Free Speech Union of Australia

Attorney-General's Department
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By Email: PID.consultations@ag.gov.au

22 December 2023

Submission: Public sector whistleblowing stage 2 reforms

Please find enclosed submission by the Free Speech Union of Australia (**FSU**) for the consultation on *Public Sector Whistleblowing Stage 2 Reforms*.

The FSU is a non-profit non-partisan organisation set up to promote the fundamental human right of Freedom of Speech within Australia. We defend, protect and promote the Free Speech rights of all Australians irrespective of the content of the speech.

The FSU is responding to this consultation both as an organisation with a general interest in Free Speech and as a union with members who are directly impacted by the outcome.

We make the following recommendations:

1. *Unprotected disclosures should be the exception, not the rule:* the disclosures that are not protected under a whistleblower regime should only be limited to those that could cause tangible harm to people, property, or the broader national interests of Australia.
2. *Greater transparency means less need for whistleblowing:* many of the recent cases involve revealing information about policy decisions that should have been made public without the need for whistleblowers. The fact that people had to make this information public should be indicative of a lack of transparency in Government which is as much of a concern as the particulars of the disclosures.
3. *The Minster should decide:* The process for making disclosures for most departments should be through the Commonwealth Ombudsman, who investigates, makes a report and advises the relevant Minister who makes the ultimate decision.

If there are any questions with respect to this submission, please direct them to Dara Macdonald on the details below.

Yours sincerely,

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Free to Speak Up: Protecting Whistleblowers and Promoting Transparency

Whistleblower protections are important to individuals, organisations and society as a whole.

The benefits for individuals are the most profound. It protects people who bring attention to wrongdoing or practices that an organisation wishes to keep hidden but deserve correction or scrutiny.

Humans are prone to protecting their in-group: this is both the cause of much corruption but also why whistleblowers are typically retaliated against. People are more willing to overlook the bad behaviour of people they perceive to be part of their tribe, particularly if it is seen as 'just the way things are done here'. This same propensity to prefer the in-group also leads the group to punish people who go against them or show disloyalty. Punishing whistleblowers is the default in most societies and that is precisely why whistleblower protections need to be encoded into an organisation to prevent people that go against the group and shed light on misconduct or issues within an organisation suffering repercussions.

It may be instinctual to punish those who show a willingness to break ranks if they witness behaviour or practices that should be challenged, but these people are necessary in order for any group or organisation to error correct and address issues. Protecting whistleblowers is important for any organisation that does not want to stagnate or degenerate over time. It also helps maintain the reputation of an organisation by stopping practices that may be common but when viewed from outside would be seen as wrongdoing.

This is particularly the case in organisations that are there to serve the public by implementing the decisions that come out of our democratic institutions. An extra level of transparency and accountability for actions and practices should be expected given the impact that these organisations have. It is vitally important that whistleblowing is encouraged as the default rather than treated as an anomaly.

The whole of society benefits when organisations, particularly those in public administration, protect whistleblowers as it encourages a culture where people feel free to speak up against bad behaviour more generally.

I. Guiding Principles

Guiding this submission are three principles that are the basis of the Australian system of government. Australia is a *liberal*, *democratic* country with a *Westminster system.*

1. *Liberal:* the default in society is that people should not have arbitrary limitations placed on their autonomy. In this instance, and of particular importance to the FSU, is freedom of speech. In the context of whistleblower protections, this means that limits on speaking up are only placed where absolutely necessary to prevent tangible harm from occurring.
2. *Democratic:* ultimately it should be the Australian people that decide how they want to be governed, and to that end, the government (including the public service) should

be maximally transparent as to what policies are being pursued and information that surrounds the decisions about how and why policies are to be implemented.[1]

3. *Westminster System:* meaning that it is the relevant Minister that has ultimate responsibility for their portfolio and the departments that sit within it. The relationship between the department and the Minister in this system is that the public servants provide advice and the Minister makes the decision based on that advice.

These three aspects of our system of government should inform any whistleblowing regime adopted with respect to the public service.

II. Recommendations

A. Unprotected disclosures should be the exception, not the rule

The most substantive change to the current whistleblowing regime should be a move away from an exhaustive list of 'permitted' disclosures that currently define what is protected. Section 29 of the *Public Interest Disclosure Act 2013 (Cth)* (**PID Act**) currently sets out a list of "disclosable conduct". The current conduct that is protected if reported is where it:

- contravenes a law
- is corrupt
- perverts the course of justice
- results in wastage of public funds or property
- is an abuse of public trust
- unreasonably endangers health and safety or endangers the environment
- is misconduct relating to scientific research, analysis or advice
- is maladministration, including conduct that is unjust, oppressive or negligent[2]

This approach means that disclosures that do not fall into the exhaustive list of 'disclosable conduct' are not protected from repercussions. In the recent high-profile cases of whistleblowing, the issue was not that people made disclosures that fell under the regime but the regime failed to protect them, but disclosures did not fall under the protections of the PID Act in the first instance.[3]

For this reason, the most obvious reform is the adoption of an expansive definition that ensures that many types of behaviour that could be considered wrongdoing or bad practice are captured.

