice or assistance, in line with the recommendation of the LACA Report.<sup>118</sup>

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109 Accountability Round Table, *Submission 2*, p. 8.

110 Professor AJ Brown, *Submission 14*, p. 5.

111 Blueprint for Free Speech, *Submission 5*, p. 3.

112 Blueprint for Free Speech, *Submission 5*, p. 8.

113 Transparency International Australia, *Submission 7*, p. 1.

114 CPSU, *Submission 9*, p. 5.

115 Blueprint for Free Speech, *Submission 5*, p. 10.

116 Dr Suelette Dreyfus, *Submission 12*, p. 9.

117 Westmead Hospital Whistleblowers, *Submission 13*, p. 3.

- 3.141 There was support from some groups for the ability to make a disclosure outside an individual's own agency to the Ombudsman.
- 3.142 The CPSU<sup>119</sup> and the ACTU<sup>120</sup> support the provision in the PID Bill which allows for disclosures to be made to an external agency, being the Ombudsman, IGIS, or other investigating agency that has the power to investigate the disclosure.
- 3.143 The Law Council supports the premise that an individual can make a disclosure to the Ombudsman. They do not think that there should be a further requirement that there be reasonable grounds for believing that the matter was appropriate for disclosure to the Ombudsman.<sup>121</sup>

### Designated publication restriction

- 3.144 In the PID Bill, the definition of a public interest disclosure is limited by reference to the designated publication restrictions. These include, for example, suppression and non-publication orders made by a court, orders under the *Witness Protection Act 1994* and non-publication directions issued by examiners under the *Australian Crime Commission Act 2002*.<sup>122</sup>
- 3.145 Many of the submissions question why these designated publication restrictions have been included in the PID Bill.
- 3.146 The ABC clarifies that most of the listed designated publication restrictions in clause 40 restrict publication to the world and do not restrict or prohibit disclosure. They question the premise of presenting publication restrictions as if they restricted disclosure, suggesting that it could cause confusion and uncertainty and discourage people from making a public interest disclosure.<sup>123</sup>
- 3.147 The Accountability Round Table felt that they would act to discourage people from making a disclosure as they would need to know if there was such a restriction in place in relation to the information that they want to disclose.<sup>124</sup>
- 3.148 The CPSU admits that there may be a legitimate need to protect certain types of confidential information from publication but question why

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118 TJN Australia, *Submission 11*, p. 4.

119 CPSU, *Submission 9*, p. 5.

120 ACTU, *Submission 10*, p. 3.

121 Law Council, Submission no. 24 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 7.

122 Public Interest Disclosure Bill 2013, Explanatory Memorandum, p. 20.

123 ABC, *Submission 15*, p. 5.

124 Accountability Round Table, *Submission 2*, p. 9.

internal disclosures, which are not made public, need to be subject to this restriction.<sup>125</sup>

3.149 In relation to these publication restrictions Professor AJ Brown states:

They create a dangerous precedent, will be difficult or impossible to implement, and compromise the PID Bill.<sup>126</sup>

3.150 The Chief Justice of the Family Court of Australia expresses a view that the PID Bill should be expressed as being subject to section 121 of the *Family Law Act 1975*. The Chief Justice acknowledges that the designated publication restrictions seek to accommodate this section but is concerned that inconsistencies may arise.<sup>127</sup>

## Investigations

3.151 The bill provides an outline of the process of investigating public interest disclosures.

3.152 An individual must make a public interest disclosure to the authorised officer of their agency. There are designated roles for the authorised officer and principal officer of that agency. These include allocating the disclosure, deciding not to investigate further or allocating it to an investigative agency.

3.153 If a disclosure has been referred, the principal officer of the investigative agency may decide to investigate the disclosure under that separate investigative power, such as the Ombudsman Act or the IGIS Act.

3.154 The principal officer must notify the discloser of the decision to investigate or not. If an investigation is conducted, it must be completed within 90 days of the allocation.

3.155 The investigation is considered complete when the principal officer has prepared the report of the investigation. A copy of this report must be provided to the discloser.

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125 CPSU, *Submission 9*, p. 5.

126 Professor AJ Brown, *Submission 14*, p. 7.

127 Chief Justice of the Family Court of Australia, *Submission no. 2 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013*, p. 2.

