Submission No 45

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

Organisation:

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Protected Disclosure under the Protected Disclosures Act

Response to: Protection of public sector whistleblower employees

Discussion Paper
Report No. 5/54 – March 2009

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Background

I prepared a submission and gave evidence at the hearings in 2006 on this matter both as an individual and as Vice-President of the Medical Consumers Association. Because the membership of the Parliamentary Committee has changed, I have attached my recommendations from the earlier submission.

Issue of concern: focus on supposed "vexatious'' and ''frivolous'' complaints

I am particularly dismayed by the focus on supposed vexatious'' and ''frivolous'' complaints,

PROPOSAL 13: That the Protected Disclosures Act 1994 be amended to include definitions for ''vexatious'' and ''frivolous'' complaints, as provided for in section 16 of the Act, to enable agencies to more easily identify complaints that are not eligible for protection

There is no demonstrated need for any provision whatsoever against supposed ''vexatious'' and ''frivolous'' complaints as I believe their frequency has been exaggerated and in large part contrived by definitions. It is illogical to believe that even a genuinely frivolous disclosure would accomplish anything for a foolish or vexatious complainant. All they would have achieved would be to irritate their fellow departmental staff and managers. The supposed waste of time investigating is a 'straw man' argument as departments are supposed to investigate employee complaints whether protected or not.

The notion that whistleblowers could somehow abuse the Act and run off to contact the media is ridiculous. We have seen numerous cases of parliamentarians and journalists being 'burned' by not checking their facts. Journalists have no protection from the Act so would be reckless to act on received disclosures without corroboration.

If drafted poorly, these definitions and procedures will open a loophole for the departments that will make the Act entirely worthless to the point of being an entrapment. If the departments have any say at all in interpreting these, they will invariably never find a case they can see as being of genuine public interest. They

can always find some ‘personal’ element in any complaint. They will use their own lack of investigation as supposed evidence that the complaint was unsubstantiated. This is their normal practice. Indeed, I challenge the Committee to show the public a successful whistleblowing outcome in NSW.

On the other hand the whistleblower who fails the test is now doubly trapped by having ‘played their hand’. I believe a flawed Act will only increase return of whistleblowers to the former system of leaks directly to journalists, bypassing the ‘entrapment act’ which would identify them. That means that the first that ministers are likely to hear about problems ‘on their watch’ will be in the newspapers.

All hypothetical examples cited in the Discussion Paper were from the departments although there was a footnote: *“Dr Peter Bowden told the Committee that up to 50% or 60% of whistleblowers approaching Whistleblowers Australia have complaints relating to personal grievance issues.”* This figure should not be extrapolated to internal reporting as Whistleblowers Australia is a private organisation to which people turn and which could not retaliate against those making inappropriate grievances. Making a Protected Disclosure is a very different act from attending a community support group meeting.

No corroborated examples were given of supposed personal grievances. Undoubtedly there will be some degree of so-called personal grievance in most whistleblowing but if these people are public servants it is public money and efficiency that is being lost when these disputes reach the level that someone resorts to a grievance let alone a protected disclosure. Employees ought to be able to report so-called ‘personal’ matters that affect their work.

A test as to whether something is ‘personal’ is to ask whether it could possibly have arisen other than through the person’s employment. For example, my own original protected disclosures were on the subject of psychosurgery. I had been officially appointed to investigate such. I had assessed such patients in the teaching hospitals. Nothing about this could be attributed to any personal grievance of mine as in my personal life the subject of psychosurgery would never have arisen. Indeed, some years after my report had been suppressed subsequent Ministers for Health from both political parties publicly described the suppression as a “cover up”.

Even if there were solely personal issues raised these ought to sort themselves out merely by requiring protected disclosures to nominate the public interests that are being claimed. Workplace grievances by public servants are rarely ‘personal’ as they would not occur if the person were not a public servant. Even with hypothetical petty personal workplace disputes at the very least there is the waste associated with the salaries of the persons involved and the strong possibility that the dispute arose over a work issue which, by definition, must involve some government money or service. One thing the Act prevents is disputants wasting vastly more time and money threatening each other with dismissals and lawsuits.

