3 March 2023

Public Interest Disclosure Review Secretariat
Strategic Policy and Legal Services
Department of Justice and Attorney-General
GPO Box 149, Brisbane Qld 4001

By email: PIDActReview@justice.qld.gov.au

Dear Mr Alan Wilson KC

RE: Review of the *Public Interest Disclosure Act 2010* (Qld)

Thank you for the opportunity to make a submission to this Review of the *Public Interest Disclosure Act 2010* (Qld) ('the Act').

Our submission focuses on the **intersection between whistleblowers and the media**. Associate Professor Ananian-Welsh is a public and constitutional law academic at the TC Beirne School of Law, University of Queensland, with particular expertise in press freedom, national security and the courts. Professor Greste is a journalism academic at Macquarie University researching the intersection of press freedom and national security. He is also the chair of the media freedom advocacy group, The Alliance for Journalists' Freedom. We make this submission jointly, in our personal capacities. The views expressed are based on our academic research:

- Rebecca Ananian-Welsh, Rose Cronin and Peter Greste, 'In the Public Interest: Protections and Risks for Whistleblowing to the Media' (2021) 44(4) *University of New South Wales Law Journal* 1242-1280.
- Rebecca Ananian-Welsh, 'Who is a Journalist? A Critical Analysis of Australian Statutory Definitions' (2022) 50(4) *Federal Law Review* (advance).
- Richard Murray, Rebecca Ananian-Welsh and Peter Greste, 'Journalism on Ice: National Security Laws and the Chilling Effect in Australian Journalism' in Téwodros Workneh and Paul Haridakis (eds), *Counter-Terrorism Laws and Freedom of Expression: Global Perspectives* (Lexington Books, 2021) 173- 190.
- Alliance for Journalists' Freedom, White Paper on Press Freedom in Australia (2019).

We welcome this inquiry and the Queensland Government's openness to improving its public sector whistleblower protection framework. In 2019 the Australian Law Reform Commission ('ALRC') identified 'press freedom and whistleblowers', together, as one of five priority areas for 'The Future of Law Reform',[1] thus acknowledging the close relationship between these two critical aspects of Australian society, culture and politics. In recent years, calls for press freedom

[1] Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020–25* (Report, December 2019) 42.

and whistleblower reform have gained momentum as, between 2018 and 2022, Australia dropped a staggering 19 places in Reporters Without Borders' annual *Global Press Freedom Index*.[2] At the same time, the two inquiries convened by the federal parliament to examine the relationship between federal law enforcement and press freedom each emphasised the importance of improving whistleblower protection laws.[3] Just last month, the federal government's Press Freedom Roundtable reaffirmed this goal. The present inquiry gives Queensland the chance to lead the way in protecting democracy with a well-considered, substantive and effective reform agenda.

Part 4 of the Act deals with 'Public interest disclosures to journalists' in a single section: s 20. However, protections for disclosures to a journalist engage other parts of the Act, such as the definition of disclosable conduct, and the absence of the concept of an 'emergency disclosure' (similar to the *Public Interest Disclosure Act 2013* (Cth).) With this in mind, this submission is limited to addressing Questions 3.1, 3.2 and 3.5 as outlined in the Issues Paper and makes **four key recommendations:**

1. **Protect external disclosures.** Whistleblower protections should extend to third party disclosures, allowing whistleblowers to seek legal advice, work with an advocacy group, or make a disclosure to a journalist.
2. **Protect emergency disclosures.** A whistleblower should be able to sidestep the current six-month waiting period before making an external disclosure in cases where there is an urgent threat to health and safety or the environment.
3. **Abandon or broaden the definition of journalist.** If journalist is defined in the legislation, that definition should be modelled on broader existing definitions (such as *Evidence Act 1995* (Cth) s 126J or *Evidence Act 1977* (Qld) s 14R(1)).
4. **Broaden the scope of information that may be revealed in an external disclosure.** The Act should adopt the Commonwealth approach of allowing a whistleblower to disclose information that is 'reasonably necessary to identify one or more instances of disclosable conduct'. Consideration should also be given to aligning the aims of the whistleblower protection framework and the *Human Rights Act 2019* (Qld).

