9 June 2016

Mr Phillip Moss AM
Department of Prime Minister and Cabinet
By email: PIDReview2016@pmc.gov.au

Re: Statutory review of the *Public Interest Disclosure Act 2013*

Dear Mr Moss,

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 Commonwealth Government's statutory review of the *Public Interest Disclosure Act 2013* (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 or maladministration within governments – in this instance, the Commonwealth Government. The disclosure of such matters should be facilitated in an expansive and inclusive manner.

INADEQUATE PROTECTIONS FOR WHISTLEBLOWERS AND LACK OF REAL AVENUE FOR 'UNAUTHORISED' DISCLOSURES

The Government introduced the Act to provide a framework for Commonwealth public sector whistle-blowers – more appropriately described as members of the public sector who disclose information that would otherwise not be disclosed. Such information is not necessarily of a classified nature or of a commercial nature.

The Joint Media Organisations submitted to the Inquiries into the Public Interest Disclosure Bill 2013 (the Bill) undertaken by both the House of Representatives Committee on Social Policy and Legal Affairs[1] and the Senate Committee on Legal and Constitutional Affairs[2].

While the final version of the implementing Bill did contain amendments to the draft Bill, there remain inadequate protections for public sector whistle-blowers.

In particular, some of the outstanding issues with the Act are:

- The Act does not cover intelligence agency personnel – they remain without protection if they go public;
- Staff of Members of Parliament are not protected;
- Wrong-doing of Members of Parliament is not included in the Act;
- The public interest test remains skewed against external disclosure;

[1] Submission 20, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%202013%20public%20interest%20disclosure/subs.htm

[2] Submission 19, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/publicinterestdisclosure/submissions

- The presumption of criminal liability should not lie against the media for using or disclosing identifying information during the course of responsible news gathering; and
- The Act lacks a real avenue for 'unauthorised' disclosures.

LAWS CRIMINALISING INFORMATION DISCLOSURE UNDERMINE THE OBJECTS OF THE ACT

The inadequate protections for public sector whistle-blowers is further exacerbated when laws, such as the three tranches of 2014-2015 national security laws[3], not only provide no protection but criminalise information disclosure (external or otherwise) – and therefore unjustifiably interfere with freedom of speech.

Interaction between the three national security bills

The Joint Media Organisations have made submissions to the Parliamentary Joint Committee on Intelligence and Security regarding all three tranches of national security laws during 2014-2015.

Each and every one of those laws contains specific provisions that unjustifiably interfere with freedom of speech, including:

- emasculating the confidentiality of sources;
- exacerbating the lack of protection for whistle-blowers including by potentially witch-hunting sources of 'unauthorised' leaks; and
- criminalising journalists for discharging their roles in a democracy.

All of which, separately and in aggregate, makes it increasingly difficult for news gathering and reporting in the public interest. We are of the view that this is untenable and does not serve the Australian democracy well.

THE REVIEW OF THE ACT

The review of the Act offers an opportunity to review the important role that the Act plays in ensuring that whistle-blowers are given adequate protection for unauthorised disclosures.

This submission addresses the following detailed issues:

- The restrictive criteria for protected external disclosures;
- The criminal offences that may lie against the media for using or disclosing confidential source information during the course of responsible news gathering;
- Inappropriate exclusions to the scheme; and
- Other issues associated with disclosable conduct.

The lack of scope for unauthorised disclosures infringes freedom of speech

The parties to this submission believe that the scope of public interest disclosures to external parties (including the media) captured by the Act is far too narrow. As currently drafted, the Act potentially limits the free flow of information to the public and therefore undermines freedom of speech. A number of amendments are recommended to address this issue.

[3] Section 35P of the *Australian Security Intelligence Organisation Act* 1979 enacted under the *National Security Laws Amendment Bill (No. 1) 2014*; provisions enacted under the *Counter-Terrorism Legislation (Foreign Fighters) Amendment Bill 2014* regarding unauthorised disclosure of information; and amendments to the *Telecommunications Interception Act 1979* enabled by the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, specifically regarding accessing journalists' metadata to identify sources and the subsequent Journalist Information Warrant scheme and associated regulations.

