ALLIANCE for JOURNALISTS' FREEDOM

20 December 2023

# Submission to Stage Two Consultation: Public Sector Whistleblowing Reforms

The Alliance for Journalists' Freedom (AJF) appreciates the opportunity to make this submission to the Attorney-General's stage 2 consultation on Public Sector Whistleblowing Reforms.

***Background:***

The AJF promotes media freedom and the right of journalists to report the news in freedom and safety. This includes working with governments to ensure legislation supports media freedom. The AJF was established in 2017, following the release of Australian journalist Peter Greste from imprisonment in Egypt. In the absence of specific constitutional or charter protections, the AJF advocates for a Media Freedom Act to enshrine media freedom in Commonwealth legislation. While a Media Freedom Act is outside the scope of the inquiry, we believe this would effectively address many of the issues we raise in our submission.

The AJF is incorporated as a public not-for-profit company limited by guarantee and is funded by donations from business and philanthropists. Funding is not sought or received from governments.

***Key Recommendations:***

- All public interest disclosures should be protected from prosecution except for circumstances where national security is **genuinely** compromised.
- We support a redefinition of "intelligence information" which would only protect information that is genuinely sensitive rather than which had just passed through a security agency.

- The entire 'chain of disclosure' should be protected. This includes all preparatory acts, internal disclosures, discussions with lawyers, transmission of evidence to journalists, and eventual publication.
- The 'extra public interest test' should be entirely scrapped.
- Government agencies should not be able to claim 'public interest immunity' to prevent certain evidence from being heard.

***General comments:***

The AJF believes the media is the whistle-of-last-resort. It should be regarded as an integral part of any comprehensive whistleblower regime. A disclosure, by definition, made under the Public Interest Disclosure Act is of interest to the public. The media is one way such issues are aired, and in the process, they often trigger important public debates and much needed reforms. The AJF believes the starting principle should be in favour of publishing rather than suppressing disclosures, appreciating that there will be some exceptions for narrow national security, confidentiality, or privacy reasons.

At the same time, the relationship between journalists and whistleblowers must also be protected and regarded with the same privilege as a lawyer-client relationship. Unless both journalists and their sources are confident that their communications remain confidential, the media's 'fourth estate' role will be compromised.

With that in mind, the AJF broadly endorses the submissions of the Human Rights Law Centre and Griffith University, and their comprehensive approach to protections for whistleblowers.

We will limit our specific comments to those issues directly related to the media and media freedom, particularly **Issue 2** of the Consultation Paper.

***Issue 2: Pathways to make disclosures outside of government.***

*4. In what circumstances should public sector whistleblowers be protected to disclose information outside of government? Are there circumstances where information should not be disclosed outside of government?*

As discussed above, public interest disclosures are, by definition, in the public interest. Therefore, we believe that disclosures outside of government should be protected in all but the narrowest of circumstances. Public disclosures are what Griffith University describes as the 'third tier' (after internal disclosure and then disclosure to a regulatory authority), and are accepted as best practice frameworks in most leading jurisdictions. Disclosures to the media are an important element of that third tier.

External disclosures should also explicitly include any circumstances where a whistleblower could not reasonably or safely approach internal or regulatory mechanisms, or where such internal disclosure did not adequately address the issue. For example, Defence Forces whistleblower David McBride took his complaint to the ABC when it became clear that the internal mechanisms were either unable or incapable of investigating it. Even though the Brereton Report into allegations of war crimes in Afghanistan vindicated much of what McBride revealed and his disclosures triggered important public debate without compromising security, he was still convicted of charges related to his external disclosure. Any changes to whistleblower laws should ensure such a situation cannot arise again.

We acknowledge that only a small fraction of whistleblowers take their complaints directly to the media. Griffith University's Whistling While They Work report (2019), found, "most 'public' reporting was not to the media. Of the 20 percent of reporters (whistleblowers) who ever went public, 19 percent went to a union, professional association, or professional body. Only 1 percent who provided data … ever went directly to a journalist, media organisation or public website." However, we contend that the potential for disclosure to the media must

always remain for the sake of public accountability as a deterrent to illegal or unethical behaviour.

The current act includes a public interest test for external disclosures. This is over and above the assumed public interest inherent in any PID. We believe that the additional public interest test should be scrapped given that the point of a PID Act is to encourage transparency. State PID Acts have done away with them without evident costs, and we see no reason why the Commonwealth should take a different approach. If such a test is inserted, we support the phrase, “not contrary to the public interest”.

Finally, the current PID Act restricts external disclosures to ‘information that is reasonably necessary to identify one or more instances of disclosable conduct’. We believe this is unreasonably restrictive for disclosures to the media. Journalists typically need extra information to place the disclosable conduct in context, or to verify certain elements of a source’s claims, even if that supporting information is never published.