The presumption should be in favour of disclosure rather than non-disclosure. Instead of regulating whistleblowers by limiting what is disclosable conduct, the default should be that issues are able to be raised unless they could be harmful to persons, property, or the national interest.

[1] Including any relevant data, cost benefit analysis, and so forth that lead to one form of implementation over another.

[2] https://www.ombudsman.gov.au/__data/assets/pdf_file/0025/29509/ombudsman_pid_fact_sheeta.pdf

[3] https://www.theguardian.com/australia-news/2023/mar/27/ato-whistleblower-richard-boyle-face-trial-after-immunity-defence-fails

B. Greater transparency means less need for whistleblowing

The recent high-profile whistleblower cases have predominantly involved people sharing information that should have been made public to begin with.[4] There is a good reason why commercial, strategic or security information should not be disclosed, but much of the inner workings of departments when they produce and implement policy should be in the public domain.[5] This knowledge is crucial for a functioning democracy. The public needs to know what policies are being pursued (including why, how and the outcomes) in order to make informed choices come election time. It should not require a whistleblower to make this information public.

The need for whistleblowing could be decreased if there was simply greater transparency and accountability to the public for decisions and actions the departments and other government organisations take and why.

Whistleblowers are an important check on how transparent and consultative the government is. If what they are trying to bring attention to is something that if made public would not result in any potential harm[6] then it is not just a sign that the specific practice being reported should be investigated but that the department is becoming overly secretive and not abiding by the principles of open and accountable government.

C. The Minister should decide

The present reporting structure has two main flaws. The first is that the first report is made to a supervisor who brings it to an authorised officer within the same department or organisation. Ideally, the first report should be made to someone outside the department or organisation who is not subject to the same culture or pressures that lead to in-group biases. The Commonwealth Ombudsman would be the logical first point of contact for whistleblowers as they already handle first reports in some circumstances.

The second is that the final decision is not made by the person in our system who has ultimate responsibility. It is for this reason that the final decision in respect to any reports about issues made by whistleblowers should sit with the Minister.

III. Responses to the Specific Issues

Issue 1: Making a disclosure within government

Ideally, the first pathway for a whistleblower should be outside the department or organisation. This avoids ramifications that can occur (even where there is a strong anti-retribution policy in place) it also means that someone who is not subject to the in-group pressures and culture of that organisation is the one that assesses whether the behaviour warrants addressing.

[4] https://www.nzherald.co.nz/nz/former-te-whatu-ora-employee-appears-in-court-charged-with-covid-19-vaccination-data-breach/ADKOB4AKFNEIFKLBO5DEVVY47M/

[5] Such as what process lead to the adoption of a particular policy, how it is implemented, and the tracking of the subsequent effects of that policy.

[6] This does not include reputational harm which should be an indicator that practices being adopted would not be endorsed generally.

The logical pathway for disclosures would be the Commonwealth Ombudsman[7] who then investigates, reports and makes recommendations for the relevant Minister to check and decide whether to take those actions or not.

Issue 2: Pathways to make disclosures outside of government

The general presumption should be in favour of protection against punishment or retribution except for where that disclosure could cause tangible harm to Australians or the national interest.

If a disclosure is for public interest reasons (e.g. it should be made public in order to facilitate open and accountable government) and the Minister determines that it should be made public then the department or organisation should release the information themselves. If it is for personal reasons (e.g. to seek legal advice) the current provisions in the PID Act seem to be sufficient.

Issue 3: Protections and remedies under the PID Act

The general presumption should be in favour of protection against punishment or retribution except where that disclosure could cause tangible harm to Australians or national interests. The main issue with the current regime is not that people who fall under it are not protected but that disclosures that are in the public interest do not necessarily fall under the protections it offers. The recommendation at issue 5 is the most important reform in order to ensure people making disclosures are protected.

Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner

The function should be carried out (where possible) by the Ombudsman with the final decision to be taken by the Minister. There is no requirement to add or involve additional agencies, particularly in the case of integrity agencies that tend to further remove the decision from democratic accountability.

Issue 5: Clarity of the PID Act

The purpose of the PID Act should be to ensure that the maximum scope is given for potential whistleblowers and disclosures which provide an important check on how the government is functioning. It should be guided by the principles that underpin our liberal, democratic, Westminster system of government.

On that basis, the FSU would recommend adopting an expansive definition of disclosable conduct that grants the greatest possible freedom to speak up against inner-department behaviour, particularly where that behaviour involves policy decisions. Below is an example of an expansive definition.

> "Disclosure of any conduct, practice or behaviour or any information relating to any conduct, practice or behaviour that has the potential to change or affect the Australian public's perception or support for a policy being pursued or would likely bring the organisation or department into disrepute."

[7] This might not be possible for highly sensitive areas like defence but for most agencies this would be the best option.

Any disclosure made in accordance with this broad definition should be protected except if the disclosure:

- could cause harm or damage to persons or property; or
- could harm or undermine the national interest including by:
    - causing commercial or economic harm or undermining any commercial or economic interests being pursued;
    - undermining the security of Australians or any security interests being pursued; or
    - undermining the strategic position of Australia or any strategic interests being pursued.

The presumption in law should be that people are free to speak up and be protected and only prevented from doing so when the disclosures have the potential to cause tangible harm.