## Obligation to investigate

- 3.156 The PID Bill outlines that there are a number of circumstances in which an authorised officer may exercise discretion not to investigate a public interest disclosure.<sup>128</sup>
- 3.157 Some concern was raised that the some of the grounds to refuse to investigate may be drafted too broadly.<sup>129</sup>
- 3.158 The Accountability Round Table describe the criteria in clause 48(1)(d) of the PID Bill as being inappropriate in circumstances where the investigation has not commenced.<sup>130</sup> They consider that it may be difficult to be conclusive in every situation that a disclosure is frivolous, vexatious, misconceived or lacking in substance without some degree of investigation.
- 3.159 The Accountability Round Table is concerned that an authorised allocation officer may require proof that a disclosure satisfies the requirements for an internal disclosure, they consider there is the potential that it could be used to deny an allocation of a disclosure for investigation.<sup>131</sup>
- 3.160 Transparency International Australia considers that the language used suggests a very wide discretion not to investigate and consider these provisions do not support a culture of disclosure.<sup>132</sup>
- 3.161 The CPSU suggests that there is little recourse for a whistleblower if they consider that the investigation was inadequate or the discretion not to investigate a disclosure was exercised improperly.<sup>133</sup>
- 3.162 Under the provisions of the PID Bill, Blueprint for Free Speech considers that it is confusing for an individual making a public interest disclosure to keep track of where an investigation is up to as the only requirement for the investigating authority is a final report is provided to the discloser.<sup>134</sup> They would also like to see more progress reporting of the investigations.<sup>135</sup>
- 3.163 The Accountability Round Table raises the further concern that in the situation where the authorised disclosure officer refuses to receive the disclosure or takes no or inadequate action, it would not be appropriate

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128 See clause 48 Public Interest Disclosure Bill 2013 for more details on disclosures not requiring an investigation.

129 CPSU, *Submission 9*, p. 9.

130 Accountability Round Table, *Submission 2*, p. 12.

131 Accountability Round Table, *Submission 2*, p. 9.

132 Transparency International Australia, *Submission 7*, p. 2.

133 CPSU, *Submission 9*, p. 9.

134 Blueprint for Free Speech, *Submission 5*, p. 4.

135 Blueprint for Free Speech, *Submission 5*, p. 8; CPSU, *Submission 9*, p. 8.

for the individual to make an external disclosure.<sup>136</sup> This is echoed by the Joint Media Organisations.<sup>137</sup>

- 3.164 Professor AJ Brown is of the view that some of the aspects contained in the discretion not to investigate have the potential to defeat the purpose of the PID Bill rather than providing intended safeguards.<sup>138</sup>
- 3.165 The Rule of Law Institute of Australia considers there is potential for the discretion not to investigate to be inappropriately used especially when there may be competing managerial or budgetary pressures.<sup>139</sup>
- 3.166 The National Whistleblowers Information Centre considers all the reporting and investigation arrangements proposed by the bill to be unsatisfactory and would like to see them carried out by an independent organisation and the protection, support and restitution of whistleblowers carried out by Comcare.<sup>140</sup>

## Administrative matters

- 3.167 Part 4 of the PID Bill sets out the additional obligations and functions of the principal officer and authorised officer in the facilitation and management of public interest disclosures. It also defines the obligations of the public officials to assist those dealing with public interest disclosures.
- 3.168 This section specifies how the Ombudsman and the IGIS are required to assist each other, as well as principal officers, authorised officers and public officials in relation to the operation of the scheme. This includes conducting educational and awareness programs.
- 3.169 The definitions of public officials, agency, prescribed authority and principal officer are also contained in this part of the bill. The bill allows for an authorised officer to take someone as a public official, if the authorised official believes that the individual has information that could be taken as a public interest disclosure.
- 3.170 The bill also creates offences relating to the inappropriate use or disclosure of information obtained through processes connected with the Act.

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136 Accountability Round Table, *Submission 2*, p. 7.

137 Joint Media Organisations, *Submission 20*, p. 4.

138 Professor AJ Brown, *Submission 14*, p. 13.

139 Rule of Law Institute of Australia, *Submission no. 8 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013*, p. 3.