If a hypothetical complainant took a truly petty personal issue to a journalist or parliamentarian those persons would then bear the risk if they took it further and would very likely not proceed as journalists or parliamentarians, of all people, must appeal to the public interest directly and get nowhere peddling petty stories.

Issue: Compensation

The Committee has paraphrased Cynthia Kardell's Whistleblowers Australia submission to the point of distortion on page 33 of the Discussion Paper. She is speaking in the abstract and is not claiming that there is any evidence for the existence of vexatious and frivolous complaints. She is most certainly not endorsing a position that anyone who subsequently seeks compensation should be exempt from protection. Indeed, she has called for an assumption of public interest.

It would be disastrous to the object of the Act to contaminate it with the compensation issue as courts invariably turn to monetary compensation as their only option in reaching a settlement.

Issue: Lack of Follow-Up

I note with dismay that the Committee has made no reference to the well-publicized aftermath of some of the cases cited in the Discussion Paper. Worse, the Committee appears to be giving sympathy and credibility to the views of some of the departments in question and thereby trivializing the actual outcome to the whistleblowers.

As a prime example of the Committee relying on departmental views rather than looking at the experience of the whistleblowers I refer to the UNSW case referred to as "the professor of medicine case" on page 36 in the Discussion Paper. This case was only mentioned in the context of confidentiality and reporting time. The Committee should be looking at the actual outcome of such cases.

Recommendations

Register of Protected Disclosures – The Public Sector Management Act Section 14 should be amended to make management of Protected Disclosures and kindred internal and external investigations as a specified responsibility of the Premier's Department and Department Heads. This is merely a logical extension to current equal employment opportunity provisions: "The Government's commitment to equal employment opportunity in the Public Sector has been reinforced by the inclusion of equitable staff management as a specified responsibility of Department Heads under section 14 of the Public Sector Employment and Management Act 2002. Section 14(3) reads: 'A Department Head is responsible for the equitable management of staff of the Department.' Chief Executives of all NSW Public Sector agencies are encouraged to be proactive in regard to this accountability". [5]

The Premiers Department or Public Employment Office should circulate the PD register at least annually, with a report on the nature of supposed investigations carried out, the employment status of persons who have made PDs, including HealthQuest and other medical assessments, and jobs and transfers for which they have applied and been refused. The Department Head should be required to review the register against names of persons currently serving in their organisation and report back. In keeping with the objects of the PD Act, some components of the register, or at least a version without names, should be available to at least members of Parliament and journalists and possibly the public at large.

In cases in which transfer, redeployment, or promotion have been denied, full details must be made available of the qualifications, status, and experience of those appointed in their stead. Under the PD Act and Premier's Policy[6], the onus of proof is on the employer or even prospective employers to show that these are not a reprisal. Thus, it

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[5] Office of the Director of Equal Opportunity in Public Employment. (2003) CEO leadership of EEO in the NSW Public Sector. New legislation - CEOs & equitable staff management

[6] Memorandum No. 96-5managing Displaced Employees. Procedures For Managing Potentially Displaced, Displaced And Excess Permanent Employees And Displaced Long Term Temporary Employees

is already a part of department heads' responsibilities. The Premier's or Auditor-General's Department needs to audit compliance with this register. Possibly random audits could be carried out, depending on the volume involved.

If the audit reveals a cover up and/or abuse of medical services such as HealthQuest, this needs to attract criminal penalties as essentially it is a violation of the Crimes Act[7], which makes it an indictable offence "to issue an instrument whereby any person may be prejudicially affected, issues the instrument for an improper purpose knowing it to be false in a material particular". This is liable to imprisonment for 5 years. The Crimes Act also covers collusion by underlings because, as an indictable offence, mere knowledge or belief that someone else has committed such an offence or even "fails without reasonable excuse" to report "information which might be of material assistance" subject to a 2 year sentence. If there is "any benefit" derived from such concealment that person becomes liable to imprisonment for 5 years[8].

