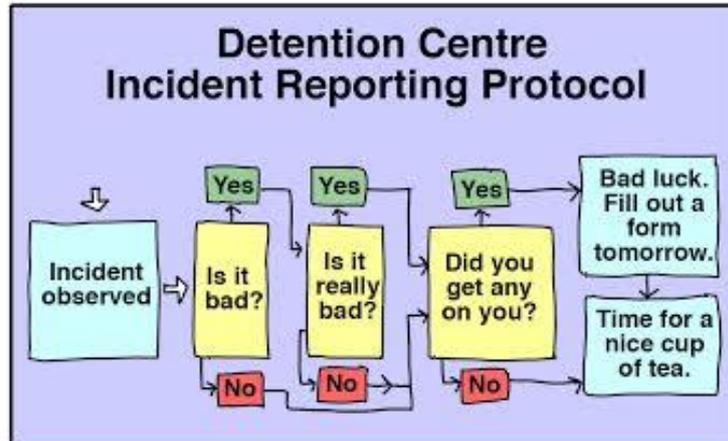


OPERATION SECRET BORDERS

What we don't know, can hurt us



ABOUT THE REPORT

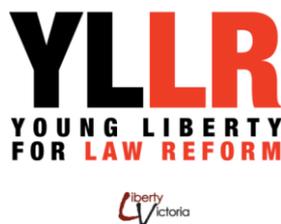
This report was authored by Donna Sherwani, Jordina Rust, Laura Dreyfus, Lexi Lachal and Tal Shmerling as members of Young Liberty for Law Reform.

Young Liberty for Law Reform is a program of Liberty Victoria. Over the 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 at the community level.

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The views expressed in this report are the views of the authors only and should not be taken to be the views of Liberty Victoria.



ABOUT LIBERTY VICTORIA

Liberty Victoria is one of Australia's leading civil liberties organisations. It has been working to defend and extend human rights and freedoms in Victoria for over 70 years. The aims of Liberty Victoria are to:

- help foster a society based on the democratic participation of all its members and the principles of justice, openness, the right to dissent and respect for diversity;
- secure the equal rights of everyone and oppose any abuse or excessive power by the state against its people;
- influence public debate and government policy on a range of human rights issues. Liberty Victoria has policy statements on issues such as access to justice, a charter of rights and freedom of speech and privacy; and
- make submissions to government, support court cases defending infringements of civil liberties, issue media releases and hold events.



The price of liberty is eternal vigilance

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ABBREVIATIONS

ABF Act	<i>Australian Border Force Act 2015 (Cth)</i>
AFP	Australian Federal Police
AHPRA	Australian Health Practitioner Regulation Agency
AMA	Australian Medical Association
APS	Australian Public Service
Customs	The Australian Customs and Border Protection Service
DIBP	Department of Immigration and Border Protection
FOI	Freedom of Information
GMP Code	Good Medical Practice: a code of conduct for doctors in Australia
ICCPR	International Covenant on Civil and Political Rights
IHMS	International Health and Medical Services
PID Act	<i>Public Interest Disclosure Act 2013 (Cth)</i>
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

FOREWORD

Access to information, freedom of expression, and protection against intimidation and reprisals are fundamental human rights and essential elements of an enabling environment for the promotion, protection and realisation of all other human rights. This is particularly the case for places of detention and other closed environments, where secrecy and lack of transparency are strongly associated with cruel, inhumane or degrading treatment, together with other human rights deprivations and violations.

These rights take expression in a range of international legal instruments to which Australia is a party, including the International Covenant on Civil and Political Rights ('ICCPR').¹ They are further elucidated in the Declaration on Human Rights Defenders², adopted by consensus in the General Assembly in 1998 and strongly reaffirmed in numerous subsequent General Assembly and Human Rights Council resolutions with strong Australian support.

Access to and the disclosure of information tends to prevent, expose, or promote accountability for human rights violations, and enjoys a particular level of protection through the Declaration on Human Rights Defenders. For example:

- **Article 6** provides that everyone has the right 'to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms' and 'freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms'.
- **Article 8(2)** affirms that everyone has the right 'to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realisation of human rights and fundamental freedoms'.
- **Article 9(4)** provides that everyone has the right to unhindered access to and communication with international bodies on matters of human rights and fundamental freedoms.
- **Article 10** provides that 'no one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so'.
- **Article 11** affirms that 'everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms'.
- **Article 12** obliges States to 'take all necessary measures to ensure the protection' of any person from any form of violence, threats or retaliation, whether de facto or de jure, 'as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration'.

This important Young Liberty for Law Reform report documents a disturbing and worsening array of barriers and restrictions, including criminal liability, access to information, disclosure of information and exercise of the right to freedom of expression in relation to Australia's offshore places of detention and other aspects of Australia's refugee and asylum seeker policy. Many of the provisions and policies identified in the report are manifestly incompatible with the ICCPR and the Declaration on Human Rights Defenders, and are likely to lead or contribute to the violation of provisions of the Convention against Torture and the Convention on the Rights of the Child, among other United Nations Conventions.

The clear recommendations in the report provide a useful roadmap to reform aspects of Australia's deeply concerning and internationally condemned refugee and asylum seeker policy. If implemented,

¹ *International Covenant for Civil and Political Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

² *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res 53/144, UN GAOR, 55th Sess, 85th plen mtg, Agenda Item 110(b), UN Doc A/RES/53/144 (8 March 1999).

they would serve both to strengthen Australia's compliance with its international human rights obligations and to reduce the risk of human rights violations for which Australia could be held directly or indirectly responsible.

I commend the report, its authors and their important and timely recommendations.

Phil Lynch is Director of the International Service for Human Rights in Geneva (www.ishr.ch). Follow him on Twitter at @PhilALynch.

EXECUTIVE SUMMARY

Key aspects of Australia's policies towards people seeking asylum involve government acting outside Australia's borders — on the high seas or on foreign soil. These places — where Australia exercises authority and control over individuals who are not Australian citizens — are in many ways beyond the reach of the normal oversight arrangements and often beyond the reach of Australian courts. Serious accountability issues arise from multiple factors; the remoteness of the locations in which these policies are enacted, the role of contracted workers, corporations and foreign officials at arms-length from the Commonwealth Government, and the secrecy surrounding many aspects of Commonwealth policy.

This report explores the extent of that secrecy and the dangers that it poses: both to people seeking asylum and to Australian democracy. It highlights the challenges faced by individuals who want to bring information about risks to the health, safety, dignity and human rights of those within Australia's asylum seeker and immigration system to the awareness of the Australian public. It outlines the current legal, practical and cultural obstacles preventing would-be whistleblowers from legitimately reporting wrongs that they have witnessed and details personal accounts from those who have spoken out about their experiences at the offshore processing centre located on Nauru or Manus Island (together, the 'Detention Centres', and each, a 'Detention Centre').

The legal and practical obstacles faced by would-be whistleblowers are numerous:

Practical and cultural barriers

- Operation Sovereign Borders and its associated policies, such as the government's controlled media briefings and refusal to comment on 'on-water operations,' restrict the public's access to information about the operation of the government's immigration policy.
- The Commonwealth Government has used the threat of prosecution to discourage individuals from speaking out about conditions in the Detention Centres.
- Information about the operation of offshore detention facilities and the operation of immigration policies is rigorously controlled and restricted.
- The public service agencies dealing with immigration and border control are increasingly militarised, and the language of war and weaponry is employed to describe policy towards people seeking asylum.
- The public's ability to have Freedom of Information (FOI) requests reviewed has been severely limited by a lack of funding to key roles.

Criminal Liability

- Individuals working at Detention Centres face criminal liability under the *Australian Border Force Act 2015* (ABF Act) or the *Crimes Act 1914* (Cth) should they disclose protected information to the public. A broad range of conduct is caught within the scope of these offences.
- Potential whistleblowers must make a number of complex legal and factual assessments about the information they wish to disclose before deciding whether or not they can legally disclose information.
- The ABF Act limits a person's ability to disclose information by threat of termination of employment, or through other measures such as reduction in salary, reassignment of duties.
- The fear of prosecution and reprisal prevents whistle-blowers from speaking out.

Summary dismissal and civil liability

- Potential whistleblowers may be at risk of summary dismissal, or face contractual or civil liability in a number of different ways for disclosing confidential or sensitive information. In most circumstances, whistleblowers will still face liability where disclosure is made in the public interest with the intention of notifying the Australian public about inhumane conditions or serious risks to health and safety occurring in Australia's immigration and border control regime.
- Whistleblowers could be sued by their employer, whether the Commonwealth Government or a corporation, even in circumstances where the whistleblower has not caused damage or financial loss. Further, if forewarned, the whistleblower's employer could take out an injunction to prevent them from becoming a whistleblower.
- Although there are some exceptions and defences available to whistleblowers facing legal proceedings, there is a high degree of uncertainty as to when these will apply. In many circumstances, the burden will fall on the whistleblower to make arguments and produce evidence in order to defend themselves against legal proceedings brought against them.
- For many would-be whistleblowers, the threat of losing their job or facing the prospect of defending a civil proceeding brought against them by the Commonwealth Government or a large corporation with a well-financed legal team is likely to be a significant discouragement to disclosing information in the public interest, even in circumstances where they may be legally permitted to do so.

Professional liability

- Both psychologists and doctors' professional standards require them to maintain patient confidentiality, except where the patient's treatment is inhumane or degrading. In these circumstances, disclosure of personal information can be made to the appropriate body, such as the Australian Health Practitioner Regulation Agency (AHPRA) or the Psychology Board of Australia. Disclosure is not permitted to external sources.
- Public servants can face a range of sanctions for disclosing any information that would 'cause detriment to the Commonwealth' or would breach 'appropriate confidentiality about their dealings with Ministers' under the *Public Service Act 1999* (Cth).
- Employees of corporations that are contracted to provide services to the Commonwealth Government at the Detention Centres may be subject to restrictive confidentiality provisions and reporting processes. For example, employees of Broadspectrum (the company formerly known as Transfield) are only permitted to disclose confidential information through internal mechanisms and may still be subject to disciplinary action if the reporting is determined to be in bad faith.

Over time, government measures targeting whistleblowers and restricting the public's access to information have incrementally created a culture of secrecy. Even where processes exist that provide for disclosure in the public interest, individuals working within Australia's asylum seeker and immigration system report a climate of fear and a culture of intimidation within the agencies, organisations and companies responsible for enacting Australia's policies.

For whistleblowers working in this context with genuine grounds for making a disclosure in the public interest, Commonwealth whistleblower protection laws offer little comfort. There is a great deal of uncertainty surrounding when and under what circumstances an external disclosure by a whistleblower to the media will be protected under the *Public Interest Disclosure Act 2013* (Cth) (PID Act) exposing whistleblowers to the risk of legal challenges to the validity of their disclosure on numerous bases. This serves as a significant impediment to whistleblowing. Further, whistleblowers bear the onus of proving the validity of their disclosure, including, for example, that their disclosure was not adequately dealt with internally.

There are a number of practical steps and legislative reforms that can be taken to remove unreasonable restrictions that discourage legitimate whistleblowing. This report recommends fundamental changes to the existing legislative and cultural framework applicable to whistleblowers in the asylum seeker context:

1. The ABF Act should 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.
2. Part 6 of the ABF Act should be repealed on the basis that it unreasonably restricts and discourages individuals from disclosing information that is in the public interest.
3. The Commonwealth Government should amend section 70 of the Crimes Act 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.
4. The 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.
5. Provisions of the PID Act that unnecessarily burden or create uncertainty for whistleblowers seeking to make external disclosure should be repealed.
6. An independent oversight mechanism should be established under the PID 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 PID Act.

Australia must do more to address the culture of secrecy surrounding its immigration and asylum seeker policies. Secrecy increases risks to the health, safety, and dignity of people in our care and prevents the Australian public from knowing what is being done at our borders, in our name. In the words of Judge Damon Keith, writing in relation to transparency and immigration in a decision of the US Court of Appeal, 'democracies die behind closed doors'.

BACKGROUND

In brief, Australia's policy regarding people seeking asylum can be summarised as follows:

- Anyone who arrives in Australia without a valid visa is subject to mandatory detention and removal from Australia.
- Those seeking to come to Australia by boat are intercepted and returned to the jurisdiction in which they embarked.
- People seeking asylum are detained in Australia or in offshore processing facilities in Nauru and Manus Island. The current average period of time for people held in detention facilities is 445 days.³
- Australia's policy has a single-minded focus on deterrence.

As at 30 December 2015, there were a total of 1459 people in detention in offshore detention centres, including 537 people on Nauru and 922 people on Manus Island.⁴

Operation Sovereign Borders

The current Commonwealth Government has maintained and expanded these policies. The present policy for people who arrive without a valid visa is known as 'Operation Sovereign Borders', and was launched on 18 September 2013. The policy aims to prevent the entry of asylum seekers arriving by boat into Australian territory and ensure that prospective asylum seekers are not settled in Australia. Aspects of this military-led policy include turning back asylum seeker boats on the water, increasing capacity at offshore processing centres and re-introducing Temporary Protection Visas. Australia claims to have turned back 20 boats since the inception of Operation Sovereign Borders, with boats being forcibly sent back to their country of origin before reaching Australia.⁵ Due to the operational secrecy under which Operation Sovereign Borders operates, information about boat turn backs and the conditions in which asylum seekers in offshore detention centres are kept, has been restricted.

Following the introduction of Operation Sovereign Borders, the Department of Immigration and Border Protection (DIBP) was renamed the Department of Citizenship and Border Protection. The new department maintained the majority of functions performed by the previous department, as well as integrating with the Australian Customs and Border Protection Service (Customs).

In May 2015 the ABF Act was passed. Its introduction prompted fears that whistleblowers speaking out about Australia's asylum seeker policies would be targeted and potentially prosecuted.

³ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 30 December 2015, 11.

⁴ *Ibid*, 4.

⁵ Michael Safi & Ben Doherty, 'Asylum seeker boat towed away after coming within 200m of Christmas Island', *The Guardian*, 20 November 2015, http://www.theguardian.com/australia-news/2015/nov/20/asylum-seeker-boat-reported-approached-christmas-island?CMP=Share_iOSApp_Other.

Offshore processing

Australia maintains agreements with Papua New Guinea and Nauru for the processing and resettlement of asylum seekers. Currently, under Operation Sovereign Borders, Australia transfers all 'illegal maritime arrivals' to the Detention Centres, where their applications are considered under the local law.