140 National Whistleblowers Information Centre, *Submission 22*, p. 10.

## Additional obligations and functions

3.171 Professor AJ Brown states that under best practice public interest legislation obligations on agencies should be direct, proactive and preventative rather than just assumed and reactive.<sup>141</sup>

...disclosures be managed in a way that will best prevent adverse consequences for disclosers, rather than just offering to compensate them for damage after the event. It is a strength of the PID Bill that this principle is reflected in s.59(1)(a), following the ACT precedent.<sup>142</sup> However, this principle also needs to be carried through in practice in other parts of the PID Bill.

3.172 Professor AJ Brown recommends that the PID Bill is scrutinised for inconsistent requirements and consideration of more consistent observance of the basic principle of reprisal/risk prevention and management.<sup>143</sup>

## Additional functions of the Ombudsman and IGIS

3.173 The role for the Commonwealth Ombudsman to implement, oversight and play a significant role in the operation of the PID scheme had its origins in the LACA Report which were subsequently accepted by the government in their 2010 response.

3.174 Evidence from the Whistling While They Work project<sup>144</sup> suggests that a strong central agency role is required.<sup>145</sup>

3.175 There was general support for the role of the Ombudsman and IGIS in the PID Bill, with some submitters seeking extra clarification around the extent of the Ombudsman's supervisory role.

3.176 The Accountability Round Table contends that the PID Bill places the Ombudsman and IGIS in oversight positions but does not provide detail of their oversight. The Accountability Round Table are concerned therefore that ultimate responsibility of the public interest disclosure scheme rests with no individual or agency.<sup>146</sup>

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141 Professor AJ Brown, *Submission 14*, p. 7.

142 Professor AJ Brown, *Submission 14*, pp. 7-8.

143 Professor AJ Brown, *Submission 14*, p. 8.

144 Roberts P, Brown AJ & Olsen J, *Whistling While They Work: A good practice guide for managing internal reporting of wrongdoing in public sector organisations*, 2011, Australia & New Zealand School of Government / ANU E-Press.

145 Office of the Commonwealth Ombudsman, *Submission 1*, p. 5.

146 Accountability Round Table, *Submission 2*, p. 17.

- 3.177 Transparency International Australia contends that the provisions in the PID Bill enable the oversight agencies to assist agencies but do not require them to participate in an active oversight arrangement.<sup>147</sup>
- 3.178 The CPSU would like to see a stronger role for the Ombudsman and IGIS with more active oversight of procedures and investigations as they happen, with the ability to make recommendations.<sup>148</sup> It raises a concern that the PID Bill does not establish any oversight arrangements for the Ombudsman and IGIS.<sup>149</sup>
- 3.179 The CPSU would also like to see a role for the Ombudsman and IGIS in reviewing the decisions regarding public interest disclosures made by agencies.<sup>150</sup>
- 3.180 Professor AJ Brown considers that there is insufficient clarity in the PID Bill around how the oversight agencies will work in practice. He theorises that there is a risk that issues will not be recognised or fail to be addressed through lack of jurisdiction.<sup>151</sup>
- 3.181 Professor AJ Brown recommends that the PID Bill contains explicit powers for the Ombudsman and IGIS to undertake this new role.<sup>152</sup>
- 3.182 The Ombudsman states that the central agency role afforded to the Ombudsman and IGIS in the PID Bill strikes a good balance between their oversight of the scheme and their day to day involvement in the operation of the scheme.<sup>153</sup> The Ombudsman considers that its role under this PID Bill will be a key enabler to ensure that the proposed legislation meets its objectives.<sup>154</sup>
- 3.183 The Ombudsman comments that it is unlikely that the office will need to see every PID in the first instance or make all substantive decisions to be able to provide effective oversight.<sup>155</sup>
- 3.184 The Ombudsman comments:
- An effective PID scheme also needs to place responsibility on the agency with the problem to ensure that the matter is properly investigated and, to the extent possible, resolved. By placing responsibility on agencies, it promotes early disclosure and

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147 Transparency International Australia, *Submission 7*, p. 2.

