Submission No 8

REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994

Organisation: Joint Media Organisations

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Mr Lee Evans, MP
The Chair
The Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission
Parliament House
Macquarie Street
Sydney, NSW, 2000
By email: ombopic@parliment.nsw.gov.au

Re: Statutory review of the *Public Interest Disclosure Act 1994*

Dear Mr Evans,

The parties to this submission – AAP, ABC, APN News & Media, Australian Subscription Television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, NewsMediaWorks, SBS and The West Australian (collectively, the Joint Media Organisations) – appreciate the opportunity to make a submission to the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission's statutory review of the *Public Interest Disclosure Act 1994* (the Act).

Free speech, free press and access to information are fundamental to a democratic society that prides itself on openness, responsibility and accountability. This includes the public's right to know how they are being governed, including the right to be informed about potential corruption, maladministration, serious and substantial waste, government information contravention and local government pecuniary interest contravention within the public sector – in this instance, within the New South Wales Government. Internal channels may not always be an appropriate or effective mechanism of addressing such issues. Exposure to the media may be the only or most effective means to inform the public and influence a positive outcome. Indeed, the law has specifically acknowledged the public interest in the communication of facts to the public by the media and its ability to access sources of facts: see the journalist privilege requirement of section 126K of the *Evidence Act 1995* (NSW).

SUMMARY

In summary, the Joint Media Organisations recommend that:

1. The criteria that a discloser is required to meet, before a disclosure to a journalist is protected under the Act, is restrictive and infringes freedom of speech, and accordingly should be less restrictive. Specifically we recommend that a discloser should be protected under the Act from making a disclosure to the media:
- in certain circumstances, without the need to first pursue official internal channels;
- with-in a reasonable timeframe, without waiting for six (6) months after the discloser notified the official internal channels of the matter;
- where the discloser believes that the internal investigating authority, public authority or officer investigating the matter has not taken appropriate action or has not investigated the matter adequately; and
- without requirement that the disclosure be 'substantially true'.

2. The scheme is too narrowly cast and should be broadened to allow the protections under the Act to include disclosures made by:
- Members of Parliament; and
- whistleblowers who were public officials but have retired, resigned or have been fired.

3. Pseudonymous disclosures should be expressly permitted under the Act.

THE REVIEW OF THE ACT

1. Restrictive criteria infringes on freedom of speech

The media, which brings issues of public interest to the public's attention, is often the only or most effective way for whistleblowers to expose wrongdoings within the public sector.

We are of the view that the criteria for whistleblower protection, as provided in the Act, should be less restrictive to facilitate public interest disclosures. As currently drafted, the Act potentially limits the free flow of information to the media and the public and therefore undermines freedom of speech.

Making such a public interest disclosure is a serious matter. However, the Act should give primacy to the public's right to know how it is governed and the decisions that are being made in its name. The Act's primary goal should be open government.

A number of amendments are recommended to address this issue.

1.1 Disclosure to the media without an internal investigation first for disclosures that are in the public interest

While section 19 of the Act permits disclosures to journalists, the Act confines the opportunity to make such disclosures. We strongly support protection of disclosures made to journalists. However, they disagree with the proposition that such protection should only be given to a whistleblower that has exhausted all internal official channels.

In some circumstances, a public servant may make a judgement that matters should be made public, in order to expedite appropriate action that is in the public interest.

We believe that whistleblowing to the media is in the public interest and a whistleblower should not necessarily be required to pursue official channels within the Government before resorting to the media. There are a number of examples to demonstrate that governments often only become aware of, or act on allegations made by whistleblowers once they have been aired to the media. Two recent examples are relevant here:

- In 2005 *The Australian* published reports of Customs Officer Allan Kessing on lax airport security, after the reports had been ignored by his superiors. Only after the reports became public knowledge, was a $200million program put in place to improve security.

  Allan Kessing was convicted of disclosing official information without authority. The Joint Media Organisations believe Kessing should not have been prosecuted.

- Queensland nurse Toni Hoffman, had raised concerns about malpractice by Dr Patel with the police, the Queensland Coroner and her employer. Action was not taken and the matter was

eventually raised with a Member of Parliament. The problems were brought to the attention of the public and Dr Patel was charged and extradited back to Australia. He was ultimately the subject of a QCAT finding that he must never again be registered as a medical health practitioner[1]. If Ms Hoffman had been able to make a public interest disclosure, immediate action could have been taken to address the danger to the health and safety of the Queensland public.

It is therefore recommended that the Act should be amended to permit a whistleblower to make a disclosure directly to the media, without the need to first pursue official channels, where the disclosure is in the public interest. Factors that should be taken into account in deciding if the disclosure is in the public interest, should include the seriousness of the allegations, the health and safety of the public or whether there is an immediate threat to the environment, animals or a cultural site of significance.

There is legislative precedent in the Commonwealth arena which provides protection for whistleblowers that make external disclosures, notwithstanding that the discloser did not first pursue official internal channels. Under clause 26(1), Item 3(a) of the Public Interest Disclosure Act 2013 (Cth) (Commonwealth Act), a discloser is protected if he or she makes a disclosure to an external person, (other than a foreign public official) 'where the disclosure concerns a 'substantial and imminent danger to the health or safety of one or more persons'.

Recommendation 1

Amend section 19 to permit a disclosure by a public official to a Member of Parliament or a journalist where the disclosure is in the public interest.