The Commonwealth Government funds the Detention Centres on Nauru and Manus Island in Papua New Guinea but delegates authority to certain private contractors to provide services to the centres. In both centres, Broadspectrum is contracted by the Commonwealth Government to provide staff and services, Wilson Security is engaged as the security sub-contractor and International Health and Medical Services (IHMS) is engaged to provide health and medical services.⁶

The actors involved in the detention and control of asylum seekers on Manus Island and Nauru, and the legal authority under which they act, is complex and involves a web of relationships between the Commonwealth Government, private companies, and foreign governments.

For example, the Nauru Detention centre is governed by an Operational Manager appointed by the Government of Nauru. The Operational Manager monitors the welfare, safety and conduct of transferees with the assistance of the service providers. The Commonwealth appoints a Programme Coordinator who is responsible for ensuring that contracted service providers deliver services to the appropriate standard. The Programme Coordinator has at all times been an officer of the DIBP and is stationed in Nauru.⁷

Representatives of Broadspectrum and Wilson Security attend regular meetings with, and report to, the DIBP and to the Government of Nauru. The Commonwealth occupies an office at the Detention Centre on Nauru at which officers of the Australian Border Force carry out functions in relation to the Centre or transferees at the Centre, including managing service provider contracts, Commonwealth-funded projects, such as construction projects, and relationships and communications between the Commonwealth, the service providers and the Government of Nauru.⁸ The governance structures for the Nauru Detention centre comprise representatives of the Government of Nauru and the Commonwealth.⁹

Until October 2015, individuals held in the Detention Centre on Nauru were prohibited from leaving the Nauru Detention Centre under Nauruan law unless they first sought approval from a person authorised by the Nauru government.¹⁰ Staff of Wilson Security were appointed by the Secretary as authorised officers and were therefore authorised by the law of Nauru to exercise powers under Nauru law. As at 7 October 2015, 138 staff of Wilson Security were 'authorised officers' for the purposes of the Nauru law. In July 2013, Wilson Security staff members were sworn in as reserve officers of the Nauru Police Force Reserve.¹¹

The conditions in centres have come under intense criticism since their inception, both domestically and internationally. The United Nations High Commissioner for Refugees (UNHCR) visited Nauru in October 2013 and concluded that Nauru does not 'provide safe and humane conditions of treatment in detention'.¹² Furthermore, an inquiry into allegations of sexual and physical assault of asylum seekers

⁶ Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre at Nauru, Parliament of Australia, *Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre at Nauru*, Final Report, 31 August 2015, [2.86] – [2.87]; Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, December 2014.

⁷ *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, [84].

⁸ *Ibid*, [12] – [13].

⁹ *Ibid*, [85].

¹⁰ *Ibid*, [33].

¹¹ *Ibid* [53].

¹² United Nations High Commissioner for Refugees, 'UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013' (Report, UNHCR 26 November 2013).

on Nauru concluded in March 2015 that there had been a number of allegations of rape, indecent assault, sexual harassment and physical assault of asylum seekers, including minors.¹³

Similarly, the UNHCR concluded after a visit to Manus Island that the living conditions for most transferees were 'harsh and, for some, inadequate' and that the conditions coupled with the indeterminate nature and length of processing was 'likely to have an increasingly negative impact on the psycho-social and physical health of those transferred'.¹⁴ Conditions on Manus Island have attracted further criticism since two asylum seekers died whilst in detention in 2014.¹⁵

¹³ Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre at Nauru, Parliament of Australia, *Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre at Nauru*, Final Report, 31 August 2015.

¹⁴ United Nations High Commissioner for Refugees, 'UNHCR Mission to Manus Island, Papua New Guinea 15-17 January 2013' (Report, UNHCR, 4 February 2013) 2.

¹⁵ Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February 10 18 February 2014*, December 2014.; 'Iranian asylum seeker Hamid Kehazaei dies in Brisbane hospital after life support switched off', *ABC News*, 6 September 2014, <http://www.abc.net.au/news/2014-09-05/iranian-asylum-seeker-dies-in-brisbane-hospital/5724050>.

I. PRACTICAL AND CULTURAL BARRIERS TO WHISTLEBLOWING

The Commonwealth Government's immigration policy, alongside the isolation of its offshore Detention Centres, has prevented information about refugees and people seeking asylum from reaching the Australian public. Both the nature of Australia's immigration policies and the way they are implemented have discouraged individuals from disclosing important information, and created a culture where secrecy is preferred to transparency and accountability.

A culture of secrecy

Operation Sovereign Borders and its associated media policies, as well as wider reaching decisions such as cutting funding to the Information Commissioner, are all examples of the Commonwealth Government and the DIBP creating disincentives for Australians to speak out, and removing avenues to do so.

Operation Sovereign Borders

In 2013, Operation Sovereign Borders commenced. Since its commencement, information about the Detention Centres has become more difficult to access, and a language of secrecy has pervaded its implementation. As the name suggests, and as the Minister for Immigration and Border Protection (the Minister) at the time, Scott Morrison, openly stated, it is a 'military-led border operation'.¹⁶

The Prime Minister at the time, Tony Abbott likened Operation Sovereign Borders to being at war. 'If we were at war we wouldn't be giving out information that is of use to the enemy just because we might have an idle curiosity about it ourselves', he said on the same topic.¹⁷

The then Minister said later to parliament that 'the battle is being fought with the full arsenal of measures' while also talking about how Australia would respond to boat arrivals on its shores.¹⁸

The language of war and weaponry provokes a sense that non-transparency is both justified and necessary to carry out the Commonwealth Government's immigration policy. In turn, this fosters a sense that speaking out is tantamount to treason.

¹⁶ Emma Griffiths, 'Immigration Minister Scott Morrison refuses to detail recent asylum seeker boat arrival in Question Time', *ABC News*, 13 November 2013, <<http://www.abc.net.au/news/2013-11-13/morrison-refuses-to-detail-asylum-seeker-boat-arrival/5089476>>.

¹⁷ Jonathan Swan, 'Tony Abbott compares secrecy over asylum seekers to war time' *The Sydney Morning Herald*, 10 January 2014, <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-compares-secrecy-over-asylum-seekers-to-war-time-20140110-30jyt.html>>.

¹⁸ Rodney Tiffen, 'The Abbot Government's War on Transparency', *Inside Story*, 5 June 2014, <<http://insidestory.org.au/the-abbott-governments-war-on-transparency/>>.

Weekly media briefings

Upon the commencement of Operation Sovereign Borders, the Department introduced singular weekly media briefings, instead of releasing information on boat arrivals as they occurred or relaying events as they happened. The weekly briefings were given by the then Minister Scott Morrison and Lieutenant General Angus Campbell, whose role it was to oversee Operation Sovereign Borders. Questions often remained unanswered because of the refusal to comment on so called 'on-water' operations.¹⁹

The weekly media briefings were discontinued in January 2014, when the then Minister decided that reports would be made on an 'as needs' basis.²⁰ He said that the Department would continue to release weekly written statements on the number of boat arrivals. By scrapping the briefings, journalists no longer had an opportunity to ask questions directly to the Minister or to the Lieutenant General. The decision was not explained.²¹

Refusal to comment on on-water operations

The Department's continued refusal to comment on 'on-water' or 'operational' matters has strengthened the culture of secrecy. In November 2013, when the Minister was interviewed about a rescued boat of refugees near the Indonesian coast, he said (up to seven times in one interview) that he would 'not discuss further on-water operations'.²²

When pressed for information about what sort of assistance was given, where the people seeking asylum would be taken and whether Australia had arrived first at the scene, the then Minister, alongside Lieutenant General Campbell, refused to comment, on the basis that it would 'go to our conduct of on-water operations'. The following is an excerpt from the interview:

Q: What's become of that boat of asylum seekers?

Campbell: I will not comment further in relation to on-water matters. Thank you.

Q: Are they on their way to Christmas Island now?

Morrison: These matters continue to be dealt with in the practice we have been adopting for the last eight weeks under Operation Sovereign Borders and we'll continue to do it the way we have been doing it.

Q: Do you consider this to be a matter of public importance?

Morrison: What is important is that the people who were the subject of our assistance are all accounted for and I'm sure Australians will be pleased to know that is the case

Q: What sort of assistance did you give them?

Morrison: Well, again, we're not going to go into the micro detail of these operational matters.

¹⁹ Judith Ireland, 'Scott Morrison Stops Weekly Briefings on Asylum Seekers' *The Sydney Morning Herald* (online), 15 January 2015, <<http://www.smh.com.au/federal-politics/political-news/scott-morrison-stops-weekly-briefings-on-asylum-seekers-20140114-30tpf.html>>.

²⁰ Ibid.

²¹ 'Scott Morrison says he will stop holding weekly asylum seeker briefings' *ABC News*, 4 February 2014, <<http://www.abc.net.au/news/2014-01-14/scott-morrison-says-he-will-stop-holding-weekly-asylum-seeker-b/5200158>>.

²² Natalie O'Brien, 'No comment: government silent over fate of asylum seekers', *The Sydney Morning Herald*, 9 November 2013, <<http://www.smh.com.au/national/no-comment-government-silent-over-fate-of-asylum-seekers-20131109-2x8a1.html>>.

Q: Did you help them?

Morrison: What we are saying is that we rendered assistance...

Q: Can you tell us what assistance that was?

Morrison: So we can go around this for a lot longer but that is the position.

Q: Were the Australians the first to arrive on the scene?

Morrison: Well, again, I'm not going to go into on-water operations of what other potential partners have been engaged with. We were asked to render assistance and we rendered assistance.

Q: So is the boat heading in any particular direction or is it still sitting there?

Morrison: Well, again, that would go to on-water operations, which we're not providing any further detail on.²³

The journalists reported that they had received more information from the Indonesian government than from the Commonwealth Government in relation to the rescued boat.²⁴

Further, when asked about a protest on Christmas Island in which six people were reported to have engaged in a hunger strike, the then Minister responded 'we do not comment on protest activity'.²⁵

In 2015, Minister Peter Dutton repeated the same line when asked about paying a crew and captain of a boat to take asylum seekers away from Australia.

Q: Has Australia ever done that?

Dutton: it has been longstanding government policy not to comment on on-water matters.²⁶

²³ Ibid.

²⁴ Samantha Hawley, 'Morrison refuses answer rescue questions', *ABC News*, 8 November 2013, <<http://www.abc.net.au/pm/content/2013/s3887267.htm>>.

²⁵ Above, n 21.

²⁶ Daniel Hurst, 'Peter Dutton invokes 'on-water' secrecy over claim of payments to boat crew' *The Guardian*, 10 June 2015, <<http://www.theguardian.com/australia-news/2015/jun/10/peter-dutton-invokes-on-water-secrecy-over-claim-of-payments-to-boat-crew>>.

Denying the existence of a boat of Tamil refugees

In July 2014 the Department refused to confirm or deny the existence, status or location of an intercepted boat of Tamil refugees.²⁷ It took a challenge in the High Court of Australia for the government to break its silence and confirm the existence of the refugees in the government's custody.²⁸ The following excerpt from a doorstep interview about the boat of Tamil refugees highlights the then Minister's lack of disclosure:

Q: So Mr Morrison, you are not even going to confirm there is a boat, you are not going to say what is happening if people are in the water? Their boat is leaking, we are told – leaking oil – and you are not going to say anything about that situation?

Morrison: What I have said is that it is our practice to report on significant events at sea, particularly when they involve safety of life at sea. Now there is no such report for me to provide to you today. If there was a significant event happening then I would be reporting on it.

Q: So what does that mean? If the boat actually sinks you would tell us -

Morrison: You are a bright journalist, I'm sure you can work it out.

Q: No, we are asking you, Sir, you're the Minister.

Morrison: And I have given you my response.

Q. Well I don't understand your response

...

Q: So could you clarify, Sir, for us – at what point does an event become a significant event involving a boat on the water?

Morrison: When you see me here standing and reporting on it.

Q: And you are standing here reporting.

Morrison: I am not. I am saying there is no such report for me to provide to you today, there is therefore no significant event for me to report at sea.

...

Q: Are you saying that it could be a hoax that people are saying they are in trouble?

Morrison: I am not saying anything of that at all. I am not confirming any of these matters. This should come as no surprise to you. This has been our practice now for the entire period of this operation. This is another day at the office for Operation Sovereign Borders.²⁹

²⁷ Annabel Crabb, 'Scott Morrison interview takes on pythonesque proportions', *The Sydney Morning Herald*, 6 July 2014, <<http://www.smh.com.au/federal-politics/political-opinion/scott-morrison-interview-takes-on-pythonesque-proportions-20140704-zsw9n.html>>.

²⁸ 'High Court finds that detention at sea of 157 Tamil asylum seekers was not a breach of Australian domestic law', *Human Rights Law Centre*, 28 January 2015 <<http://hrlc.org.au/high-court-finds-that-detention-at-sea-of-157-tamil-asylum-seekers-was-not-a-breach-of-australian-domestic-law/>>.

²⁹ Crabb, above, n 27; ABC TV, 'Secrecy on the high seas' Media Watch, Episode 24, 14 July 2014 (Paul Barry), <http://www.abc.net.au/mediawatch/transcripts/s4045863.htm>.

Weakening the Information Commissioner

In 2014 the Commonwealth Government announced it would abolish the Information Commissioner, whose role it is to oversee government action and review decisions on FOI requests. The legislation to abolish the Commissioner was never successfully passed, however in 2015 funding for the FOI function of the Commissioner was reduced to approximately one third of what was allocated in 2014.³⁰

Because of the limited funding and reduced staff, the positions in charge of reviewing FOI decisions have been significantly diminished. This means that those who are denied access to information about Australia's refugee or asylum seeker operations will have fewer avenues to review such decisions.

³⁰ Richard Mulgan, 'The slow death of the office of the Australian Information Commissioner,' *Canberra Times*, 1 September 2015, <<http://www.canberratimes.com.au/national/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html>>.

The nature of offshore processing

Outsourcing the operation of the Detention Centres to remote and hard-to-reach places means that information about these places is more difficult to access.

Inaccessibility

Access to the Detention Centres has been severely restricted. To visit Nauru there is an \$8000 non-refundable visa application fee for journalists and a \$6000 non-refundable fee for lawyers.³¹ On 20 October 2015, Chris Kenny, a journalist for *The Australian* newspaper, became the first Australian journalist to be given permission to visit the Nauru Detention Centre in 18 months. It is unclear exactly why he, and not others, was given permission. He stated that, 'if my public support for strong border protection helped sway Nauru's decision, so be it'.³²

Access to the Manus Island Detention Centre has also been limited. The Australian Human Rights Commissioner, as well as the Immigration Ombudsman, have been denied access to the Manus Island Detention Centre.³³ In May 2015, Paul Farrell reported that no journalist had been granted access to the Detention Centres since the Coalition Government had been elected.³⁴ Journalist Ben Doherty visited the Manus Island Detention Centre in 2015. However, according to his account, he was not granted access to the Detention Centre itself.