148 CPSU, *Submission 9*, p. 9.

149 CPSU, *Submission 9*, p. 9.

150 CPSU, *Submission 9*, pp. 9-10.

151 Professor AJ Brown, *Submission 14*, p. 8.

152 Professor AJ Brown, *Submission 14*, p. 8.

153 Office of the Commonwealth Ombudsman, *Submission 1*, p. 5.

154 Office of the Commonwealth Ombudsman, *Submission 1*, p. 6.

155 Office of the Commonwealth Ombudsman, *Submission 1*, p. 6.

proactive management of issues by agencies, it also creates an environment in which an acceptance of whistleblowing is more likely to take root.<sup>156</sup>

- 3.185 The CPSU supports the role of the Ombudsman in providing education and awareness programs for agencies about the types of conduct that may be the subject of a disclosure.<sup>157</sup>
- 3.186 The Whistleblowers Action Group Qld Inc. is critical of the role of the Ombudsman in the proposed legislation.<sup>158</sup>
- 3.187 The National Whistleblowers Information Centre strongly contends that the Ombudsman's office is not an appropriate agency to deal with the reporting or the investigation of any whistleblowing matter.<sup>159</sup> They state:
- For years the Commonwealth Ombudsman's office has consistently failed to objectively or professionally deal with whistleblowing matters.<sup>160</sup>

## Officials and agencies

- 3.188 Under the proposed legislation Members of Parliament and their staff or the judiciary are not considered to be public officials.
- 3.189 The LACA report recommended that staff of Members of Parliament should be included in whistleblower protection,<sup>161</sup> although the 2010 Government response to the LACA report stated that Members of Parliament and MOPS employees would not be covered.
- 3.190 There was concern expressed by several participants<sup>162</sup> in the inquiry that certain public officials were not included in the proposed disclosure system. In particular, the fact that Members of Parliament and their staff were not included was seen as a real issue to public trust. As the Accountability Round Table states:

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156 Office of the Commonwealth Ombudsman, *Submission 1*, p. 4.

157 CPSU, *Submission 9*, pp. 4-5.

158 Whistleblowers Action Group Qld Inc, *Submission 17*, p. 2.

159 National Whistleblowers Information Centre, *Submission 22*, p. 12.

160 National Whistleblowers Information Centre, *Submission 22*, p. 12.

161 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower Protection: a comprehensive scheme for the Australian public sector*, p. 53.

162 See for example Accountability Round Table, *Submission 2*, p. 4; Blueprint for Free Speech, *Submission 5*, p. 5; National Tertiary Education Union, *Submission 6*, p. 3; Transparency International Australia, *Submission 7*, p. 2; Joint Media Organisations, *Submission 20*, p. 5; Civil Liberties Australia, *Submission 18*, p. 2; ABC, *Submission 15*, p. 4; Professor AJ Brown, *Submission 14*, p. 5; Rule of Law Institute of Australia, *Submission no. 8 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013*, p. 2.

We submit that in the absence of any persuasive argument for excluding misconduct by such persons, such exclusion is contrary to the '*public office –public trust*' proposition that is central to the legislation, and in this respect undermines the integrity of the PID Bill.<sup>163</sup>

- 3.191 The Accountability Round Table also was concerned that staff of Members of Parliament would be discouraged from revealing misconduct that comes to their attention as part of their work with executive officers of the public sector.<sup>164</sup>
- 3.192 Mr Andrew Wilkie MP disagrees with the exclusion of Members of Parliament and their staff from the PID Bill and sees this as a serious flaw.<sup>165</sup>
- 3.193 Blueprint for Free Speech consider that to not include actions of Ministers, the Speaker of the House and the President of the Senate offends the Australian notion of fairness.<sup>166</sup>
- 3.194 The National Whistleblowers Information Centre consider that exempting people and agencies on the basis of who they are or what they are seriously undermines the credibility of this legislation. They consider to be excluded from disclosure, there must be an objective and substantive reason that serves the greater public interest.<sup>167</sup>
- 3.195 The CPSU queries whether the protection of the proposed legislation would extend to State employees when working on a Commonwealth/State joint initiative.<sup>168</sup>
- 3.196 The National Tertiary Education Union considers that the definition of public official be amended to exclude university employees. The NTEU considers that a one size fits all approach to public interest disclosure would cause unnecessary complications in the university sector.<sup>169</sup>

## Intelligence information

- 3.197 The PID Bill states that conduct is not disclosable conduct if it is conduct that an intelligence agency or a public official who belongs to an intelligence agency engages in for the purposes of proper performance of its functions or the proper exercise of its powers.

