

tabled & action
evidence by Mr
Falconer 11/8/09
NHS

3 April 2009

Mr Frank Terenzini MP
Chair, Committee on the Independent Commission Against Corruption
Protection of public sector whistleblower employees
Parliament of New South Wales
SYDNEY NSW 2000

NB: Additional comments in red added by R (Bob) Falconer APM who is appearing before the Committee on 11 August 2009

Dear Mr Frank Terenzini MP

Committee on the Independent Commission Against Corruption Protection of public sector whistleblower employees – Discussion Paper

Background:

As a leading specialist provider of whistleblower hotline services, we at STOPline are aware that achieving acceptable change in both the public and private sector is sometimes a stepped process. We would like to congratulate the Committee on its outcomes and appreciate the opportunity to make a submission during your deliberations.

For the past 7 years STOPline has been supporting public (Commonwealth, State and Local), private and not-for-profit sector clients with independent, impartial and confidential whistleblower services.

Our client base has necessitated the application of Commonwealth legislation (e.g. Public Service Act, Corporations Act, ASIC Act etc) State legislation (e.g. Whistleblowers Protection Act (Vic) 2001) and overseas legislation (e.g. Sarbanes-Oxley Act (USA); Financial Instruments Exchange Law (Japan)) as well as best practice according to Australian Standards AS 8001 "Fraud and corruption control" and AS 8004 "Whistleblower protection programs for entities" in the provision of whistleblowing services.

With clients such as Telstra, Woodside, George Weston Foods, CSL, Toyota, Airservices Australia and Visy we are assisting our clients in aspects of their corporate governance requirements.

With such experience we would like to make the following comments regarding specific proposals contained within the "Discussion Paper".

Proposal 1 (a)

(a) That a Protected Disclosures Unit be established in a suitable oversight body to:

- *Monitor the operational response of public authorities (other than investigating authorities) to the Protected Disclosures Act 1994 (the Act);...*

Discussion:

In paragraph 3.6 (3) of the Discussion Paper “Protection of public sector whistleblower employees”, The NSW Ombudsman’s Office stated...*while some of the larger organisations have the ability to designate and train specific staff to perform protected disclosure type roles, for most organisations the receipt of a protected disclosure is a rare event for which they have no staff who are appropriately trained or experienced....*

In 3.11 the Independent Commission against Corruption stated...*the role of the proposed unit would not be in keeping with current government policy, which requires agencies to take greater responsibility for their corruption prevention activities...*

The difficulty that is highlighted by the Ombudsman in 3.6 is not unique to the NSW Government agencies. The problem is exacerbated by Sec 8 (1) of Part 2 of the Protected Disclosure Act 1994 (the PDA) where there is the requirement for a whistleblower to achieve protection by making a disclosure only:

- *to an investigating authority, or*
- *to the principal officer of a public authority or investigating authority*
...or
- *to:*
 - *another officer of the public authority to which the public official belongs*
 - *an officer of the public authority or investigating authority to which the disclosure relates...*
- *to a Member of Parliament or to a journalist.*

As highlighted at 3.18 of Dr AJ Brown’s “Whistleblowing in the Public Sector”, 97% of employees wish to report internally.

However, the desire for anonymity, perceived lack of confidentiality, lack of trust in management and fear of reprisal are major inhibitors to employees coming forward with legitimate disclosures of improper conduct when reporting avenues are limited to either a fellow employee of the agency or, in most instances a public official of an investigating body.

A 2008 ‘People Matter survey’ by the Victorian State Services Authority reported that:

- *over one-quarter of respondents did not have confidence in the procedures and processes for resolving grievances in their organisation;*
- *and thirty per cent were concerned about the negative consequences of lodging a grievance*

In *'Whistleblowing in the Australian Public Sector'* 2008– edited by Dr AJ Brown (Based upon a three year survey of 6 Universities and 118 public agencies involving 7763 public officials) the research found that 29% of respondents who had observed 'very or extremely serious' wrongdoing had not reported it.

The main reason for non-reporting was;

- a belief that no action would be taken,
- fear of reprisals,
- or that management would not protect them from reprisals (especially where the perceived wrongdoers include managers)

The capacity for agencies of any size to engage a third party to provide and thereby enhance the perceived, if not real confidentiality, impartiality and independence of process is not provided.

The STOPline experience has been that staff within entities often have to handle disclosure management duties as an extraneous appointment, often with little experience and/or training. In to-days work environments there are also high rates of staff mobility, including in these roles. One troublesome result of these issues we encounter is; the lack of confidentiality accorded to the reported misconduct and the identity of the whistleblower.

