Press Freedom Policy Papers
Reform Briefing 2/2020

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WHISTLEBLOWING TO THE MEDIA

SUMMARY

KEY POINTS

- Whistleblowing is an important, legitimate and protected mechanism for ensuring integrity and accountability in the public and private sectors.
- The *Public Interest Disclosure Act 2013* (Cth) provides two avenues for public sector whistleblowers to disclose information to journalists:
  - Emergency Disclosures.
  - External Disclosures.
- To be protected, a disclosure must meet a series of requirements.
- There are significant gaps and weaknesses in these protections, particularly in the intelligence sector.

REFORM CONSIDERATIONS

- The *Public Interest Disclosure Act 2013* (Cth) should be reformed to:
  - Recognise professional journalists as legitimate recipients of protected Emergency or External Disclosures.
  - Identify public and democratic accountability as relevant public interest considerations.
  - Introduce a limited framework for external disclosures of intelligence information.
  - Limit the scope of 'intelligence information' insofar as it includes information relating to law enforcement.

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WHISTLEBLOWING TO THE MEDIA

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An extensive empirical study of whistleblowing in Australia, led by AJ Brown, revealed that whistleblowers 'are the single most important way that wrongdoing or other problems come to light in organisations.'[1]

In this Policy Paper, I summarise and critique the avenues by which a public sector worker may make a protected disclosure of information to the media.

Whistleblowing has been defined as 'the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action'.[2] As Marcia Miceli, Janet Near and Terry Morehead Dworkin have said: 'If the individual does not consider the action to be wrong, but only misguided or stupid, it does not amount to whistleblowing'.[3]

Whistleblowers facilitate both internal and external accountability across the public and private sectors. Financially, whistleblowing can help to avoid the considerable costs of organisational wrongdoing. Public sector whistleblowing, in particular, also plays a critical democratic role. The information required to ensure responsible and representative government is not limited to summaries of policy, outputs and successes. It must include information about misconduct, corruption, incompetence, and the abuse of power – information that governments might be inclined to withhold.

While formal systems of accountability such as the courts and oversight committees are vital for policing governments, the informal watchdog roles of whistleblowers and a free press remain key components of the system.

However, a whistleblower can face a range of serious consequences, especially if their anonymity is compromised. They may face unemployment, personal reprisals, or legal action. These repercussions are not only serious for the individual; they can also have a 'chilling effect' on future whistleblowing.

Whilst whistleblowing serves an important role in maintaining organisational integrity, it is not 'an unqualified good'.[4] As Danielle Ireland-Piper and Jonathan Crowe observed: 'frivolous or poorly articulated claims can cause needless disruption to important public institutions.'[5] Whistleblower protections must be carefully designed to maximise accountability and integrity, and minimise unjustified or unnecessary negative consequences for those concerned.

Leaks and Exposés: Whistleblowing to the Media

Most whistleblower concerns are handled internally, within an organisation or department. There will be times when internal systems of accountability fail or are somehow inadequate or inappropriate, or when individuals may lack faith in whistleblower protections and feel too exposed to use formal internal channels.

When embarrassing information finds its way into the public sphere, it may be through the joint operation of whistleblowers and the free press. Under these circumstances, the media becomes a whistle-of-last-resort 'for those who feel disempowered by formal accountability processes.'[6]

The absence of a protected channel through which to communicate with the media may convince a potential whistleblower not to speak out at all, letting the chance for accountability and improvement slip away.

For all these reasons, Brown has emphasised the vital importance of:

> comprehensive, effective whistleblowing regimes for ensuring that disclosures are properly managed, and when made to third parties (including the media) occur as much as possible in a manner that recognises and supports the wider public interest.[7]

The direct relationship between whistleblowers and the media is important, but it ought not be overstated. Only 1% of whistleblowers disclose information directly to a journalist, media organisation or public website.[8] The rarity of whistleblower disclosures to the media does not, however, detract from their critical public function.

