QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
Protecting Queenslanders' individual rights and liberties since 1967

Public Interest Disclosure Review
Secretariat Strategic Policy and Legal Services
Department of Justice and Attorney General
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Brisbane QLD 4001

Email: PIDActReview@justice.qld.gov.au

Dear Judge,

Please accept this submission in relation to this review.

1. Principles

In our view the need for whistleblower protection is a part of free speech.

To work out the content of the right to freedom of speech in any particular context, it is necessary to consider the interests of the three parties who may be involved in the speech act: the speaker, the audience and bystanders. In this case, it is the audience's interest that needs to be considered.

The audience's interest is, amongst other things, in having a good environment for the formation of their beliefs and desires. This means that the audience has an interest in access to information which includes government held information. Freedom of speech is not simply a claim to be free from interference but also includes a claim for affirmative action to protect the interest of the audience in access to information.[1]

Freedom of speech is rooted in a distrust of the government's capacity to regulate speech, particularly political speech, where it is in a position of a conflict of interest. This conflict is no starker when the government wants to prevent the public having access to embarrassing information about it.

Government accountability is a key part of our democratic system. Transparency is, in turn, a key part of government accountability. Without public scrutiny, abuses may flourish undetected. Transparency is therefore central to maintaining public confidence in the administration of government.

Whilst we are strongly of the view that government secrecy in this country is excessive to a very significant degree, we accept that a degree of secrecy is required for governments to fulfil their duties. Secrecy is also required to protect the privacy of constituents and shield information from foreign adversaries. Though we would suggest that more often than not the need for secrecy is time sensitive and need be imposed usually for only relatively short periods of time

However, we recognise that one of the reasons for internal disclosure systems is to reduce the harm that might occur by the release of legitimately secret information to the public.

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[1] T M Scanlon *"Freedom of Expression and Categories of Expression"* in Scanlon *The Difficulty of Tolerance- Essays in Political Philosophy* Cambridge University Press 2003 Pages 90-92

We respond to your questions by reference to somewhat broader questions.

2. What wrongdoing is disclosable?

In essence there are two approaches to the definition of what type of wrongdoing is disclosable. One approach is to create a broad single category, such as that supported by our colleagues at the Irish Council for Civil Liberties[2]: "The disclosure contains information about wrongdoing that is of relevance to the public interest"

The other approach is to provide a comprehensive list. That is the approach which is currently applied in Queensland.

The Queensland definition of what is disclosable includes the concept of "corrupt conduct" from the *Crime and Corruption Commission Act.* That provision is both expansive and restricting in that it covers a wide range of conduct but that conduct must amount to either a criminal offence or give rise to disciplinary sanctions including dismissal.

The downside of the single broad category approach is that it creates a lot of uncertainty for a person deciding to make a disclosure. The downside of the list approach is that it could be under inclusive.

Therefore, as is recommended by Transparency International[3], a mixed approach is required.

We submit that subject to our comments below the existing list should be retained but augmented as follows to include

A. miscarriage of justice - this comes from the Irish statute and is not covered by our current list. In some circumstances it might be covered by the definition of "corrupt conduct" but it is often not going to amount to a criminal offence or give rise to disciplinary action.
B. breach of the Human Rights Act - with the introduction of the *Human Rights Act* the government committed to a human rights supporting culture. This would facilitate that aim
C. "a serious threat or harm to the public interest"- this is the broad catch all public interest category, borrowed from the French statute. It broadens the categories but still requires a significant level of impact on the public interest making it a better balance than the ICCL proposal

Under s.13(1)(a)(ii) of the Act, a public officer may make a disclosure about 'maladministration that adversely affects a person's interests in a substantial and specific way'. The Ombudsman in his report[4] found that this provision is regularly used to make disclosures concerning matters that are substantially individual workplace complaints or grievances. - Ombudsman page 29

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[2] https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/submissions/2021/2021-12-14_submission-ronan-kennedy-policy-officer-democratic-freedoms-irish-council-for-civil-liberties-iccl_en.pdf

[3] Transparency international *A Best Practice Guide for Whistleblowing Legislation* 2018 pages 7-9

[4] *Review of the Public Interest Disclosure Act 2010* January 2017 "Ombudsman"

The object of the Act is to facilitate disclosures in the public interest. We agree personal grievances which can be dealt with elsewhere should not be covered by this Act. Ombudsman page 30. This is also the position in Ireland.

However, the Act should provide for a discretion on the part of a proper authority to accept a disclosure if in the circumstances it is reasonable to do so. -Ombudsman recommendation 7

3. Who is entitled to disclose?

With the explosion of outsourcing, contracting and similar integration of non public servants into government the definition of 'public officer' in section 7 of the Act should be amended to encompass all persons performing duties in and for public sector entities, whether paid or unpaid, so as to include volunteers, contractors (including the employees of organisations engaged under contracts for service), trainees, students and others in employment-like arrangements in the public sector.