The parties to this submission recognise the need to balance certain factors in determining whether a disclosure should attract the protection of clause 10. Making such a disclosure is a serious matter and must be appropriately regulated. 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. The requirements at clause 26 of the Act are onerous and set too many limitations on disclosure. This is not in the public interest.

- Clause 26(3) – Assessing whether disclosure is contrary to the public interest

  Item 2 of clause 26 contains a list of nine requirements which must all be satisfied to enable a whistle-blower to provide information to the media (or anyone other than a foreign public official) and claim the protections offered by the Act. This includes a requirement that the disclosure is not, on balance, contrary to the public interest (Item 2(e) of clause 26(1)).

  Clause 26(3) of the Act then contains a list of factors to take into account to determine whether a public disclosure is not, on balance, contrary to the 'public interest'. However all of the factors listed indicate when it would be contrary to the public interest. The framing of this list skews the outcome against external disclosure because there is not a complementary list of factors that can be used to determine whether such a disclosure is in the public interest. Balancing such matters in the context of whistle-blower disclosures will invariably involve complex and competing factors and the Joint Media Organisations are of the view that the Act should be amended to also include a list of factors in favour of disclosure.

  Alternatively, clause 26(3) should be deleted.

- Clause 26(1) – Emergency disclosures are limited

  The Act only authorises disclosure to the media (or other persons) without first making an internal disclosure and waiting for an internal investigation to conclude in very limited circumstances. Overall, the requirements for such 'emergency disclosures' should be far less restrictive to facilitate disclosures that are in the public interest.

  Item 3 of the clause 26 confines the opportunity to make an 'emergency disclosure' only where that disclosure concerns a *'substantial and imminent danger to the health or safety of one or more persons'* (clause 26(1), Item 3 (a)). We recommend extending the scope of allowable emergency disclosures beyond health and safety circumstances where a person may be endangered. For example, the current wording would not include instances where there is an immediate threat to the environment, animals or a cultural site of significance. It is therefore recommended that a broader formulation, such as the one at clause 43H(1) of the *Public Interest Disclosure Act 1998* (UK) be considered (that the relevant failure is of an "exceptionally serious nature").

  We are also concerned by the requirement that '*the extent of information disclosed is no greater than is necessary to alert the recipient to the substantial and imminent danger'* (clause 26(1), Item 3 (c)). It is conceivable that this restriction could result in significant unintended consequences, including an elevated risk of the activity occurring. For example, if restricted information was presented to media outlets, it is likely to be the case that further investigation would be required before notifying the public of what is a matter of substantial public interest. It is recommended that Item 3 (c) be replaced with the existing provision of clause 26(1) Item 2 (f), that "*No more information is publicly disclosed than is reasonably necessary in the public interest."*

Furthermore, there must be *'exceptional circumstances'* to justify the whistle-blower's failure to disclose the information internally, or make the external disclosure before the disclosure investigation has been finalised. There is no explanation or justification for such restrictions. If an emergency disclosure is, by its very nature, a time critical issue and it is not reasonable to include such restrictions in conjunction with the increased public interest threshold. If such a requirement is to be included it should be accompanied by some examples of what would be considered exceptional circumstances, including a reasonable apprehension that internal disclosure would not result in sufficiently timely action, could result in harm to the discloser or others or the concealment of evidence.

It is recommended that that clause 26(1) Item 3 (a) – (f) be replaced with the existing provision of clause 26(1) Item 2 (f) "*No more information is publicly disclosed than is reasonably necessary in the public interest*", along with a requirement that the failure is of a serious nature.

- Clause 26(1)(c) Item 2(c) and (d) - Internal investigation must be completed and inadequate or unreasonably delayed

Clause 26(1)(c), as currently drafted, only enables external disclosure (other than an 'emergency disclosure') where an internal investigation has completed or has been unreasonably delayed. However, the Act does not explicitly allow for external disclosure where:

- an internal disclosure is unreasonably refused at allocation (clause 43(2)); or
- the allocation of an internal disclosure has been unreasonably delayed (clause 43(5)); or
- the allocation of an internal disclosure is made to another agency who in turn refuses to accept the allocation (clause 43(6)).

In all of these circumstances the Act should specify that external disclosure is available.