*5. What safeguards are needed to ensure that information disclosed outside of government is treated appropriately, for example, without breaching confidentiality or without prejudicing Australia’s national security, international relations or defence?*

Ultimately, the only circumstances where external disclosures should be restricted are those that include genuinely sensitive information, narrowly defined. The current approach forbids disclosure of ‘intelligence information’. The discussion paper describes ‘intelligence information’, as anything that has originated with or been received from an intelligence agency, as well as a range of other information that may reveal sources, technologies or operations, foreign government information from similar agencies, the identities of ASIO staff, employees and affiliates, and sensitive law enforcement information.

While we acknowledge the importance of protecting such information, we contend that the security and intelligence agencies are as capable of corrupt or inappropriate behaviour as any other organisation, and so the normal whistleblowing regime should still apply as far as reasonably possible. Restricting disclosure of *anything* that originates or has been received from an intelligence agency is extraordinarily and dangerously expansive.

David McBride's case discussed above also illustrates this issue. McBride's disclosure contained intelligence material, including classified documents related to SAS operations in Afghanistan. The documents included evidence of alleged war crimes that triggered a crucial conversation about the conduct of Australian troops, the culture of the SAS and the systems of command and control within the ADF. There is no evidence that his disclosures exposed technologies, methods or individuals, or in any way harmed national security.

Apart from genuinely sensitive security information, we also support restrictions to the disclosure of private personal information such as tax or health records. Any revised definition of restricted material should not hinge on classification level but rather on the demonstrable and narrowly defined risks its release would pose to either the nation or individuals.

McBride highlights one other issue we believe needs to be addressed. In his case, the Government claimed 'public interest immunity' to argue that key evidence he wanted to use in his defence should be excluded. It is contrary to natural justice that evidence directly relating to circumstances in which the whistleblower obtained information or context in which they decided to go public be excluded from being heard in court due to an agency's claims of immunity. Our courts have the capacity and ability to deal with these issues quickly and without too much comport.

***Issue 3: Protections and remedies under the PID Act***

*9. In what additional circumstances should protections and remedies be available to public sector whistleblowers, such as for preparatory acts?*

For internal disclosures, whistleblowers need only point out an alleged act of wrongdoing to the appropriate channel. Where an external disclosure is made to a journalist, the source may need to disclose additional evidence so the journalist can confirm the details and context, and write a factually accurate story even if not all of that evidence is published. We believe the entire process should be protected, starting from the moment the whistleblower begins gathering evidence and including preparatory acts, transmission of information, discussions with legal counsel and so on.

We describe this as the 'chain of disclosure'. For the PID act to robustly protect the whistleblower system, it must protect every part of the chain.

***Issue 4. Oversight and integrity agencies, and consideration of a Whistleblower Protection Authority or Commissioner.***

*16. Should an additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?*

AJF is broadly supportive of the submissions of the HLRC and Griffith Uni about establishing a Whistleblower Protection Authority (WPA). This was also unanimously recommended by the Joint Parliamentary Committee on Corporations and Financial Services (Recommendation 12.1). Such an authority could better facilitate public interest disclosures and provide support and guidance for whistleblowers before, during, and after disclosure. We note that such a

model was twice proposed by cross-bench MPs Cathy McGowan[1] and Helen Haines[2]. The most recent bill was supported in the Senate by the then Labor opposition.

What matters is that any act and subsequent established authority should be sufficiently well-funded, independent, and robust to increase transparency and accountability of all public and private sectors.

*22. Should a principles-based approach to regulation be adopted in the PID Act? If so, to what extent? What risks might be associated with adopting this approach?*

A principles-based approach would strengthen and enhance the PID Act. The current act sets out detailed procedures that are often confusing and difficult to follow in all circumstances. Any whistleblower who fails to adhere to the rules risks being criminalised even if they are acting in good faith and taking reasonable steps.

We should have confidence in the courts to deal with behaviour that is dangerous or damaging and ensure that we protect the wider principle of disclosure in the public interest. The AJF is supportive of amendments proposed by independent MP Zoe Daniel in February 2023[3], which would have granted a judge the discretion to protect whistleblowers who have not strictly followed procedures.

We acknowledge this may create a degree of ambiguity about what is and is not acceptable under the Act, but we maintain that it is a far more appropriate way of approaching the problem than an overly detailed set of procedures. What matters is that any Act and established authority should be robust enough to increase transparency and accountability of

[1] *National Integrity Commission Bill 2018.*
[2] *Australian Federal integrity Commission Bill 2021.*
[3] *Public Interest Disclosure Amendment (Review) Bill 2022.*

both public and private sectors. We endorse the submissions of the HLRC and Griffith University on this question.

Once again, the AJF is grateful for the opportunity to contribute to the government's Whistleblower Review process, and we would be happy to appear at any hearing should we be invited to do so.

Yours sincerely,

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