Submission No 17

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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Submission to the New South Wales Parliamentary Committee on the Independent Commission Against Corruption

Inquiry into the protection of public sector whistleblower employees

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

CCL appreciates the invitation to file a submission to the Committee on ICAC. Whistleblowing is an important aspect of any democratic government. It holds leaders and public servants accountable, and protecting it makes it clear that corruption, serious maladministration, serious and substantial waste of resources and other serious misconduct such as actions which set the public at risk, breach of public trust, or which risk damage to the environment will not be tolerated.[1] These protections are especially necessary when such misconduct can harm human rights and degrade governmental response to civil liberties claims in Australia.

Background

It is vital that employees of governmental organizations feel free to report on serious misconduct by the powerful men and women with whom they work. Information that exposes fraud, corruption, or gross incompetence needs to be revealed for the sake of well-functioning government, and can provide 'an invaluable early warning system for management about problems that, if unaddressed, can sometimes reach catastrophic proportions'.[2] But the exposure of these facts can subject the whistleblower to condemnation, reprisal, and legal consequences. In 1997, the *Queensland Whistleblower*

[1] In what follows, we will refer to all of these kinds of bad practice as serious misconduct. Following the Protected Disclosures Act 1994 subsection 11(2), we take maladministration to include action or inaction of a serious nature that is contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, or based wholly or partly on improper motives.

[2] Barbour, Bruce A., *Annual Report of the New South Wales Ombudsman 2004-2005*, p.133.

Study found that 71 percent of whistleblowers suffered official reprisals, and 94 percent suffered unofficial reprisals. This is unacceptable.

The corruption-free running of the various branches of government is not merely important for the integrity of the system, but because of the impact of serious misconduct upon society at large, or as with the AWB and Abu Ghraib scandals, upon the world.

The Situation

Australian common law has not been accommodating to whistleblower protections, finding the implied duty of trust between an employer and his employees to be more valuable to the functioning of the law than the right of an employee to disclose confidential or even non-confidential information about the workplace. These common law duties were held to exist in the public sector as well as in the private sector. This common law interpretation, combined with a culture in which whistleblowing is treated as disloyalty, ha meant that employees faced harsh repercussions for exposing illegal or illegitimate practices by their organisation.

It is important, therefore, that whistleblowers are protected by legislation, and do not have to rely upon the goodwill of their superiors or the practice of their departments.

In the late 1980s and early 1990s, there were highly publicized corruption inquiries that made political whistleblowing a national issue. In 1989, the Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Commission) exposed the difficulties of disclosing significant anti-corruption information. The Commission found an urgent need for protection from reprisal in legislative form. Since then, every state and the ACT have adopted some form of whistleblower protection for the public sector. The legislation, however, differs significantly from state to state. New South Wales has in place significant protections of public employees, but in our view, those protections should be extended.

Summary of recommendations[3]

Recommendation 1. That the protection offered by the Protected Disclosures Act (the Act) be extended to include persons with contracts with the State and their employees, to consultants and to staff members of politicians.

Recommendation 2. That protection be provided for internal whistleblowing over misbehaviour that is not classed as serious.

[3] These recommendations draw to a considerable extent on the discussion in the NSW Ombudsman's Issues Paper *The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, NSW Government Publication, April 2004.

Recommendation 3. That subsection 14 (2) of the Act be amended to include protection of disclosures of conduct creating risk to public health and safety or damage to the environment.

Recommendation 4. That the Act be amended to make specific provision for disclosures to be made anonymously.

Recommendation 5. That subsection 16 (2) or the Act (which allows an authority to determine that a disclosure is vexatious and thereby remove the protection whistleblowers are given by the Act) should be repealed.

Recommendation 6. That the Act be amended to oblige CEOs, senior managers or employers to protect whistleblowers, and, subject to their wishes, to obtain alternative employment within their existing agencies or in another agency.

Recommendation 7. That the Act be amended to allow a whistleblower to seek an injunction or an order by a court to restrain breaches of the Act.

Recommendation 8. That the Act be amended to require whistleblowers who have been the subject of reprisals to be compensated by the employer or the government.

Recommendation 9. That the Act be amended to permit whistleblowers to take civil action for damages against those who engage in reprisals for their whistleblowing.

Recommendation 10. That the Act be amended to require CEOs, senior managers or employers to investigate disclosures, and to inform whistleblowers of the outcome of these investigations.

Recommendation 11. That the Act be amended to ensure that whistleblowers are offered the opportunity, should they desire it, to relocate within or between agencies.

Recommendation 12. That the Act be amended to remove the provision that protection is only provided for disclosures to members of parliament or to journalists if the disclosures are substantially true. It should be sufficient that the person making the disclosure has reasonable grounds for believing that the disclosure is substantially true.

Who should be protected: the scope of the Act

In most other Australian jurisdictions, protection is offered to anybody who makes disclosures about misconduct, including private citizens. However, the NSW Act restricts protection to public officials. (Section 8.)

Because unchecked misconduct in any area is likely to spread and to get worse, and because the discovery of misconduct may be made by any person who deals with or is involved in public administration, the Parliament should provide protection, not only to whistleblowers in the public service, but also to independent contractors doing business

with government (and to their employees), to consultants used by government agencies or by members of parliament, and to staff members of members of parliament. The distinctions between a government employee, independent contractor, or personal consultant are not relevant when a person is aware of serious misconduct. Whistleblowers of all kinds must be free to expose wrongdoing, and the Parliament should extend protection to all those in a position to do it.