On paper, there are extremely harsh penalties for public servants who misuse their authority to try and discredit a whistleblower or complainant. In practise, there is no enforcement.

Redeployment of PD users Detriment to whistleblowers is invariably industrial. Pressure from the media and parliament to cut the public service provides management with perfect excuses to illegally carry out reprisal against whistleblowers through restructure. However preposterous, management is usually believed when they say they have only taken "reasonable action … with respect to transfer, demotion, promotion, performance, appraisal, discipline, retrenchment or dismissal of workers"[9] They are free to use this umbrella even when their department is being justifiably smeared as incompetent across the pages of the NSW press. Indeed, in their public sector silo, they know that the hue & cry will only make their positions more secure by giving them more positions to cut to silence their critics.

There are ample existing policies which uniformly condemn such action. For example, restructure policy requires that "all staff, including part-time, casual and temporary staff be treated equitably in re-structuring ..Requires documentation and rationale of all decisions ie transparency Provides for a right of review of any decision under the policy .. Provides for monitoring and periodic review of the policy in terms of any adverse impact on EEO groups." [10] Displacement is supposed to be only a transition phase of a restructure: "Excess staff are redeployed to fill skill gaps wherever possible It is increasingly important that every effort is made to use existing skills and develop skills of those requiring redeployment."[11]

Under the Public Sector Employment and Management Act, a Department Head is delegated to approve dispensing with the services of an excess person only in a Voluntary Redundancy situation. Otherwise, it must be approved by the Department Head's Minister and reductions in salary can only apply if "The employee has been formally declared excess and has been placed on salary maintenance for more than 12

[7] Crimes Act Sec 337 False instruments issued by public officers
[8] Crimes Act Sec 316 Concealing serious indictable offence
[9] in the terms of the Workers' Compensation Act 1987 Sec 11 A (1)
[10] Office of the Director of Equal Employment Opportunity in Public Employment Draft equity standards - Restructuring
[11] NSW Public Sector Workforce Planning Strategic Framework And Action Plan

months; Redeployment to substantive salary/ grade has not been possible; and The employee has been undertaking meaningful work at a lower grade and will continue to do so" [12].

"Displaced employees who are excess are considered before other applicants for advertised vacancies against the criteria of whether the employee: meets the essential requirements for the position/job; and/or can perform adequately or is likely to perform adequately in the position/job in a reasonable period of time, given access to appropriate training. The onus is on the selecting organisation to show why the excess employee cannot meet the criteria." [13]

Meeting the onus of proof needs to require more than the mere say so of managers. At present managers can make up any story and it is then up to the victim to take legal action. The common strategy to displace a well-qualified whistleblower is to let someone else act in those duties while leaving the whistleblower idle. The manager then hires the acting officer on the grounds that they have more experience and documented 'achievement'.

Premiers Department policy clearly acknowledges potential for such abuses: "Over-reliance on the interview alone is discouraged. … All assessment processes used – applications, reference checks, employment tests and interviews need to be validated using standard validation techniques. … Departments need to look beyond the attributes of the present or previous incumbent in specifying the knowledge and experience needed as key selection criteria for a position. This will ensure consideration of a wider range of applicants as suitable and prevent bias towards an acting incumbent.". .[14]

Thus there is ample existing policy and legislation to prevent abuse but it is never enforced. The press assists managers in reprisal of displaced whistleblowers by portraying displaced public servants as idle due to obsolete skills. This makes them easy targets.

