Submission No 2

REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994

Organisation: NSW Council for Civil Liberties

Name: Ms Therese Cochrane

Position: Secretary

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New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

to

The Parliament of NSW, Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

http://www.nswccl.org.au
office@nswccl.org.au
Street address: Suite 203, 105 Pitt St, Sydney, NSW 2000, Australia
Correspondence to: PO Box A1386, Sydney South, NSW 1235
Phone: 02 8090 2952
Fax: 02 8580 4633

NSWCCL Submission to the NSW Parliament, Committee on the Ombudsman, the Police Integrity Commission, and the Crime Commission

The New South Wales Council for Civil Liberties welcomes the Committee's decision to review the important changes made in the *Protected Disclosures Amendment (Public Interest Disclosures) Act 2010*. We appreciate the invitation to provide our views on this legislation.

Summary

The New South Wales Council for Civil Liberties ("NSWCCL") believes that the right of individuals to report wrongdoing within organisations ("whistleblowing") is an extension of the fundamental right to freedom of expression. Australian courts have supported this view with rulings guaranteeing the freedom of public servants to speak on matters of public concern under the implied right of political communication.[1]

Whistleblowing engaged in by government employees furthers the democratic values of transparency and accountability of the state to the people. Governmental organisations, like all organizations, are susceptible to groupthink and collective cognitive biases which can threaten their legitimacy.[2] Whistleblowers play an essential role by injecting individual ethical conscience into bureaucracy, providing healthy opportunities to reassess the direction an organisation has taken in light of its obligations to citizens.

When wrongdoing cannot be addressed within an organisation (through "internal whistleblowing"), third parties such as the Ombudsman can provide another pathway for whistleblowers to have their concerns addressed. In some circumstances, disclosure to the media or members of Parliament ("external whistleblowing") may also be necessary. External disclosure is relatively rare[3] and seems to increase in frequency after "national security" crises, when governments often begin to routinely exceed their constitutional powers.[4] Disclosures in these circumstances can trigger democratic reengagement with policies shrouded in secrecy. This, in turn, creates a sense of popular power which undergirds democracy.[5]

NSWCCL believes that the integral role played by whistleblowers in revitalising democracy should be reflected in and secured by public interest disclosure legislation. We adopt the

[1] *See Bennett v President, Human Rights and Equal Opportunity Commission*, [2003] FCA 1433 (10 December 2003).
[2] Stephen G. Coven*, Public Sector Ethics: Theory and Applications*, 105 (2015).
[3] A.J. Brown, *Whistleblowing in the Australian Public Sector*, xxxvii (2008), *available at* http://press-files.anu.edu.au/downloads/press/p8901/pdf/book.pdf?referer=465.
[4] Yochai Benkler, *A Public Accountability Defense for National Security Whistleblowers and Leakers*, 8 HARV. L. & POL'Y REV. 281, 283 (2014).
[5] Daniel Markovitz, *Democratic Disobedience*, 114 YALE L. J. 1847, 1947-1948 n115 (2005) (providing a theoretical account of the democratic utility of Daniel Ellsberg's leak of the Pentagon Papers).

position of the leading international anti-corruption organisation, Transparency International, which defines the three essential aspects of whistleblower legislation as:

(1) providing accessible disclosure channels for whistleblowers,
(2) meaningfully protecting whistleblowers from all forms of retaliation, and
(3) ensuring that the information whistleblowers disclose can be used to advance needed reforms.[6]

Within this framework, this submission will evaluate the 2010 amendments and the legislation as a whole.

I. Providing Accessible Disclosure Channels for Whistleblowers

a. Internal Channels

The vast majority of public interest disclosures take place entirely *within* organisations.[7] A majority of these internal disclosures are made directly to a supervisor.[8] Problematically, the *Public Interest Disclosures Act 1994* ("the NSW Act"), as amended in 2010, does not allow direct disclosure to a supervisor, instead creating a confusing list of potential officials to whom a disclosure can be made.