Information is blocked

Not only are the Detention Centres difficult to access, but those who do attempt to report on them are under threat of being referred to the Australian Federal Police (AFP). Under the Coalition Government, at least eight referrals have been made to the AFP on the subject matter of people seeking asylum or immigration detention.³⁵ For example the AFP has confirmed that it received a referral from Customs in relation to a customs vessel entering Indonesian waters, which was reported in the *Guardian* newspaper. West Australian journalist, Nick Butterly has twice been referred by Customs, firstly for reporting on an intercepted asylum seeker boat, and secondly for a story about filling asylum seeker boats in Indonesia.³⁶

Journalists Nick Moir and Rory Callinan visited Manus Island shortly after Reza Berati, a detainee, was killed in a riot in the Manus Island Detention Centre. When visiting both the Detention Centre and the hospital in Papua New Guinea, situated 14 kilometres from the Detention Centre, their camera was confiscated and they were forced to delete photographs they had taken.³⁷ The same thing happened to an ABC reporter who tried to take footage in front of the hospital.³⁸

³¹ Hon Geoffrey Eames AM QC, Submission No 70 – Supplementary Submission to Senate Committee, *Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre at Nauru*, 20 July 2015, p 1.

³² Amande Meade, 'Chris Kenny the first foreign news report in 18 months granted visa to Nauru', *The Guardian*, 20 October 2015 <<http://www.theguardian.com/world/2015/oct/20/chris-kenny-first-foreign-news-reporter-in-18-months-granted-nauru-visa>>.

³³ Ben Pynt, 'We need to see Manus', *Sydney Morning Herald*, 24 February 2014, <<http://www.smh.com.au/comment/we-need-to-see-manus-island-20140224-33bk1.html>>.

³⁴ Paul Farrell, 'Shrouded in Secrecy,' *Media, Entertainment and Arts Alliance*, 4 May 2015, <<http://www.pressfreedom.org.au/asylum-seekers/shrouded-in-secrecy>>.

³⁵ Ibid.

³⁶ Paul Farrell 'Journalists reporting on Asylum Seekers referred to Australian Police' *The Guardian*, 22 January 2015, <<http://www.theguardian.com/australia-news/2015/jan/22/journalists-reporting-on-asylum-seekers-referred-to-australian-police>>.

³⁷ Rory Callinan, 'Manus Island: How information is kept 'under control'', *The Age*, 25 February 2014, <<http://www.theage.com.au/comment/manus-island-how-information-is-kept-under-control-20140225-33eob.html>>

³⁸ Ibid.

The refugees at the Manus Island Detention Centre are restricted to half hour telephone conversations once every three days, which are heavily monitored. There is some internet access, but it is tightly controlled and censored.³⁹

Lack of transparency

Members of parliament have, to some extent, recognised the serious problems at the Nauru Detention Centre. The Senate Select Committee investigating the Nauru Detention Centre (comprised of two Liberal, two Labor and a Greens MP) produced its final report on 31 August 2015. It found that conditions in the Nauru Detention Centre were 'not adequate, appropriate or safe for asylum seekers'.⁴⁰

The Committee wrote:

The department has been unaware of serious acts of misconduct by staff of contractors, as those contractors have not adequately fulfilled their reporting obligations. The committee believes that no guarantee can be given by the department that any aspect of the RPC [regional processing centre] is run well, and that no guarantee of transparency and accountability can be given until significant changes are made and accountability systems are put in place.⁴¹

The Committee also wrote that it did not believe it had been afforded full and transparent access to the information it requested from key stakeholders.⁴²

Paul Ronalds, CEO of Save the Children, has endorsed the suggestions by the Committee stating:

The culture of secrecy that has been associated with the offshore detention facilities has facilitated all sorts of harms that this Senate review has clearly demonstrated have been going on.⁴³

Restrictions on Broadpectrum staff

Individuals employed at the Detention Centres are subject to harsh workplace policies (as set out below in section II of this report). In April 2015 it was reported that Broadpectrum staff at Detention Centres could be fired for interacting with people seeking asylum on social media or being associated with political or religious advocacy groups. Broadpectrum said:

Due to the nature of the Operations, there is a heightened risk that the publication of information or comments about the operations may pose a risk to the operations, transferees and/or workers, or damage the business or reputation of Transfield Services (now Broadpectrum).⁴⁴

Staff are prohibited from contacting current or former asylum seekers without permission and are required to refrain from joining certain advocacy, political or religious organisations and they are also prohibited from attending rallies.⁴⁵

³⁹ Ben Doherty, 'A life in limbo: the refugees who fled torture only to end up trapped indefinitely on Manus' *The Guardian*, 5 September 2015, <<http://www.theguardian.com/australia-news/2015/sep/04/a-life-in-limbo-the-refugees-who-fled-torture-only-to-end-up-trapped-indefinitely-on-manus>>.

⁴⁰ Alex McDonald, 'Nauru detention centre not safe for Children Senate committee calling for full audit into abuse claims', *ABC News*, 1 September 2015, <<http://www.abc.net.au/news/2015-08-31/senate-inquiry-calls-for-children-to-be-removed-from-nauru/6738644>>.

⁴¹ Select Committee on Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre at Nauru, Parliament of Australia, *Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre at Nauru*, Final Report, 31 August 2015, [5.9].

⁴² *Ibid* [5.11].

⁴³ McDonald, above n 41.

⁴⁴ SBS, 'Transfield immigration staff can be instantly dismissed for affiliating with asylum seekers', *ABC News*, 7 April 2015, <<http://www.sbs.com.au/news/article/2015/04/07/transfield-immigration-staff-can-be-instantly-dismissed-affiliating-asylum>>.

⁴⁵ *Ibid*.

While the official channels of communication continue to be restricted, refugee advocates and lawyers such as Julian Burnside and Lizzie O'Shea have both reported that calls from people wishing to speak out on detention centre conditions have 'significantly increased' in the past few years.⁴⁶

⁴⁶ Bec Zajac, 'More Australians wanting to blow the whistle on Manus Island and Nauru conditions' *The Citizen*, 23 January 2015, <<http://www.thecitizen.org.au/news/more-australians-wanting-blow-whistle-manus-island-and-nauru-conditions#sthash.OUgJ5HDn.dpuf>>

II. LEGAL BARRIERS TO WHISTLEBLOWING

Potential whistleblowers employed at the Detention Centres also face a vast and complex set of legal barriers to disclosing information that is in the public interest. The disclosure of sensitive information may expose employees at the Detention Centres to criminal, civil and professional liability. They face a range of sanctions including, but not limited to: imprisonment, fines, injunctions, loss of employment, and reduction in their professional duties.

Navigating the labyrinth of legal hurdles can be intimidating for potential whistleblowers. Even with legal advice, the potential legal consequences of a disclosure may remain unclear. The stakes are incredibly high and people may not be willing to take personal risks in order to disclose information that is in the public interest.

Criminal liability

Employees working at the Detention Centres who disclose sensitive information may be criminally liable under provisions in the ABF Act or the Crimes Act or both. These offences carry a maximum sentence of two years' imprisonment.

Even if a person is not ultimately found to have committed an offence, the legislative provisions require that person to make a number of burdensome and complex legal and factual assessments about the information they are disclosing, and the method by which they choose to disclose, before they might whistleblow. This may delay or even prevent someone from disclosing information that is in the public interest.

ABF Act

The ABF Act places restrictions on anyone working for or providing services to Customs or the Department, among others. The ABF Act 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'.⁴⁷

The definition of 'entrusted person' is broad and covers, amongst other groups:

- Australian Public Service (APS) employees;
- officers of Customs and the Department; and
- consultants or contractors engaged by the Department.⁴⁸

The Secretary or Australian Border Force Commissioner may also designate a person to be an 'entrusted person' for the purpose of the ABF Act.⁴⁹

'Protected information' is defined broadly in the ABF Act as information that was obtained by a person in that person's capacity as an 'entrusted person'.⁵⁰ The definition of 'protected information' captures a wide range of information, regardless of its nature. A person may not make a record of or disclose 'protected information' unless it is in the course of their employment or service as an entrusted person.⁵¹

⁴⁷ *Australian Border Force Act 2015* (Cth) s 42.

⁴⁸ *Ibid* s 4.

⁴⁹ *Ibid* ss 4, 5.

⁵⁰ *Ibid* s 4.

⁵¹ *Ibid* s 42(2)(b).

Possible examples of offences under the ABF Act include:

- a contractor recording footage of a riot on a phone;
- a health worker taking photographic evidence of an assault; or
- a security guard keeping a personal diary of their daily experiences.

Employees at the Detentions Centres may fall under a number of exceptions in the ABF Act, which will prevent criminal liability.⁵² However, the burden of proving that an exemption exists rests with the person disclosing the information. This may be enough to discourage whistleblowers from coming forward. Relevant exceptions that may protect whistleblowers working at the Detention Centres include disclosures made to an authorised person for:

- a purpose relating to the protection of public health, or the prevention or elimination of risks to the life or safety of an individual or a group of individuals,⁵³ and
- the provision of services to persons who are not Australian citizens.⁵⁴

If a person has complied with the PID Act in making their disclosure, they will be protected from liability under the ABF Act. The availability of whistleblower protection under the PID Act is considered below in section II of this report.

Section 48 of the ABF Act is, however, the most important exception for people working at the Detention Centres. It permits the disclosure of information if the whistleblower reasonably believes the disclosure is necessary to 'prevent or lessen a serious threat to the life or health of an individual' and if 'the disclosure is for the purpose of preventing or lessening that threat'. There are a number of assessments a person must make about the information they are disclosing, and the steps they are taking to disclose it, before they might feel comfortable that this exception applies to them.

The ABF Act may also limit a person's ability to disclose information by threat of termination of employment or other reprimands such as reduction in salary, and reassignment of duties.⁵⁵ Consultants or contractors may have their contracts terminated.⁵⁶

Crimes Act

Section 70 of the Crimes Act applies criminal sanctions to any breach of secrecy obligations by public officials. It effectively criminalises breaches of obligations which are not, in and of themselves, criminal offences. It makes it an offence, punishable by up to two years' imprisonment, for APS 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'.⁵⁷

The duty not to disclose is not contained in section 70 itself. The person must be under a duty not to disclose the information from another source, typically a specific secrecy provision. Potential sources of these duties are the equitable duty of confidentiality and statutory duties imposed on APS employees. Both of these are considered in more detail below. A contractual duty may be enough to constitute a duty not to disclose under the Crimes Act but this is still unclear.⁵⁸

⁵² Ibid s 42.

⁵³ Ibid ss 44, 45, 46(d).

⁵⁴ Ibid ss 44, 45, 46(j).

⁵⁵ *Public Service Act 1999* (Cth) ss 13(4), 15, 28, 29.

⁵⁶ *Australian Border Force Act 2015* (Cth) s 57.

⁵⁷ *Crimes Act 1914* (Cth) ss 70(1)-(2).

⁵⁸ See *Director of Public Prosecutions v G* (1999) 85 FCR 566 [78].

Section 70 of the Crimes Act fails to outline the type of information that will be prohibited from disclosure. On the face of it, section 70 could apply to any disclosure regardless of the nature of the information, as long as it came into the possession of the officer by virtue of their office.⁵⁹ It is more likely that whether information is protected will depend on the nature of the duty not to disclose.⁶⁰ Either way, having such a broad provision which imposes criminal liability for acts that might merely be prejudicial to the effective working of government, is concerning.

By way of exceptions, a person will be exempt from this provision if the disclosure is made to an authorised person or where they have lawful authority or excuse, for example, if the disclosure of documents is pursuant to an obligation to give discovery or oral evidence in legal proceedings.⁶¹ However, these are narrow exceptions and notably, section 70 does not create an exception or defence relating to the disclosure of information 'in the public interest'.

A whistleblower may be protected from liability if the disclosure falls within the provisions of the PID Act. The availability of whistleblower protection under the PID Act is considered below in section II of this report.

Save the Children

In October 2014, then Minister Scott Morrison pursued a number of Save the Children employees working in the Nauru Detention Centre under section 70 of the Crimes Act. The employees were accused of communicating privileged information to non-Commonwealth workers relating to the conditions at the Nauru Detention Centre and were referred for investigation to the AFP. They were removed from Nauru without explanation. Distinguished media law expert Peter Bartlett called the use of section 70 against workers 'draconian.'⁶²

While charges were never laid, the Department soon after made further allegations that Save the Children employees had encouraged detainees to self-harm and had fabricated stories of abuse.⁶³ In May 2015, the release of the Moss Review revealed that there was no evidence to substantiate such claims,⁶⁴ and in January 2016 a government commissioned report by immigration expert Christopher Doogan found that the allegations were 'not justified.'⁶⁵

⁵⁹ Cf. *Crimes Act 1914* (Cth) s 78, which makes express reference to the characteristics of information that will be protected.

⁶⁰ *Deacon v Australian Capital Territory* (2001) 172 FLR 123, [66]-[88].

⁶¹ *Kanthal Australia Pty Ltd v The Minister for Industry, Technology and Commerce* (1987) 14 FCR 90.

⁶² Sarah Whyte, 'Legal experts criticise Scott Morrison's use of 'draconian' law', *The Sydney Morning Herald*, 9 October 2014, <<http://www.smh.com.au/federal-politics/political-news/legal-experts-criticise-scott-morrison-use-of-draconian-law-20141008-10rwn3.html>>.

⁶³ 'AFP asked to prove Ministerial leak', *SBS News*, 8 October 2014, <<http://www.sbs.com.au/news/article/2014/10/08/afp-asked-probe-ministerial-leak>>.

⁶⁴ New Matilda, 'Moss Review release: Finds no Evidence of Misconduct by Save the Children Workers', *New Matilda*, 20 March 2015, <<https://newmatilda.com/2015/03/20/moss-review-released-finds-no-evidence-misconduct-save-children-workers/>>.

⁶⁵ Nicole Hasham, 'Expulsion of Save the Children staff from Nauru not justified, says report', *Sydney Morning Herald*, 15 January 2016 <<http://www.smh.com.au/federal-politics/political-news/no-justification-for-save-the-children-staff-to-be-banished-from-nauru-says-report-20160115-gm73s2.html>>.

