Blueprint for Free Speech

Submission to the Department of the Prime Minister and Cabinet, in respect of the statutory review of the *Public Interest Disclosures Act 2013*

16 March 2016

Submission to the Hon Philip Moss, Department of the Prime Minister and Cabinet in respect of the statutory review of the *Public Interest Disclosures Act 2013*

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Thank you for the opportunity to provide comment on the upcoming statutory review of the *Public Disclosure Act 2013* ("the **Act**"). Blueprint is pleased to be able to contribute to the review required under Section 82A of the Act.

We note that we have previously provided a submission dated 17 December 2012 in respect of the '*Public Interest Disclosure (Whistleblower Protection) Bill 2012* (**Wilkie Bill**) to the Social Policy and Legal Affairs Committee of the House of Representatives (**17 December 2012 Submission),** a further submission to that committee (**19 April 2013 Submission)**, and a submission to the Senate Legal and Constitutional Affairs Committee on '*Public Interest Disclosure Bill 2013* (Cth) (Government Bill)' (**26 April 2013 Submission**). Blueprint has, throughout the passage and enactment of the Act, been committed to providing comment and thought to the operation and functioning of the Act. We appreciate the opportunity to continue our involvement in terms of the Act.

1. The impact of the Act on individuals seeking to make disclosures in accordance with its provisions;

Blueprint wishes to express two distinct points in relation to the impact to the Act on individuals seeking to make disclosures in accordance with the Act. The first is in relation to the necessity of the expansion of the scope of the Act to cover the private sector, as well as the public sector (as is currently the case). The second is in relation to the promotion and awareness surrounding the Act.

a. Private Sector

One of the most important deficiencies within the Act, as it stands, is its confinement to the public sector. As privatisation of public utilities continues to grow, the more public interest becomes entwined with the private sector. If this trend of merging public/private fields of operation continues it may be that certain action within the private sector will, or should, be considered within the realms of public interest, and therefore disclosable. It is integral that employees within the private sector be afforded the same protection as those in the public sector.

Additionally, wrongdoing routinely occurs in the private sector. This is recognised in many laws worldwide. Most notably, the *Public Interest Disclosure Act 1998* (UK) as contained in the *Employment Rights Act 1996* (UK) covers both the public and private sectors. Since its enactment it has covered 'workers' in both the public and private sectors in the UK who have sought to come forward and expose wrongdoing. As the Act is in a very clear sense based on the UK legislation

(especially where its provisions are embedded in employment law), it seems a natural extension that it would also apply to private sector employees.

Blueprint strongly urges that the Act be amended to apply to employees both in the private and public sectors.

b. Promotion and Awareness

A key issue with the Act seems to be that those it seeks to protect – employees in the public sector – do not know of its existence or usefulness. For the legislation to be effective, a clear and well-implemented program of promotion is required. Implementation of rights and protections is often as important as their passage.

A rigorous promotion regime is required for both employers and employees. This necessity is two-pronged. First, it ensures all managers/superiors in public office are aware and cognisant of their obligations and duties under the Act, and for ensuring adequate protection for public sector employees who make disclosures in the public interest. Second, comprehensive education on the functioning of the Act for other employees within the public sector may increase the use of the Act. It is well established that, in cases of disclosing sensitive information, many employees are concerned about possible repercussions or retribution, which may affect their employment security, future employment prospects, and even their personal safety and the safety of their family. By providing adequate training and instruction about the Act, employees may subsequently feel more comfortable reporting or disclosing information in the public interest with the comfort that they are adequately protected under the law.

Recommendations: The government should implement a comprehensive program of promotion to ensure that all individuals covered by the Act are aware of their rights and obligations. Further, the jurisdiction of the Act should be extended to cover both the public, as well as the private, sectors.

2. The breadth of disclosable conduct covered by the Act, including whether disclosures about personal employment-related grievances should receive protection under the Act

a. Approach to intelligence information

Intelligence information is excluded from the application of the Act under Section 33 and Section 41. We note our previous concerns with the exclusion of the disclosure of intelligence information in our previous submission to the Senate Committee (26 April 2013). In that submission, we described the changes to the *Wilkie Bill* as being inappropriate. Our opinion remains the same.