In contrast, the Commonwealth's *Public Interest Disclosures Act 2013* ("the Commonwealth Act"), section 26 provides for direct disclosure to a supervisor, who is then required to pass the information along to a designated person within the organisation for review.[9] As the Public Interest Disclosures Steering Committee found in 2014, this provision is much simpler than the NSW provision, allowing a discloser the option of going directly to someone they may know and trust.[10]

Recommendation 1: Amend Part 2 of the NSW Act to allow protected disclosures to be made directly to a discloser's supervisor.

b. External Channels

Because we frame whistleblower protections in terms of their function within democracy, we view public disclosure as an option which, although it is a last resort, must remain open and accessible. When whistleblowers face serious retaliation or observe no changes over time in their organisation's wrongdoing, public or legislative accountability may be the only tool left to affect necessary reforms.

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[6] Transparency International, *International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest*, 3 (2013), *available at* http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation.
[7] *See supra* note 2.
[8] *See id.* at 87.
[9] *Available at* http://www.austlii.edu.au/au/legis/cth/num_act/pida2013295/s26.html
[10] Public Interest Disclosures Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, 5 (2014) https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/15195/Review-of-the-Commonwealth-public-interest-disclosure-legislation.pdf

New South Wales was the first jurisdiction in Australia to provide any kind of protection for disclosure to the media and members of Parliament.[11] This pioneering provision has since been built upon and expanded by laws in the Commonwealth and other states. We believe that the approach taken to third party disclosures at the federal level, as well as in a recent law in the Australian Capital Territory, discussed below, represent an improvement on the NSW model.

ACT Provision on Significant Risk of Reprisals

The ACT's *Public Interest Disclosure Act 2012* ("the ACT law"), section 27 addresses the unique circumstances which may arise when a whistleblower faces "significant risk" of reprisal if they go through internal disclosure channels, rendering it "unreasonable" for them to do so. [12] In these circumstances, the ACT law allows a whistleblower to disclose directly to the media or members of Parliament.

We believe that the ACT's provision provides important protections for whistleblowers who find themselves in unique circumstances of heightened risk of reprisal. Such reprisals are sometimes caused by a strong culture of workplace secrecy, the gravity of an accusation, or the high status of those against whom accusations are made. This legislation also protects the state from imprudent disclosures by imposing a reasonableness standard on the determination of risk of reprisal.

Recommendation 2: Strengthen protections for external disclosure to media and members of Parliament in Section 19 of the Act, allowing disclosure when a public official faces "significant risk" of detrimental action due to reporting through internal procedures, which makes such disclosure "unreasonable in all the circumstances."

Commonwealth Provision on Inadequate Investigations

The Commonwealth's *Public Interest Disclosures Act 2013*, Section 26 provides that whistleblowers who reasonably believe that the internal investigation of their disclosure has been "inadequate" can make an external disclosure. By comparison, the New South Wales legislation is more complex, laying out multiple fact scenarios in which it would be possible to make an external disclosure.

We believe that the Commonwealth provision is simpler and more comprehensive, because it allows for the fact that an investigation could be inadequate in a way other than the

[11] A. J. Brown, Public Interest Disclosure Legislation in Australia: Towards the Next Generation, 28 (2006) *available at* https://www.griffith.edu.au/__data/assets/pdf_file/0015/151314/full-paper.pdf.
[12] *Available at* http://www.austlii.edu.au/au/legis/act/consol_act/pida2012295/s27.html

specifically enumerated ways listed in the NSW Act. As in the ACT law, the government's interests are sufficiently protected by the inclusion of a reasonableness standard.

Recommendation 3: Provide protection to whistleblowers who make external disclosures based on their reasonable belief that internal investigation processes have proved "inadequate."

NSW Heightened Truth Standard for External Disclosures

The NSW Act protects whistleblowers who make *internal* disclosures, so long as they hold an "honest belief on reasonable grounds" that their disclosure reveals wrongdoing. If this reasonable belief turns out to be incorrect, whistleblowers do not lose protection. In contrast, the standard for whistleblowers who make *external* disclosures is heightened – requiring that a whistleblower reasonably believe the disclosure to be substantially true and *that the disclosure actually is substantially true*.[13]

Neither the ACT nor the Commonwealth whistleblower protection laws require this heightened standard for external disclosures. The heightened standard seems to serve the purpose of raising the stakes on external disclosures. There is no difference in culpability between external and internal disclosers to justify this. No one should be punished based upon their reasonable belief that they are disclosing wrongdoing. Such a punishment, especially of a public whistleblower, is likely to serve as a deterrent to other would-be whistleblowers.

