

**Submission  
No 4**

# **INQUIRY INTO PUBLIC INTEREST DISCLOSURES BILL 2021**

**Organisation:** NSW Council for Civil Liberties

**Date Received:** 4 November 2021

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## **NSWCCL SUBMISSION**

### **NSW LEGISLATIVE COUNCIL PORTFOLIO COMMITTEE NO.1- PREMIER AND FINANCE**

### **INQUIRY INTO THE PUBLIC INTEREST DISCLOSURES BILL 2021**

**1 November 2021**

**NSWCCL**

## **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**

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The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Legislative Council Portfolio Committee No.1- Premier and Finance, in regard to the Inquiry into the *Public Interest Disclosures Bill 2021* (Bill).

NSWCCL endorses the Bill which is a complete rewrite of the *Public Interest Disclosures Act 1994*. The Bill is in response to recommendations from the 2017 reports of the Joint Parliamentary Committees on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission (Committee) and the Joint Parliamentary Committee on the Independent Commission Against Corruption.

It is concerning that the final draft took so long to emerge though heartening that the Bill substantially implements all but one of the recommendations of those committees. The Bill commences 18 months after assent.

## Introduction

1. The Bill makes it simpler for public officials to report wrongdoing, imposes clear duties on agencies to deal with the alleged wrongdoing, and sets out the supports and protections for the person who reported.
2. The Explanatory note summarises the key features, which<sup>1</sup>:
  - define the categories of public interest disclosure;
  - specify conditions under which a disclosure is a voluntary public interest disclosure;
  - enable a public official to make a voluntary public interest disclosure to an agency whether or not the agency has jurisdiction to investigate it;
  - make it an offence to take detrimental action against a person based on the suspicion, belief or awareness that a person has made a public interest disclosure;
  - protect people who make public interest disclosures from detriment and liability in relation to making the disclosures;
  - require agencies to adopt policies specifying their procedures for dealing with voluntary public interest disclosures;
  - require agencies to carry out training in relation to the public interest disclosure scheme;
  - specify how agencies should deal with voluntary public interest disclosures and respond to findings of serious wrongdoing or other misconduct; and
  - require agencies to provide the NSW Ombudsman with an annual return about the public interest disclosures they receive.
3. Despite endorsing the Bill, NSWCCL has reservations, shared to some extent by the Ombudsman and the Committee, concerning certain sections of the Bill and its operation. These are set out further in this submission.

## Serious wrongdoing

4. A public interest disclosure for the purposes of the Bill means a disclosure showing a serious wrongdoing.<sup>2</sup> NSWCCL is concerned that some serious types of wrongdoing are not included in the Bill.
5. Serious wrongdoing is defined in the Bill as “corrupt conduct, a government information contravention, a local government pecuniary interest contravention, serious maladministration, a

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<sup>1</sup> NSW Government *Public Interest Disclosures Bill 2021* Explanatory note

<https://legislation.nsw.gov.au/view/pdf/bill/ffeca197-a61e-4ed2-b340-676ac772673f>

<sup>2</sup> Cls22-26 Bill

privacy contravention or a serious and substantial waste of public money.”<sup>3</sup> However, this definition does not explicitly include:

- an alleged crime or breach of the law;
- official misconduct;
- defective administration, which includes negligence or incompetence; or
- any failure to perform a duty that could result in injury to the public, such as an unacceptable risk to public health, public safety or the environment.<sup>4</sup>

6. The Ombudsman acknowledges that, unlike other Australian jurisdictions, the Bill does not expressly extend to conduct that endangers health, safety or the environment.<sup>5</sup> For example, the Environment Protection Authority or Safework NSW disclosures would not attract the Bill’s protections.
7. It is also acknowledged that “serious maladministration” would exclude a disclosure such as a sexual harassment claim, which would certainly be a matter of public interest.

### Reporting avenues should not be mutually exclusive

8. The Bill provides certain avenues for reporting serious wrongdoing. These are reporting within the workplace (public authority) or to an investigation authority (including an integrity agency), and to external parties (Members of Parliament and journalists).
9. However, prior to reporting to external parties, substantially the same disclosure must have been made to a relevant public authority or investigation authority.<sup>6</sup> The Committee and Ombudsman support this requirement on the basis that “*external disclosures ....could undermine the application of secrecy and confidentiality provisions, lead to a higher risk of reprisals ...[and the] alternative reporting avenue for people fearing reprisals within their own organisation.*”<sup>7</sup>
10. NSWCCCL considers that there are valid reasons why a discloser might prefer to report a wrongdoing directly to external parties rather than use internal reporting mechanisms. For example, if they fear or have reasons to believe that the wrongdoing might be covered up or in cases of urgent or grave public or personal danger.<sup>8</sup>
11. Furthermore, as pointed out, serious wrongdoing as defined in the Bill does not provide protection for all types of wrongdoing.
12. The mere risk that a discloser will legitimately repeat their disclosure to the media directly is a motivating factor in convincing agencies to deal with internal disclosures seriously.<sup>9</sup> Direct external disclosures might therefore be permitted in limited circumstances as they serve an important public function.

