maurice blackburn lawyers

20 January 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Madam/Sir,

We welcome the opportunity to provide feedback in relation to the Committee's review of the *Public Interest Disclosure Amendment (Review) Bill 2022* (the Bill).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 34 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Maurice Blackburn congratulates the Government on the development of this important Bill, and its ongoing commitment to improving protections for whistleblowers. We believe that the Bill represents a positive first step in enacting the recommendations of the Moss Review, and improving appropriate protections for whistleblowers - both disclosers and witnesses - in the public sector.

Maurice Blackburn is satisfied that, across the board, the provisions outlined in the Bill are appropriate, workable, and will make the *Public Interest Disclosure Act 2013* (PID Act) more fit for purpose.

We believe that the main objectives of the Bill, as articulated in paragraph 1.4 of the Explanatory Memorandum, represent an encouraging step forward, following a significant period of inaction under the previous administration.

It is important that focus soon turns to whistleblower protections in the private sector. The community has been shocked by numerous examples of misconduct in parts of the private sector such as the tech industry - misconduct which would have never come to light if not for the actions of a whistleblower. We have seen first-hand how such corporate misconduct has directly impacted the lives of hundreds of thousands of Australians.

Maurice Blackburn has long advocated that not only should whistleblowing be protected, it should be rewarded.

In the following pages, we offer some observations about certain elements of the Bill for Committee consideration. We have also included some thoughts on future reforms required over the medium term, to ensure that Australia's approach to whistleblowing meets community expectations.

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Observations in relation to the Bill:

1. Employer's liability to pay compensation

The existing section 14(2) of the *Public Interest Disclosure Act 2013* (the PID Act) provides that the Federal Court or the Federal Circuit and Family Court of Australia must not make an order for a respondent's employer to pay compensation in respect of unlawful reprisal action if the employer establishes that it 'took reasonable precautions, and exercised due diligence, to avoid the reprisal or threat'.

Maurice Blackburn supports the amendment of this section to require the employer to establish that it took all reasonable precautions, not just reasonable precautions.

This amendment is consistent with the standard of vicarious liability existing in Commonwealth anti-discrimination statutes. Requiring that an employer take all reasonable steps to avoid reprisal action will provide enhanced protection to disclosers and foster an agency culture that promotes the aims of the PID Act.

2. Exemplary damages

Section 15 of the PID Act sets out the orders the Federal Court or the Federal Circuit and Family Court of Australia may make where they are satisfied that unlawful reprisal action has occurred.

Maurice Blackburn encourages the Committee consider the following:

- the insertion into section 15 of the PID Act of a provision which mirrors section 1317AE(1)(f) of the *Corporations Act 2001*, and enables the relevant Court, where appropriate, to order a person or agency that has engaged in unlawful reprisal action to pay exemplary damages; and

- The insertion into section 15 of a provision providing guidance as to the criteria for determining exemplary damages, for example, the seriousness of the impugned conduct, the impact of the impugned conduct on the discloser, and whether the person or agency against whom exemplary damages is to be awarded has previously contravened the PID Act.

Maurice Blackburn believes that the possibility for, and award of, exemplary damages would provide a further general and specific deterrent in respect of unlawful reprisal action against public interest disclosers.

3. Waiver of confidentiality of discloser identity

The new proposed section 20(3)(e) provides that the obligation to keep identifying information confidential would not apply where the discloser acts in a way inconsistent with his or her identity being kept confidential.

The Explanatory Memorandum to the Bill[1] refers to reports of disclosers identifying themselves within their workplace or publishing information about their disclosure. However, there is a meaningful distinction between a discloser publicly identifying him/herself, and for example, a discloser identifying him/herself in a confidential setting to a trusted colleague. In other contexts, such as the implied waiver of legal professional privilege, assessing whether

[1] Ref: Item 49: p.40

an individual has acted inconsistently with the maintenance of confidentiality and privilege has proven to be an uncertain and unpredictable exercise.

In light of the above, any loosening of the identity protection restrictions in the PID Act should be tightly controlled.