The *Public Interest Disclosure Act 2013* (Cth)

The law concerning public sector disclosures (at federal level) is contained in the *Public Interest Disclosure Act 2013* (Cth) (‘*PIDA*’). Further legal protections exist in each state and territory, though this Policy Paper is limited to the federal sphere.

PIDA protects the discloser’s identity and provides immunity from liability in civil or criminal proceedings. It protects whistleblowers from reprisals – creating a criminal offence of undertaking or threatening a reprisal, punishable by up to 2 years’ imprisonment.[9] Courts are given a wide discretion as to potential relief that may be granted for a reprisal and may grant, for example: compensation,[10] an injunction, an apology,[11] or reinstatement where the reprisal involved dismissal.[12]

PIDA protects **four forms of ‘public interest disclosure’**: Internal Disclosures, External Disclosures, Emergency Disclosures and Legal Practitioner Disclosures.[13] Only External Disclosures and Emergency Disclosures encompass potential disclosures to a journalist or media organisation.

PIDA protections hinge on the identity of the whistleblower, as well as the subject, recipient, and the content of the disclosure. Only the disclosure of *disclosable conduct* by a *public official* to a specified recipient will qualify for protection under *PIDA*. Of these criteria, disclosable conduct is the most complex.

Who Is Protected?

Public official is given an expansive definition in section 69 of PIDA. Public officials include Australian Public Service employees, members of the defence force, contracted service providers for Commonwealth contracts, and a range of individuals holding statutory office or performing statutory functions. A public sector whistleblower should be wary of making disclosures to family or other third parties – for their own sake, and because the third party would not be protected if they disclosed the information.

What Information May Be Disclosed?

The operation of *PIDA* turns on the concept of **‘disclosable conduct’**. ‘Disclosable conduct’ must be engaged in by an agency, public official, or contracted services provider for a Commonwealth contract.[14] ‘Agency’ is given a broad scope under *PIDA* and is defined as a government department, an Executive Agency or a prescribed authority.[15]

ANNIKA SMETHURST AND THE ASD MEMO

In April 2018, Annika Smethurst published a series of stories in the *Daily Telegraph*, based on a Top Secret departmental memo. This memo concerned a proposal to expand the powers of the Australian Signals Directorate (‘ASD’) beyond its existing mandate – namely, the collection of intelligence on foreign nationals, the provision of intelligence support to military operations, cyber warfare and information security.

Smethurst reported that the proposed new powers enabled the ASD to covertly access Australians’ digital information – including financial transactions, health data and telecommunications records – without a warrant. Without judicial oversight, the expanded powers could seriously undermine privacy in Australia and were of considerable public interest.

In June 2019 the AFP executed a raid on Smethurst’s Canberra home, which appeared focussed on identifying her confidential source. The raid attracted global attention and was ruled unlawful in a 2020 High Court challenge.

Later in 2019, a raid was conducted on the home of former intelligence officer Cameron Jon Gill on the suspicion that he was Smethurst’s confidential source. The investigation into Gill – who maintains his innocence – was dropped for lack of evidence. Smethurst still refuses to name her source.

WITNESS K AND BERNARD COLLAERY

On 6 August 2019, 'Witness K' informed the ACT Magistrates' Court that he would be pleading guilty to breaching section 39 of the *Intelligence Services Act 2001* (Cth). Witness K's crime involved revealing to his security cleared barrister, Bernard Collaery, secret information obtained in the course of his duties as an Australian Secret Intelligence Service ('ASIS') agent. This information concerned the bugging of Timor-Leste government rooms, including Cabinet offices, by ASIS agents in 2004, in the context of treaty negotiations between the two countries, concerning oil and gas reserves reportedly worth $40 to $50 billion.

Witness K's deep discomfort about the operation prompted him to approach the Inspector General of Intelligence and Security, who referred him to Collaery for legal advice. Based on this information, Collaery assisted Timor-Leste to build a case against Australia at the Hague, seeking to void the treaty.

Both Witness K and Collaery were charged with federal secrecy offences. At the time of writing, Collaerey's trial has commenced in the ACT Supreme Court, under conditions of secrecy imposed by provisions of the National Security Information (*Criminal and Civil Proceedings) Act 200*4 (Cth).