Enforcement of existing legislation – The Ombudsman's and ICAC Acts must be reviewed so that 'industrial issues' are not a bar to investigation. Schedule 1 of the Ombudsman's Act[15] and Sec 94 of the ICAC Act[16] seem to provide for this already but in practice investigations are only carried out in a tiny (1%) number of cases, so

[12] Public Sector Employment and Management Act. Sec 56; New South Wales Premier's Department Manual of Delegations to Department Heads Sydney: Premier's Department, 2004

[13] Memorandum No. 96-5managing Displaced Employees. Procedures For Managing Potentially Displaced, Displaced And Excess Permanent Employees And Displaced Long Term Temporary Employees

[14] NSW Premier's Department Personnel Handbook, Chapter 5

[15] "Excluded conduct of public authorities includes Conduct of a public authority relating to: 12 (a) the appointment or employment of a person as an officer or employee, and (b) matters affecting a person as an officer or employee, unless the conduct: (c) arises from the making of a protected disclosure ..or (d) relates to a reportable allegation .. or to the inappropriate handling or response to such an allegation or conviction"

[16] 94 (1) "An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Commission is guilty of an indictable offence. ..(3) In any proceedings for an offence against this section, it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned ..".

the protection is effectively worse than useless as it gives departments a chance to claim a declined investigation as an 'exoneration'.

This 'industrial' loophole must be forcefully slammed shut. At the moment, this loophole has allowed the proliferation of 'consultants' paid by departments to conduct supposedly independent investigations[17]. The Internal Audit Bureau has moved to fill this void. The IAB is totally inadequate to the point of being dangerous. No feedback is given to informants to see if their information has been faithfully recorded or summarized. The final IAB reports are not even shown to complainants. Thus departments are free to completely misquote or distort the supposed findings. As an example, the Committee should review the net outcome of the highly-publicized example of the UNSW inquiry. Dr Norman Swan said of it: 'I will never do a case of scientific fraud ever again. ... And the reason for that is just the failure of institutional responses. If the University of NSW can get away with something like this – what is the point?"[18]

The Protected Disclosures Act in itself is not the bottleneck. It is the related legislation such as the bars in the Ombudsman's and ICAC Act against involvement in so-called 'industrial' issues. The unlimited discretion to decline investigation in the Ombudsman's, ICAC, Health Care Complaints, Legal Practitioners, Police and Crimes Acts do not allow for effective prosecution or even deterrent for white collar crime.

The PD Act itself has at least provided welcome respite from the defamation plague in NSW[19]. Wording of the Act is clear and strong to the point of being unusual in reversing onus of proof: "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."

The problem is that this is not enforced in practice and there is no appropriate enforcement mechanism. Correspondence received from the Premiers Department and Police show the confusion that arises when PD matters are brought to the attention of authorities. The Police and Attorney-General have unlimited discretion and numerous stock excuses for avoiding prosecution of white collar crime. They pass the buck back and forth, as had been noted by the Slattery Royal Commission. The whistleblower ends up making a statement at the local police station.

Reprisal is invariably industrial –ie- the whistleblower is restructured or put up on contrived 'performance' or even disciplinary charges. The Ombudsman and ICAC refuse to investigate on grounds of it being an industrial or management issue. This leaves it open for the bureaucracy to conduct its own bogus internal so-called inquiry. There are no protections in these internal inquiries or rules about evidence. Witnesses can be called or ignored selectively to support a pre-ordained conclusion.

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[17] We draw attention to former Premier Wran's comment that these proliferating investigative bodies were in danger of "disappearing up their own fundamental orifice investigating each other"

[18] What happens to the Whistleblowers? ABC The Science Show. Saturday 3 September 2005

[19] Newcity, M, "The Sociology of Defamation in Australia and the United States", 26 Texas Int'l L J (1991), 1-69 http://www.presscouncil.org.au/pcsite/fop/auspres.html#defam6. Slee, John. Doctors sue when doubts are raised. Sydney Morning Herald 11 January, 1991 Slee, John. Sydney as World Libel Capital 15 December 1989 Sydney Morning Herald..