Recommendation 4: Make holding an "honest belief on reasonable grounds" uniformly the test for protection throughout the Act, including in the Section 19 external disclosures provision.

We believe that these recommendations, if implemented, would be a huge step towards the goal of providing accessible disclosure channels for whistleblowers by simplifying the internal disclosure channel and widening the external disclosure channel.

II. Meaningfully Protecting Whistleblowers From All Forms of Retaliation

The 2010 amendments created a tort of victimization which theoretically allows whistleblowers who suffer retaliation to receive restitution for the economic, emotional, and reputational harm that they endure.[14] Worryingly, the legislation does not include satisfactory protections such as a "public interest" costs provision, and precludes the

[13] *Available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/pida1994313/s19.html

[14] *Protected Disclosures Amendment (Public Interest Disclosures) Act 2010,* codified at *Public Interest Disclosures Act 1994*, Section 20A *available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/pida1994313/s20a.html.

recovery of exemplary, punitive, or aggravated damages. As a result, the tort has rarely been used.[15] Those few whistleblowers who have recovered damages have done so under other employment legislation.[16]

Commonwealth Act "Public Interest" Costs Provision

A costs provision alleviating the possibility that a plaintiff will have to pay the costs of the other party is appropriate in "public interest" cases. Recognizing that making a public interest disclosure is not only a private right but a public good,[17] the Commonwealth government included such a costs provision to protect whistleblowers in its 2013 Act. We believe that such a provision in the NSW Act would remove the deterrent effect caused by the specter of potentially huge costs awards.

Recommendation 5: Amend Part 3 of the NSW Act so that it bars courts from ordering a whistleblower plaintiff to pay costs incurred by the other party to litigation, except in cases brought vexatiously or without reasonable cause.

ACT Provision on Damage Award Types

The NSW Act limits the remedy that can be awarded to a whistleblower to actual damages, precluding the award of exemplary, punitive or aggravated damages. Practically speaking, such limitations on damages often prevent lawyers from acting in whistleblower cases, leading to insufficient legal specialisation in whistleblower protection law and a paucity of adequate legal representation in the area. The ACT legislation is more attuned to this problem. It provides that "[a]ny remedy that may be given by a court for a tort, including exemplary damages, may be given[.]"[18] This provision is preferable because it increases the likelihood that whistleblowers can afford representation and thereby receive appropriate remuneration.

Recommendation 6: Amend Section 20A (3) to allow for the broad award of "any remedy which may be given by a court for a tort."

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[15] A. J. Brown*, Towards 'Ideal' Whistleblowing Legislation? Some Lessons From Recent Australian Experience*, 12 (2013) *available at* http://transparency.org.au/wp-content/uploads/2013/10/Brown-A-J-Towards-Ideal-Whistleblowing-Laws-Australia-forthc-2013.pdf.

[16] *See* Wheadon v. State of New South Wales, unreported, District Court of New South Wales, No. 7322 of 1998 (2 February 2001) per Cooper J. *See also 'Toni Hoffman Settles Claim for Compensation',* Maurice Blackburn Lawyers (2012), *available at* http://www.mauriceblackburn.com.au/news/press-releases—announcements/2012/toni-hoffman-settles-claimfor-compensation.aspx.

[17] *See id.* at 14.

[18] *Available at* http://www.austlii.edu.au/au/legis/act/consol_act/pida2012295/s41.html.

We believe that these two recommendations, taken together, will remove the barriers which have so far caused the tort provisions of the NSW Act to be little used. This will result in a more encouraging environment for whistleblowing by mitigating the sometimes serious financial risks taken by whistleblowers.