'Prescribed authority' in turn refers to a vast range of government agencies, including statutory agencies, law enforcement and intelligence agencies, federal courts, and any body established by Commonwealth law and prescribed as such by *PIDA*.[16] Royal Commissions are excluded from the definition of prescribed authority.[17]

Disclosable conduct is defined in section 29 of *PIDA* 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, section 29 includes a table which sets out ten additional categories of disclosable conduct, including that 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;
- unreasonably results in or increases a risk of danger to the health and safety of persons; or
- results in or increases danger to the environment.

PIDA excludes disclosures based on mere disagreement with conduct or policy from the definition of disclosable conduct. The amounts, purposes or priorities of expenditure related to a policy or a proposed policy are also excluded from the scope of disclosable conduct.[18] Conduct relating to a federal court or tribunal is also subject to specific exclusions.[19] Finally, conduct engaged in by an intelligence agency, or a public official belonging to an intelligence agency, that is within the proper performance or exercise of the agencies functions or powers, is also excluded from the definition of disclosable conduct.[20]

Protected Media Disclosures

PIDA provides two avenues by which a public sector worker may make a protected public interest disclosure to a journalist.

Emergency Disclosures

The Emergency Disclosure provisions of the *PIDA* provide a limited avenue by which a whistleblower may disclose information to the media. This form of disclosure is only available where:

- The whistleblower has reasonable grounds to believe that the information concerns a **substantial and imminent danger** to the natural environment or to the health or safety of one or more persons.
- The extent of the information disclosed must be **no greater than necessary** to highlight the danger.[21]
- The whistleblower can demonstrate **exceptional circumstances**.

If these stringent requirements are met, a public sector whistleblower may make a disclosure to anyone (other than a foreign public official) regardless of whether they have already made an internal disclosure.[22] Clearly, this avenue for a protected disclosure will rarely be available.

External Public Interest Disclosures

PIDA regulates disclosures to the media primarily through the External Disclosure rules. The scope of information that may be externally disclosed under *PIDA* is strictly limited. It must tend to show **'disclosable conduct'**, or the discloser must believe on reasonable grounds that the information tends to show such conduct;[23] and it must **only contain information reasonably necessary to identify the disclosable conduct**. Where action has been taken by a Minister, the Speaker of the House of Representatives, or the President of the Senate in response to an internal disclosure, any external disclosure will not be protected, as the handling of any such internal disclosure is deemed to be adequate by *PIDA*.[24]

DAVID MCBRIDE AND WAR CRIMES BY AUSTRALIAN SOLDIERS

In 2014, David McBride - a security cleared military lawyer for the Australian Defence Force ('ADF') – compiled a report centered around potential war crimes committed by Australian Special Forces soldiers in Afghanistan. He pursued his complaint through internal channels and then the AFP. Following this, McBride claimed that his career 'went downhill' whilst the internal inquiry 'went nowhere'.

In July 2017, 'The Afghan Files', by investigative journalists Dan Oakes and Sam Clark, opened by citing 'Hundreds of pages of secret defence force documents leaked to the ABC.' This was just one in a series of reports by the ABC into the issues raised in the leaked documents.

The reports revealed shocking incidents of troops killing unarmed men and children, the execution of an unarmed detainee and the mutilation of the bodies of enemy combatants. The reports also examined how a 'code of silence' enabled those responsible to escape prosecution. A four-year inquiry by Major General Paul Brereton also resulted in damning and disturbing findings against the ADF.

McBride has been charged with a range of offences, including theft of Commonwealth property (the information), the unauthorised disclosure of a Commonwealth document, and unlawfully giving information about Australia's defence capabilities. McBride's trial is ongoing in the ACT Supreme Court. A civil hearing is expected to take place in May 2021, at which McBride will argue that he is entitled to whistleblower protections.

Public sector whistleblowers must **allow a 'reasonable' period of time** after their internal disclosure before speaking to a journalist. Finally, the disclosure must **not be contrary to the public interest** 'on balance'.[25] Certainly, any conditions of confidentiality, security classification, or relevance to international relations could indicate that external disclosure is not in the public interest.

