

BY EMAIL

The Hon. Mark Dreyfus KC MP
Attorney-General
Commonwealth of Australia

02 November 2022

Dear Attorney-General,

We, the undersigned, are a coalition of whistleblower protection experts from across the globe, brought together through the Whistleblowing International Network (WIN). WIN works to strengthen support for whistleblowers whose disclosures challenge corruption, waste, fraud, abuse of power, illegality, and other harms to the public interest. **We write to express our deep concern for the ongoing criminal prosecution of Australian whistleblowers Mr Richard Boyle and Mr David McBride and to urge you to urgently take steps, in these cases and more broadly, to restore faith in Australia's whistleblowing laws.**

We have welcomed Australia's efforts to strengthen the legal protection of whistleblowers over the years, and the news in July 2022 that you had exercised your powers to end the prosecution of the lawyer for the whistleblower Witness K, Mr Bernard Collaery.¹

The cases of whistleblowers Mr Boyle and Mr McBride are equally exceptional and important. Mr Boyle raised concerns about serious wrongdoing at the Australian Taxation Office and Mr McBride about responsibility for war crimes allegedly committed by Australian forces serving in Afghanistan. Despite raising matters of serious public concern – since vindicated by independent investigations – these prosecutions have continued. Urgent intervention is needed to address the injustice caused by these criminal prosecutions, to minimise the chilling effect of these cases and to fix Australia's whistleblowing law to ensure such cases can never happen again.²

Australia's whistleblowing legislation, the *Public Interest Disclosure Act 2013 (PID Act)*, introduced by yourself to the Australian Parliament, states its object to be:

“to encourage and facilitate the making of public interest disclosures by public officials (b); and to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures (c).” (emphasis added)

¹ See ACT Supreme Court formally ends prosecution of Canberra lawyer, ABC News, available at <https://www.abc.net.au/news/2022-07-08/act-supreme-court-formally-ends-case-against-bernard-collaery/101221910>

² See Are Australia's whistleblowing laws fit for purpose? A former tax officer's hearing may tell us, The Guardian, available at <https://www.theguardian.com/australia-news/2022/sep/17/are-australias-whistleblowing-laws-fit-for-purpose-a-former-tax-officers-hearing-may-tell-us>

Despite the clear intent of the prevailing legal framework, the prosecutions of Mr Boyle and Mr McBride – commenced and pursued for more than four years now – are proof that Australia’s *PID Act* has manifestly failed to fulfil its objectives. These prosecutions actively and seriously discourage the making of public interest disclosures. Far from being protected from adverse consequences, Mr Boyle and Mr McBride have endured significant hardship for speaking up. They could yet be imprisoned. As you know, Witness K himself was forced to plead guilty, after revealing wrongdoing in Australia’s spying activities in Timor L’Este, because the *PID Act* denied him the opportunity to mount any defence. These high-profile prosecutions, in a country that purportedly has strong laws to protect them, sends a devastating message for the protection of whistleblowers around the world.

We welcome your public statements about the need for reform of the *PID Act*. However, these cases reinforce that more is needed than any simple and easy fix. As new whistleblower protection legislation has swept the globe in the last decade, Australia’s law has fallen dramatically behind international best practices. It is deeply unfair that the Australian Government continues to condemn these whistleblowers to their fate, relying on a law that all agree is not fit for purpose.

The Boyle case has especially underscored frailties in the *PID Act*, including legal uncertainty about the scope of the immunity from civil and criminal liability, and whether it extends to the obtaining of evidence where this is proportionate and necessary to make the disclosure.

By way of comparison, under the new EU whistleblowing Directive, whistleblowers enjoy full immunity from legal liability, unless committing a “self-standing” criminal offence – the correct interpretation of which would be where the offence is *wholly unrelated* to making a public interest disclosure.³ In France, the legislation explicitly protects a whistleblower for misappropriating or concealing documents containing information of which they have lawfully obtained knowledge.⁴ Similar protection is afforded to whistleblowers in the UK and Ireland.⁵ **Australian whistleblowers have been left behind.**

Even if Mr Boyle’s whistleblowing defence is successful, the damage of enduring legal harassment, criminal prosecution, destroyed career prospects and inordinate legal costs will have been done. While your commitment to law reform is admirable, it will likely mean nothing for him. Recent developments in Mr McBride’s case are even more alarming, with your government’s invocation of national security making it impossible for him to proceed with a *PID Act* defence in an independent court – even a closed one. Mr McBride will now face a jury trial without the benefit of any formal whistleblowing defence.

³ See Article 21 (3) and Recitals para. 84 of (Dir (EU) 2019/1937).

⁴ See Article 122 - 9 French Criminal code, as amended by Law No. 2022-401

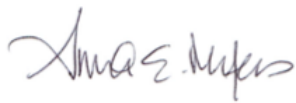
⁵ See s. 43(b)(3)(UK) Public Interest Disclosure Act 1998 and s. 15 Public Disclosures Act (Ireland) 2014

You have previously stated that you will not formally intervene to discontinue these cases. There are however many other steps you can take to remedy the injustice caused by these cases and minimise their impact on Australian whistleblowing. We call on you to:

1. Require the Commonwealth Director of Public Prosecutions (**CDPP**) to publicly explain why the Boyle and McBride prosecutions are in the public interest – when the spirit of the *PID Act* indicates they are not;
2. Commit to reforming the external and emergency disclosure provisions in all federal whistleblowing laws, to ensure such dubious, protracted, damaging and unproductive prosecutions are not commenced in the future – including by making it clear that immunity extends to necessary preparatory acts, and cannot be arbitrarily overridden by the state in the name of national security or official secrets;
3. Commit to establishing a whistleblower protections commissioner or authority to protect and empower Australian whistleblowers. Such a body would oversee and enforce whistleblower protections, and be well-placed to advise the CDPP and courts on the proper, beneficial interpretation of whistleblowing laws, including by independently reviewing the merits of cases such as these; and
4. Reimburse Mr Boyle and Mr McBride their legal fees, ensure the agencies and individuals responsible for bringing and maintaining of these misguided, oppressive prosecutions are held to account, and compensate these two whistleblowers for the detriment they have suffered as a result of the Australia's defective federal whistleblower protection regime.

Around the world, we once looked to Australia as a beacon in protecting and empowering public interest whistleblowers. If Australia proceeds to prosecute and imprison public officials who speak up about government wrongdoing, it will lose credibility on the world stage when it comes to transparency and accountability. We urge you to act immediately to avert these outcomes.

Yours sincerely,



Anna Myers
Executive Director of WIN

On behalf of the undersigned organisations:

1. Article 19, International
2. Pištaljka, Serbia
3. Protect, United Kingdom
4. Xnet, Spain

5. GlobaLeaks, Italy
6. Transparency International Italy
7. Blueprint for Free Speech, Australia
8. SpeakOut SpeakUp Ltd., United Kingdom
9. Centre for Free Expression, Canada
10. African Centre for Media & Information Literacy, Nigeria
11. Maison des Lanceurs d'Alert, France
12. The Signals Network, International
13. Whistleblower-Netzwerk (WBN), Germany
14. Transparency International, Global
15. Campax, Switzerland
16. Transparency International Ireland
17. Transparency International Australia