

Addressing misconduct should not be a crime

Kieran Pender – Canberra Times – 3 May 2021

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According to the United Nations, World Press Freedom Day - marked today - is intended to serve "as a reminder to governments of the need to respect their commitment to press freedom."

A central component of press freedom is the ability of individuals to safely and securely speak to journalists about government misconduct. This collaboration between people who witness wrongdoing and journalists who report on it is at the heart of our democracy.

Throughout history, whistleblowers and journalists have worked together to expose unlawful and unethical behaviour and hold perpetrators to account.

Yet in recent years the Morrison government has overseen raids by the Australian Federal Police on Australian journalists and the high-profile prosecutions of several whistleblowers.

Their alleged crime? Telling the truth about wrongdoing.

Richard Boyle exposed unethical debt recovery practices by the Australian Taxation Office. David McBride leaked documents to the *ABC* that revealed apparent war crimes in Afghanistan. Canberra lawyer Bernard Collaery and his client Witness K are alleged to have spoken out about our government bugging Timor-Leste's cabinet during negotiations about Timor's oil and gas reserves.

The Morrison government has not denied the truth of what any of these whistleblowers have said. By speaking up, each one has helped achieve important accountability and change.

In each case, these whistleblowers sought to do the right thing, following the reporting pathways set out in federal whistleblowing law, the *PID Act*.

Boyle and McBride both spoke up internally, and then to external oversight bodies. Witness K approached the Inspector-General for Intelligence and Security. Boyle and McBride only went public after internal avenues failed; Witness K had no lawful public disclosure channel available to him.

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Boyle's concerns about ATO practices have been endorsed by a Senate committee and the Small Business Ombudsman, with policy changes adopted as a result; the Brereton Report found credible evidence that Australian soldiers had unlawfully killed civilians in Afghanistan

After Timor-Leste began international legal proceedings in relation to the espionage, Australia backed down and signed a revised energy treaty.

Telling the truth about government wrongdoing is a national service. It makes Australia better.

Yet rather than being thanked, each of these whistleblowers has been charged and threatened with years - potentially life - in prison.

Each prosecution has imposed an immense psychological and financial burden on the whistleblower involved, and sent a chilling message to others thinking about speaking up. Each also reveals major failings with the *PID Act*, which was enacted in 2013 with the aim of strengthening a pro-disclosure, "if in doubt, speak up" policy within the public service.

In 2016, an independent review recommended substantial reform, finding that the experience of whistleblowers under the *PID Act* had not been "a happy one".

Five years later, the Morrison government has failed to implement these recommendations or ensure that protections for public sector whistleblowers keep track with the private sector equivalent.

When whistleblowers suffer, our democracy suffers. The *PID Act* must be urgently reformed, to make it easier and safer for Australians to speak up about wrongdoing.

Take external disclosure - the channels that enable whistleblowers to lawfully go to the media when internal checks have failed. This is a critical safety valve, but it is not working.

The relevant *PID Act* provisions are so complex as to be indecipherable; one key clause is over 200 words long. The Boyle and McBride prosecutions are proof of the law's failings: each sought to comply with the *PID Act*, and now find themselves on trial. The *PID Act* must be reformed to make external disclosure a genuine possibility for Australian whistleblowers.

The Witness K case highlights another problem with the *PID Act*: an accountability lacuna at our intelligence agencies. Australia's conduct in Timor-Leste was deeply immoral and potentially unlawful, yet after raising concerns internally and with the Inspector General, Witness K had nowhere else to turn.

Australia's intelligence agencies have immense power and billions of dollars in annual funding; they must be held accountable for wrongdoing like everyone else.

Finally, guidelines should be introduced to ensure that the CDPP properly considers the democratic benefit of whistleblowing before trying to send whistleblowers to jail.

There is no public interest in these prosecutions, yet the CDPP persists with each one.

These cases have a democratic cost; prosecutorial guidelines should reflect that, so the next whistleblower won't find themselves on trial.

Thanks to the courage of individual whistleblowers, including Boyle, McBride, Collaery and Witness K, Australians know of misconduct committed in our name and can demand accountability and reform.

But what don't we know? What might we never know, because of how these whistleblowers are currently being treated?

The CDPP should drop these four prosecutions and the Morrison government must urgently reform the *PID Act*.

On World Press Freedom Day, we must insist that whistleblowing is not a crime.

- **Kieran Pender is a senior lawyer at the Human Rights Law Centre, leading the Centre's work on whistleblower protections. He has contributed a section on whistleblowing to the MEAA's 2021 Press Freedom Report, which was published today.**