Gaps, Weaknesses and Recommendations

The existing scheme for whistleblower protections has attracted significant criticism and calls for review, including in the Parliamentary Joint Committee on Intelligence and Security Inquiry that followed the AFP Raids on Australian Media.[26] In this Policy Paper I highlight four issues with the protections.

Recognise the Legitimacy of Media Disclosures

PIDA regulates all External Disclosures by a single set of rules. Terms such as 'journalist', 'journalism' and 'media' do not appear in *PIDA*. This avoids having to define these contested terms. However, it stands in contrast to the *Corporations Act*, as well as public sector whistleblower laws in Queensland, NSW, WA, SA and the ACT – each of those schemes establish frameworks for protected external disclosures to a targeted set of recipients, including journalists.[27]

PIDA's breadth and avoidance of technical definitions are commendable. However, by not creating a targeted framework for disclosures to journalists, *PIDA* fails to articulate the legitimate role served by media disclosures. Thus, it is easier to see disclosures to journalists as illegitimate, unnecessary or extreme within the framework created by *PIDA*. The provisions could be simply amended to recognise the legitimacy of media disclosures **by identifying professional journalists as an example of a recipient of a protected external disclosure**.

Recognise the Public Interest in Public Accountability

Public sector disclosures to the media are constrained by an assessment of the 'public interest'. The driving 'public interests' served by the whistleblower laws are accountability and integrity, which have related economic, democratic and other benefits. *PIDA* articulates a range of 'public interests' that weigh for and against disclosure and secrecy.

A public interest assessment under *PIDA* could be expected to seek both accountability *and* secrecy on a case by case basis, which arguably favours the *internal* resolution of complaints over external disclosures. Again, the failure to recognise the legitimacy of media disclosures or recognise *public*, democratic accountability as a specific consideration supports this interpretation of the provisions.

ANDREW WILKIE AND IRAQI WMD

In 2003, then military officer Andrew Wilkie was working at the Office of National Assessments ('ONA'), processing intelligence related to the search for weapons of mass destruction ('WMD') in Iraq. Then Prime Minister John Howard had committed Australia to supporting the US-led invasion of Iraq, on the understanding that Iraqi president Saddam Hussein had WMD and links to Al Qaeda.

Wilkie said he could see no evidence to support these claims, and believed the Prime Minister was leading the nation into war on a false premise. With no option for internal disclosure, Wilkie resigned from the ONA and took his concerns to the media. He told Channel Nine's chief political correspondent Laurie Oakes, '[Iraq's] military is very small, their weapons of mass destruction program is fragmented and contained...and there is no hard evidence for any active co-operation between Iraq and Al-Qaeda.'

Wilkie believes he ultimately escaped prosecution because the government judged the political cost of prosecuting him to be higher than the damage caused by his leaks. This may have saved Wilkie from a jail term and, incidentally, paved the way for his election as an Independent Federal MP – a position he has held since 2010.

A Gap in Protections: Intelligence Disclosures

Australia's intelligence frameworks are effectively exempt from the form of accountability presented by external, and even emergency, protected disclosures. Conduct that amounts to the proper performance or exercise of the agency's functions is excluded from the definition of disclosable conduct (ruling out the prospect of an internal protected disclosure). Moreover, intelligence information – which includes certain law enforcement information – may only form the basis of an *internal* disclosure.

The exclusion of most intelligence disclosures from whistleblower protections means that persons employed, contracted or engaged by Australia's vast intelligence apparatus lack adequate protection. The principles of integrity and accountability are equally relevant to intelligence organisations, underscoring the need for a clear, effective and widely available framework for *internal* disclosures.

A challenging set of issues is presented by the prospect of *external* disclosures relating to intelligence information and the conduct of Australia's intelligence agencies. At present, the external disclosure of intelligence information will leave the whistleblower vulnerable to reprisals and criminal sanction.

There is a tension between the need for secrecy within Australia's security agencies and the democratic imperative for transparency and accountability that underpins the media's role as watchdog.