As a provider of whistleblowing programs in the public sector addressing disclosures inside and outside legislative boundaries, STOPline believes that ultimate flexibility should be provided for agencies to best determine their needs. As such the ICAC reference at 3.11 and stated concern that the current government policy requires agencies to take greater responsibilities for their corruption prevention activities would be satisfied.

Australian Standards 8001-2003 'Fraud and corruption control' and 8004 'Whistleblower protection programs for entities' each provide for reporting unethical or illegal behaviour through;

- (a) normal reporting channels
- (b) outside the normal reporting channels but within the entity; and
- (c) through reporting channels external to the entity

The most recent Griffith University report released in July 2009 *'Whistling while they work – towards best practice whistleblowing programs in public sector organisations'* presents the "first major objective of any whistleblowing program" as "encouragement of reporting" and also emphasises the need for "multiple reporting pathways"

Recommendation:

That the scope of recipients of protected disclosures be expanded to include appropriate persons appointed for that purpose.

(Please refer to Attachment A which highlights current Commonwealth legislation which addresses this issue).

Proposal 1(b):

(b) That the Ombudsman's Office should be responsible for....

- *Coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities; and*
- *Providing advice on internal education programs to public authorities*

Discussion:

As part of the recommended responsibilities of the Ombudsman, the provision of promotional and educational activities should be considered carefully. As with all responsibilities with respect to protected disclosure system, our experience is that it is important that the commitment is and is seen to originate from the senior management of the agency.

In the previously mentioned July 2009 Griffith University publication organisational commitment is nominated as the first of "five fundamental elements of a whistleblowing program".

It is also asserted that senior management need to make "a clear statement in support of reporting wrongdoing and the principal of whistleblowing". Of course they also need to "undertake a credible investigation process and where some wrongdoing or failure has been verified" act upon it.

In other words the senior management of the entity needs to put their own stamp upon the procedures and the process, rather than present it as an imposed and not so desirable requirement from "outside"

Interestingly in the Griffith University three year study of 175 federal, state and local government agencies across Australia (including NSW) they only found five agencies with programs that rated reasonably strong against the basic Australian Standards for whistleblower protection.

In this respect, the promotional and educational strategy should not be imposed but personalised to suit the culture of the individual entity. While the initial awareness and briefing sessions for the protected disclosure system may well be provided by the Ombudsman, we would strongly recommend the direct involvement of the agency in the broader agency promotion rather than a generic "whole of government" approach. As above, "ownership" by the agency is important from the employee viewpoint as such a system should not be seen or perceived as superimposed on the agency by the Ombudsman.

Failure to engage employees and convince them of the legitimacy of the process will not achieve a reduction in improper conduct. It is also our experience that instead of a perhaps "one-off" education program, it is far more effective to engage in an awareness program that is launched within an agency and then continued through ongoing promotional activity, employee induction etc.

Many employees will not be familiar with or may be confused with the legislative requirements if and when they deem it appropriate to make a protected disclosure. There will be disclosures made that will not fit within the legislative framework

although significant in their own right. It is the responsibility of the agency or its nominee, not the whistleblower, for ensuring the rights of the whistleblower are protected and the disclosure is appropriately handled.

Employees need to know that a protected disclosure process exists, not the intricacies of how the process works. If all are aware of the existence of a confidential reporting process, such is a deterrent for someone to engage in improper conduct.

Recommendation:

1. Ensure agencies have “ownership” and the ultimate responsibility for initiating and maintaining awareness of the Protected Disclosures Act within their agency.
2. Do not impose generic “whole of government” promotional activity on individual agencies.
3. Include promotional activity as part of the auditing scope of the Ombudsman.

Proposal 2:

That, pursuant to Section 30 of the Protected Disclosures Act 1994, enforceable regulations on protected disclosures be made requiring public authorities (including local government authorities) to have internal policies that adequately assess and properly deal with protected disclosures, and to provide adequate protection to the person making the disclosure. These protected disclosure regulations should require the internal policies to be consistent with, but necessarily identical to, the NSW Ombudsman’s “Model internal reporting policy for state government agencies” and its “Model Internal Reporting Policy for Councils” as outlined in the NSW Ombudsman’s Protected Disclosure Guidelines, 5th Edition.

Discussion:

While we agree with the Committee’s statement that... *“It is imperative that public sector agencies and local councils take a consistent and robust approach to whistleblowers...(Para 3.22).* It is also imperative that whistleblowers who make disclosures that do not fall within the scope of the legislation, have a consistent and robust approach.