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163 Accountability Round Table, *Submission 2*, p. 4.

164 Accountability Round Table, *Submission 2*, p. 5.

165 Mr Andrew Wilkie MP, *Submission 19*, p. 1.

166 Blueprint for Free Speech, *Submission 5*, p. 4.

167 National Whistleblowers Information Centre, *Submission 22*, p. 8.

168 CPSU, *Submission 9*, p. 2.

169 National Tertiary Education Union, *Submission 6*, p. 3.

- 3.198 Additionally, the PID Bill provides that to be able to make a protected external, emergency or legal practitioner disclosure, information must not consist of or include intelligence information.
- 3.199 Many submitters to the inquiry challenge the status of intelligence information in the PID Bill.
- 3.200 Mr Howard Whitton considers that the PID Bill is overly focussed on secrecy concerns, mainly in relation to intelligence matters and does not give enough consideration to encouraging the principled disclosure of wrongdoing by Australian public officials involved in security and intelligence functions at all levels.<sup>170</sup>
- 3.201 Blueprint for Free Speech acknowledges that there is a need for confidentiality in intelligence information as well as the importance of secrecy in certain situations. They consider, however, that there are certain circumstances where the public interest is better served by exposing certain wrongdoing rather than maintaining secrecy.<sup>171</sup>
- 3.202 The Accountability Round Table notes that if a disclosure contains intelligence information the only option is an internal disclosure and there is no recourse for the discloser if the investigation or response is inadequate. Any external disclosure would not be a protected disclosure.<sup>172</sup>
- 3.203 Transparency International Australia considers the definition of ‘intelligence information’ in clause 41 disturbingly broad. They contend that the
- Information... is not restricted to information whose disclosure carries risk of harm to actual security, intelligence or law enforcement interests but extends beyond ‘intelligence related information’ to *any* information involving an intelligence agency<sup>173</sup>
- 3.204 The ABC considers that external disclosures should not be precluded for intelligence information where the disclosure relates to unlawful or other serious misconduct.<sup>174</sup> They state that whistleblowers have no options if an internal disclosure is not properly dealt with and their complaints deal with:

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170 Mr Howard Whitton, Submission no. 25 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, p. 4.

171 Blueprint for Free Speech, *Submission 5*, p. 11.

172 Accountability Round Table, *Submission 2*, p. 6.

173 Transparency International Australia, *Submission 7*, p. 2.

174 ABC, *Submission 15*, p. 5.

...extraordinary rendition, unlawful interception of citizens' phone calls, the use of torture in interrogations of detainees, or humiliating and degrading treatment of prisoners.<sup>175</sup>

## Miscellaneous

- 3.205 The bill gives the Ombudsman the authority to determine standards relating to procedures for agencies when dealing with internal disclosures, investigations, reports of investigations and the management of information and records relating to public interest disclosures.
- 3.206 The bill provides that the Ombudsman must provide an annual report at the end of each financial year, for the Minister to present to Parliament. The annual report must include the number of public interest disclosures made in that financial year, as well as a range of information about the scheme.

## Standards

- 3.207 The Ombudsman and IGIS<sup>176</sup> would be able to monitor compliance with their standards using existing powers under their respective acts.
- 3.208 Professor AJ Brown would like to see the key requirements included in the proposed legislation rather than being included in the standards and procedures developed by the Ombudsman; he considers that key requirements must be in the Act to be effective.<sup>177</sup>
- 3.209 The CPSU supports the role given to the Ombudsman to develop standards for agency procedures for receiving disclosures, conducting investigations and preparing reports of investigations. They consider this will help ensure a consistent standard of investigations.<sup>178</sup>

## Appropriate resourcing

- 3.210 The Office of the Commonwealth Ombudsman highlights that as the PID scheme is likely to place a significant burden on agencies to establish procedures and appoint and train personnel, as well as the Ombudsman's office determining standards that there needs to be sufficient time between the passing of the PID Bill and commencement.<sup>179</sup>

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175 ABC, *Submission 15*, p. 6.

