Submission No 6

INQUIRY INTO PUBLIC INTEREST DISCLOSURES BILL 2021

Organisation: NSW Bar Association

Date Received: 5 November 2021

NEW SOUTH WALES
BAR ASSOCIATION

5 November 2021

The Honourable Tara Moriarty MLC
Committee Chair
Portfolio Committee No. 1 – Premier and Finance
Legislative Council
Parliament House, Macquarie Street
Sydney NSW 2000

By email: PortfolioCommittee1@parliament.nsw.gov.au

Dear Ms Moriarty

New South Wales 'whistleblower' legislation

1. The New South Wales Bar Association (**Association**) thanks the Portfolio Committee No. 1 – Premier and Finance for its invitation to make a written submission in relation to its inquiry into the Public Interest Disclosures Bill 2021 (**Bill**).

2. The Association welcomes this new Bill which seeks, in a broad sense, to support and protect the institutions of government which are the pillars of liberal democracy in NSW. This Bill does so by protecting public officials who identify and expose serious wrongdoing in the public sector.

3. Although the Association supports the Bill overall, we make a number of proposals for amendments which, in our submission, would enhance this Bill.

Objects and Guiding Principles

4. The objects are described in the explanatory notes as forming one of several "machinery" provisions. That diminishes the significance of the objects. They are much more than mechanical provisions – they are the objects of the Act.

5. Missing from both the objects and the Bill more broadly, however, are guiding principles which underpin the Act, and should guide the exercise of powers or duties thereunder.

6. The guiding principles that underpin this legislation ought to be stated clearly in the Bill. The *Coroners Act 2008* (Vic) provides a good example of such provisions. Further, it may be beneficial for the Act expressly to provide that the objects and any such guiding principles are matters which must be taken into account, if relevant, "when exercising a function under this Act (as is provided in s 8 of the *Coroners Act 2008* (Vic)).

7. The Association suggests that this approach ought to be adopted in this Bill.

8. In relation to 'whistleblower' legislation, the Association suggests that the applicable guiding principles are:

a. The legitimacy of a liberal democracy depends, among other things, on support by institutions of government and agencies for transparency, appropriate disclosure and accountability in respect of their operations.
b. The rule of law in maintained and enhanced in an environment in which institutions of government support transparency, public interest disclosure of serious wrongdoing and accountability of public sector institutions and their agents.
c. A culture of honest, good faith public disclosure of suspected serious wrongdoing is to be encouraged and valued.[1]

9. If the suggestion of a separate section setting out the guiding or underlying principles is not accepted, we suggest that clause 3(a) and (b), be amended to read as follows:
    a. To maintain and protect the integrity of institutions and agencies of government in New South Wales by enhancing transparency, public interest disclosure of serious wrongdoing and accountability of those bodies and their staff;[2]
    b. To promote a culture in which honest and reasonable public interest disclosures, are encouraged and valued;[3]

10. Proposed amended clause (a) above provides the broad rationale for the Bill.

11. Proposed clause (b) essentially lifts clause (c) of the Bill higher in the list of objects because, like (a), it provides broad context and general guidance. It fits better here than where it now sits in the Bill. The objects that follow in clauses 3(d)-(f) deal with more specific issues.

12. Proposed clause 3(b) lays emphasis on two of the desirable features of public interest disclosure – (i) that they are made honestly and (ii) reasonably in the sense that the public official making the disclosure must at least have reasonable grounds to suspect serious wrongdoing. [See further commentary below.]

13. It is well-known that whistleblowing almost invariably carries a significant cost for those who have the courage to make public interest disclosures. An assurance in the Act that honest, good faith disclosure is 'valued' provides a psychological signal to the whole of the public sector that public officials who have the courage to expose serious wrongdoing will receive not only legal protection but affirmation.

Division 3 key terms – public official

14. For the purposes of the Act, we suggest that clause 14 (the definition of 'public official') be amended to include persons who, at the time the alleged serious wrongdoing occurred or was identified, fell within the current proposed definition of 'public official'.

15. As the definition currently stands, it appears not to cover either whistleblowers or persons who are the subject of a disclosure unless they are, at the time of the disclosure, 'public officials'. While it may be intended that regulations made under clause 14(2) will address this issue, it would be preferable for the position to be stated in the Bill itself.

[1] See Paul Latimer and AJ Brown, "Whistleblower laws: International best practice", (2008) UNSWLJ 766, 767.
[2] Ibid. 767.
[3] Ibid. 768.

Clause 26(1) – content of voluntary public interest disclosures

16. This sub-clause is perhaps the most important aspect of the Bill. It requires that a disclosure be, both, honest and believed by the public official 'on reasonable grounds'. Expressed in this way, the clause may set too high a threshold for a voluntary public interest disclosure.

17. Honesty should be the most basic requirement but the Association suggests that the more appropriate test should be honesty and good faith or honesty and reasonable grounds to *suspect* serious wrongdoing.