It is reasonable to assume that people in Australia's intelligence agencies are capable of breaking the law, behaving corruptly or dishonestly, or abusing public trust – all behaviours that qualify as 'disclosable conduct'. That behaviour could take place outside sensitive security operations. Moreover, given the wide scope of the powers vested in security agencies, there is pressing public interest in ensuring they behave ethically and lawfully in both sensitive and non-sensitive settings.

This raises the question of whether the protection of intelligence whistleblowers should be regulated through legislation. The introduction of an avenue for external disclosures of intelligence information *in the public interest* may be appropriate. Any such disclosures would need to adhere to a high threshold of public interest and be subject to a rigorous process.

Limit the Scope of Intelligence Information

Excluding intelligence information from protected external disclosures significantly erodes accountability and exposes whistleblowers to serious reprisals and criminal penalties. The scope of any exclusions must, therefore, be narrowly constrained and justified. Information relating to operatives and operations appropriately falls within the central ambit of this exclusion.

The same cannot be said of information 'reasonably likely to prejudice Australia's law enforcement interests'.[28] Accountability and integrity in Australia's police and law enforcement agencies has long been controversial, giving rise to some of the most infamous cases of whistleblowing. Those cases have in turn triggered inquiries and, often, urgently needed reforms and improvements.

The inclusion of law enforcement information in the definition of intelligence information reflects a serious and troubling creep in the scope of information excluded from one of the most important and demonstrably effective methods of external oversight. It therefore compounds the secrecy inherent in the sector, and the accountability deficits that creates.[29] In light of these issues, only the core of intelligence information should be excluded from the scope of external disclosures, with other information subject to the usual rigorous requirements for protected disclosures, including a public interest test.

About the Author

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Dr Rebecca Ananian-Welsh is a constitutional law scholar and Senior Lecturer at UQ Law with combined expertise in courts, national security and press freedom. She has published widely in these fields, including two edited collections and a book and, in 2019, she was awarded the Academy of Social Sciences in Australia's Paul Bourke Award for Early Career Research. Dr Ananian-Welsh's current research combines legal and empirical approaches to examine the impacts of national security law on the press. Prior to joining UQ, Dr Ananian-Welsh held positions with the Gilbert + Tobin Centre of Public Law at UNSW, DLA Piper Sydney, and the Federal Attorney-General's Department.

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Press Freedom Policy Papers offer short, evidence-based insights and recommendations informed by scholarship and consultation.

Reform Briefings present targeted, evidence-based recommendations for law reform to enhance the appropriate protection of press freedom.

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8 AJ Brown et al, *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government* (Whistling While They Work 2 Report, Griffith University, August 2019) 48.

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10 Ibid s 14.

11 Ibid s 15.

12 Ibid s 16.

13 Ibid ss 25, 26(1).

14 Ibid s 29(1)(a)-(c).

15 Ibid ss 8, 71.

16 Ibid s 72.

17 Ibid) s 72(3).

18 Ibid s 31.

19 Ibid s 32(1).

20 xIbid s 33.

21 Ibid s 26(1) [Table 3].

22 bid s 26(1) [Table Item 3].

23 Ibid s 26(1) [Table Item 2].

24 Ibid s 26(2A).

25 Ibid s 26(3).

26 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* (2020) xx.

27 *Corporations Act 2001* (Cth) s 1317AAD; *Public Interest Disclosure Act 2012* (ACT) s 27; *Public Interest Disclosure Act 1994* (NSW) s 4; *Public Interest Disclosure Act 2010* (Qld) s20(4); *Public Interest Disclosure Act 2018* (SA) s4; *Public Interest Disclosure Act 2003* (WA) s7A. Notably, only NSW and Queensland share a common definition of journalist, the remaining jurisdictions adopt distinct definitions of this core term.

28 *Public Interest Disclosure Act 2013* (Cth) s 41(2).

29 See generally, Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and Protections in Australia for Disclosing National Security Legislation' (2014) 37(2) *UNSW Law Journal* 784.

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