[2] 'Global Press Freedom Index', *Reporters Without Borders* (Web Page) <https://rsf.org/en/index>.
[3] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Report, August 2020) recommendations 9-10; Environment and Communications References Committee, Parliament of Australia, *Press Freedom Inquiry* (Report, May 2021) Ch 4, recommendation 10.

3.1 Policy Objectives of the Act

One of the main objects of the Act is to 'promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector'.[4] By definition, the public has a specific and legitimate interest in the integrity of the public sector. While we recognise that in general, public interest disclosures are best delt with internally, public confidence will be enhanced when there is a culture that preferences transparency, particularly in cases that expose significant breaches of integrity.

Whistleblowing is widely recognised as critical to internal accountability and integrity of any institution.[5] In respect of the public sector, it also serves a critical *public* service.[6] We recognise that it is not always appropriate for someone to blow the whistle publicly and that, in general, it is preferable to deal with problematic conduct internally – the important thing is, of course, the effective enhancement of integrity and accountability. However, we submit that there must always be the credible option of using the media as a whistle-of-last-resort.

The prospect of a problem being aired in the media is a deterrent to wrongdoing and an incentive to dealing with issues swiftly and effectively. Whistleblowing to the media serves a critical democratic role and deserves to be a valid and legitimate option for a whistleblower when internal mechanisms have failed. This latter scenario may arise where an internal complaints process is so compromised that it is incapable of dealing with a breakdown in integrity (such as the initial response and management of David McBride's disclosure within the ADF); where the matter is keenly in the public interest (such as the ATO's robo-debt practices), or; where there is particular urgency to the matter.[7]

For whistleblower protections and a system of public accountability to be effective, it is important to protect the 'chain of disclosure'. This includes protecting not only the whistleblower, but: the journalist who receives information, the media organisation, and others involved in the handling of information throughout the news-gathering, editorial and publication processes. Any legislation that fails in this regard ultimately fails to achieve its aim. Thus, whistleblower protection laws intersect with schemes that, for instance, protect the confidentiality of journalistic sources (eg, shield laws), create public interest or journalism-based defences to prosecution for communication offences, and protect free speech more broadly.

Any whistleblowing regime should:

- Allow the media to report on cases where wrongdoing is called out safely, and when it is in the public interest to do so.

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[4] *Public Interest Disclosure Act 2010* (Qld) s 3(a).

[5] See, eg, AJ Brown et al, *Clean as a Whistle: A Five Step Guide to Better Whistleblowing Policy and Practice in Business and Government* (Report, Griffith University, August 2019).

[6] See Danielle Ireland-Piper and Jonathan Crowe, 'Whistleblowing, National Security and the Constitutional Freedom of Political Communication' (2018) 46(3) *Federal Law Review* 341.

[7] For a selection of further examples of Australian whistleblowers, see: Rebecca Ananian-Welsh, Rose Cronin and Peter Greste, 'In the Public Interest: Protections and Risks for Whistleblowing to the Media' (2021) 44(4) *University of New South Wales Law Journal* 1242, Part B.

- Allow the media to report on police action taken against the alleged wrongdoers (when appropriate) rather than the whistleblowers.
- Robustly protect the media's role as a whistle-of-last-resort, when internal mechanism have failed, or when there is a compelling public interest in a disclosure.
- Robustly protect the journalists' relationship with sources who are making a public interest disclosure, particularly their capacity to fulfil their ethical obligation to maintain source confidentiality.

3.2 What is a public interest disclosure?

We believe the definition of 'disclosable conduct' should be as broad as the federal whistleblower laws.