1.2 Disclosure to the media where a matter has not been investigated properly, an authority has not taken action or where internal channels are likely to be futile

Currently, a discloser that has a grievance based on the failure of authorities to conduct competent and timely investigations into their claims is not protected from going to the media under the Act.

It is our view that the Act should allow for external disclosure where the discloser reasonably believes that the investigating authority, public authority or officer of a public authority has not investigated the matter adequately, or has not taken appropriate action. This is a necessary addition, particularly as the Act lacks any requirement on an investigating authority to exercise any level of duty to the discloser or to meet quality controls such as timeliness, resource sufficiency and whistleblower involvement when investigating a matter.

There is legislative precedent in the Commonwealth that is consistent with the recommendation to allow for a disclosure to an external person, (other than a foreign public official) 'where the disclosure believes on reasonable grounds that the investigation was inadequate' (clause 26(1), Item 2(c)(i) and (ii) of Commonwealth Act).

We also believe that the Act should be further extended to allow for external disclosures where the discloser reasonably believes that the disclosure through internal channels is likely to be futile or result in the whistleblower, or any other person, being victimised. This provision is important to encourage whistleblowers to take action, particularly as and there is significant research supporting

[1] Medical Board of Australia v Patel [2015] QCAT 133

the view that whistleblowers believe that their own organisations are not serious about protecting people that speak up internally[2].

Recommendation 2

Amend section 19 to permit a disclosure by a public official to a Member of Parliament or a journalist where the discloser reasonably believes that:

(a) the investigating authority, public authority or officer of a public authority has not investigated the matter adequately or has not taken appropriate action; or

(b) the disclosure is through internal channels is likely to be futile or result in the whistleblowers [or any other person] being victimised.

1.3 Disclosures within a 'reasonable period'

Under the Act, a whistleblower is protected from disclosing to a journalist unless the investigating authority, public authority or officer investigating the matter has:

- not completed their investigation within six (6) months after the discloser being made (s19(3)(b) of the Act); or
- failed to tell the discloser whether the matter was investigated within six months of the disclosure being made (s19(3)(d) of the Act).

We believe that the six (6) month waiting period is arbitrary and recommend that the Act should refer to a 'reasonable period', having regard to the nature of the matter, the time and resources required to properly investigate the matter and the urgency of the matter. If such a requirement is to be included, it should be accompanied by some examples of what would be considered a reasonable period.

Recommendation 3

Sub-section 19(3)(b) and (d) of the Act should be amended as follows:

"…. (b) must have decided to investigate the matter but not completed the investigation within a reasonable time of the original disclosure being made, or"

"…. (d) must have failed to notify the person making the disclosure, within a reasonable time of the disclosure being made, of whether or not the matter is to be investigated."

1.4 Disclosure are not required to be substantially true

Section 19 of the Act provides that the:

- discloser must have reasonable ground for believing the disclosure is substantially true; and
- disclosure *must be* substantially true.

We believe that this second requirement (that the disclosure must be substantially true) should not be a factor in whether protection is available under the Act. It acts as a disincentive for whistleblowers to

[2] In a survey conducted by Newspoll on 3-6 May 2012 for Griffith University and the University of Melbourne, the first stage of the survey shows only 49% of organisation members were confident that their own organisation was serious about protecting people who speak up.

come forward and disclose information to the media, as it may be difficult for the whistleblower to prove the facts in a Court. Provided that the whistleblower has reasonable belief in the truth of the allegation, we believe that the whsitleblower be entitled to the protection.

Recommendation 4

It is recommended that sub-section 19(5) be deleted.

2. The scheme is too narrowly cast

The scheme is too narrowly cast and should be broadened to encourage a wider group of people to come forward and report matters by allowing them to have the same protections under the Act.

2.1 Members of Parliament

The public interest disclosure scheme should apply to all areas of Government, including the Executive, the Legislature and the Judiciary. Accordingly we do not agree with the exclusion of Members of Parliament who make disclosures from the protections of the Act (s 4(A)(1)(a)(ii) of the Act).

Recommendation 5

Delete the following words in section 4A(1)(a)(ii):

", but not for the purposes of a disclosure being made by the member".

2.2 Public Officials who have retired, resigned or been fired

As currently drafted, the definition of 'public officials' in section 4A of the Act does not include a discloser who retires, resigns or is fired. There is no justification for the exclusion of the protection of the Act of a discloser who reports a matter after that person retires, resigns or is fired.

Recommendation 6

Section 4(1)(a) of the Act should be amended to allow for 'public officers' to include a public officer who has retired, resigned or been fired.

3. Pseudonymous disclosures should be expressly permitted and protected

The Act explicitly requires an investigating/public authority (and each of their officers) or a public official to whom a disclosure is made, not to disclose information that might identify or tend to identify a discloser (clause 22). However, it contains a number of carve-outs to revealing the identity of a discloser such as where the investigating authority, public authority, officer or public official is of the opinion that the disclosure of the identifying information is necessary to investigate the matter effectively or it is in the public interest to do so' (s22(1)(c) of the Act. It is in these instances that it is appropriate that disclosures are able to be made under pseudonyms.

We therefore recommend that the use of pseudonyms be explicitly permitted.

Recommendation 7

The Act be amended to explicitly allow for disclosures to be made pseudonymously.