UN Special Rapporteur on the human rights of migrants

On 27 September 2015, the UN Special Rapporteur on the human rights of migrants, Francois Crepeau, was due to investigate Australia's treatment of people seeking asylum at the Detention Centres. He cancelled his visit on the basis that the Commonwealth Government was not prepared to meet his request that anyone he spoke to during his visit would not be imprisoned under the ABF Act.⁶⁶ In particular he stated that the ABF Act would 'discourage people from fully disclosing information relevant to [his] mandate' and that the 'threat of reprisals with persons who would want to cooperate with me on the occasion of this official visit is unacceptable'.⁶⁷

The government's unwillingness to provide an exemption may show that there is a threat of prosecution for reporting on workplace conditions, even to a UN official.

⁶⁶ Jane Lee, 'UN postpones Australian visit over failure to guarantee protection of detention centre workers' *The Sydney Morning Herald*, 26 September 2015, <<http://www.smh.com.au/federal-politics/political-news/un-postpones-australian-visit-over-failure-to-guarantee-protection-of-detention-centre-whistleblowers-from-re-20150926-gjvqm2.html>>.

⁶⁷ Office of the High Commissioner for Human Rights, 'Official visit to Australia postponed due to protection concerns' (Statement, 25 September 2015), accessed 16 November 2015, <<http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>>.

Summary dismissal

Employees at Detention Centres who whistleblow face a risk of being summarily dismissed for:

- breaching their employment contract or confidentiality deed; or
- serious misconduct, disobedience or gross incompetence.⁶⁸

This is a serious impediment to whistleblowing because would-be whistleblowers could lose their job. This, too, encourages silence.

Breach of an employment contract or confidentiality deed

Employees at the Detention Centres may be required to sign several documents before their employment begins, including an employment contract and various confidentiality deeds in favour of their employer and/or the Commonwealth Government, represented by the Department.

Employment contracts often contain a clause which expressly sets out the circumstances that justify summary dismissal. If a breach of confidentiality is included in this clause, an employer has a clear legal basis for terminating an individual's employment after they blow the whistle, since blowing the whistle will invariably involve the disclosure of confidential information.

However, even if the employment contract does not contain a clause stating that an employee's breach of confidentiality is grounds for summary dismissal, employers still have the power to terminate a whistleblower's employment if the act of whistleblowing demonstrates an intention to repudiate that contract i.e. the whistleblower's conduct demonstrates they no longer consider themselves bound by the contract.⁶⁹ For example, an employee who reports allegations of abuse at the Detention Centres to a journalist, in contravention of their contractual obligations of confidentiality, arguably evinces an intention to no longer be bound by their employment contract, or, alternatively, to only fulfil their employment contract in a manner substantially inconsistently with their contractual confidentiality obligations.

There is extensive judicial consideration of an employer's right to summarily dismiss an employee for repudiation of their contract.⁷⁰ During formal court proceedings a judge would determine whether the contract has been repudiated by reference to the intention of the parties at the time the contract was entered into,⁷¹ the terms of the contract as a whole and the surrounding factual circumstances.⁷²

As a result, whistleblowers who have signed confidentiality agreements or who have a confidentiality clause in their contract will be at risk of summary dismissal. Such arrangements are common for

⁶⁸ Note that until recently, it was thought that an implied mutual duty of trust and confidence was implied in Australian employment contracts, which allowed an employer to dismiss an employee summarily if their conduct was destructive of the relationship of trust and confidence between the parties. This principle has been recently rejected by the High Court in *CBA v Barker* (2014) 253 CLR 169.

⁶⁹ *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at 256 - 257.

⁷⁰ Considered in the narrow sense, repudiation occurs where one party evinces an intention to no longer be bound by the contract, or fulfil the contract only in a manner substantially inconsistent with that party's obligations (see *Koompahtoo*, at 135; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1988) 166 CLR 623; *Shevill v Builders Licensing Board* (1982) 149 CLR 620.) When used in the broader sense, repudiation means any breach of contract which justifies termination (see *Koompahtoo* at 136). A breach of contract justifies termination if the obligation which has not been complied with is either:

- an 'essential' term of the contract (see *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423); or
- a sufficiently serious breach of a non-essential term (see *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26).

⁷¹ *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 627.

⁷² *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.

individuals working in Australia's immigration and border control system, and present a real obstacle to whistleblowing.

Serious misconduct, disobedience or gross incompetence

An employer also has a common law right to summarily dismiss an employee for serious misconduct, disobedience or gross incompetence. There are two categories of conduct that amount to serious misconduct, disobedience or gross incompetence which are particularly relevant to whistleblowers.

Firstly, the commission of a crime in the course of employment, or the commission of a crime outside the employment where it is inconsistent with the individual's duties as an employee, both amount to serious misconduct justifying summary dismissal. As discussed above in section II of this report, employees working at the Detention Centres who disclose sensitive information may be criminally liable under provisions of the ABF Act and the Crimes Act. Consequently, employers may summarily dismiss a whistleblower who is found guilty of an offence under these ABF Act and Crimes Act provisions.

Secondly, wilful disobedience of a lawful and reasonable direction may also amount to serious misconduct justifying summary dismissal.⁷³ An employer's command not to disclose confidential information will be lawful if it is within the scope of the employment or relates to the subject matter of the employment.⁷⁴

An employer's command will generally be reasonable as long as it does not put an employee's safety at risk in a manner over and above that which arises properly in the ordinary course of the employment. This is a very low threshold and, as such, a direction not to disclose confidential information will almost always be lawful. A whistleblower who speaks out in violation of such a direction faces the prospect of being summarily dismissed as a consequence.

The mere prospect of being fired for speaking out in spite of a direction to stay silent may be deterrent enough to prevent a whistleblower from speaking out.

⁷³ *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621- 622, *Australian Telecommunications Commission v Hart* (1982) 43 ALR 165.

⁷⁴ *McManus v Scott-Charlton* (1996) 140 ALR 625.

Civil liability

Whistleblowers must also be wary of having to defend a court action against a large corporation or the Commonwealth Government. Defending this type of litigation with significant resources and litigation experience on the other side, would be daunting and may also intimidate a potential whistleblower into staying quiet.

Whistleblowers face a threat of being sued in formal court proceedings for:

- breach of contract;
- breach of the equitable principle of confidence;⁷⁵
- breach of section 183 of the Corporations Act 2001 (Cth) (Corporations Act); and/or
- defamation.

Each of the other actions is discussed in turn below (except for an action for breach of contract, which is discussed above in this section of the report).

Breach of the equitable principle of confidence

Unlike an action for breach of contract, an employer does not necessarily need to show damage in order to make out a claim for breach of confidence.⁷⁶

Consequently, this type of action is most likely to be brought in circumstances where no actual loss has been suffered by the employer or the Commonwealth Government: for example, where a security guard's disclosure about the inhumane conditions at the Detention Centres results in a negative media report about the conduct of Wilson Security and Broadspectrum, but does not cause any material financial loss or lead to the termination of their contracts with the Commonwealth Government.

An action brought pursuant to the equitable principle of breach of confidence may be brought by an employer in circumstances where the employer is seeking an injunction in order to prevent an employee who is threatening to blow the whistle from doing so.

In order to prove a breach of confidence, an employer must be able to:

- identify with specificity the information in question;
- illustrate that the information has the necessary quality of confidence by producing evidence that the information was imparted on the understanding that it was to be treated by the employee on a limited basis, or the employee ought to have realised that in all the circumstances the information was to be treated in such a way.⁷⁷ Common knowledge, information in the public domain⁷⁸ and trivial information⁷⁹ do not have the necessary quality of confidence; and

⁷⁵ This principle was originally developed to protect an employer's trade secrets. The ability of a court to protect an employer's confidential information was affirmed in *Kone Elevators Pty Limited v McNay* (1997) ATPR 41-564; *Woolworths Limited v Olson* [2004] NSW CA 372; *Lindner v Murdocks Garage* (1950) 83 CLR 628.

⁷⁶ *National Roads and Motorists' Association Ltd v Geeson* (2001) 40 ACSR 1, [58]; *NP Generations Pty Ltd v Feneley* (2001) 80 SASR 151, [21].

⁷⁷ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434; *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73, 86-87; *Coulthard v State of South Australia* (1995) 63 SASR 531, 546-547.

⁷⁸ *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 460.

⁷⁹ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

- demonstrate that there has been an unauthorised use or threatened use of the information.⁸⁰

There is a defence to an action for breach of confidence – the existence of, or real likelihood of the existence of, an iniquity. An iniquity is described as a crime, civil wrong or serious misdeed of public importance where the obligation of confidence is being relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.⁸¹ For example, a whistleblower who witnesses inhumane treatment of a detainee at a Detention Centre has witnessed a serious misdeed, which is of public importance in light of the Commonwealth Government’s obligations in respect of the refugees and people seeking asylum it detains at the Detention Centres, and given the seriousness of the allegation.

This defence is useful to whistleblowers and may, depending on the factual circumstances, successfully defeat an action for breach of confidence. However, the whistleblower bears the burden of proving the existence of an iniquity and it is not enough for a whistleblower to claim that it is in the public interest that the truth be told.⁸² Also, while a prosecuting authority like the police has a real and direct interest in redressing a misdeed at a Detention Centre, it is not clear whether a journalist has such an interest. Due to these areas of uncertainty, a whistleblower cannot be confident that they will be protected by this defence if they whistleblow to the media.

Further, it has been said that ‘[i]t is true that the existence of, and /or the extent of any public interest defence to a breach of confidentiality is by no means clear and settled in Australia.’⁸³

In light of these uncertainties in respect of the legal defence to an action for breach of confidence, a whistleblower who discloses sensitive information to the media thinking they are protected may, in fact, risk exposing themselves to civil liability.

Breach of section 183 of the Corporations Act

The Corporations Act imposes obligations on both current and former employees not to improperly use information to gain an advantage or cause detriment to their present or former employer.⁸⁴ What is improper is determined using an objective standard⁸⁵ by reference to the particular duties and responsibilities of the relevant employee.

This action is relevant to whistleblowers because it reflects the equitable principle of confidence⁸⁶ (considered above in this section of the report). Also, use of information in breach of a contractual obligation can constitute improper use of that information (considered above in this section of the report).⁸⁷

⁸⁰ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

⁸¹ *Re Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 456, Gummow J. Note that this approach differs from the broader approach to public interest taken in the UK, which balances public interest with the interests served by confidentiality. In the *Smith Kline* case, Gummow J stated at 111:

‘(i) an examination of the recent English decisions shows that the so-called ‘public interest’ defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence, and (ii) equitable principles are best developed by reference to what conscionable behaviour demands of the defendant not by balancing and then overriding those demands by reference to matters of social or political opinion.’

⁸² *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1980) 33 ALR 31; cf *Allied Mills Industries Pty Ltd v TPC* (1981) 34 ALR 105.

⁸³ *Australian Football League v The Age Company Ltd* (2006) 15 VR 419 at 439.

⁸⁴ This is a civil penalty provision (s 1317E of the Corporations Act), however criminal penalties for dishonest use of information can apply under s 184(3).

⁸⁵ *MG Corrosion Consultants Pty Ltd v Gilmour* [2014] FCA 990 at [541]; *Dais Studio Pty Ltd v Bullet Creative Pty Ltd* (2007) 165 FCR 92.

⁸⁶ *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148.

⁸⁷ *Armstrong World Industries (Australia) Pty Ltd v Parma* (2014) 101 ACSR 150.

If an employer brings an action against a whistleblower for breach of contract or breach of the equitable principle of confidence, the employer may use similar arguments, in the alternative, to bring an action against the whistleblower for breach of section 183 of the Corporations Act. A breach of this statutory duty renders a whistleblower potentially liable to a pecuniary penalty of up to \$200,000 and orders to pay damages and compensation.

Defamation

Depending on the nature of the disclosure, a whistleblower may be sued for defamation. Most corporations and government bodies cannot sue for defamation.⁸⁸ This means that neither a government department nor a company that provides services to the government could pursue an individual for defamation as a result of the disclosure of sensitive information. However, an individual within a corporation or a government body can sue in relation to the publication of defamatory information about themselves.

For example, if an employee at the Detention Centres hears about a security guard employed by Broadspectrum abusing detainees and discloses this information to the media, he or she may be sued for defamation by that individual guard even if the material is also defamatory of the entire corporation.

In order to establish liability the disclosure must be of a defamatory character. The plaintiff must prove that the publication has harmed or lowered their reputation in the eyes of ordinary reasonable people in the community. Liability for defamation will only be an issue where a whistleblower has 'communicated' or 'published' the sensitive information. However, this need only be to a small group of people. If the disclosure is made to someone who republishes that information, both the original publisher and each re-publisher will be liable to the same extent.⁸⁹

If it can be shown that the information disclosed was defamatory, a defence may apply. Relevantly, if someone can establish that the publication is substantially true they will be protected from liability.⁹⁰ A defence of qualified privilege may also apply where the whistleblower has a legal, social or moral obligation to make the disclosure.⁹¹ However, the burden will fall on the whistleblower to bring evidence capable of establishing such defences.

Thus, again, while whistleblowers who disclose truthful, factual information that is in the public interest are less at risk of being successfully sued for defamation, the threat of such litigation could be enough to intimidate a would-be whistleblower into staying quiet.

⁸⁸ Corporations may be able to sue under other causes of action, such as injurious falsehood, if something untrue is published about them.

⁸⁹ *Speight v Gosnay* (1891) 60 LJQB 231.

⁹⁰ *Defamation Act 2005* s 25.

⁹¹ *Ibid* s 30.

Professional and employer liability

The Department has contracted with several companies to carry out the myriad services that are needed to operate the Detention Centres. The employees of these companies belong to various professions, and must uphold professional standards. The act of whistleblowing may, in certain circumstances, constitute a breach of these professional standards. This can lead to serious consequences and disciplinary action, including de-registration and exclusion from the profession. The risk of disciplinary action being taken against them is likely to dissuade a whistleblower from speaking out.

Doctors

The Department has contracted with IHMS to provide health services at the Detention Centres. Australian doctors employed by IHMS must comply with the Medical Board of Australia's GMP Code,⁹² which complements the Australian Medical Association (AMA's) Code of Ethics. According to the AMA's policy position on ethical issues related to prisoners and detainees in custodial settings, the GMP Code and the AMA Code of Ethics apply equally to detainees at the Detention Centres as they do to the general population.⁹³

If a doctor's professional conduct varies significantly from the professional standards set out in the GMP Code and the AMA Code of Ethics, they may be required to explain and justify their decisions and actions to the Medical Board of Australia and may even face de-registration from the AHPRA.