176 IGIS, *Submission 8*, p. 4.

177 Professor AJ Brown, *Submission 14*, p. 9.

178 CPSU, *Submission 9*, p. 9.

179 Office of the Commonwealth Ombudsman, *Submission 1*, p. 8.

- 3.211 The Ombudsman also raises the concern that the PID scheme will potentially have resource implications on the office of the Commonwealth Ombudsman and suggests a review of resourcing a period of time after the scheme has been in operation.<sup>180</sup>
- 3.212 Professor AJ Brown supports the proper resourcing of the oversight agency to undertake their role, including being able to handle cases directly where necessary.<sup>181</sup>

### Parliamentary privilege

- 3.213 The Clerk of the Senate does not agree with the inclusion of clause 81 in the PID Bill. The clause states 'law relating to parliamentary privilege (is) not affected' and the Clerk considers it unnecessary and a precedent that is 'not without risk'.<sup>182</sup>

### Other issues

- 3.214 The Whistleblowers Action Group Qld Inc. criticises the PID Bill for not including provision for a Whistleblower Protection Agency.<sup>183</sup>
- 3.215 Professor AJ Brown would like to see the government enact comprehensive whistleblower protection for the business and non-government sectors.<sup>184</sup>
- 3.216 The National Whistleblowers Information Centre contends that the bill does not acknowledge the existence of covert detriments. They consider covert reprisals can often be made to look like the whistleblower is receiving a benefit rather than a reprisal.<sup>185</sup> An example of a covert reprisal is:

Removing any supervision of staff to 'help the whistleblower cope with the disclosure issue' or 'to help the whistleblower get through this difficult time'.<sup>186</sup>

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180 Office of the Commonwealth Ombudsman, *Submission 1*, p. 8.

181 Professor AJ Brown, *Submission 14*, p. 9.

182 Clerk of the Senate, Submission no. 1 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013, pp. 1.

183 Whistleblowers Action Group Qld Inc, *Submission 17*, p. 2.

184 Professor AJ Brown, *Submission 14*, p. 13.

185 National Whistleblowers Information Centre, *Submission 22*, p. 14.

186 National Whistleblowers Information Centre, *Submission 22*, p. 15.

## New approach to whistleblowing

- 3.217 Some submissions<sup>187</sup> to the inquiry provided evidence that a new approach to whistleblowing may be required or should be considered. This may take the form of *qui tam* or a False Claims Act similar to that of the United States.
- 3.218 Dr Kim Sawyer provided the outline of an evidence-based approach which has several requirements which are designed to support whistleblowers and incentivise integrity. They include:
- Transferring the onus of proof away from the whistleblower;
  - Integrating anti-corruption and whistleblowing, and
  - Establishing legislation which is a deterrent against corruption.<sup>188</sup>
- 3.219 Dr Sawyer states that the only legislation that satisfies these is the US False Claims Act but warns that Australia would need its own False Claims legislation in conjunction with appropriate provisions for an integrity agency.<sup>189</sup>
- 3.220 Westmead Hospital Whistleblowers support the idea of a system similar to *qui tam* legislation but suggest that instead of the whistleblowers directly receiving a proportion of the funds as happens under the US False Claims Act that this proportion is shared between the whistleblower and other groups designed to assist whistleblowers directly.<sup>190</sup>
- 3.221 Blueprint for Free Speech suggest that similar concepts to the US False Claims Act could be used for the creation of a self-sustaining fund to support future whistleblower protection litigation.<sup>191</sup>
- 3.222 Mr Howard Whitton does not support a US style payment of a reward based on the value of the fraud. He states that the disclosure of wrongdoing is part of a public official's duty and should not be additionally rewarded.<sup>192</sup>

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187 Dr Kim Sawyer, *Submission 4*, p. 1; Blueprint for Free Speech, *Submission 5*, p. 7; Westmead Hospital Whistleblowers, *Submission 13*, p. 3.

188 Dr Kim Sawyer, *Submission 4*, p. 1.

189 Dr Kim Sawyer, *Submission 2*, p. 1.

190 Westmead Hospital Whistleblowers, *Submission 13*, p. 3.

191 Blueprint for Free Speech, *Submission 5*, p. 7.

192 Mr Howard Whitton, *Submission no. 25 to the Senate Legal and Constitutional Affairs Committee inquiry into the Public Interest Disclosure Bill 2013*, pp. 7-8.