

Democracy in Australia – Protection of whistleblowers

Whistleblowing

Whistleblowing involves the disclosure of information in the public interest, typically to expose improper conduct, corruption, irregular unauthorised or mismanagement of public resources, or conduct that involves risk of injury, prejudice or harm to the public environment. Most Australian states have adopted some form of whistleblowing legislation to eliminate improper and unlawful conduct in the public sector; facilitate and encourage public disclosure and provide protection for those who make disclosures. Whistleblowers are nominally protected under legislation from criminal or civil liability, dismissal or breach of confidentiality, and their identity is also kept confidential. Overall the existing protection for whistleblowers is weak in Australia.

The exposure of information of public significance that would otherwise have been suppressed is an important part of open, transparent and accountable government. It is regularly of significance in uncovering corruption, malfeasance and mismanagement.

At the same time, it is well established that the costs to whistleblowers of making disclosures under current laws are nearly always very high. They are personally attacked by those they expose and sometimes by governments themselves, they often lose their jobs and they are sometimes prosecuted. Strong laws to provide independent agencies to which whistleblowers can turn and to protect whistleblowers from retribution are therefore of considerable importance.

Legislation

There is no uniform national legislation to provide protection to whistleblowers. A Senate Select Committee on Public Interest Whistleblowing recommended in 1994 that “the practice of whistleblowing should be the subject of Commonwealth legislation to facilitate the making of disclosures in the public interest and to ensure the protection for those who choose to do so”. Legislation is generally limited to the public sector, namely government entities and their agencies. Whistleblowers from the corporate, unincorporated and charitable sectors thus remain largely unprotected. Because state laws do not provide adequate protection, whistleblowers continue to face reprisals or punitive actions as a result of their disclosures. This is in contradiction of whistleblower protection principles and the freedom-of-the-press doctrine. A.J. Brown suggests that “All laws require a devised approach to allow clearer and more effective identification of those public interest matters requiring the protection of the scheme, better filtering of disclosures not intended to be protected, and clearer discretions for when investigation is not required”.

Inquiry

On July 11th, 2008, the Federal Government announced an inquiry asked to recommend a preferred model for legislation to protect public interest disclosures (whistleblowing) within the public sector. The House of Representative Standing Committee on Legal and Constitutional Affairs, chaired by Labor’s Mark Dreyfus QC, reported in February 2009. The inquiry recommended that whistleblower protection be introduced in the form of legislation with the aim of promoting accountability in public administration. Disclosures from a broad range of employees should be protected, including employees in the Australian Government public sector including Australian Public Service and non-Public Service agencies, contractors, consultants and their employees and parliamentary staff. Disclosures of serious matters would be protected. These matters would include illegal activity, corruption, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment. The inquiry recommended that the Bill be titled the Public Interest Disclosure Bill.

T H E A U S T R A L I A N C O L L A B O R A T I O N

The recommendations in the report have, however, been criticised for failing to provide adequate protection for whistleblowers. Dr Bill de Maria, for example, described the report as ‘mean and narrow’ in its vision (Australia Institute May 2009)

Australian Law Reform Commission

In early August 2008, Attorney-General Robert McClelland announced an additional inquiry to be conducted by the Australian Law Reform Commission to examine the interaction between the secrecy provisions of the Commonwealth Crimes Act and other laws and practices “relating to secrecy, privacy, freedom of information, archiving, whistleblowing, and data-matching”. The Commission released a discussion paper on secrecy issues in December 2008, and invited public comment. Its final report and recommendations were due to be delivered to the Attorney-General at the end of October 2009, and will be available to the public when they are tabled in Parliament.

Resources

Australian Law Reform Commission Discussion Paper 74, “Review of Secrecy Laws”

<http://www.austlii.edu.au/au/other/alrc/publications/dp/74/>

Brown, A.J. (2006). “Public interest disclosure legislation in Australia: Towards the next generation?”

http://democratic.audit.anu.edu.au/papers/20060830_whisbl_ajbrown.pdf

Hindess, B. (2004). “Corruption and democracy within Australia”

http://democratic.audit.anu.edu.au/papers/focussed_audits/200408_hindess_corruption.pdf

House Standing Committee on Legal and Constitutional Affairs Committee, “Inquiry into whistleblowing protections within the Australian Government public sector”

<http://www.aph.gov.au/House/committee/laca/whistleblowing/report.htm>