Generally, the doctor-client relationship requires that a doctor maintain the confidence of their patient's medical and personal information.⁹⁴ Therefore, a whistleblower who discloses information that would be covered by this obligation may have breached their professional standards. There are exceptions to this general rule. For example, doctors must notify the AHPRA if they encounter any form of cruel, inhuman or degrading treatment, regardless of society's attitudes and regardless of the alleged offence of which the patient is suspected, accused or convicted.⁹⁵ However, the exceptions only permit disclosure to a professional body, such as the AHPRA, and do not permit disclosure to the media or some other external source.⁹⁶

Psychologists

Australian psychologists must comply with the professional standards set out in the Australian Psychological Society's Codes of Ethics and Australian Clinical Psychology Association's Codes of Ethics. As is the case with doctors, if a psychologist's conduct varies significantly from the professional standards set out in these codes of conduct, a psychologist may be required to explain and justify their decisions and actions to the Psychologists Board of Australia or face de-registration from the AHPRA.

Arguably, a psychologist's professional standards permit whistleblowing in certain circumstances. For example, psychologists must 'assist clients' to address unfair discrimination or prejudice directed against their clients.⁹⁷ Nonetheless, as with professionals working in other health services, the general

⁹² The GMP Code is consistent with the *Declaration of Geneva and the international code of medical ethics*, issued by the World Medical Association.

⁹³ Australian Medical Association, *Medical Ethics in Custodial Setting*, s 1.3.

⁹⁴ *Good Medical Practice: a Code of Conduct for Doctors in Australia*, Medical Board of Australia, s 3.2 and 3.6.1; Australian Medical Association, *Code of Ethics*, s 1.1(l); Australian Medical Association, *Medical Ethics in Custodial Settings*, s 4.2.

⁹⁵ Australian Medical Association, *Code of Ethics*, s 4(g).

⁹⁶ For example, doctors are required by law to notify the AHPRA if they have formed a reasonable belief that a health practitioner has behaved in a way that constitutes notifiable conduct in relation to the practice of their profession (*Health Practitioner Regulation National Law (Victoria) Act 2009*, s 141).

⁹⁷ Australian Psychological Society, *Code of Ethics*, s A.1.3.

rule requires psychologists to maintain the confidence of their patient's medical and personal information. Like doctors, the exceptions to this rule only permit reporting to the appropriate body, such as the Psychology Board of Australia or the AHPRA, and do not permit whistleblowing to the media or any other external source.⁹⁸

Public servants

APS employees have a range of statutory duties imposed on them by the *Public Service Act 1999* (Cth) and its regulations.⁹⁹ Section 13 of that Act sets out the APS Code of Conduct, which regulates APS employees' official conduct and ethics, and imposes a number of duties that limit the disclosure of official information. In particular, the APS Code of Conduct requires APS employees:

- not to improperly use inside information or the employee's duties, status, power or authority to cause, or seek to cause, detriment to the Commonwealth;¹⁰⁰ and
- to maintain appropriate confidentiality about dealings the employee has with any minister or minister's member of staff.¹⁰¹

The *Public Service Regulations 1999* (Cth) also specify that APS employees must not disclose information where this would prejudice the effective working of government or development of policy¹⁰² or information that was communicated or received in confidence in connection with their employment.¹⁰³ Therefore, a whistleblower who discloses information about the conditions at the Detention Centres may have breached the APS Code of Conduct and could face a range of sanctions, including:¹⁰⁴

- termination of employment;
- re-assignment of duties;
- reduction in salary;
- deductions from salary; or
- a reprimand.

Security Personnel

Broadspectrum has entered into a subcontract with Wilson Security to provide security services at the Detention Centres. Under the contract between Broadspectrum and Wilson Security, Wilson Security is subject to Broadspectrum's Code of Business Conduct¹⁰⁵ and is required to comply with 'Good Industry Practice'¹⁰⁶ and relevant Australian law.

⁹⁸ Psychologists may disclose confidential information if required to do so by law, or if there is an immediate and specified risk of harm to an identifiable person or persons that can be averted only by disclosing information.

⁹⁹ *Public Service Regulations 1999* (Cth).

¹⁰⁰ *Public Service Act 1999* (Cth) s 13(10).

¹⁰¹ *Ibid* s 13(6).

¹⁰² *Public Service Regulations 1999* (Cth) r 2.1(3).

¹⁰³ *Ibid* r 2.1(4).

¹⁰⁴ *Public Service Act 1999* (Cth) s 15(1).

¹⁰⁵ Contract between Broadspectrum and Wilson Security, s 3.2(c).

¹⁰⁶ *Ibid*. Note that Good Industry Practice means the exercise of that degree of skill, diligence, prudence and foresight that reasonably would be expected from competent contractors performing services comparable to the Services, consistent with Law.

Broadspectrum staff

Broadspectrum's Code of Business Conduct¹⁰⁷ requires that staff not intentionally engage in conduct that damages Broadspectrum's business or reputation.¹⁰⁸ Employees must also:

- not use confidential information for personal gain or that of others;
- not disclose confidential information outside Broadspectrum, except where disclosure is authorised or legally mandated;
- not encourage or pressure others to divulge confidential information;
- comply with the terms of confidentiality agreements they or Broadspectrum have entered into; and
- dispose of confidential information appropriately.

According to Broadspectrum's whistleblower policy,¹⁰⁹ if a whistleblower's disclosure is made in good faith and based on reasonable grounds, that employee will be protected from reprisal or repercussions. However, whistleblowers must first discuss their concern with a Broadspectrum manager or supervisor or make their disclosure through Broadspectrum's Audit and Risk Group or by calling the Broadspectrum Integrity Hotline. The Broadspectrum whistleblower policy does not permit disclosure to the media or outside these sanctioned avenues of reporting. Further, where a whistleblower's report is determined to be in bad faith, maliciously false or unreasonably grounded, the whistleblower may be subject to disciplinary action, including summary dismissal.

Conclusion

Employees at the Detention Centres are subject to various professional standards and employer codes of conducts. There are only very limited circumstances in which an employee may disclose confidential information in compliance with these standards and codes. Notably, disclosures are only permitted through certain approved avenues, such as through a recognised professional body or an internal mechanism. As a general rule, the various professional standards and employer codes of conduct do not permit acts of whistleblowing to the media or the public at large. A whistleblower is likely to stay silent under threat of de-registration or disciplinary action from their employer or professional body as a result of this overlapping patchwork of limitations.

¹⁰⁷ Broadspectrum Code of Business Conduct, found here: <http://www.transfieldservices.com/pdf/FINAL-COBC_2015_English_280715.pdf>.

¹⁰⁸ Ibid, p 9.

¹⁰⁹ Broadspectrum whistleblower policy can be found here: <http://www.transfieldservices.com/pdf/109130_Whistleblower_Policy.pdf>.

Difficulties associated with seeking protection for public interest disclosures

The PID Act provides a scheme for all public interest disclosures across the Commonwealth public sector. However, in the context of Australia's refugee and asylum seeker policies, it has recently assumed a greater significance. The Commonwealth Government recently responded to concerns regarding the ABF Act by stating that persons who made public interest disclosures were provided with adequate protection under the PID Act.¹¹⁰

In light of the specific challenges for accountability and the rule of law in many aspects of Australia's current refugee and asylum seeker policy, it is important to assess the effectiveness of the PID Act in protecting persons who make a disclosure in the public interest, and the degree to which would-be whistleblowers will be able to understand and access such protections.¹¹¹

This section of the report will:

- provide an overview of key aspects of the PID Act;
- highlight potential barriers for whistleblowers, including uncertainty about what constitutes 'disclosable conduct';
- outline the specific barriers that a whistleblower may encounter when trying to make either an internal or external disclosure; and
- address the impact of these barriers on the effectiveness of the PID Act in providing protection for whistleblowers, particularly in relation to Australia's border protection and asylum seeker regime.

Overview of key aspects of the PID Act

Who is protected, and what is a 'public interest disclosure'?

'Public interest disclosures' are disclosures made by a person who is a public official or has been a public official in the past.

'Public officials' are both people working in a department or agency within the federal government, and most individuals who work as contracted service providers for these agencies.¹¹² This category includes, for example:

- an employee of a contracted service provider for a Commonwealth contract (including, for example, employees of companies that have contracted with the Commonwealth to provide services at the Detention Centres);
- an individual who is employed by the Department or a statutory authority, including by the Australian Border Force Commissioner; and
- a member of the Australian Defence Force participating in Operation Sovereign Borders.

¹¹⁰ See for example Jane Lee, 'Detention centre doctors, workers dare government to prosecute them over new laws', The Age Newspaper, 1 July 2015, <<http://www.theage.com.au/federal-politics/political-news/detention-centre-doctors-workers-dare-government-to-prosecute-them-over-new-laws-20150701-gi24pr.html?skin=smart-phone>>.

¹¹¹ Different rules apply for members of the Australian intelligence services making public interest disclosures: this analysis does not deal with this category of public officials.

¹¹² *Public Interest Disclosure Act 2013* (Cth) s 69.

The PID Act extends to acts, omissions, matters and things outside Australia and occurring in external territories.¹¹³ Protected disclosures can thus relate to conduct that occurred outside of Australia at the Detention Centres.

The PID Act establishes two key ways that protected disclosures can be made; through internal disclosure and external disclosure. Disclosure can also be made in the case of emergencies, and for the purpose of obtaining legal advice.

Internal disclosure

An internal disclosure is a disclosure made to an authorised internal recipient,¹¹⁴ or the supervisor of the discloser, where, at a minimum, the discloser believes on reasonable grounds that the information tends to show one or more instances of disclosable conduct.

Authorised officers are individuals that are either ‘principal officers’ of an agency, or public officials who belong to an agency and who have been appointed as an authorised officer. Consequently, in most cases, a potential whistleblower who makes an internal disclosure will have that disclosure received by either the leader of the agency in question (for example, the Secretary of the Department, or CEO of a prescribed authority) or an appointed authorised officer who is also a member of that agency.

The term ‘authorised internal recipient’ is defined in section 34, and allows internal disclosure to be made to the Commonwealth Ombudsman (Ombudsman), when the discloser ‘believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman’. The Ombudsman will only proceed to investigate a disclosure if it determines that the agency to which it relates cannot handle the matter appropriately, for example, where it considers that there may be a conflict of interest, confidentiality or reprisal issue.¹¹⁵

Part 3 of the PID Act sets out the procedure for how internal disclosures must be investigated. Once a disclosure is received by an authorised officer, a decision must be made in relation to which agency should be allocated the disclosure for investigation, or whether the disclosure should not be allocated for investigation at all. Once the disclosure has been allocated for investigation, the investigation must be undertaken by the principal officer of the agency to which it is allocated.¹¹⁶ The principal officer of an agency has a discretion not to investigate the disclosure if one or more of the following criteria apply:¹¹⁷

- the discloser is not or has not been a public official;
- the conduct disclosed does not, to any extent, concern serious disclosable conduct; or
- it is impracticable for the disclosure to be investigated.

A degree of oversight of this process is provided by the Ombudsman at several stages. At the time that a disclosure is allocated to an agency, an authorised officer must notify the Ombudsman of the allocation of the disclosure for investigation, and also the content of the disclosure and any suspected disclosable conduct. In addition, if an agency makes a decision not to investigate a disclosure after it is allocated, then the Ombudsman must also be notified of the decision not to investigate the disclosure. Complaints may also be made to the Ombudsman concerning a failure to allocate a disclosure for investigation, a failure to investigate, or in relation to the conduct of the investigation pursuant to the *Ombudsman's Act 1976* (Cth).

¹¹³ Ibid ss 4, 5.

¹¹⁴ As defined in s 34 of the PID Act.

¹¹⁵ See: <<http://www.ombudsman.gov.au/pages/pid/information-for-disclosers/#>>.

¹¹⁶ There is, however, provision for the investigation into the disclosure to be undertaken by an organization that has a ‘separate investigative power’ under an act other than the PID Act (for example, the Ombudsman under the *Ombudsman Act 1976*).

¹¹⁷ *Public Interest Disclosure Act 2013* (Cth) s 48.

Time limits apply to the process of allocation and investigation. An authorised officer must use their best endeavours to decide the allocation within 14 days of the disclosure being made. An investigation must then be completed within 90 days after the disclosure was allocated. Extensions to the 90 day time limit can only be made on application to the Ombudsman.

External disclosure

The PID Act encourages internal disclosure rather than providing protection for individuals who want to report disclosable conduct to organisations outside government, or to the media. It is much harder to access the protections under the PID Act for external disclosures.

The PID Act also provides for a public official to be protected when they make a disclosure to a person other than an authorised officer or the Ombudsman (including, for example, to the media) in some circumstances. In order for the protections of the PID Act to apply, it is necessary for the would-be whistleblower to satisfy a number of additional criteria (set out below).

Emergency disclosure

Disclosures will also be protected where they are an 'emergency disclosure'. To fall within this definition, the discloser must believe on reasonable grounds that the information disclosed concerns a 'substantial and imminent danger to the health or safety of one or more persons or to the environment', and must not consist of or include 'intelligence information'. Further, no greater information can be disclosed than is necessary to alert the recipient to the substantial and imminent danger. Emergency disclosures can be made to almost any person, however, it is necessary for the discloser to show that there were exceptional circumstances justifying their failure to make an internal disclosure.

Emergency disclosures may, in some cases, be relevant in the context of Australia's current refugee and asylum seeker policies and the Detention Centres. However, the requirement that the risk to health and safety be 'imminent', and the further requirement that there be 'exceptional circumstances' for not making an internal disclosure, are likely to significantly narrow the scope of the circumstances in which a whistleblower is able to access the protections afforded under the PID Act on this basis. Potential whistleblowers may find it difficult to confidently conclude that their disclosure constitutes an emergency disclosure except in the most extreme circumstances.

Disclosable Conduct

In order to have the benefit of the protections under the PID Act, it is necessary for a whistleblower to identify one or more ways in which the conduct in question falls within the scope of 'disclosable conduct', as defined in section 29 of the PID Act.

In addition, pursuant to section 31 of the PID Act, it is also necessary for the whistleblower to be able to demonstrate that the conduct they are disclosing does not 'relate only' to a government policy, action or decision in relation to expenditure 'with which [they] person disagrees'.

'Disclosable conduct' covers conduct that is engaged in by an agency, by a public official (in connection with his or her position) or by a contracted service provider for the Commonwealth (in relation to their work under the contract).

Section 29 of the PID Act sets out the type of conduct that is considered to be 'disclosable conduct' under a number of heads. These include:

- conduct that is 'corrupt', 'perverts the course of justice' or involves an 'abuse of public trust';
- conduct that is illegal under the laws of the Commonwealth or a State or Territory;
- conduct that takes place in a foreign country and is illegal under the laws of that country (including, for example, conduct that is illegal under the laws of Nauru and Papua New Guinea);
- conduct that constitutes 'maladministration', which is defined by the PID Act as conduct that is 'based in whole or in part on improper motives', 'unreasonable, unjust, oppressive' or 'negligent'; and
- conduct that unreasonably results in a danger to health and safety or unreasonably results in, or increases the risk of, such danger.