Our experience in the difference between public sector agencies driven by legislation and the private sector whose system is based upon corporate good governance expectations is quite interesting. Legal definitions can be used to rule out a disclosure whereas if an entity established a reporting model based upon any breaches of the company code of conduct it is obviously much more inclusive.

One of two key messages from the recent Griffith University report was that “organisations can and should adopt a policy of ‘when in doubt report’ to encourage the reporting or wrongdoing”.

It is our experience in public sector environments that the objective of many agencies is to satisfy the legislative requirements rather than introduce processes that enable the reporting of a broad range of improper conduct. Whether the disclosure is protected

may well be irrelevant to someone facing continuing sexual harassment. While there may be other avenues to deal with such issues, it is STOPline's experience that 64% of complainants will wish to remain anonymous to the agency while 1 in 4 contacts will involve bullying, sexual harassment or intimidation.

The workplace disruption and disharmony created by this latter type of behaviour is well known and reported upon. The economic cost of bullying was estimated between \$6 billion and \$13 billion after a poll last year by Harmer's Workplace Lawyers.

Federal sex discrimination commissioner, Elizabeth Broderick has commented on a meeting with 10 young women who alleged they had been sexually harassed but only one had reported the matter. The remainder stated they remained silent for fear of recriminations.

The 2008 Victorian State Services Authority '*People Matter*' survey in 2008 reported that over one-third of respondents witnessed harassment or bullying at work and 21 percent personally experienced harassment or bullying within the 12 months prior to the survey.

Any guidelines or internal policies should recognise the needs of the whistleblower and their deep concern with respect to confidentiality, independence and the fear of reprisal and not just the legislative means to achieve protection.

The Committee's review provides an opportunity to address these key issues.

Recommendation:

Ensure that agencies are provided with guidelines that address the full scope of all possible disclosures.

The role of "Anonymity"

The issue of anonymity does not appear to be addressed. It is our experience (64% of complainants) that whistleblowers will seek anonymity for their own protection. Unfortunately there are many instances where the processes are more likely to "shoot the messenger" than "address the message". It is also our experience, that the availability of anonymity does not engender "frivolous" or "vexatious" calls. Conversely, the use of third party providers is a deterrent and filter for such calls whilst providing added protection to legitimate complainants.

Based upon our considerable experience we describe anonymity as "a shield not a mask".

About half of those whistleblowers who wish to remain anonymous to their organisation are willing to identify themselves to us. Their major concern is that if their identity is submitted to their employer then the likelihood of their confidentiality being maintained is very low. And of course most of them are aware of the negative ramifications of being identified as a workplace whistleblower; with or without protective legislation.

A survey by the Australian Compliance Institute in 2004 recorded that 80% of respondents believed employees were more likely to report unethical behaviour if they could do so anonymously.

The recently released Griffith University research report states; “a final key component in encouraging reporting is for the organisation to have credible mechanisms for offering anonymity, backed up by realistic undertakings of confidentiality for reporters”.

In the USA, where hotlines have existed for 20 years their 2009 ‘*Corporate Governance and compliance hotline benchmarking report*’ records that for the calendar years 2004 to 2008 “around half” of all callers reported anonymously.

Recommendation:

That the legislation provide for disclosures under the Act to be able to be made anonymously.

We thank you for the opportunity to make this submission and look forward to discussing these issues with you in the near future.

Yours faithfully

Wayne Bruce
Chief Executive Officer

Attachment A: Current Commonwealth Legislation

Attachment A

Current Commonwealth Legislation

Current Commonwealth legislation which does provide specific inclusion of third parties is:

1. Corporations Act 2001 (Section 1317AA 1 (b) (iv))

"the disclosure is made to:....a person authorised by the company to receive disclosures of that kind;..."

2. Banking Act 1959 (Section 52A (2) (a) (iv))

"a person authorised by the body corporate to receive disclosures of the kind made:"

3. Insurance Act 1973 (Section 38A (2) (a) (iv))

"a person authorised by the body corporate to receive disclosures of the kind made:"

4. Life Insurance Act 1995 (Section 156A (2) (a) (v))

"a person authorised by the life company to receive disclosures of the kind made:"

5. Superannuation Industry (Supervision) Act 1993 (Section 336A (2) (a) (iv))

"a person authorised by the trustee or trustees of the superannuation entity to receive disclosures of the kind made:"