Further, the investigation or response to the investigation must be 'inadequate'. This is currently expressed as an objective test. However the discloser (and any media the discloser provides information to) will not necessarily be entitled to all the facts of an investigation sufficient to determine whether the investigation was adequate. For this reason, a test based on the subjective belief of the discloser should be applied.

- Clause 70 – Lack of consideration for external disclosure where disclosures by those with 'insiders knowledge' are not deemed to be 'public officials'

The Act allows for a person with 'insider's knowledge' (but not belonging to an agency) to be determined to be a 'public official' and therefore provided with protections under the Act. However, clause 70(3)(b) also enables a request to be determined a 'public official' to be refused.

In the instance that such a request is refused, the options to make a public disclosure are not available under clause 26 and therefore none of the protections apply.

It would be reasonable that the scheme be extended to enable such persons to make public disclosures where it is reasonable for that course of action to be taken under the existing provisions.

The parties to this submission recommend that the restrictions associated with public disclosure be significantly reduced. Specifically:

Recommendation 1
Amend clause 26(3) to include a list of factors to determine whether a public disclosure is, on balance, in the 'public interest'. If this approach is not accepted then the existing clause 26(3) should be deleted.

Recommendation 2
Requirements for emergency disclosures should be less restrictive. This can be achieved by replacing clause 26(1) Item 3 (a) – (f) with the existing provision of clause 26(1) Item 2 (f): *No more information is publicly disclosed than is reasonable necessary in the public interest,* along with a requirement that the failure is of a serious nature.

Recommendation 3
The Act should be amended to explicitly include the availability of external disclosure in circumstances where an allocation of internal disclosure has been unreasonably refused or delayed or the allocation to another agency has been refused.

Recommendation 4
The Act should be amended to enable disclosure in circumstances where the discloser has a reasonable belief that the investigation, or response to the investigation, was inadequate. Such an assessment should be subjectively based and should not be based on the extremely high threshold set in the current clauses 37, 38 and 39 that 'no reasonable person' could have reached the relevant findings or would consider the actions taken adequate.

Recommendation 5
Extend the scheme such that those with 'insider's knowledge' that are not determined to be 'public officials' are able to make public disclosures and claim the protections of the Act as appropriate.

A presumption of criminal liability should not lie against the media for using or disclosing identifying information during the course of responsible news gathering

The parties to this submission oppose the presumption of criminal liability for the use and/or disclosure of identifying information during the course of responsible news gathering.

Clause 20(1) of the Act makes it a crime for any person to disclose information about a public interest disclosure that is likely to enable the identification of the whistle-blower – unless the defendant can prove an exception under clause 20(3). Furthermore, clause 20(2) of the Act makes it a crime to use identifying information, unless the defendant can prove an exception under clause 20(3).

If an internal disclosure has been made in accordance with the processes outlined in the Act, and a whistle-blower (anonymously or otherwise) decides for whatever reason to go to the media with the matter, it is likely that clause 20(1) and/or clause 20(2) will be satisfied. The member of the media is, therefore, criminally liable for an offence unless an exception is able to be proved.

Examples of situations where this arises in the course of usual newsgathering include:

- a media representative *uses* the information in the course of newsgathering to establish the veracity of the information and investigate a story; and
- the media representative *discloses* the information in the course of internal editorial processes to decipher reliability prior to publication.

In both of these situations, the media representative has not yet published a story but may be criminally liable for the use and/or disclosure of identifying information.

The imposition of criminal sanctions on journalists – regardless of available defences – weakens the ability to expose wrong doing, crime and corruption within the Commonwealth public service. This occurs because it exposes journalists to potential liabilities and criminal sanctions which in turn have a chilling effect on freedom of speech – directly impacting on news gathering.

Further, for the media representative to prove an exception, it may be the case that to do so would involve disclosing the identity of the confidential source, such as to prove the source consented at clause 20(3)(e) or to prove clause 20(3)(a) that the disclosure or use of the identifying information is for the purposes of the Act. This is of deep concern and clearly impacts on news gathering.

Recommendation 6
The parties to this submission recommend incorporating an exception at clause 20(3) of the Act to allow the media to use and disclose identifying information for the purpose of inquiring into and investigating matters raised by a whistle-blower in the course of responsible news gathering.