Protections

Individuals who make 'public interest disclosures' have the following protections:

- they are not subject to any civil, criminal or administrative liability (including disciplinary action) for making the public interest disclosure (including absolute privilege in proceedings for defamation);¹¹⁸
- no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the individual on the basis of the public interest disclosure, and a contract to which the individual is a party must not be terminated on the basis that the public interest disclosure constitutes a breach of the contract;¹¹⁹
- criminal sanctions apply for revealing the identity of a person who has made a protective disclosure or making or threatening a reprisal against such a person;¹²⁰
- protection from reprisals for making, or being suspected to have made, a public interest disclosure, including through criminal sanctions and rights to remedies such as compensation and reinstatement of employment;¹²¹ and
- certain employee protections under Part 3-1 of the *Fair Work Act 2009* (Cth).¹²²

A person who makes a valid protected disclosure within the meaning of the PID Act will be immune from prosecution for the offences outlined in the ABF Act or the Crimes Act.

Potential barriers for whistleblowers

Lack of clarity in the scope of 'disclosable conduct'

The scope of the conduct that falls within the definition of 'disclosable conduct' is broad. However, the definition of 'disclosable conduct' has not been tested in court and some uncertainty remains about how this phrase would be interpreted. This lack of clarity is also likely to impair the ability of authorised officers to adequately assess and respond to internal disclosures. The meaning of 'unjust and oppressive conduct' is also open to legal interpretation.

For a layperson wishing to make a disclosure, it will be difficult to determine whether certain types of conduct falling within the scope of 'disclosable conduct' for the purposes of the PID Act. Given the risk of reprisal or detrimental action that making such a disclosure may entail, this uncertainty as to the

¹¹⁸ *Public Interest Disclosure Act 2013* (Cth) s 10. Some limitations to s 10 do apply under s 11A, for example, regarding the publication of the names of individuals who are applicants for a protection visa.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* s 19, 20.

¹²¹ *Ibid* s 13-17.

¹²² *Ibid* s 22, 22A.

availability of protection is likely to further discourage would-be whistleblowers from making both internal and external disclosures.

This issue is well illustrated by section 29, item 8 of the PID Act. In some respects, conduct that 'unreasonably results in a danger to health and safety' is likely to be among the easiest for a would be whistleblower to identify, since dangers or risks of danger to health and safety are easier to quantify than concepts such as 'abuse of public trust', 'oppressive conduct' or even 'negligence'. In the context of individuals working at the Detention Centres, such a provision is likely to provide potential whistleblowers with an effective way to frame their concerns about the conditions and treatment of the individuals, including those detained and those intercepted at sea.

However, the inclusion of the word 'unreasonably' as a qualifier makes the scope of the conduct that falls within section 29, item 8 somewhat uncertain. It is difficult to predict how this provision will be interpreted. It will be harder still for a would-be whistleblower to assess whether the risk or danger is an 'unreasonable' result of the conduct of a government agency or official. This is particularly true given the impact of section 31 of the PID Act, which requires would-be whistleblowers to demonstrate that their disclosure is not the result of their disagreement with a policy, action or decision concerning expenditure (discussed further below).

Such a qualification does not appear in the equivalent provision of public interest disclosure laws in any other jurisdiction in Australia.¹²³ The most common qualification is that the danger or risk of danger must be 'substantial or specific', though Victoria imposes a further qualification that the conduct creating a risk to public health and safety amounts to a criminal offence or grounds for dismissal or termination.

For example, in what circumstances does exposure to a risk of contracting malaria become 'unreasonable' in the context of Commonwealth Government policy to detain individuals in a location where there is a high prevalence of malaria? At what point does inadequate provision of privacy and security in a detention setting create an 'unreasonable' risk of sexual assault? When can placing individuals in a life-raft and attempting to return them to a foreign county be said to involve an 'unreasonable' danger to their life, in the context of a Commonwealth policy of boat turn-backs? These examples illustrate that the narrow definition of disclosable conduct is clearly insufficient when applied in the context of off-shore detention.

Requirement to demonstrate that conduct is not merely disagreement with a policy, action or decision concerning expenditure

Section 31 of the PID Act states that conduct is not disclosable conduct if it relates only to a policy, action or decision concerning expenditure with which the individual disagrees. In effect, this may create a further hurdle for individuals who seek to benefit from the protections afforded under the PID Act.

This is especially true in the context of policies such as offshore detention and boat turn-backs where government policy may play a material role in creating the danger to health and safety, or a lack of provision of public funds may result in conditions that occasion negligence.

¹²³ Speaking generally, these provisions provide for disclosure of 'risks to public health and safety'. See: *Public Interest Disclosure Act 2012* (Act) s 8(1)(b)(ii); *Public Interest Disclosures Act 2002* (Tas) s 3; *Public Interest Disclosure Act* (NT) s 5(1)(b); *Public Interest Disclosure Act 2010* (Qld) s 13(1)(c); *Protected Disclosure Act 2012* (Vic) s 4; *Public Interest Disclosure Act 2003* (WA) s 3; *Whistleblowers Protection Act 1993* (SA) s 4.

Reasonable grounds

In order to enjoy protection under the PID Act, a would-be whistleblower seeking to make an external disclosure must be able to demonstrate that they believe on reasonable grounds that the information they are disclosing is 'disclosable conduct'.

This requirement may be a significant hurdle for whistleblowers, even for those who have a strong basis for making the disclosure. An individual seeking to access the protections available under the PID Act will bear the onus of proving that their disclosure had a proper basis and will be required to produce evidence of the basis on which their decision to make an internal or external disclosure was made.

Whistleblowers seeking to make a disclosure after leaving their position as a public official, or who leave their position or have their employment terminated after making a disclosure, may have limited access to information capable of proving that the basis for their disclosure was reasonable should this be contested in court.

Legal barriers to accessing protections

Internal disclosure

General limitations on internal disclosure

Internal disclosure is a means by which a public official can make a disclosure that is kept within government, and addressed to the agency it concerns. This has certain advantages, including the fact that the disclosure is directed to the agency that needs to address the issue raised. However, it is also problematic for the validity of a disclosure to be assessed by individuals who work within the agency to which the disclosure relates, as the decision to allocate a disclosure for investigation and the investigation itself are not independent.¹²⁴

Difficulties identifying authorised complaint receivers

A practical impediment for contractors working at the Detention Centres from making disclosures is likely to be the ability to identify the relevant authorised complaint recipient in order to make a valid internal disclosure. In addition, many contractors may not know that they are able to make public interest disclosures, especially if they have worked in the private sector where there is most often no protection for disclosing confidential information.¹²⁵

Power of authorised officers to decide not to allocate disclosures for investigation

An authorised officer has the power to decide not to delegate a disclosure for investigation if they are satisfied that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure.¹²⁶

In its annual report on the first year of the PID Act, the Office of the Ombudsman raised as an area for concern its observation that some agencies appeared to be incorrectly considering whether a disclosure

¹²⁴ Of the disclosures that were allocated, 31% of investigations were then discontinued because the principal officer investigating the matter determined that it did not concern 'serious disclosable conduct'. Commonwealth Ombudsman Annual Report, pp 72-74.

¹²⁵ In 2013-2014, only 3% of public interest disclosures recorded by agencies were made by contractors. The Commonwealth Ombudsman, *Annual Report 2013-2014*, October 2014, available at: http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2013-14/pdf/commonwealth_ombudsman_annual_report_1314.pdf, p 73.

¹²⁶ *Public Interest Disclosure Act 2013* (Cth) s 43 (2).

related to 'serious disclosable conduct' before it was allocated for investigation, rather than making determinations about the seriousness of the conduct once the matter had been allocated, or during the investigation.¹²⁷

Roughly 12% of all disclosures made were invalidly rejected before allocation on the basis that the conduct disclosed did not constitute 'serious disclosable conduct' (although this does not take into account the agencies who did not keep records of disclosures that were rejected prior to allocation). This means that a significant proportion of internal disclosures that met the threshold of disclosable conduct under the PID Act were being rejected before they reached a person in a position to determine whether the conduct was serious, and before they had been investigated.

This issue, to some extent, could be considered to be a teething problem of implementation of the PID Act by agencies in its first year. However, it points to a broader problem inherent in the PID Act's focus on managing disclosures internally. When agencies are given responsibility for assessing the appropriateness and seriousness of a disclosure and then conducting an investigation, there is a greater risk that disclosures that highlight systemic issues or call into question broader policy objectives will be dismissed at an early stage and will not be actively investigated or considered.

In addition, it is unclear what degree of protection is available to individuals who approach an authorised officer with a disclosure that is deemed not to constitute an internal disclosure. It is likely that these individuals will not enjoy protection from civil, criminal and contractual liability under section 10 of the PID Act (although they are likely to still be protected from reprisals).¹²⁸ In some circumstances, this may have a chilling effect on the willingness of public officials to make disclosures.

Limits of the oversight provided by the Ombudsman

Under the PID Act, the Ombudsman is given a role that allows some degree of independent oversight for internal disclosures. In practice, there are clear limits on the ability of the Ombudsman to ensure that public interest disclosures are investigated and taken seriously by the agencies concerned.¹²⁹

Firstly, the PID Act provides that the Ombudsman must be notified when a decision is made to allocate a public interest disclosure, and when a decision is made not to investigate a disclosure, but not when the disclosure is first received. This means that authorised officers of an agency are under no obligation to notify the Ombudsman about disclosures that they receive and reject without allocating them for investigation. Indeed, 70% of the organisations surveyed by the Ombudsman did not record these approaches by potential whistleblowers or report them to the Ombudsman.¹³⁰ It is thus unclear how many disclosures were made that meet this description. The organisations that did keep records and provide these to the Ombudsman recorded 75% more approaches from potential whistleblowers than disclosures that were actually determined to be internal disclosures.¹³¹ This is particularly concerning in light of the Ombudsman's other findings in relation to decisions on whether to allocate a file for investigation, as discussed below.

¹²⁷ Ibid at pp 72-73 and 78-79.

¹²⁸ Theoretically, the protections against reprisals under the PID Act apply in circumstances where a person 'believe or suspects that a person may have made a public interest disclosure'. This means that even if a disclosure is made that is deemed not to be a public interest disclosure by the authorised officer, the individual making the disclosure is still able to access protection from reprisals. In practice, the onus would likely be on the individual who made the disclosure to seek a remedy for the reprisal.

¹²⁹ Pursuant to s 72 of the PID Act, other agencies can be prescribed by rules made under the PID ACT agencies that are able to investigate disclosures. To date, no agencies have been prescribed in this way. The Commonwealth Ombudsman notes in their Annual Report that this has meant that some specialist agencies such as the Australian Human Rights Commission and the Australian Public Service Commission have not been given the power to investigate matters under the PID Act within their specialist jurisdictions (see p 84, Commonwealth Ombudsman, *Annual Report 2013-2014*.)

¹³⁰ Commonwealth Ombudsman, *Annual Report 2013-2014*, October 2014, available at: http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2013-14/pdf/commonwealth_ombudsman_annual_report_1314.pdf, p 73.

¹³¹ Ibid.

Secondly, in circumstances where an individual has reason to be concerned that an agency has a conflict of interest, confidentiality or reprisal issue, they are permitted under the PID Act to make their disclosure to the Ombudsman rather than to the agency to which their disclosure relates. However, in practice, very few disclosures that are made to the Ombudsman are determined by the Ombudsman as disclosures that are appropriate for the Ombudsman to investigate, and most often these disclosures are allocated back to the agency to which they relate, for investigation. Out of the 28 potential disclosures made to the Ombudsman in the reporting period, in 15 of these cases the Ombudsman determined that the individual could not establish reasonable grounds as to why the Ombudsman should investigate the disclosure, and the disclosure was thus not an internal public interest disclosure. Of the 12 cases that were determined to meet the threshold requirement for an internal public interest disclosure, six cases were at a later stage allocated to the agency to which they related and only six were investigated by the Ombudsman.

External disclosure

The bar for external disclosure is significantly higher than for internal disclosure.

External disclosure is only protected under the PID Act if the whistleblower meets a number of additional criteria, namely, if the whistleblower:

- has reasonable grounds for their belief that the information tends to show disclosable conduct;
- has already made an internal disclosure (unless the external disclosure is an 'emergency disclosure') and has reasonable grounds for believing that the response to that disclosure was inadequate;
- the disclosure is not, on balance, contrary to the public interest; and
- no more information than is reasonably necessary is disclosed.

In practice, these requirements create significant hurdles for a whistleblower, due to the uncertainty of many of the key terms, which have not been subject to judicial consideration.

The 'public interest' test

A whistleblower making an external disclosure must be satisfied that such a disclosure is 'in the public interest', having regard to a lengthy list of factors. There is likely to be uncertainty on the part of whistleblowers as to how 'public interest' will be interpreted by a court, as there would be for the lawyers advising them about the availability of protection.

In determining whether or not disclosure is in the 'public interest', regard must be had to a long list of factors in section 26(3). One such factor is the risk that the disclosure could cause damage to the security or defence of the Commonwealth, or the international relations of the Commonwealth. Another such factor is whether the disclosure would 'expose a failure to address a serious wrongdoing in the Commonwealth public sector'.¹³² Regard must also be had to 'any other relevant matters'.¹³³

Applying the public interest test firstly requires the potential whistleblower to identify which factors they must take into consideration before making an external disclosure, and to then engage in a balancing exercise. The complexity of this threshold requirement for making an external disclosure is likely to make it difficult for a lawyer advising a potential whistleblower to predict whether a court will agree with the whistleblower's view, thus creating a strong risk that the whistleblower will not be immune from civil,

¹³² *Public Interest Disclosure Act 2013* (Cth) s 26(3)(ab).

¹³³ *Ibid*, s 26(3)(f).

criminal and contractual liability. This uncertainty is likely to discourage many whistleblowers from making an external disclosure.

Determining whether a response has been 'inadequate'

A response is taken not to be 'inadequate' where that response involved action that has been or is being taken by a Minister, the Speaker of the House of Representatives, or the President of the Senate.¹³⁴ This qualification is likely to be significant, especially given the frequency of ministerial intervention in decisions concerning the rights and interests of people seeking asylum, for example, with regards to health concerns. Should a Minister intervene to address the substance of a protected disclosure, a would-be whistleblower would not be protected in the event that they considered the ministerial response to be inadequate and sought to disclose information concerning the matter to a journalist. Indeed, any response taken by a Minister will 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.