The *Public Interest Disclosure Act 2013* (Cth) s 29 defines disclosable conduct to include 'conduct engaged in by a public official that involves, or is engaged in for the purpose of, the public official abusing his or her position as a public official' as well as, 'conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official'. In addition to these terms, the Commonwealth Act includes a table which sets out ten additional categories of disclosable conduct, including conduct which:

- contravenes Australian or applicable foreign law;
- perverts or attempts to pervert the course of justice;
- is engaged in for corrupt purposes;
- constitutes maladministration or an abuse of public trust;
- results in the wastage of public money or property; or
- unreasonably results in or increases a risk of danger to the health and safety of persons.

This Commonwealth approach is both wider and clearer than the present Queensland approach. Confusion as to the scope of 'disclosable conduct' is likely to act as a deterrent to whistleblowers who struggle to understand whether they are covered by the Act. We also believe that greater clarity makes it easier for journalists to recognise and respond to in an appropriate manner.

There is also considerable potential for the Act and the *Human Rights Act 2019* (Qld) to be aligned in a way that assists each scheme to better achieve its legislative aims. Specifically, we recommend that the definition of disclosable conduct be amended to include serious human rights violations by reference to the *Human Rights Act*. Preventing serious human rights violations is a key aspect of integrity and accountability; to extend disclosable matters/conduct in this respect would assist the whistleblower protections to achieve their core purpose. It would also align with international practice. For instance, in a 2010 Resolution, the Council of Europe urged the inclusion of a comprehensive definition of protected disclosures which would encompass serious human rights violations.[8]

The 2019 empirical study led by AJ Brown indicated that widening the definition of 'disclosable conduct' to include human rights violations would not correspond with an increase in public

[8] Council of Europe, Parliamentary Assembly, *Protection of 'Whistle-Blowers'*, Res 1729, 17th sitting, 29 April 2010, 1 [6.1.1].

complaints or allegations.[9] If individuals feel a human rights violation may not be disclosable they may fail to report it, sacrificing accountability and integrity; or they may report it improperly, such as by going to the media without considering whether internal channels would be more effective or appropriate.

With regard to the state of mind of a discloser, we believe the current approach, which only requires a discloser to have an honest belief on reasonable grounds that the information they disclose demonstrates wrongdoing, is sufficient. Disclosers should not be required to meet the higher standard where information disclosed must *in fact* demonstrate the wrongdoing.

Further, we do not believe a discloser's motives should be a consideration. From the perspective of journalists, the reasons a whistleblower comes forward are largely irrelevant. What matters is the significance and integrity (or otherwise) of the information they bring, and any misconduct it may reveal. A whistleblower may be driven by malice, but that should not be a material consideration if they are exposing some genuine problem.

3.5 Making, Receiving and Identifying PIDs

External Disclosures

The Commonwealth *Public interest Disclosure Act* makes no specific reference to the media or journalists. It refers only to 'external disclosure' to 'any person other than a foreign public official'.[10] This recognises that external disclosures can come is a variety of forms and be justified by legitimate concerns in a variety of situations. It allows for the possibility of a discloser going through an agency such as an advocacy group which is capable of understanding, validating and contextualising the information for a journalist (or guiding the whistleblower through internal processes). The Commonwealth Act further provides for a specific 'Legal Practitioner Disclosure', an important protection for access to justice that should be a priority inclusion for the Queensland Act. Whilst disclosures for the purpose of seeking legal advice could be incorporated into provisions for a broader 'external disclosure', the Commonwealth approach of separating this into a clear, separate disclosure category put a more appropriate emphasis on this critical and very particular form of disclosure.

Providing for a broad category of protected 'external disclosure' also avoids the potentially thorny issue of defining 'journalist'. This is valuable, especially in light of the dynamic and evolving nature of journalism in today's globalised and technology-driven context.[11] though we also believe that for clarity, journalists should be mentioned in the Act as a valid way of making an external disclosure.

