

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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Submission to: Protection of public sector whistleblower employees
*on the effectiveness of current laws, practices and procedures in protecting
whistleblower employees who make allegations against government officials and
members of Parliament.*

Background

The MCA and its members have regularly submitted to this series of Parliamentary Inquiries, most recently in 2006. We regret to report from our experience that our conclusion is that

There is no protection for public sector whistleblower employees

It is not only that our constituents who have tried to use protective legislation have received nothing but career destruction but that we have yet to read or even hear anecdotally of a single case where the whistleblower has seen an equitable outcome and the villains punished.

Maybe the happy outcomes don't make the press. If that is so, then it defeats the purposes of the legislation for many are in agreement with Lord Hewart's dictum that "Justice must be seen to be done". For decades we've seen no justice being done. Only the naïve or foolhardy would risk their careers and domestic lives relying on NSW protective legislation.

One reason why people continue to bring so-called "industrial disputes" and "personal grievances" to your Committee is that they have no where else to go. For these people the matters are serious. They lose their careers, reputations, fortunes, and often their family lives. There have even been suicides.

Rather than re-hash our previous submissions we draw to the Committee's attention some of the issues arising from the 2006 inquiry:

Recommendation 5 *The Parliamentary Committee recommends that Part 2 of the Protected Disclosures Act 1994 be amended so as to protect a disclosure where the public official has an honest belief on reasonable grounds that it is true*

MCA was startled by the proposition put forward in the public hearing in 2006 by the Committee chairman that "These matters must play out in the courts". Probably the biggest failing in the current system is that government departments have unlimited access to the public purse for \$10,000 per day legal teams. They would rather spend \$1,000,000 in legal fees than concede anything through transfer, conciliation or any other remedies costing far less. The NSW Deputy Ombudsman revealed the motive to the Committee in 2006 "...There have been numerous court cases since then that

relate to disclosures. The money involved is huge. Anything that can be done to try to reduce the chances of that sort of cost is, I think, well worth it.”

This logic makes departments think they have a mandate to fight whistleblowers no matter what the costs. Yet NSW government departments are obliged by Premier’s policies to act as ‘model employers’. Moreover, even when a government department allows itself to feel ‘forced’ to litigate to ‘defend itself’, the courts oblige it to act as a ‘model litigant’. These judgments are reviewed in Moline and Comcare¹

The Federal Attorney-General has issued guidelines to Commonwealth departments, including the following: *“endeavouring to avoid litigation, wherever possible ... where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by ... not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and ... not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum ... not taking advantage of a claimant who lacks the resources to litigate a legitimate claim ... not relying on technical defences”*².

All this seems the opposite to the practices our members have experienced and those cases reported in the press.

Without legal reform or at least alternatives to courts, the legislation is nothing more than a ‘whistleblowers entrapment act’.

Recommendation 8 *The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to require each public authority and investigating authority to adequately assess and properly deal with a protected disclosure.*

Of course, if simpler remedies had been implemented at the start many might never have become legal “cases”. The absence of a Public Service Board and failure of Premiers’ Department to facilitate transfer provisions leaves the whistleblower facing a series of perfunctory, doomed interviews as a ‘displaced’ worker. We know of cases with multiple masters and even a PhD³ refused transfer as ‘untrainable’. Departments have unlimited discretion to deny mobility to whistleblowers. Commonly they are left sitting idle or given menial work in violation of all of the Premiers’ policies.

Desktop investigations by investigating authorities are fraudulent. Often the whistleblower sends an outline of the complaint, offering to back it up in detail with voluminous material (which can often be boxes of documents). Usually the offer is ignored and the complaint ‘dismissed’ with the key evidence never being viewed. Only public hearings in which the whistleblower has the chance to attract some public attention can keep officials on their toes. It has long been seen that checks and balances are the only safeguard:

"Those who defend the system of departmental decision, without reasons given, without the possibility of appeal, and behind the back of the other party, are heard

¹ [2003] AATA 827 (25 August 2003)

² http://www.ag.gov.au/Archived/agd/olsc/Legal_Services_Directions.htm#AppendixB

³ These were Australian qualifications, not obscure overseas degrees

from time to time to say that it is cheap. Yet it may be much too dear at the price. “ (Lord Hewart, New Despotism, 1929 p157).

The ‘active ingredient’ of public exposure is clearly acknowledged in the Act itself by Sec 19 “Disclosure to a member of Parliament or journalist”.

Recommendation 9 *establishment of a Protected Disclosures Unit within the Office of the Ombudsman, (e) to monitor the operational response of public authorities (other than investigating authorities) to the Act*

Recommendation 11 *The absence of a statistical base has been a central weakness in the implementation of the Protected Disclosures scheme to date*

The main things that need to be monitored and made public are

- outcomes for the public – whether corrupt practices have been stopped, monies saved or recovered, maladministrations restructured.
- outcomes for offenders – whether any disciplinary actions or sanctions have been taken when gross violations have been exposed
- outcomes for whistleblowers –ie- continuous follow-up as to whether they have been transferred, bankrupted, forced into court cases, committed suicide etc.

MCA fears that the proposed unit will only adopt a ‘bean counting’ role –ie- number of complaints received, number dismissed etc. The public will have no way of knowing what actually happened. If, however, they knew that the same department was again in the headlines and they could track the whistleblower’s movement through the public service they would have a better view of actual outcomes.

There are privacy concerns but there should be a mechanism whereby journalists can follow up cases without a court action. By this we mean verified contact, not some bureaucrat merely stating that the whistleblower’s case had been satisfactorily resolved.

The terms of reference applicable to submissions to Committees under the Act serve to keep parliamentarians all but ignorant of actual case details and so form a central part of machinery that disadvantages and silences whistleblowers.

