

## **ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS**

1.1 With legislative preparation on a comprehensive whistleblower protection scheme running at close to four years, the Australian Greens welcome the introduction of the Public Interest Disclosure Bill 2013 (Bill) into the Parliament.

1.2 The drafting of the Bill in two protracted stages under two different Ministers with varying commitment to whistleblower protection has resulted in a convoluted, complex and technical structure that does more to protect the public service institutions rather than Australian Public Servants.

1.3 While the Australian Greens generally support the Committee's recommendations, there are some obvious gaps with the Bill that the Committee's Majority Report does not recommend addressing. We hope that the inclusion of a two year review in the Bill enables these issues and the general complexity of the Bill to be rectified once the scheme is in place.

1.4 The Bill is not ideal and multiple technical amendments are required, which the Australian Greens understand the Government intends to, at least partially, address. In the absence of any information as to the nature and extent of those government amendments, the Australian Greens make five recommendations for changes to the Bill to improve the operation of public interest disclosures in the Australian Public Service.

### **Emergency disclosures**

1.5 The narrow scope for direct external disclosures on matters of serious significance is limited to events that are likely to affect the health and safety of one or more persons. As mentioned in paragraphs 2.44 to 2.51 of the Majority Report, this would exclude emergency disclosures to prevent a substantial threat to the environment or stop the misuse of public money, for instance through a suspicious tender that has not yet been contracted or a public official misappropriating funds on a continuous basis. The money could be misappropriated for up to 104 more days before an internal report is finalised.

1.6 As various submissions pointed out, the word 'imminent' further restricts the application of this provision by requiring the disclosable event to be in a state where it is about to occur.<sup>1</sup> This drafting may unintentionally restrict disclosures on serious matters that have already happened or where a time frame is not known by the discloser.

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1 Law Council of Australia, *Submission 24*, p. 11; ABC, *Submission 12*, pp 6-7; Joint Media Organisations, *Submission 19*, pp 3-4; Accountability Round Table, *Submission 17*, p. 7.

**1.7 Recommendation 1: Include the environment and the protection of public money as subject-matters covered by the emergency disclosure provisions.**

**1.8 Recommendation 2: Remove the requirement for the disclosable event to be 'imminent'.**

### **Members of parliament and their staff**

1.9 There is no public policy justification for the exclusion of Ministers of the Crown, Members of Parliament and staff employed under the *Members of Parliament (Staff) Act 1984* to be exempt from the scheme. Recent high profile investigations into Members of the Commonwealth Parliament and New South Wales Parliament demonstrate that there is a real need that avenues for disclosure be available to MPs and their staff to disclose wrongdoing well before the consequences escalate.

1.10 The reason put forward for their exclusion is because they have access to parliamentary privilege to raise matters in the public interest. A clear flaw in this proposition is that Ministerial staff and the staff of MPs have no access to this privilege and no way to refer matters to a privileges committee, which requires a vote of the relevant chamber of Parliament.

1.11 The Australian Greens do not support the current consensus that the legislature should seek to exempt itself from the standards, rights and obligations it is seeking to impose upon all other public officials. Such special treatment simply reinforces the public's perception that politicians are diligent at arranging their affairs to protect their own interests.

**1.12 Recommendation 3: Ministers, the Speaker of the House of Representatives, the President of the Senate, MPs and staff employed under the *Members of Parliament (Staff) Act 1984* should be included within the scheme.**

### **Intelligence agencies**

1.13 The exemption and lack of oversight of whistleblowers within intelligence agencies is a very real cause for concern within the Bill. As one submission concluded, at its most extreme, even disclosures on matters that have been publicly announced would still breach the provisions of the Bill.<sup>2</sup>

1.14 This overreach is both overly cautious and counterproductive. This was made clear by Dr Suelette Dreyfus through her use of real-life examples where whistleblowers had come forward: '[i]f these disclosers had not proceeded in the manner they did, the damage to intelligence and security would have been far greater'.<sup>3</sup>

1.15 On the basis that corruption and maladministration proceeds on a calculation of the likelihood of detection against the possible rewards, intelligence agencies will be more vulnerable to the effects of maladministration or illegal activity than any other public sector agency if this Bill is passed into law.

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2 ABC, *Submission 12*, p. 5.

3 Dr Suelette Dreyfus, *Submission 14*, p. 4.

1.16 In recognition of the importance of intelligence information being restricted where it poses a threat to national security, a relevant exemption should be carved out. However the blanket requirement of 'information that has originated with, or has been received from, an intelligence agency' covers almost all conceivable information remotely incidental to an intelligence organisation.

1.17 Another oversight in the Bill is the lack of support available to an employee who makes an internal disclosure to the Inspector-General of Intelligence and Security (IGIS). There is no other avenue for appeal if the employee feels that they are being bullied in the workplace as a result of that disclosure or that the agency is not complying with recommendations made by the IGIS. There is also no place for an employee to go if they feel that an investigation into their disclosure has been inadequate.

**1.18 Recommendation 4: Allow external disclosures where they would not disclose information or conduct which is likely to pose a risk to national security.**

**Provide incentives for disclosure**

1.19 Many submissions made reference to the fact that the Bill provides very little in the way of encouragement or incentives for disclosure, despite this being the object of the Bill in clause 6. In addition to removing the factors listed against disclosure in clause 26(3), there should also be an explicit, non-compulsive provision that would allow the Minister to make ex gratia payments to a whistleblower where public money was saved or reclaimed or there is a principled public interest reason for making such a payment.

1.20 While the Australian Greens are not advocating for a *qui tam* legislative mechanism, evidence from international jurisdictions demonstrates the significant benefits to public service efficiency and public expenditure when a whistleblower is able to be compensated for making public interest disclosures – and usually at great personal cost.

1.21 If a potential wrongdoer knows that their colleagues could expose their activities and be personally rewarded for doing so, it would act as a powerful deterrent to that action being taken, irrespective of the level or regularity of such payments being made.

**1.22 Recommendation 5: The Minister should be able to exercise a general, non-compulsive power to make ex gratia payments to a discloser where the public interest warrants it.**

**Senator Penny Wright**

**Australian Greens**