In addition, the time limits for a response to an internal disclosure are lengthy. It could take over three months before a whistleblower knows what response has been given to the disclosure and can assess whether the response is inadequate and justifies making an external disclosure. If the protected disclosure was made in relation to a danger to health and safety, but the risk does not have the immediacy required for an 'emergency disclosure', a significant amount of harm may occur before the whistleblower is permitted to make an external disclosure pursuant to the PID Act.

No more information than is reasonably necessary

Further, even where it is accepted that a whistleblower had satisfied all the other requirements for making an external disclosure, whistleblowers may still be liable under criminal and civil law and in contract where they are deemed to have disclosed 'more information than necessary to identify [the instance of disclosable conduct]'. This provides an additional means by which the validity of the disclosure might be challenged in court and a further factual matter an individual seeking to rely on the protections under the PID Act must prove if contested.

Intelligence information

There is some uncertainty as to whether information relating to border operations constitutes 'intelligence information'. Examples of conduct falling within this definition of 'intelligence information' include:

- information that has originated with, or has been received from, the Defence Department, and that is about, or that might reveal the collection, reporting, or analysis of operational intelligence; and
- 'sensitive law enforcement information', including information the disclosure of which is reasonably likely to prejudice Australia's law enforcement interests, including Australia's interests in avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence, security intelligence or the integrity of law enforcement agencies. In light of the increasing militarisation of border protection operations (described in section I of this report), this restriction may be a significant barrier to individuals working in agencies such as the Australian Border Force being able to make

¹³⁴ It may be even harder to demonstrate that the threshold for making an external disclosure is met where a disclosure is not allocated for investigation on the basis that it is not an internal disclosure, as the individual will also have to establish that they made a valid internal disclosure that should have been investigated: see *Public Interest Disclosure Act 2013* (Cth) Item 2 (c) (iii) of s 26 (1) (c).

external disclosures about illegal activities or risks to health and safety that arise in 'on-water operations'.

Example:

A health practitioner working at a Detention Centre seeks to make a disclosure regarding the risk of children in detention developing serious mental health problems.

The person authorised to receive protected disclosures within an agency determines that the individual's disclosure is a disagreement with policy, and chooses not to allocate the disclosure for investigation on the basis that it is not a public interest disclosure.

The whistleblower considers that the agency's assessment of their disclosure is incorrect and that the agency has provided an inadequate response to the disclosure. In order to make an external disclosure, they must be confident that they have evidence capable of demonstrating:

- that they believed on reasonable grounds that the information relating to the conduct they want to disclose fits the definition of 'disclosable conduct' (for example, they will have to show that the conditions in offshore detention are unreasonably resulting in a danger to health and safety);
- their disclosure is not only a result of their disagreement with the policy of offshore detention;
- that the failure to allocate the disclosure for investigation by the agency to whom they made the internal disclosure was incorrect, and that the agency in question was required to undertake an investigation into their disclosure;
- that external disclosure would be in the 'public interest'; and
- they have disclosed no more information than was reasonably necessary to identify the disclosable conduct.

The would-be whistleblower finds themselves in circumstances where they have been told by an authorised officer or principal officer who is not independent of the agency to which their disclosure relates, that their disclosure has been deemed not to constitute a protected disclosure.

They are also unsure of the degree to which any further disclosure will be protected, due to uncertainty regarding the threshold requirements for making an external disclosure.

In these circumstances, the individual would likely be strongly discouraged from making an external disclosure, even if they may have a legal basis to do so.

Conclusion: would-be whistleblowers face substantial uncertainty when seeking protection for public interest disclosures

The PID Act sets out significant protections for would-be whistleblowers, including protection from prosecution, civil and contractual liability, termination of employment and the taking of reprisals. In practice, however, it is clear that the lack of clarity surrounding key definitions and the numerous tests and evidentiary burdens that must be satisfied by a would-be whistleblower create a great deal of uncertainty for potential whistleblowers as to whether their disclosure will be protected. The criteria of which a would-be whistleblower must satisfy themselves before making a disclosure are so onerous and lacking in clarity that, even in circumstances where an internal complaint has been made and the relevant agency has failed to adequately respond, a whistleblower could have little confidence that their disclosure would be deemed to be protected. These significant sources of uncertainty greatly weaken the effectiveness of the protections available under the PID Act for external disclosure in particular, potentially leaving a whistleblower exposed to legal challenges to the validity of their disclosure on numerous bases; challenges in which the whistleblower would often bear the onus of demonstrating that their disclosure was validly made.

For a would-be whistleblower who has access to legal advice, making an external disclosure under the PID Act is likely to entail substantial risks and offer an uncertain prospect of protection. For an unrepresented individual, it would be extremely difficult to have confidence that they have fulfilled all of the threshold requirements for making a valid external disclosure. This uncertainty is likely to produce a chilling effect that could significantly limit the effectiveness of the protections available under the PID Act for external disclosures.

Further, where a complaint is investigated, the fact that the disclosure is likely to be assessed and investigated within the agency itself rather than an independent body, may limit the effectiveness of their internal disclosure as a means to prevent harm, and risks to health and safety. Lastly, should a Minister intervene to address the substance of the public disclosure at any stage, external disclosure will not be available, regardless of whether that intervention was effective in dealing with the disclosable conduct.

Nonetheless, a significant number of disclosures were made in agencies working within the context of Australia's border protection and asylum seeker policies during the first year of the operation of the PID Act. The Department was the second largest recipient of internal disclosures in the 2013-2014 period (with a total of 61 disclosures registered). Together with the nine disclosures made to the former Australian Customs and Border Protection Service (now the Australian Border Force), disclosures relating to these two Commonwealth agencies accounted for roughly 18% of the disclosures reported to the Ombudsman.¹³⁵ Clearly, there is a demand for a scheme that provides for independent investigation and effective protection for individuals seeking to take steps to raise issues within government.

¹³⁵ Commonwealth Ombudsman, *Annual Report 2013-2014*, October 2014, available at: http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2013-14/pdf/commonwealth_ombudsman_annual_report_1314.pdf, pp 70-71, 87-95.

III. ACCOUNTS FROM DETENTION CENTRE WORKERS

As discussed above, imposing strict confidentiality requirements and putting in place narrow complaint procedures discourages employees from speaking openly about the conditions of their workplace. A number of former staff at the Detention Centres have spoken out about how such restrictive measures can affect their ability to properly fulfil their roles.

Those who have spoken out demonstrate that, in reality, staff either leave the Detention Centres on their own terms due to the appalling conditions, or as soon as they demonstrate an unwillingness to comply with the confidentiality agreements, their employment is terminated.

Kristi Moffat

Moffatt was a case manager employed by Broadspectrum at the Manus Island Detention Centre for a brief time in 2014.¹³⁶ Her employment was terminated for breaching her confidentiality agreement only days after she arrived at the Detention Centre. Moffatt posted a link about Steve Kilburn's statement to a parliamentary committee on her Facebook page and also mentioned in a comment that despite the bad conditions on Manus Island she had 'found the detainees to be friendly'.

Moffatt reports:

I was confused, and spoke to several of my teammates, who were also feeling the same way. We were wondering just what it is that we could do for them? We were told that if the guys needed something, they were to put in a request to Wilsons guards. We were not allowed to assist them, in the name of self-promoting their own capabilities.

All we could do was ask them questions like are you eating regularly, do you need anything, if you do, submit a request. How is your mental health, do you need to see IHMS, if you do, submit a request. Do you have any problems or issues, if you do, submit a request or complaint.

My role was beginning to be not what I thought it was, and a lot of other case managers felt the same.

Steve Kilburn

Kilburn was a security officer on shift at the Manus Island Detention Centre when Reza Berati died during the events of 16 – 18 February 2014. After witnessing the violence and riots he decided that he needed to say something. He has since spoken openly to the media about his experiences as an officer at the Manus Island Detention Centre.¹³⁷

¹³⁶ Kristi Moffatt, Submission No 36 to Senate Standing Committees on Legal and Constitutional Affairs, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, p 4.

¹³⁷ Naomi Woodley, 'Former Manus Island Detention centre guard Steve Kilburn warns of danger for any refugees resettled there', *ABC News*, 12 June 2014, <<http://www.abc.net.au/news/2014-06-11/former-manus-island-guard-makes-emotional-address-to-inquiry/5515166>> also see <https://www.youtube.com/watch?v=90nJTd-Pglw>.

Kilburn told a Senate inquiry that:

The OH&S systems at the MIRPC (Manus Island Refugee Processing Centre) were almost non-existent. Breaches of OH&S requirements were widespread and potentially put the safety of staff and clients at risk. These issues were raised on numerous occasions by SSO's (Safety and Security Officer) and I know many Officers' Reports were submitted regarding safety breaches; however, due to the difficulties of getting resources at Manus Island many staff felt that these issues were not being actioned quickly enough.

The inadequacy of each of these items [refers to lack of internet access and lack of rooms for religious practice] was brought to the attention of the department on the island, in Canberra and in writing on multiple occasions, but to no avail.¹³⁸

Regarding signing his confidentiality agreement Kilburn says:

It was like the 'I agree' box when you download something from iTunes. I read it and I thought 'Well, what does it matter who am I going to talk to?'¹³⁹

Kilburn recalls the attempts he made to report issues with management:

Like many others, I started writing reports — reports about the lack of shade, reports about problems with accommodation, reports about the lack of food. But we put in report after report and never heard anything back. There was no incentive to do the right thing. Those who raised legitimate concerns were often labelled as 'troublemakers'. And those who refused to follow orders were sacked.¹⁴⁰

Chris Iacono

Iacono was a Salvation Army employee who worked at both Detention Centres. Iacono reported that complaints made by people seeking asylum in relation to racism or abuse by the guards were not adequately dealt with. Asylum seekers were usually given a response after an extended period of time, with a conclusion that there was not enough evidence to follow the complaint up.¹⁴¹

Iacono says of his attempts to report misconduct:

When we reported issues we were seeing to G4S, we were told we were bleeding hearts and to toughen up. The other staff saw the Salvation Army as do-gooders who were 'too soft'. They'd say, 'Why don't you go sing them a bedtime story?'¹⁴²

In a formal submission to the Senate enquiry into Manus Island he wrote that:

Any formal complaints entered by asylum seekers against guards for abuse, racism or plain negligence received an answer an extended time later stating that the issue had been followed up and there was either a lack of evidence or the guard couldn't be identified. This was a

¹³⁸ Ibid.

¹³⁹ Bec Zajac, 'On the path to whistleblowers: in their own words' The Citizen, 23 January 2015, <<http://www.thecitizen.org.au/news/path-whistleblower-their-own-words#sthash.eXaNfxPG.dpuf>>.

¹⁴⁰ Zajac, above n 46.

¹⁴¹ Christopher Iacono, Submission No 20 to Senate Standing Committees on Legal and Constitutional Affairs, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, p 6.

¹⁴² Zajac, above n 139.

common theme on the four complaints I was shown by asylum seekers and others I was told about.

Nicole Judge

Judge, like Iacono, was also a Salvation Army employee who worked in both Detention Centres.¹⁴³

Judge reports that people were constantly getting fired for not following orders and that it seemed you could lose your job if you were too upset about the conditions at the Nauru Detention Centre.

When we told management about what we saw, we were told it was 'normal' for where we were. They said we were not supposed to care who has services or how they're treated. One time this guy was slamming his head on the concrete and we were told to just sit there and not pay attention. And if you seemed too upset you'd lose your job. People were getting fired constantly for not following orders.¹⁴⁴

Karen Wells

Wells was a G4S guard at the Manus Island Detention Centre who had worked in Curtin and Woomera detention centres before taking a position at the Manus Island Detention Centre. She tells of her attempts to report serious issues and concerns to her managers.

When I first saw things that were wrong, I wrote a report. [Management] would read it in front of you and tell you, 'You need to harden up'. They'd say, 'You're getting soft in your old age.' Whether I agree with [the asylum seekers] being here or not, whether I agree with them getting visas, you can't treat a human being like that.¹⁴⁵

Dr Robert Adler

Dr Adler visited Nauru on behalf of IHMS. He drafted a letter to then Prime Minister Tony Abbott a few days into his trip expressing his dismay about the disgraceful conditions in the Nauru Detention Centre. He sent the letter to Mr Abbott, along with copies to the leader of the Australian Labor Party, Bill Shorten and the deputy leaders, as well as to some staff at IHMS when he returned home. Despite the fact that the letter contained no confidential information, IHMS notified Dr Adler that he would not be returning to work at the Nauru Detention Centre.¹⁴⁶

He said, 'I couldn't provide health services in a situation that I found deeply concerning and [then] remain silent'.

Martin Appleby

Mr Martin Appleby was a Security officer at the Manus Island Detention Centre for about ten months. Appleby trained other guards at the Manus Island Detention Centre in safety and security.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Bec Zajac, 'Speaking Out' (Blog) The Monthly, 21 January 2015, <https://www.themonthly.com.au/blog/bec-zajac/2015/21/2015/1421797900/speaking-out>; also see Zajac, above n 46.

The authors spoke to Appleby personally about the practical barriers facing whistleblowers. Appleby stated that his biggest concern during the process was whether he would be employable again after speaking out.

When considering whether or not to speak out, Appleby stated:

There were concerns about career path, legality, as well as the part of the contract referred to as the secrecy part. Thus, there were a number of things that I had to make sure I understood would happen to me if I spoke out and what those ramifications would be.

It is very difficult to try and draw the line between what's right and what's wrong and also between your own personal fate, as in what you can and cannot do, because you know, the total treatment of asylum seekers is totally wrong.

He said in relation to the obstacles facing whistleblowers:

I think number one: would be the career options that would be left. I got abused, accused on Facebook, social media.

In terms of employment, the impact whistleblowing had on my life was not being able to gain employment again in that industry, for about eight months.

And on whether speaking out had an impact:

Yes! I believe it has. It is difficult to gauge what that impact is, but in regards to the operation it has become a lot more open. I like to think that by speaking out something happened. People need to raise some of these issues, because if they don't, things will get worse and worse, and people will continue to suffer, and that is not right. We all have a social conscience, a moral compass, let's use them!

RECOMMENDATIONS

Secrecy Provisions

The secrecy provisions contained in Part 6 of the ABF Act unreasonably restrict and discourage individuals from disclosing information that is in the public interest. The Commonwealth already has broad powers under section 70 of the Crimes Act to prosecute APS employees and government contractors for unauthorised disclosures of information.

RECOMMENDATION 1

Part 6 of the ABF Act should be repealed.