18. The test of honesty and good faith or honesty and reasonable suspicion ought to be the threshold for disclosure for the following reasons:
    a. First, a public official may be given or learn of incomplete information which, nevertheless, gives rise to a reasonable suspicion. That person may not have access to the evidence which provides the reasonable grounds basis for belief that serious wrongdoing has occurred. Second or third-hand hearsay evidence, for example, may be a basis for a reasonable suspicion but not provide reasonable grounds for believing that serious wrongdoing has occurred. The threshold test is too high.
    b. Second, it is in the public interest that reasonable suspicions of serious wrongdoing be disclosed to appropriate public officials in a position to investigate the disclosure or to correct the misunderstanding of the public official. Such disclosures are not intended to become public but are intended to alert senior officials. Reasonable and honest suspicion is an appropriate threshold in such cases.
    c. Third, disclosures to Members of Parliament and journalists are intended to become public. Protection against honest but baseless allegations being made to them by public officials is provided by the setting of a much higher threshold in cl. 28. In those cases disclosures must meet five conditions if it is to be protected, including 'substantial truth' and previous disclosure to a relevant official within the public sector who, it may be assumed, has taken no appropriate action.

Clause 26(2) – Content of voluntary public interest disclosures

19. The definition of 'serious wrongdoing' outlined in cl. 13 is as follows:

> In this Act, serious wrongdoing means 1 or more of the following—
> (a) corrupt conduct,
> (b) a government information contravention,
> (c) a local government pecuniary interest contravention,
> (d) serious maladministration,
> (e) a privacy contravention,
> (f) a serious and substantial waste of public money.

20. Clause 26(2) reads:

> (2) A disclosure does not comply with this section to the extent that the information disclosed relates to a disagreement with a government policy, including—
> (a) a government decision concerning amounts, purposes or priorities of public expenditure, or
> (b) a policy of the governing body of a local government authority.

21. This sub-clause, as presently drafted, appears capable of an unintended exclusionary operation having regard to the following considerations.

22. In general terms, government policy should be respected by public officials, regardless of whether they personally agree or disagree with it. The theory underlying liberal democracy is that elected persons make up the government of the day and are accountable for the implementation of those policies to the parliament.

23. In practice, however, an executive which controls the parliament is less than fully accountable. A government policy may constitute 'serious maladministration' or result in 'a serious and substantial waste of public money', especially if implemented solely for party political advantage.

24. What is a public official's position if government policies are intended towards ends which constitute 'serious maladministration' or 'a serious and substantial waste of public money'? A public official may both identify that apparent serious wrongdoing and disagree with the policy purported justifying it. Which takes precedence – government policy or the protection of the objective public interest?

25. The principal object of the Bill is to protect public officials who expose serious wrongdoing. If that serious wrongdoing is a government policy the public official appears to be in need of greater not lesser protection against detrimental action.

26. Against that background, and although it may not be the intention, s 26(2) as presently drafted, in effect, protects governments from disclosure of 'serious and substantial waste of public money' if that serious and substantial waste of government money can be characterised as conforming with 'a government policy'. That would, in the Association's submission, potentially undermine the ability of the Bill to achieve its stated objects.

27. Further, the full implications of s 26(2) are not clear. The phrase "to the extent that the information disclosed relates to a disagreement with a government policy" is opaque and seems capable of being applied very widely to prevent protected voluntary disclosure and intimidate public officials.

28. On the other hand, idiosyncratic, unreasonable opposition to government policy by public officials ought not be protected.

Clause 55 – Voluntary public interest disclosures relating to an agency

29. This clause deals with internal disclosures.

30. This clause in its current form is opaque. In some NSW public sector agencies, such as the NSW Police Force, officers can be compelled to make statements in respect of relevant incidents. In others,the Association understand that there are no such powers to compel evidence from public official over their objections on grounds of self-incrimination.

31. In our submission, consideration ought be given to introducing provisions to ensure both that internal investigations can be conducted effectively and that persons of interest have appropriate protection against self-incrimination. Public officials, and the general public, ought be able to go to the Act to find the relevant powers and protections. The powers of Ombudsman office investigators may provide a suitable model (see eg, Part 3 of the *Ombudsman Act 1974* (NSW)).

Clause 60 – Internal review

32. Internal review of a purported voluntary disclosure is designed to filter out insubstantial or misconceived allegations of serious wrongdoing within an agency. While in practice this may be a convenient course, it raises the problem of the legitimacy of self-investigation by government agencies.

33. The Bill does not provide for an appeal to the NCAT against a decision by an internal reviewer to cease dealing with or not to investigate the disclosure as a voluntary public interest disclosure. In the Association's submission, to ensure the integrity of the internal investigation process, an appeal mechanism ought to be available to the NCAT. in practice, this would be unlikely to add much by way of caseload to the NCAT's workload, but would serve to enhance the integrity of the investigative process.

34. Secondly, it may be implied in cl.60 that an internal reviewer has all the powers of an internal investigator but the clause does not express that to be the case. This should be clarified if that is the intended effect of the clause.

Conclusion

35. The Association thanks the Portfolio Committee for considering the representations made in this letter.

Yours sincerely

Michael McHugh SC
President