III. Ensuring That the Information Whistleblowers Disclose Can be Used to Advance Needed Reforms

After a whistleblower has made huge personal sacrifices in order to bring wrongdoing to light, it is important that they see their allegations taken seriously and used to prompt change. Often, Australian whistleblowers' courageous actions have led to reform, not only within their organisations, but at the level of public policymaking. For example, recent whistleblowing by insiders to the greyhound racing industry has led the NSW government to ban greyhound racing.[19] Whistleblowing about police corruption led to the legal changes which established many of the integrity commissions in Australia as well.[20]

Contrary to this progressive history that has challenged government policy, the NSW Act broadly provision excludes disclosures which "question[] the merits of government policy" from protection.[21]

In the Ombudsman's factsheet regarding what disclosures are not covered by the Act, it is stated that:

> "[A] report alleging that the government's decision to close a particular school was wrong because it had an unfair impact on a vulnerable group of children – who would have to travel a longer distance to attend the next closest public school – would most likely fall outside the coverage of the PID Act."[22]

We believe that a making a report like this should be protected. Such an allegation is not meaningfully different from the reports of whistleblowers we hail as heroes, such as those who helped to end the government's policy of supporting greyhound racing by uncovering

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[19] *See* Natalie O'Brien and Lisa Cox, *Greyhound industry whistleblowers 'intimidated, threatened and ignored,* (2015), *available at* http://www.smh.com.au/sport/greyhound-industry-whistleblowers-intimidated-threatened-and-ignored-20150217-13gw6n.html*; see also* Sean Rubinsztein-Dunlop, *Greyhound racing industry hit with doping, cruelty, collusion allegations*, (2013) *available at* http://www.abc.net.au/news/2013-10-15/greyhound-racing-industry-hit-by-doping,-cruelty-allegations/5024714 (describing whistleblower Ted Humphries' allegations which sparked the inquiry leading to the passage of the bill banning racing).

[20] *See* Ross Fitzgerald, *Two decades after Fitzgerald inquiry, police culture still needs change* (2010), *available at* http://www.theaustralian.com.au/opinion/two-decades-after-fitzgerald-inquiry-police-culture-still-needs-change/story-e6frg6zo-1225935797568 (explaining how the Fitzgerald inquiry, spurred by whistleblower Col Dillon led to the establishment of such a commission).

[21] *Available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/pida1994313/s17.html.

[22] Ombusdman of New South Wales, *What's Not a Public Interest Disclosure*, 2 (2011) *available at* http://www.alc.org.au/media/76762/c_%20b3-whats_not_a_public_interest_nov11.pdf.

live baiting and illegal drug use or those who convinced the government to spend more money on monitoring to end police abuses of power.

However, where disagreement with government policy is precluded from whistleblower protection, it is important that any exclusion from protection be stated as precisely and thereby, as transparently, as possible. In this respect, the ACT Act is once again illuminating. It provides a narrowly worded provision excluding disclosures questioning government policy, which removes protection from disclosures which "relate[]…to a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure."

Recommendation 7: Remove or substantially narrow the broad exception for disclosures questioning the merits of government policy in Section 17 of the NSW Act.

IV. Other Concerns

The benefits which may be gained from an insider's knowledge about wrongdoing do not cease when that person stops working for the government. We believe that the NSW Act should include protection for former public officials, as the Commonwealth Act does. Allowing former public officials to come forward about historical wrongdoing can inform modern policy choices by helping us to understand what went wrong in the past. Also, because a person may be fired as a result of their mere knowledge of wrongdoing, even before they have taken any steps to disclose it, the lack of protection for former employees may prevent the knowledge from ever coming to light. In fact, this lack of protection may even encourage such "preemptive retaliation."

Recommendation 8: Amend the definition of "public official" in Section 4A (1) of the Act to include former government employees.

Concluding Comments

The NSWCCL is proud that New South Wales has historically been a leader in Australia and the world in protecting whistleblowers. To remain at the forefront of these issues, New South Wales must update its laws to reflect the innovative changes made in other jurisdictions.

It is important to frame whistleblower protections in light of their democratic importance. We believe that reforming the NSW Act with an eye towards supporting the democratic purpose of whistleblowing requires liberalizing many of its provisions, as outlined above.

We thank you for your consideration of our submission.

This submission was written by Taylor Markey and Eugene Schofield-Georgeson (NSWCCL Committee Member) on behalf of the NSWCCL.

Yours sincerely,

Therese Cochrane
Secretary
NSW Council for Civil Liberties
Mobile [redacted]

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Contact in relation to this submission
[redacted]