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<sup>3</sup> Cl13 Bill

<sup>4</sup> Brown, A.J, Latimer, P., McMillan, J. and Wheeler, C. (2008) “Best-practice whistleblowing legislation for the public sector: the key Principles” in *Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management in public sector organisations* [Editor(s): A. J. Brown, ANU Press] <https://www.jstor.org/stable/j.ctt24h7w1.18> [Brown] p.283

<sup>5</sup> Special report by the NSW Ombudsman on the Public Interest Disclosures Bill 2021 (19 Oct 2021) [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0003/123528/Special-Report-by-the-NSW-Ombudsman-on-the-Public-Interest-Disclosures-Bill-2021.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0003/123528/Special-Report-by-the-NSW-Ombudsman-on-the-Public-Interest-Disclosures-Bill-2021.pdf) [Report] pp 66-67

<sup>6</sup> Cls27-28 Bill

<sup>7</sup> Op.cit Report 58

<sup>8</sup> Terracol, M (2018) “A Best Practice Guide for Whistleblowing Legislation” Transparency International [https://images.transparencycdn.org/images/2018\\_GuideForWhistleblowingLegislation\\_EN.pdf](https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf) [Terracol]

<sup>9</sup> Op.cit. Brown 279

## Reporting to journalists- substantially true

13. The Bill retains the requirement in the Act that external disclosures, to Members of parliament and journalists, must be 'substantially true'. In NSW, a public official can only make a public interest disclosure to the media if, at least six months earlier, they already made the disclosure through official channels and no appropriate investigation or action was taken. However, to gain the protections of the legislation, the disclosure must also be shown to be "substantially true".<sup>10</sup>
14. According to the Crown Solicitors office "substantially true" means that the discloser would have to prove that the fact of the wrongdoing had actually occurred,<sup>11</sup> difficult considering that it is not the place of the discloser too investigate the wrongdoing.
15. The Committee recommended removing the threshold so that a discloser who reports to the media or a member of parliament will be protected, provided they believed honestly, and on reasonable grounds, that their disclosure indicated serious wrongdoing. It noted that these disclosures are a valuable part of the disclosure regime, particularly after all internal avenues have been exhausted.
16. Transparency International also endorses the view that if disclosure channels are differentiated in any manner, the disclosure process should not be onerous and must allow disclosures based on reasonable suspicion alone (e.g. UK Public Interest Disclosure Act).<sup>12</sup>
17. The Ombudsman has suggested a compromise to retain the substantially true threshold but only where the allegations have been tested through an investigation and found not to be substantiated. In all other cases, the threshold would be the standard one under section 26(1), 'honestly, and on reasonable grounds believes' the disclosure shows or tends to show serious wrongdoing.
18. NSWCCCL supports the approach of the Committee to remove the threshold so that a discloser who reports to the media or a member of parliament will be protected, provided they believed honestly, and on reasonable grounds, that their disclosure indicated serious wrongdoing.

## Public interest Defence

19. Journalists operate in Australia, without an explicit right to freedom of speech<sup>13</sup> and whistleblowers assist them in keeping the public informed. Journalists, and others acting in the public interest, should not be prosecuted or intimidated when proper channels for dealing with public interest disclosures fail. The effect of doing so is to criminalise reporting that is in the public interest.<sup>14</sup>
20. Tshwane Principal 43 recommends that the law provides a public interest defence for whistleblowers who make a disclosure that is not protected and are facing criminal, civil or administrative sanctions, if the public interest in disclosing the information in question outweighs the public interest in not disclosing the information.<sup>15</sup>

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<sup>10</sup> CI 28 PID Bill

<sup>11</sup> Op.cit. Report

<sup>12</sup> Terracol

<sup>13</sup> Williams, G. (2014) Protecting Freedom of Speech in Australia *Alternative Law Journal* Volume: 39, issue: 4, page(s): 217-221 at 221

<sup>14</sup> Ibid p.221

<sup>15</sup> Op.cit. Terracol; The Global Principles on National Security and the Right to Information (The Tshwane Principles)

<https://www.justiceinitiative.org/uploads/bd50b729-d427-4fbb-8da2-1943ef2a3423/global-principles-national-security-10232013.pdf>

## Ombudsman Funding and Investigatory Powers

21. The Ombudsman's office has oversight for operations of the Bill and confers on that office advisory, auditing, monitoring, reporting and certain other functions.<sup>16</sup>
22. In 2006 the NSW Legislative Assembly Committee recommended the creation of a Public Interest Disclosures Unit within the Office of the Ombudsman, 'funded by an appropriate additional budgetary allocation'. The Ombudsman has once more made it clear that the "Government is... aware that my office will require significant additional resources to prepare for that commencement, and to establish our ongoing enhanced oversight and reporting functions once the PID Bill is operational."<sup>17</sup>
23. The Ombudsman, though it is an independent agency with existing expertise in investigations and case-handling, does not appear to be given powers to do so, in this case. The oversight agency should be empowered to act, for example, to ensure effective responses in cases of reprisal or breakdown of the process, to support and protect disclosers.<sup>18</sup>

## Recommendations

### NSWCCL recommends that:

- a) "Serious wrongdoing" should explicitly include an alleged crime or breach of the law; official misconduct; defective administration, which includes negligence or incompetence; or any failure to perform a duty that could result in injury to the public, such as an unacceptable risk to public health, public safety or the environment.
- b) Direct external disclosures should be permitted in limited circumstances without the same disclosure having had to be made to a relevant public authority or investigation authority first.
- c) The "substantially true" threshold for members of parliament and the media should be the standard one under section 26(1), that is, 'honestly, and on reasonable grounds believes' the disclosure shows or tends to show serious wrongdoing.
- d) There should be a public interest defence for whistleblowers and others who make or receive a disclosure that is not protected and are facing criminal, civil or administrative sanctions, if the public interest in disclosing the information in question outweighs the public interest in not disclosing the information.
- e) The Ombudsman's office receives adequate funding to oversee the operations of the Bill and increased powers to participate in investigations and case handling.

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<sup>16</sup> CI72 Bill

<sup>17</sup> Paul Miller, NSW Ombudsman, Report p.2

<sup>18</sup> Brown

This submission was prepared by Michelle Falstein on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

**Michelle Falstein**  
**Secretary**  
**NSW Council for Civil Liberties**