Currently, the Act defines 'journalist' in s 20(4) as, 'a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media'. This

[9] AJ Brown et al, *Clean as a Whistle: A Five Step Guide to Better Whistleblowing Policy and Practice in Business and Government* (Report, Griffith University, August 2019) 48.
[10] *Public Interest Disclosure Act 2013* (Cth) s 6.
[11] For discussion of various legal and social science definitions of journalism, see: Rebecca Ananian-Welsh, 'Who is a Journalist? A Critical Analysis of Australian Statutory Definitions' (2022) 50(4) *Federal Law Review* (advance).

definition rules out many people who are legitimately producing journalism, but who may not be regarded as ‘engaged in the occupation’, such as student journalists or volunteers. The words, ‘print or electronic’ also risk becoming redundant and are unnecessary. This definition is inconsistent with the newer definition in *Evidence Act 1977* (Qld) s 14R(1) that says a journalist is a person ‘engaged and active in a) gathering and assessing information about matters of public interest; and b) preparing the information or providing comment or opinion or analysis of the information, for publication in a news medium.’ We believe this is a more appropriate approach and should be adopted for consistency and clarity. A further example of a model definition is provided by s 126J of the *Evidence Act 1995* (Cth), which effectively defines a journalist as ‘a person who is engaged and active in the publication of news’ and has ben advocated by Associate Professor Ananian-Welsh in a recent article for the *Federal Law Review*.[12]

Emergency Disclosures

Currently, the Act requires a person to wait six months before making a disclosure to a journalist. We believe this is inappropriate and potentially harmful, particularly in cases where there is urgency involved, and internal mechanisms have failed. The Commonwealth PID Act contains a provision for ‘emergency disclosure’, where ‘the discloser believes on reasonable grounds that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the environment’. We believe this is appropriate, and that such a provision should be included in the Act.

Information That May Be Disclosed

Section 20(2) of the Act states, ‘the person may make a disclosure of substantially the same information that was the subject of the public interest disclosure mentioned in subsection (1)(a) to a journalist’. This section is problematic for several reasons. To focus on the particular problems which arise in the context of media disclosures:

1. Journalists have an ethical obligation to confirm the information received, and therefore may require additional supporting information that might not be otherwise relevant to an internal disclosure.
2. A journalist may also require additional information for context. For example, the whistleblower might reveal an internal email that contained evidence of corruption in a contract. That email may be sufficient for an internal disclosure where the details of that contract are understood, but a journalist would need further information to understand the bigger picture and report the incident appropriately.
3. Where a discloser may appear to be at least partly motivated by malice or anger, a journalist may require additional information to confirm that there is indeed a serious breach that would be covered by the Act.
4. The provision may allow for excessive information to be disclosed to a journalist. For instance, a whistleblower making an internal disclosure may be prepared to share a wealth of material within the organisation, some of which may be inappropriate or unnecessary for public release.

[12] ‘Who is a Journalist? A Critical Analysis of Australian Statutory Definitions’ (2022) 50(4) *Federal Law Review* (advance).

For those reasons and to allow journalists to perform their roles effectively and remain covered by the Act, we believe the definition of information that may be disclosed should be tailored to the specific context of external disclosures. The Commonwealth Act says, ‘No more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct’, and that ‘the information does not consist of, or include, intelligence information’ or relate to an intelligence agency.[13] Whilst we have elsewhere raised concerns in respect of ‘intelligence information’,[14] we believe this is a more appropriate way of approaching the issue and might provide a general model for the Queensland approach.

Yours sincerely,

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[13] *Public Interest Disclosure Act 2013* (Cth) ss 26(1) item 2, 33
[14] Rebecca Ananian-Welsh, Rose Cronin and Peter Greste, ‘In the Public Interest: Protections and Risks for Whistleblowing to the Media’ (2021) 44(4) *University of New South Wales Law Journal* 1242, Part C.6.