Response from Kieran Pender, Acting Legal Director at the Human Rights Law Centre:

Why wasn't David McBride protected under our current whistleblower legislation?

Whistleblowing laws, including the *Public Interest Disclosure Act* (*PID Act*), contain immunities from prosecution for people who blow the whistle according to the law. Unfortunately the laws are complex and, by the government's own admission, broken. David McBride sought to rely on the immunity in the *PID Act*, but withdrew it on the opening day of the defence hearing in October 2022, after the Department of Defence made a late national security public interest immunity claim to prevent McBride relying on certain evidence, and the prosecution foreshadowed an intention to challenge McBride's reliance on certain expert evidence.

The public interest immunity claim was extraordinary in circumstances where the proceedings where already covered by national security laws, the *National Security Information Act* (*NSI Act*), which would have allowed the government to seek to have parts of the hearing held in closed court. The *NSI Act* was specifically developed in the early 2000s to minimise the use of public interest immunity claims. In Senate Estimates, the Department of Defence indicated it made the public interest immunity claim due to the interests of a foreign partner - ie the United States. In other words, rather than allowing McBride to rely on that evidence, in closed court to reflect its sensitivity, the government removed his ability to rely on it at all.

This meant that McBride was never able to pursue the argument that he was immune from prosecution under whistleblowing law. That said, even if he had, he likely faced an uphill battle due to the technicality and narrowness of the immunity - a problem only compounded by a court judgment last year in the prosecution of tax whistleblower Richard Boyle, which found that the immunity only covered the act of blowing the whistle - not related preparatory steps (that judgment has been appealed; the Human Rights Law Centre has participated in the appeal as a friend of the court).

These two prosecutions have underscored the failures of Australia's whistleblowing laws to adequately protect whistleblowers.

What would need to happen for him to be protected as a whistleblower?

The Human Rights Law Centre, and many other legal and civil society groups, have long called for the enactment of a fall-back public interest defence to secrecy charges, as a last resort where whistleblowers may fail to satisfy the criteria in whistleblower protection laws, but their whistleblowing was nonetheless in the public interest. Regrettably, in a review of secrecy offences last year, the Attorney-General's Department declined to accept that recommendation. Australia's secrecy

laws are currently also being reviewed by the Independent National Security Legislation Monitor.

The absence of a general public interest defence means that whistleblowers like McBride will face prosecution, and imprisonment, even in circumstances where there whistleblowing was in the public interest. In our view, the ABC's journalism that resulted from McBride's whistleblowing, the Afghan Files, was manifestly in the public interest - exposing grave wrongdoing committed by Australian forces in Afghanistan. Australia is a better place because of that journalism, and it would not have been possible without the files that McBride leaked to the ABC.

Has the Albanese government implemented any effective reforms to protect whistleblowers, and are any further reforms currently in the pipeline? Do we know what they are yet, and do they go far enough?

Last July, the Albanese government enacted an initial, largely technical phase of reform to federal public sector whistleblowing laws, the *PID Act*. A more substantial reform process is underway - consultation began in November (ironically, at the same time as McBride was facing trial). However, the government has not indicated the current status of that reform, and without swift progress there is a real risk it will not become law before the end of this parliamentary term.

The government will also begin a mandatory review of private sector whistleblowing, from July this year, and is pursuing narrow whistleblowing reform in the tax sector (sparked by the PwC leaks scandal) and the aged care sector (following the royal commission). Regrettably, this piecemeal approach fails to heed the call of advocates for comprehensive, consistent reform. As things stand, there are eight distinct whistleblowing laws at a federal level - all with different requirements, thresholds and protections. That is not good for whistleblowers.

Most critically, the government has not yet committed to establishing a federal whistleblower protection authority, to oversee and enforce whistleblowing laws and support whistleblowers. Such a body was first recommended by a Senate committee in 1994, and again by a bipartisan parliamentary joint committee in 2017. Labor took the proposal to the 2019 election, and a whistleblowing authority was included in the cross-bench proposal for a national anti-corruption body, which Labor supported. Regrettably, the government's National Anti-Corruption Commission does not contain a dedicated whistleblowing function, and the government is now only considering whether one is needed, for the public sector only. This regression from its 2019 position is unfortunate, given the failure of whistleblowing laws and the ongoing prosecutions have made manifestly clear that whistleblowers urgently need dedicated support and oversight.

Could the AG have prevented David McBride's prosecution and is it clear why that didn't happen?

The Attorney-General has the power to discontinue a federal prosecution. This power is reserved for unusual circumstances, given we have an independent Commonwealth Director of Public Prosecutions. However, in our view the prosecution of David McBride, and the ongoing prosecution of tax whistleblower Richard Boyle, are not in the public interest and warrant the Attorney-General's intervention. Upon taking office, the Attorney-General moved to discontinue the prosecution of Bernard Collaery, who together with his client Witness K had helped expose Australia's spying against Timor-Leste. That was the right thing to do. But the Attorney-General should have also ended the cases against McBride and Boyle. His failure to do so has undermined our democracy. It is not too late for him to end the prosecution of Boyle, who will face trial in September.