The subsequent time taken for any application of due process in a case also has a negative effect for whistleblowers and may allow a cover-up mentality within an organisation to form, spread, and consolidate. As one whistleblower reported, when attempting to gauge the impact within an office as the matter proceeded, the response from a work colleague was: “Look I can’t get involved or even express a view – I have a wife and children to support and I need this job”.

As positions are taken the corruption/negligence that was the causation for blowing the whistle affects staff well beyond the person who made the protected disclosure,

and the stakes for others become progressively raised. Such realities are ignored by the current legislation.

Typically as an organisation moves to damage control, the person at the centre of the disclosure is removed or isolated, so becoming an object lesson for other staff on the fringes of the event. The path to bullying is opened up. With tenure being largely a thing of the past and more use of temporary positions, staff turnover acts to partly remove from corporate memory clear knowledge of the event. However this process also tends to leave in place a more oppressive management style than before which forms an environment that then aids the progress of corporate psychopaths. Under such conditions the scope for staff having the freedom to provide honest professional advice to management on matters relating to the core business of the organisation can be much reduced. Being a good employee is reduced to being positive, certainly never expressing a view that could be seen as being in opposition to the ruling management, whatever the technical and business realities. The cost to the public purse of allowing public sector organisations to run in this manner must today be massive.

With no machinery for the honest collection of case details the truth never gets into the sunshine, while in the courts ‘money rules’ and so due process even if attempted is quite incapable of addressing the problems.

Recommendation 12 *The Parliamentary Committee agrees in principle that the Protected Disclosures Act 1994 should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action in reprisal*

The right to seek damages clearly implies court actions. Given the extortionate and inflationary costs of the legal system in NSW this ‘right’ is nothing but a trap for the naïve. Whistleblowers will more likely end up bankrupted. The departments will then trumpet the failed court action as ‘proof’ that their senior staff have been ‘fully exonerated’. This is a recipe for disaster. The only fair way to exercise such rights would have to be through a fully-subsidised system that offered the checks and balances of a court but had no downside risk whatsoever to whistleblowers. Currently, even the Human Rights jurisdictions are capable of bankrupting whistleblowers seeking to enforce their so-called rights against \$10,000 a day legal teams. Little has changed since Charles Dickens’ description of a system which gives “*monied might the means abundantly of wearying out the right.*”

Recommendation 13 *The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended so as to authorise a person who has made a protected disclosure (or a public authority or investigating authority on behalf of such a person) to apply for an injunction against the making of a reprisal.*

This recommendation suffers from its generality given the way that reprisals are conducted. In many cases, what whistleblowers seek is not tangible enough for an injunction. Often it is a matter of affirmative action rather than ‘stopping’ something.

If they are being shuffled around ‘displaced’ from one doomed ‘priority interview’ to another or being left to rot at a desk with meaningless or no duties – what form would the injunction take? –ie- “Give this person the next job that becomes available.”“Immediately give this person meaningful duties.” ...? Departments would rather

spend millions than accede to such injunctions. They will come up with any excuse: “over-qualified ... under-qualified ... no recent experience ... no referee from current supervisors ...etc”.

The sentiment is correct. But what is needed to accompany this is some sort of authority for the aggrieved to demand that the Police and DPP also do their jobs and prosecute the gross white collar crimes such as perjury which usually follow a blown whistle. At present the Police have unlimited discretion to merely claim “low priority” to avoid any embarrassing investigations and prosecutions.

An injunction could be constructed similar to that for Apprehended Violence Orders under the Crimes (Domestic and Personal Violence) Act 2007. Reprisal clearly falls within the ambit of ‘offence’ in terms of the Protected Disclosures Act Sec 20. A variation of the AVO could be used to at least force a separation of the parties –ie- the victim given a transfer arrangement or the bully stood down.

Where such an injunction could be used most powerfully in the public interest, however, is to prevent the departments’ immediate grab for the holster to pay legal teams. It could be made a serious offence to bypass policy and normal remedies and instead to resort to legal hired guns to deal with a whistleblower. The crime would also have to apply to lawyers on this gravy train. At the moment they hide behind all sorts of legal privilege arguments which appeal to judges whenever anyone dares to point out that this law should apply to all.

There is ample precedent for this. The Legal Profession Act 2004 - Sect 345 obliges: *“A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.”*

This should not be interpreted as meaning that if the highly-paid legal team believe they can win or argue that this gets around the need to follow Premier’s policy. Rather, a re-wording similar to this logic should be to the effect that all internal mechanisms have been exhausted. Mere say-so by the department would be laughable. The onus of proof should be on the department to show publicly that they have not merely considered but actually transferred the person to meaningful duties, separated the parties, and followed relevant policies. Departments will of course abuse this, lie and do everything to make it seem that they have done so.

Indeed, this ought to be already covered by the Protected Disclosures Act Sec 20 (1A) *“In any proceedings for an offence against this section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure”.*

But we have seen no enforcement of this. Injunctions under Sec 20 could be a powerful tool for the public interest against the powerful ‘lawyer-government complex’.

Assuming the Police and DPP could be talked into doing their jobs enforcing white collar crime statutes, it would force departments to come to the table with realistic

proposals. There is nothing radical about such a proposal. If reprisal is deemed illegal it follows that there must be a means of forcing it to cease.

Governments have had to resort to 'follow the money trail' strategies to deal with organised crime. Lawyers have always been the most potent 'soldiers' in the Mafia's arsenal. Crimes within the government need a similar approach. Departments are not persons. They have no 'right' to defend themselves against the public. Lawyer fighting whistleblower is merely theft from the public purse and should be treated as such.

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