Recommendation 1. That the protection offered by the Protected Disclosures Act (the Act) be extended to include persons with contracts with the State and their employees, to consultants and to staff members of politicians.

Whistleblowers provide a valuable function of providing information about illegal or illegitimate behaviour. A culture in which minor misdeeds are performed routinely may lead to more serious wrongs, especially where there is a culture of silence. There should be means by which such minor misdeeds as well as serious ones can be reported and discussed within the public service and to the oversight bodies without fear of reprisal.

Recommendation 2. That protection be provided for internal whistleblowing over misbehaviour that is not classed as serious.

In most other Australian states, protection is offered to public servants and others who disclose actions which create risks to public health and safety or which threaten environmental damage. The absence of protection for disclosures concerning risks to the public is striking, especially in view of the notorious history of failures by private industry to respond appropriately to persons raising concerns about such matters.

Recommendation 3. That subsection 14 (2) of the Act be amended to include protection of disclosures of conduct creating risk to public health and safety or damage to the environment.

What protections should be given?

Specific provision should be made to protect anonymity. (At the moment this is merely implied.) Whistleblowers must be allowed to report information without their names being exposed. This can be implemented through several schemes, which include facilitating the provision of information anonymously, exclusion of the whistleblower's identity as a subject of investigation, and imposing a duty on the recipient of the information not to reveal the whistleblower's identity. Although absolute anonymity cannot be ensured in every case, the investigating authorities should strive to maintain the anonymity for as long as possible.

Recommendation 4. That the Act be amended to make specific provision for disclosures to be made anonymously.

Subsection 16 (2) should be removed. A whistleblower who in good faith makes a disclosure should not be subjected to reprisals, even if someone else thinks that the matter

was raised vexatiously. It is, indeed, a common response to whistleblowers that their efforts are treated as vexatious, even when very serious matters are raised. For misconduct often occurs within a culture where it is taken for granted, and any action against it is likely to be seen as vexatious.

Recommendation 5. That subsection 16 (2) or the Act (which allows an authority to determine that a disclosure is vexatious and thereby remove the protection whistleblowers are given by the Act) should be repealed.

The act does not provide obligations on senior managers, employers or CEOs to protect whistleblowers. Indeed, it does not oblige them to do anything besides informing the whistleblower within six months of what they have decided to do.[4] Indeed, the Act in subsections 16 (1) and (3) permits authorities to decline to investigate at all. Moreover, under subsection (2), the protection given by the Act is removed if the investigating authority considers the disclosure is made frivolously or vexatiously.

This is unsatisfactory. Whistleblowers perform an important public service. But people take risks when they blow the whistle—their working lives can be made miserable, and they may find it hard to obtain alternative employment. There should at least be an obligation on employers, CEOs or senior managers top investigate disclosures and to protect whistleblowers, and to provide the opportunity for the whistleblower to move to a different job within the agency or in another agency.

Recommendation 6. That the Act be amended to oblige CEOs, senior managers or employers to protect whistleblowers, and, subject to their wishes, to obtain alternative employment within their existing agencies or in another agency.

Recommendation 7. That the Act be amended to allow a whistleblower to seek an injunction or an order by a court to restrain breaches of the Act.

Compensation for reprisals

Financial security must be ensured. In the United States, under the False Claims Act, a whistleblower is to be given 'all the relief necessary to make the employee whole', which can include reinstatement, back pay, litigation costs, and attorney's fees. In Australia, clause 1317AC of the Corporations Act makes causing a detriment or threatening to cause a detriment to whistleblowers an offence, and clause 1317AD provides for compensation to people so harmed.

Of particular importance here is the right of whistleblowers to sue for damages where they have been subject to reprisals. NSW is the only state in which this legal right has not been provided for.

[4] This is less likely to be a problem when the disclosure is made to an investigating authority such as the Ombudsman or the Police Integrity Commission.

Recommendation 8. That the Act be amended to require whistleblowers who have been the subject of reprisals to be compensated by the employer or the government.

Recommendation 9. That the Act be amended to permit whistleblowers to take civil action for damages against those who engage in reprisals for their whistleblowing.

Recommendation 10. That the Act be amended to require CEOs, senior managers or employers to investigate disclosures, and to inform whistleblowers of the outcome of these investigations.

Recommendation 11. That the Act be amended to ensure that whistleblowers are offered the opportunity, should they desire it, to relocate within or between agencies.

External Whistleblowing

The Act protects persons who make disclosures to members of parliament and to journalists provided that certain conditions are met (including that essentially the same disclosure has been made to an authority and the authority has failed in one of four respects) (section 19). The conditions however include both that the whistleblower must have reasonable grounds for believing that the disclosure is true (subsection (4)) and that the disclosure must be substantially true (subsection (5)). CCL believes that the first of these should be sufficient. The second sets the barrier unreasonably high.

Recommendation 12. That the Act be amended to remove the provision that protection is only provided for disclosures to members of parliament or to journalists if the disclosures are substantially true. It should be sufficient that the person making the disclosure has reasonable grounds for believing that the disclosure is substantially true

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