To that end, Maurice Blackburn suggests the inclusion of an additional provision in section 20 which gives guidance or examples of when a discloser may be found to have acted inconsistently with his or her identity being kept confidential. We believe that a court should consider, for instance, the following factors:

- whether the discloser has identified him/herself in a public forum such as a group meeting or group communication;
- whether the discloser subjectively intended to reveal his/her identify; and
- whether the discloser revealed his/her identity in circumstances of assumed or requested confidentiality.

4. Categories of report receivers

Maurice Blackburn urges the Committee to consider expanding the categories of persons to whom protected public interest disclosures can be made in the first instance (without the current restrictive requirements contained in items 2(b)-(f) of s 26 of the PID Act) to include an employee's lawyer or union representative, where such disclosure is made for the purposes of seeking advice or assistance in relation to the operation or potential operation of the PID Act.

For many employees, especially those in precarious employment and/or employees from migrant backgrounds who have lived experience of government oppression or corruption, making an internal disclosure is highly intimidating and less likely to occur.

We consider that protections under the PID Act should be expanded to include initial disclosures to a discloser's lawyer or union. Inserting protections where a disclosure is made to a lawyer would be consistent with the whistleblower protection provisions of the Corporations Act. Such an expansion of protections would no doubt require various further amendments to the PID Act scheme, and this should be the subject of further consultation and consideration by the Committee.

5. Personal work-related conduct

The proposed changes to paragraph 29 of the PID Act would establish a carve-out, subject to certain qualifications, of personal work-related conduct from disclosable conduct under the PID Act.

The carve-out appears to be loosely modelled on section 1317AADA of the Corporations Act ('personal work-related grievances'). There has been limited judicial consideration of that section of the Corporations Act, and to our knowledge there have to date been no findings made by a relevant court as to whether a disclosure meets the requirements of section 1317AADA of the Corporations Act.

There are, no doubt, resource-preserving and associated benefits with the introduction of an employment grievance carve-out into the PID Act. However, we would argue that any amendment should strike an appropriate balance between these and countervailing considerations.

In our view, best practice whistleblower legislation should include a broad definition of reportable wrongdoing, and any narrowing of that definition should be approached with extreme caution. Technical or legalistic distinctions of the types of conduct that can and cannot be the subject of the protected disclosure will almost certainly impact on whether a disclosure is actually made. It is important that persons considering making a disclosure have as much confidence in their protection as possible.

Further, it is difficult to draw a bright line distinction between personal employment grievances and alleged unlawful conduct in relation to which disclosure and investigation with external regulatory oversight is required in the public interest. The Bill seeks to mark out that distinction by reference to matters that are of such significant nature that they would undermine public confidence in, or have other significant implications for, an agency.[2]

The Explanatory Memorandum indicates that examples of such conduct may be discriminatory employment practices or nepotism.[3] However, to our reading, this does not entirely cohere with the proposed definition of personal work-related conduct in the proposed section 29A, which gives an example of such excluded conduct as interpersonal conflict such as harassment. These examples traverse beyond those given in the equivalent section 1317AADA of the Corporations Act.

All instances of unlawful harassment and discrimination contrary to the various Commonwealth anti-discrimination statutes such as the *Sex Discrimination Act 1984* or the *Racial Discrimination Act 1975* undermine public confidence in an agency and have significant implications for an agency. Maurice Blackburn believes that assessment should not be left to individual officers receiving disclosures.

In light of the above, Maurice Blackburn would support the inclusion of an additional subsection 29B which explicitly states that conduct which, if proven, could amount to a contravention of a Commonwealth anti-discrimination statute, is conduct within the definition of subsection 29(2A)(b) and is disclosable conduct.

The investigative scheme under the PID Act, with its associated confidentiality protections and regulatory oversight, provides a mechanism for systemic discrimination issues within agencies to be addressed and without an individual being obliged to utilise adversarial processes such as pursuing a complaint through the Australian Human Rights Commission or proceedings in Court. Such processes come at a large personal cost to the complainant and are often not fit for purpose.