Most fatal to enforcement is that reprisal is carried out by a 'culture' rather than by specific individuals. Often, the persons who were the subject of the PD have moved on. The reprisal which eventually brings down the whistleblower is carried out by a completely different set of persons who may not have even known anything about the whistleblower, let alone the PD. All they need know is that this is a person who has been given a 'kiss of death'- they have broken *Omerta*, the code of silence, against the public service 'cosa nostra[20] society':

- "Aid was to be extended to a member no matter what the circumstances.
- There was to be absolute obedience to the officers of the society.
- An offence against an individual member was an attack on the Society and must be avenged.
- No member will turn to a government agency for justice.
- *Omerta*, the code of silence, must always be obeyed. No member was to reveal any of the organisation's secrets"[21].

This unwritten code has served the Mafia well. Because all members know it and adhere to it, nothing ever has to be put in writing which could leave a paper trail in an investigation. Public service traditions operate in much the same way. A whistleblower may receive some sympathy from other sections but this will rarely ever result in a transfer. They are viewed as 'damaged goods'. The private sector would be even more unlikely to hire them. Despite innumerable Premiers policies on restructure and re-deployment procedures, these are only regarded as optional by managers and they will always come up with reasons for bypassing the whistleblower in favour of the underqualified and underexperienced.

Bizarre and dumbed-down hiring policies now allow highly qualified and experienced whistleblowers to be bypassed in favour of persons with neither: "Whenever possible, the phrase 'or equivalent' should be included with the qualification … For example, experience in voluntary or community groups, raising a family, coaching sports teams all provide evidence of generic knowledge, experience and skills relevant to paid employment.". .[22] While well-intentioned as an EEO precaution, in practise it gives managers open slather to bypass and hire with no questions asked.

To break this culture requires public examples. Instead, we so far have the 'heads on pikes' only of the few who have tried to enforce the PD Act. MCA cannot name a single repriser who has been brought down by the PD Act.

Legal Defence Budgets – One thing common to all white collar crime is the limitless amount of money available to finance legal defences, whether from corporate or state coffers. There are some paper sanctions for lawyers and witnesses committing perjury or making false statements as public officials. On paper, they carry stiff sentences but they are never enforced. The Premiers Guidelines for the Provision of Ex Gratia Assistance for Legal Representation for Ministers of the Crown, Public Officials and Crown Employees require "no need to apply for assistance" if they can "establish that his or her involvement in the proceedings or inquiry relates to his or

[20] Translated to "our thing"
[21] Former US Federal Narcotics Bureau investigator John. T. Cusack outline of the Mafia code
[22] NSW Premier's Department Personnel Handbook, Chapter 5

her official duties and that he or she has a substantial and direct interest in the proceedings. .. Where assistance is sought by a public official, his or her application should be made to his or her Departmental Head. A thorough Departmental investigation into the circumstances giving rise to the proceedings must be undertaken.". This has great potential for abuse as most of it is internal and there is no mechanism for public accountability for these funds.

Legal Misconduct – The Crimes Act S 337 has harsh penalties for misstatement: "False instruments issued by public officers: A public officer who, being authorised or required to issue an instrument whereby any person may be prejudicially affected, issues the instrument for an improper purpose knowing it to be false in a material particular is liable to imprisonment for 5 years". Given this clear intention of Parliament to discourage such activity, the use of extraordinary legal funds for a case "whereby any person may be prejudicially affected … for an improper purpose knowing it to be false in a material particular" ought to be punished even more severely. Such action costs far more money, compromises the integrity of the lawyers involved, and is ruinous to those who 'fight City Hall'. At the moment there is not even central accounting for such use of funds. Extortionate legal practice probably warrants a parliamentary inquiry or Royal Commission in its own right.

My relevant NSW public service history:

- Teaching Hospitals of UNSW: Clinical Psychologist in Charge, Allied Health; Clinical Psychologist Deputy and acting in charge, Rozelle Hospital
- Lecturer in Health Services Management, Medicine, University of NSW
- Research Officer, NSW Psychosurgery Review Bd
- NSW Department of Education & Training, Senior Policy Officer: Learning Innovation, Human Resources Services & Systems, Occupation Health & Safety, Strategic Planning