Section 12 allows any person aware of disclosable information to make a disclosure. The Ombudsman[5] reports that the benefits of this provision have been limited. He also noted that there are many other mechanisms for disclosure and recommended that it be repealed. We agree.

We also support amending the Act to expressly state that a disclosure by a public officer includes a disclosure of relevant information that is made by the officer in the ordinary course of the officer's performance of their duties. It is our view that such disclosures are clearly as worthy of protection as any others.

Finally former public officers should be able to make a disclosure for up to 12 months after departure from the position or role.

4. To whom should it be disclosed?

We see no need for changes in this area

5. Journalists

In *New York Times Co. v. United States*[6], commonly known as the Pentagon Papers case, the US Supreme Court refused to issue an injunction restraining publication of the papers. Justice Potter Stewart's opinion best captures the view of the Court. "We are asked," he wrote:[T]o prevent the publication . . . of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.[7]

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[6] 403 U.S. 713 (1971)

[7] ibid 730

Whilst the Court has never considered the application of this principle to the case of a prosecution of a journalist for publishing secret information, the general view is that it does apply.

It is our view that no lesser protection should apply under our law, with a modification of the language to make it more appropriate to a State Government than a national government.

6. Procedures for dealing with disclosures

The current legislation contains a number of vital provisions providing immunity to the discloser, intended to protect them from reprisals and allowing them to claim compensation. It is our submission those provisions need to be augmented to provide greater protection once the disclosure has been made**.**

First, the Act should be amended to impose a duty on agencies to protect and support employees who make a disclosure, any person that helped him or her as well as witnesses and people mistaken as whistleblowers.

The Ombudsman found evidence of disputes between agencies and disclosures about whether the disclosure does fall within the provisions of the Act. This needs to be addressed by requiring the agency to, within one month of receiving a disclosure make a written decision as to whether the disclosure is covered by the Act. The discloser should have a right to apply for an external review of that decision to the oversight agency.

The Ombudsman seems to be of the view that the criminal standard of proof applies in tortious claims. Notwithstanding that we agree with his recommendation that there should be established an administrative redress scheme for disclosers, witnesses and other parties who have experienced detriment as a result of their involvement in the making, assessment or investigation of a disclosure.

Various participants in this debate have suggested that there should be a reversal of the onus of proof. Consistently with our long-term support of the principled asymmetry of the criminal justice system of which the onus of proof being on the crown is a part, we would object to any change of the onus of proof in relation to criminal charges. However, the situation is different in civil and similar noncriminal jurisdictions. To that end, we would not object to a provision which required the employer to demonstrate that disciplinary actions alleged to be reprisals were not related to a public servant's disclosure of wrongdoing.

7. Other issues

The objects of the Act do not require amendment.

To make it easier for disclosers and others to find it, the title of the Act should be amended to incorporate both the terms ‘whistleblower' and ‘public interest disclosure'.

[2] https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/submissions/2021/2021-12-14_submission-ronan-kennedy-policy-officer-democratic-freedoms-irish-council-for-civil-liberties-iccl_en.pdf

[3] Transparency international *A Best Practice Guide for Whistleblowing Legislation* 2018 pages 7-9

[4] *Review of the Public Interest Disclosure Act 2010* January 2017 “Ombudsman”

The Act should be amended to provide the oversight agency with authority to conduct audits of agencies' compliance with the Act, and to require agencies to cooperate in those audits

8. Disclosures outside the scheme[8]

We have acknowledged that one of the purposes of the scheme is to reduce the harm that might occur by the release of information to the public. But equally we are of the view that provision should be made for those who do not use the scheme as not everyone wants to. Their contribution to free speech is also entitled to protection.

In our view a level of incentive to use the scheme could be maintained by providing that anyone who makes a disclosure outside it could be subject to ordinary disciplinary processes including dismissal except where the disclosure reveals illegality. In addition, those who disclose outside the scheme will not obtain the benefit of the other protections under the Act

However, the government must meet a higher threshold when it seeks to impose criminal or civil penalties on those who disclose outside the Act. When the government seeks to impose severe sanctions such as prison or serious monetary penalties, the government should be required to prove that the discloser lacked an objectively reasonable basis for believing that the public interest in disclosure outweighed identifiable harms to the public interest that might flow from the disclosure. In the case of less serious penalties, a lesser standard is proposed being that the government must show that the disclosure lacked an objectively substantial basis for believing the public interest in disclosure outweighed any identifiable harms to the public interest that might flow from the disclosure.

We trust this is of assistance to you in your deliberations.

Yours Faithfully

[redacted]

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
24 February 2023

[8] What follows borrows from Kitrosser *Free Speech and the Leaky Ship of State* 6 Journal of National Security Law & Policy 409