

10 February 2017

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

corporations.joint@aph.gov.au

Dear Secretary

Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

Young Liberty for Law Reform (YLLR) thanks the Parliamentary Joint Committee on Corporations and Financial Services for the opportunity to provide a submission.

YLLR is a program of Liberty Victoria. Over a 12-month program, young professionals and law students work in small teams supervised by leading human rights experts to produce analysis, advocacy and law reform proposals directed towards decision-makers, or with the aim of promoting dialogue and change in the community.

This submission is based on a report, 'Operation Secret Borders', prepared by Young Liberty for Law Reform in April 2016. We attach a copy of the report for the Committee's reference. We urge the committee to consider it in full. Our submission below is a brief summary of the key parts of that report, as they are relevant to this inquiry.

The report outlines the legal, practical and cultural barriers preventing would-be whistleblowers working in immigration detention from legitimately reporting wrongs that they have witnessed.

There are a number of legislative reforms that can be made to remove unreasonable restrictions that discourage legitimate whistleblowing, as outlined below.

Secrecy legislation

The *Australian Border Force Act 2015* (Cth) makes it a criminal offence, punishable by two years' imprisonment, for an 'entrusted person' to make a record of or disclose information, if that information is 'protected information'.¹ These provisions, being Part 6 of the Act, should be repealed

¹ *Australian Border Force Act 2015* (Cth) s 42.

on the basis that they unreasonably restrict and discourage individuals from disclosing information that is in the public interest.

Similarly, section 70 of the *Crimes Act 1914* (Cth) applies criminal sanctions to any breach of secrecy obligations by public officials. It makes it an offence, punishable by up to two years' imprisonment, for Australian Public Service employees and even government contractors, to disclose any fact they have learned or document they have obtained by virtue of their position that they are under a 'duty not to disclose'.² Section 70 should be amended so as to restrict that offence to disclosures that harm, are reasonably likely to harm or intended to harm an essential public interest, in line with the Australian Law Reform Commission's recommendation.³

Statutory defence

As an alternative to repealing Part 6 of the *Australian Border Force Act*, the Act could be amended to include a statutory defence protecting public servants and contractors from claims for loss or damage caused by their act of whistleblowing if they are disclosing information in the public interest. This reform would clarify uncertainty about the extent of the protection to whistleblowers under the common law, broadly as stated in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, in the context of overseas immigration detention, and give meaning to existing common law principles by giving them statutory authority.

Standardised confidentiality clauses

In addition to the above, the Commonwealth Government should require that all detention centre or immigration policy-related employment contracts contain a standardised confidentiality clause. This would improve clarity and consistency of access to protections between workers, and increase the confidence of those making legitimate disclosures.

Uncertainty regarding the scope of protection under the Public Interest Disclosure Act

We also submit that there should be a repeal of the provisions of the *Public Interest Disclosure Act* 2013 (Cth) that unnecessarily burden or create uncertainty for whistleblowers seeking to make external disclosure.

Section 26(1) of the *Public Interest Disclosure Act* sets out the procedure for making a 'public interest disclosure'. Before an external disclosure can be validly made the discloser must have first made an internal disclosure.⁴ The discloser must believe that the investigation into that internal disclosure was inadequate; or believe the response to the investigation was inadequate; or the investigation must be out of time.⁵ However, section 26(2A) deems any response to an investigation by a minister, the Speaker of the House of Representatives, or the President of the Senate to be 'adequate'. The effect of this provision is that any response taken by a minister could have the effect of preventing external disclosure, even where that response was entirely ineffective in dealing with, for example, a danger to health or safety. This provision provides too great a discretion to ministers and other members of government to prevent a whistleblower from making an external disclosure, and should be repealed.

² *Crimes Act 1914* (Cth) ss 70(1)-(2).

³ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112, December 2009, p.143.

⁴ *Public Interest Disclosure Act 2013* (Cth) s 26(1).

⁵ *Public Interest Disclosure Act 2013* (Cth) s 26(1)(c).

Section 2(e) and section 26(3) of the *Public Interest Disclosure Act* require a potential whistleblower to be satisfied that external disclosure is in the public interest having regard to a lengthy list of factors that must be considered and weighed against each other. This threshold requirement for making an external disclosure is highly complex and the uncertainty as to whether a court will endorse the analysis performed by a whistleblower (or their legal representative) creates a significant and disproportionate barrier to public disclosure. Accordingly, these provisions should be repealed.

Section 31 of the *Public Interest Disclosure Act* states that a public interest disclosure cannot be a mere disagreement with government policy. This provision creates an unnecessary burden on whistleblowers without adding or modifying the definition of 'disclosable conduct' under the *Public Interest Disclosure Act*.

Independent oversight mechanism

An independent oversight mechanism should be established under the *Public Interest Disclosure Act* to provide guidance and advice in relation to the scope of protection available to an individual seeking to make a disclosure, in order to address current uncertainty about access to protection under the *Public Interest Disclosure Act*.

This oversight mechanism should have the ability to make binding determinations in relation to whether specific conduct constitutes 'disclosable conduct' within the meaning of the *Public Interest Disclosure Act*. It should also be empowered to determine whether certain requirements under section 26 have been met (for example, whether disclosure is, on balance, in the public interest – a necessary precondition for external disclosure) and whether a particular type of disclosure (i.e. emergency disclosure or external disclosure) would be protected. Although these determinations would not be binding, they would provide a strong basis for a whistleblower to defend their decision to disclose information, and could be relied upon in any civil or criminal proceedings against them or in any employment dispute. Accordingly, this would provide whistleblowers with greater confidence in making a disclosure.

Such a body could also issue general guidance notes in relation to systematic issues identified by the members of the oversight mechanism to assist both whistleblowers and authorised officers receiving and assessing internal disclosures.

A proposed amendment to the *Public Interest Disclosure Act* creating such a mechanism can be found in Annexure A to the report enclosed.

Should you wish to discuss any aspect of this submission further please contact yllr@libertyvictoria.org.au. We would also welcome an opportunity to address the Inquiry in person, if that would assist. This is a public submission and is not confidential.

Yours sincerely



Lexi Lachal

Refugee & Asylum Seeker Coordinator, YLLR