An explicit mechanism for protected disclosures about unlawful discrimination and harassment in relation to one employee is essential to enable identification and rectification of such issues at a systemic level.

Where a discloser elects to report an instance of unlawful discrimination or harassment using the PID Act scheme, it should not be open to officers allocating or investigating disclosures to, without the discloser's consent, divert the discloser to an adversarial scheme under anti-discrimination laws.

Both the adversarial processes under anti-discrimination laws, and investigative processes under the PID Act, have significance and serve a meaningful purpose. Where there is effective education for employees in the public sector about the various avenues for redress available, it should be open to those employees to make an informed decision to utilise the PID Act scheme in relation to unlawful discrimination and harassment.

[2] See proposed subsection 29(2A)
[3] See para 1.7: p.16

Future Focus:

We are pleased to note from the Attorney General's second reading speech[4] that:

> *The bill is only the first stage of reform to restore the Public Interest Disclosure Act to a best-practice whistleblowing framework.*

With this in mind, Maurice Blackburn offers the Committee the following suggested priorities for further reform over the course of 2023:

Private Sector Whistleblower Reform

Maurice Blackburn believes that the provisions of the current Bill, once agreed, will provide a solid base for reform in relation to protecting whistleblowers in the private sector.

The current lack of protections in the private sector has real-world consequences. Maurice Blackburn has previously advocated in relation to specific hindrances upon the conduct of lawyers under the current arrangements.

Alleged wrongdoers should be prevented from suing whistleblowers or lawyers acting for victims of misconduct in circumstances where the whistleblower has provided incriminating confidential information to lawyers in litigation against the alleged wrongdoer.

In *AG Australia Holdings v Burton and Anor (2002),* a whistleblower was sued for talking to class action lawyers for shareholders in breach of a confidentiality agreement.

Burton has had a chilling effect on whistleblowers in the context of civil litigation, with lawyers acting for victims of misconduct effectively precluded from speaking with whistleblowers.

It is contrary to the interests of justice for wrongdoers to be protected from the consequences of unlawful behaviour in this way.

The *IOOF case* shows the difficulties which arise when private interests of confidentiality are placed ahead of the public interest in the administration of justice. In this case, the whistleblower sent incriminating documents to ASIC, Senators and Fairfax Media and subsequently provided these documents to Maurice Blackburn at the time when our lawyers were investigating a potential class action on behalf of shareholders in IOOF against the company for breaches of the Corporations Act. IOOF sued Maurice Blackburn to restrain it from acting in the class action but did not pursue the whistleblower or Fairfax Media. It seems clear that the true purpose of the suit was to avoid the class action, or at least to frustrate it, and to increase the costs involved in its pursuit, in an attempt to mitigate IOOF's liabilities to its shareholders.

At the time, Maurice Blackburn proposed legislative amendments which would protect whistleblowers and lawyers from this type of unfair suit. In particular, that the law should explicitly provide that there can be no liability for a breach of confidence in the following circumstances:

- A person (whistleblower) has information which they believe, demonstrates, or provides evidence that tends to demonstrate, that a company or person has engaged in unlawful conduct; and

[4] Ref: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F26233%2F0182%22

- Another person or persons (claimant/s) has claims against the alleged wrongdoer in relation to the relevant unlawful conduct; and
- The claimant has sought legal advice in relation to the pursuit of those claims from a lawyer (the lawyer);
- The lawyer should be permitted by law to obtain from the whistleblower confidential information or confidential documents belonging to the alleged wrongdoer for the following purposes:

    - To advise the claimant in relation to litigation or contemplated litigation;
    - To take a proof of evidence for the purposes of determining whether to call the whistleblower as a witness at the trial and in order to prepare for examination of that witness;
    - To obtain documents for tender as evidence in the trial.

- Any information or documents obtained by the lawyer from the whistleblower may only be used for those purposes and otherwise protected by the usual implied undertaking.

Maurice Blackburn urges the Committee to consider the provisions in the Bill as an important first step in achieving better protections for private sector whistleblowers in the longer term.

Yours faithfully,

Andrew Watson
Principal Lawyer
Maurice Blackburn Lawyers