The scheme is too narrowly cast

The public interest disclosure scheme should apply to all areas of government, including the Executive, the Legislature and the Judiciary.

Division 3 of the Act lists public sector agencies, authorities and contracted service providers, and the individuals belonging to these, whose whistle-blowing activities are protected by the Act. It is of concern that this list is limited by broad exclusions which are outlined at sections 31, 32 and 33.

- Section 31 – Disagreements with government policies etc

  In principle, it is reasonable that protection under the Act should not arise in relation to disclosures made in relation to policies (clause 31(a)), actions (clause 31 (b)) or expenditures (clause 31(c)) (actual or proposed) to which the whistle-blower merely disagrees.

  However, the clause as it is currently drafted is unjustifiably broad.

  In particular, the parties to this submission oppose the exclusion of protection of whistle-blowers who seek to report misdeed and misconduct by a Minister, the Speaker of the House of Representatives or the President of the Senate as conferred under clause 31(b). There is no justification for excluding people in these positions from being the subject of whistle-blowing. Such individuals should be subject to the same level of scrutiny and accountability as other government officials. Clause 31(b) should be removed from the Act.

  If it is intended that mere disagreement with government policies and associated expenditures does not satisfy the threshold of what constitutes disclosable conduct, those elements are adequately addressed by clauses 31(a) and 31(c). In any event, it is unlikely that such disclosures would satisfy the criteria for protection set out at clause 26.

- Clause 32 – Conduct connected with courts and tribunals

  The parties to this submission do not agree that disclosures regarding conduct associated with Courts and Tribunals should be excluded. These government bodies should be held to the same standard of accountability as other agencies.

  It should not be the case that disclosable conduct should not include conduct of: the judiciary; the CEO of a court or a member that person's staff when exercising the power of the court, or performing a function of a judicial nature or exercising a power of a judicial nature (clause 31(1)(b)); a tribunal member; and the CEO of a tribunal or a member of that person's staff when exercising the power of the tribunal (clause 31(1)(c)).

- Clause 33 – Conduct connected with intelligence agencies

  Again, there is no justification for a broad exclusion regarding disclosable conduct concerning intelligence agencies. There may well be instances where corruption or maladministration occurs in these agencies the disclosure of which will not affect intelligence or security matters. These agencies, which are responsible for significant matters of public interest, should be subject to the same level of accountability as the rest of government.

- Clause 41 – Meaning of intelligence information

  Again, this section is drafted very broadly and stretches beyond the boundaries of intelligence information which may pose a risk to the security of the nation. To illustrate, clause 41(1)(a) precludes *'information that has originated with, or has been received from, an intelligence agency'* as precluded from disclosure.

The parties to this submission recommend that all areas of the Commonwealth Government should be covered by the Act. Specifically:

Recommendation 7
Delete clause 31(b) so that protection is granted for whistle-blowers regarding disclosable conduct of Ministers, the Speaker of the House of Representatives and the President of the Senate.

Recommendation 8
Delete clauses 32 and 33, so that disclosures regarding the judiciary and intelligence agencies can be protected.

Recommendation 9
Delete clause 41(1)(a)

Recommendation 10
Broad exemptions should not be the default for exemptions to the Act. Therefore, to the extent to which exemptions or special procedures associated with the judiciary and intelligence agencies are necessary – particularly the nature of the information to be exempted or subject to special procedure – those exemptions should be specifically and narrowly defined, therefore requiring amendment to clauses 32 and 33.

Other matters

Pseudonymous disclosures should be expressly permitted and protected

The Act explicitly allows for anonymous disclosures (clause 28(2)). However, it contains a number of references to steps in the internal disclosure process whereby notification is required to be made where the discloser is *'readily contactable'*[5]it is appropriate that disclosures are able to be made under pseudonyms to facilitate notification more easily. Importantly, the process steps are requirements in external disclosures. Therefore the facilitation of notifications via pseudonym (email addresses etc) is appropriate to assist the functioning of the scheme.

Recommendation 11
The Act be amended to explicitly allow for disclosures to be made pseudonymously.