The current wording of section 70 of the Crimes Act imposes criminal sanctions for acts which may merely be prejudicial to the effective working of government. Criminal liability should be restricted to sufficiently serious cases where there is a threat to the public interest. As such, we endorse the Australian Law Reform Commission's recommendation that section 70 should be amended to insert subsections which restrict the offence to disclosures that harm, are reasonably likely to harm or intended to harm an essential public interest, as defined in subsection 3.¹⁴⁷ The government would still be able to seek recourse against individuals who fell short of this threshold but made unauthorised disclosures by termination of employment or seeking civil remedies.

RECOMMENDATION 2

Section 70 of the Crimes Act should be amended to include the following subsections:

- 3) *A person shall only be guilty of an offence under subsections (1) or (2) if the disclosure did, or was reasonably likely to, or was intended to:*
- a. *damage the security, defence or international relations of the Commonwealth;*
 - b. *prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;*
 - c. *endanger the life or physical safety of any person; or*
 - d. *prejudice the protection of public order, public health and the rights of others.*

Exception

- 4) *Subsections (1) or (2) do not apply if the disclosure:*
- a. *was made in the course of a Commonwealth officer's functions or duties;*
 - b. *was made in accordance with an authorisation given by an agency head or minister that the disclosure would, on balance be in the public interest; or*
 - c. *concerned information that was already in the public domain as the result of a lawful disclosure.*

¹⁴⁷ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112, December 2009, p.143.

Statutory defence

The daunting prospect of having to defend a court action against a large corporation or the Commonwealth Government is likely to intimidate a potential whistleblower into staying quiet.

This recommendation 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.

RECOMMENDATION 3

As an alternative to recommendation 1, the ABF Act should be amended to insert a statutory defence for whistleblowers against claims against them for loss or damage caused by their act of whistleblowing, if they are disclosing information in the public interest.

Section 42A: It is a defence to any claim or proceeding against an entrusted person alleging that the entrusted person made a record of or disclosed protected information, that the protected information reveals the existence of, or real likelihood of the existence of, a:

- a) *crime;*
- b) *civil wrong; or*
- c) *serious misdeed of public importance.*

If recommendation 1 is adopted, section 70 of the Crimes Act should be amended to insert a statutory defence with the same effect as the proposed new section 42A of the ABF Act.

Standardised Confidentiality Clauses

Non-standardised confidentiality clauses in detention centre employment contracts create confusion about what information can or cannot be disclosed.

This recommendation would help employees understand more clearly when they can disclose information publicly. It would allow individuals to know that when their fellow employees disclose information and do not face prosecution or dismissal, that they too can disclose that information. And in the context of legal proceedings - where evidence is required from those working in connection with Australia's immigration policy, it would allow legal professionals to apply the same standard to employees working across various sectors.

RECOMMENDATION 4

All employment contracts made in connection with overseas immigration detention should contain a standardised confidentiality clause.

Uncertainty regarding the scope of protection under the PID Act

A key barrier for whistleblowers in accessing the protections afforded under the PID Act is a lack of certainty around how key terms may be applied in practice and how this may affect the scope of protection available under the PID Act for a particular individual in the specific circumstances of their disclosure. Even where a would-be whistleblower seeks legal advice, the uncertainty around how many of the key terms in the PID Act would be applied in practice is likely to make it difficult for a would-be whistleblower to have confidence that their disclosure would be protected.

Repeal of provisions of the PID Act that create greatest uncertainty

Certain sections of the PID Act create the greatest uncertainty for whistleblowers and their legal representatives in assessing whether protection will be available. These provisions represent the most significant barriers to whistleblowers accessing the protections available under the PID Act.

Greater certainty in relation to the application of certain sections of the PID Act could be achieved by repealing the sections of the PID Act that are the most difficult for whistleblowers and their representatives to interpret and apply to the circumstances of a potential disclosure.

Section 26(2A) of the PID Act deems certain responses by a minister, the Speaker of the House of Representatives, or the President of the Senate to be 'adequate' for the purpose of assessing whether an external disclosure can be made. 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.

Section 2(e) and section 26 (3) of the PID 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) in effect creates a significant and disproportionate barrier to public disclosure. Accordingly, these provisions should be repealed so that their application will be more predictable.

Section 31 of the PID 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 PID Act.

RECOMMENDATION 5

The following section of the PID Act should be repealed:

- Section 26(2A);
- Sections 2(e) and 26(3);
- Section 31

Independent oversight mechanism

An independent oversight mechanism should be established under the PID Act to provide advice in relation to the scope of protection available to an individual seeking to make a disclosure.

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 PID 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 mechanism 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.

An independent oversight mechanism could be an alternative or complimentary measure to Recommendation 5, above.

RECOMMENDATION 6

The PID Act should be amended to include a new 'Part 2A' establishing the Public Interest Disclosure Panel. These amendments should provide for a Public Interest Disclosure Panel:

- established by statute with conditions of appointment that sufficiently provide for the independence of the Panel from government;
- with powers to receive cases for determination from persons considering making a public interest disclosure;
- with the power to make binding determinations in relation to whether a proposed disclosure constitutes disclosable conduct within the meaning of the PID Act;
- with powers to assess individual cases to determine whether the requirements for an emergency disclosure or external disclosure have been met;
- with powers to provide general guidance to the interpretation of the PID Act.

The mechanism should be separate from the Commonwealth Ombudsman, in light of that body's existing role under the PID Act in receiving, allocating and assessing some public interest disclosures.

A proposed amendment to the PID Act creating such a mechanism has been drafted and included under **Annexure A** to this report to illustrate how such a body might work within the scheme created by the PID Act.

ANNEXURE A

Proposed Oversight Mechanism

The PID Act should be amended to include a new 'Part 2A' establishing the Public Interest Disclosure Panel. There should also be amendments to sections 26 and 65 to provide, respectively, for the Public Interest Disclosure Panel to make binding determinations in relation to whether a proposed disclosure constitutes disclosable conduct within the meaning of the PID Act, and to extend the provision for secrecy under section 65 to the work of the Public Interest Disclosure Panel.

Part 2A – The Public Interest Disclosure Panel

For the purpose of this Part:

guidance note – is a document issued with the consent of all three members of the Public Interest Disclosure Panel and published on the website of the Commonwealth Ombudsman addressing one of the matters listed in section 57F (2), below.

unconfirmed disclosure – is a disclosure made by a public official to a member of the Public Interest Disclosure Panel for the purpose of a determination being made pursuant to section 57D(1).

unconfirmed emergency disclosure is an unconfirmed disclosure submitted to the Public Interest Disclosure Panel that:

- (a) is made to the Public Interest Disclosure Panel as a potential emergency disclosure; or
- (b) that is assessed by the Public Interest Disclosure Panel as potentially constituting an emergency disclosure.

57A Appointment of Public Interest Disclosure Panel

- (1) There shall be appointed a Public Interest Disclosure Panel, with three members.
- (2) Members of the Public Interest Disclosure Panel shall be appointed by the Governor-General in Council and shall hold office in accordance with this Act.
- (3) A person is not qualified to be appointed as a Public Interest Disclosure Panel Member unless the Minister is satisfied that the person has advanced qualifications, knowledge or experience in a relevant field, including but not limited to:
 - (a) law;
 - (b) medicine or public health; or
 - (c) public administration.
- (4) A person is not qualified to be appointed as a Public Interest Disclosure Panel Member unless the Minister is satisfied that the person has an appropriate security clearance to perform his or her role as a Public Interest Disclosure Panel Member.
- (5) A Public Interest Disclosure Panel Member shall not be a member or former member of the Parliament of the Commonwealth or any State or Territory.
- (6) Subject to this Act, a Public Interest Disclosure Panel Member shall hold office for a term of 5 years.
- (7) A Public Interest Disclosure Panel Member shall cease to hold his or her office—
 - (a) If he or she resigns in writing under his or her hand and his or her resignation is accepted by the Governor-General in Council;

- (b) if he or she is removed from office upon the presentation of an address of both Houses of Parliament praying for his or her removal from office;
- (c) if he or she is suspended from office by the Governor-General in Council on the ground of disability, bankruptcy, neglect of duty or misconduct or on any other ground which in the opinion of the Governor-General in Council makes him or her unfit to be a Public Interest Disclosure Panel Member and is not restored to office; or
- (d) if he or she nominates for election of the Commonwealth or any other State or Territory.

57B Principal functions of the Public Interest Disclosure Panel

- (1) The functions of the Public Interest Disclosure Panel are:
 - (a) to issue guidance notes pursuant to their power under section 57F;
 - (b) to issue determinations pursuant to their power under section 57D;
 - (c) to advise persons considering making a public interest disclosure in relation to a potential disclosure; and
 - (d) to advise the Commonwealth Ombudsman and the Parliament of Australia in relation to systematic issues affecting individuals seeking to make public interest disclosures as necessary.
- (2) The powers of the Public Interest Disclosure Panel are:
 - (a) to receive unconfirmed disclosures;
 - (b) to issue determinations pursuant to section 57D;
 - (c) to issue guidance notes pursuant to section 57F;
 - (d) any other powers under this Act; and
 - (e) any powers necessary to perform a function under subsection (1) or to exercise a power under subsection (2).

57C Procedure for receiving unconfirmed disclosures

- (1) A public official may submit an unconfirmed disclosure to the Public Interest Disclosure Panel.
- (2) An unconfirmed disclosure may be made in a manner listed in subsections 27 and 28 of this Act.
- (3) Once an unconfirmed disclosure is made to the Public Interest Disclosure Panel, the Public Interest Disclosure Panel must —
 - (a) make a determination in relation to the unconfirmed disclosure pursuant to section 57D; and
 - (b) communicate the determination made by the Public Interest Disclosure Panel to the public official who submitted the unconfirmed disclosure for determination;
 within the prescribed period
- (4) If the unconfirmed disclosure is determined by the Public Interest Disclosure Panel to, if it were to be disclosed to any person other than a foreign public official, meet the definition of—
 - (a) an external disclosure; or
 - (b) an emergency disclosure
 the Public Interest Disclosure Panel must also communicate the outcome of the determination to an authorised officer of the agency to which the unconfirmed disclosure relates.
- (5) For the purpose of subsections (3) and (4), the prescribed period is:
 - (a) in the case of an unconfirmed emergency disclosure, within 24 hours from the date that the unconfirmed disclosure was received by the Public Interest Disclosure Panel.

- (b) in the case of any other unconfirmed disclosure, within 28 days from the date that the unconfirmed disclosure was received by the Public Interest Disclosure Panel.
- (6) If the Public Interest Disclosure Panel determines that it is unable to make findings in relation to the unconfirmed disclosure pursuant to section 57D(1)(d), the Public Interest Disclosure Panel must provide reasons as to why no determination can be made within a reasonable time.
- (7) If the Public Interest Disclosure Panel fails to make a determination and communicate that determination to the public official who submitted it to the Public Interest Disclosure Panel within the prescribed period, the Public Interest Disclosure Panel will be deemed to have made a determination that it is unable to make findings in relation to the unconfirmed disclosure pursuant to section 57D(1)(d).
- (8) The Public Interest Disclosure Panel may, at a time convenient to the Public Interest Disclosure Panel, convene a hearing between the person making the unconfirmed disclosure and the members of the Public Interest Disclosure Panel for the purpose of assessing an unconfirmed disclosure.
- (9) If a hearing is convened under subsection (8), the Public Interest Disclosure Panel must:
 - (a) provide the person who made the unconfirmed disclosure with reasonable notice that the hearing will take place; and
 - (b) ensure that such a hearing is closed to the public, and that it occurs in such a way that the confidentiality of the unconfirmed disclosure is protected.
- (10) The Public Interest Disclosure Panel is not required to hold any hearing for the purposes of an investigation, and may obtain information from such persons and in such manner as it sees fit.

57D Determinations of the Public Interest Disclosure Panel

- (1) After considering the unconfirmed disclosure, the Public Interest Disclosure Panel may determine that:
 - (a) the conduct in the unconfirmed disclosure that is sought to be disclosed does or does not constitute disclosable conduct, or the public official does or does not have reasonable grounds to believe that the conduct is disclosable conduct; and
 - (b) in relation to one of the requirements under Item 2 of Section 26, the public official has met or not met that requirement; and
 - (c) the public official has met or has not met all the necessary requirements under s 26 in relation to:
 - i. an external disclosure
 - ii. an emergency disclosure;
 - iii. a legal practitioner disclosure; or
 - (d) that it is unable to make findings concerning the matters set out in subsections (1)(a) – (c).
- (2) A determination is made by the Public Interest Disclosure Panel if it is:
 - (a) subject to the agreement of two of the three panel members; and
 - (b) set out in a written statement.
- (3) If the outcome of a determination is provided to an authorised officer pursuant to section 57C(4), no entitlement to reasons relating to the determination of the Public Interest Disclosure Panel exists for a period of 14 days.

57F Guidance notes issued by the Public Interest Disclosure Panel

- (1) The Public Interest Disclosure Panel may issue guidance notes as it deems necessary.
- (2) A guidance note may:
 - (a) Provide guidance as to whether a particular category of conduct will be considered to fall within Items 1 to 10 of the PID Act;
 - (b) Provide guidance as to when a particular category of disclosure will constitute an emergency disclosure or legal practitioner disclosure;
 - (c) Provide guidance as to the circumstances in which any one of the requirements under Item 2 of Section 26 may be met; or
 - (d) Provide guidance as to the interpretation of any definition in Parts 1,2,3 and 4 of this Act.

57G Protections apply to the making of unconfirmed disclosures

- (1) The protections under Part 2 of this Act apply to the making of an unconfirmed disclosure and an unconfirmed emergency disclosure as if it were a public interest disclosure.
- (2) To avoid doubt, the making of an unconfirmed disclosure:
 - (a) does not for any purpose constitute unprofessional conduct or a breach of professional ethics; and
 - (b) does not make the person by whom it is made subject to any liability in respect of it.

Other amendments to the PID Act

In addition to the addition of Part 2A, the following further additions to other sections of the PID Act would be necessary to give effect to Recommendation 5.

Section 29 of the PID Act would be amended to insert an additional item (Item 11):

- (11) Conduct that has been confirmed to be disclosable conduct pursuant to a determination issued pursuant to s 57D

To avoid doubt, section 65(1)(a) of the PID Act would be amended to define 'protected information' as information obtained:

- (i) in the course of conducting a disclosure investigation; or
- (ii) in the course of dealing with an unconfirmed disclosure or unconfirmed emergency disclosure; or
- (ii) in connection with the performance of a function, or the exercise of a power, by the person under this Act.