The exclusion of intelligence information from "external disclosures" under Sections 33 and 41 remains highly problematic. The procedure created by Sections 33 and 41 is highly restrictive, in the sense that it maintains secrecy of intelligence information, irrespective of its public interest where it might provide evidence of wrongdoing.

The inability of intelligence agency employees to disclose intelligence information which may be in the public interest to legal counsel is concerning. The reason for this is that this may provide a 'road block' to individuals' access to justice. Only a lawyer with an adequate security clearance relative to the intelligence information is permitted to handle disclosures. Subsequently, employees in an intelligence agency would be unable to seek independent legal advice, and must rely on legal advice provided from within the intelligence agency.

Recommendation: The Act requires appropriate balance between the necessity for secrecy in regard to intelligence information and the possibility of intelligence information being genuinely in the public interest.

b. Employment grievances

Blueprint continues to maintain that the purpose the Act is not for an employee to raise personal employment grievances – but rather to disclose wrongdoing in the public interest. However, a blanket harsh statement that explicitly excludes employment grievances might potentially be used by an employer against a whistleblower. In order to seek protection under the Act, a whistleblower's disclosure must be at least partially in the public interest. This is not as high a threshold as 'entirely in the public interest' and strikes a sensible balance without bold statements such as 'employment grievances should be excluded'. This underlines the purpose of the Act but does not give employers a powerful tool to resist a disclosure where perhaps part of the disclosure (although in the public interest) relates to a personal employment grievance.

Recommendation: In order to qualify as a disclosure under the Act, the threshold should be that the disclosure is at least in part in the public interest.

3. The interaction between the Act and other procedures for investigating wrongdoing, including Code of Conduct procedures under the Public Service Act 1999 and the Commonwealth's fraud control framework;

a. An untested Act

The Act has yet to be tested by the judiciary. It is unclear why this is the case. It could in part be due to the fact that the Act is not well promoted. It could be that potential users of the Act have been advised against blowing the whistle – where their legal counsel have advised against its use. Or, perhaps due to the narrow scope of the Act (as it only applies to those in the public sector – and not in the intelligence sector), its potential users are limited by the structure of the legislation. However, it remains the case that in the two years of proper operation, the principles in the Act have not been tested in any meaningful way.

Despite this, it does not diminish the importance of the Act within the overarching framework of employment and anti-corruption law in Australia. In contrast, the fallow/inactiveness of the Act within

the Australian judiciary may be a testament to the functioning and operation of the overall anti corruption framework in Australia. However, one need only to consider the very pubic national security whistleblowing related cases to understand that Australia is not immune from wrongdoing that is suppressed against the public interest. In any event, this enquiry's main thrust should focus on why the Act isn't been used – and examined from both the failure to promote same as well as perhaps the potential that many legal practitioners simply think the provisions are inoperative.
Recommendation: Blueprint recommends the committee to commit further time and research as to why the Act is not used as was foreseen and intended at the time – with a focus on its ease of implementation.

4. Conclusion

Blueprint has expressed above some of the issues that were endemic from the time of its passage, and indeed which are still plaguing the *Public Interest Disclosure Act 2013*. We believe that it is crucial that the scope of the Act is broadened to include the private sector as well as the public sector. Furthermore, the Act requires an intensive and comprehensive education programme, such that those afforded rights and duties under the Act are appropriately communicated to those to whom they apply. Further, Blueprint maintains that the approach to intelligence information should be reconsidered in its entirety. Though we recognise and are aware of the importance of discretion in regard to intelligence information, we are of the opinion that this is where the battleground for public interest is situated. It is also key that any relation to employment grievances be removed from the Act, as such would poison the intent and purpose of the Act.

Blueprint would like to take the opportunity again to thank you for your time in considering our submission and reiterate its enthusiasm in assisting the you further in whatever way it might deem us to be helpful.

Please contact us about this submission or any other matter.

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