Democracy in Australia – Protection of whistleblowers

Whistleblowing

Whistleblowing involves the disclosure of information in the public interest, typically to expose improper conduct, corruption, 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 in order 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, however, the protection for whistleblowers has historically been weak in Australia.

The exposure of information of public interest 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.

New national legislation

There has long been 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 in Australia 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, Director of Transparency International Australia, 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".

In 2008, the Federal Government announced an inquiry, which was 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 Australian Public Service and non-Public Service agencies, contractors, consultants and their employees and parliamentary staff. Those making 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.

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, whistle-blowing, 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 delivered to the

Attorney-General at the end of 2009. In its final report, the Commission recommended the repeal of general criminal sanctions and their replacement with secrecy offences which apply only when disclosures harm essential public interests.

The recommendations in the reports were, nevertheless, criticised for failing to provide adequate protection for whistleblowers. Dr Bill de Maria, for example, described the initial inquiry's report as 'mean and narrow' in its vision (Australia Institute May 2009). Legislation introduced in late 2012 by the ACT, was described by A.J. Brown as "what are now Australia's best whistleblower protection laws" and provided a model for national legislation.

As part of the arrangements between the ALP and Independent members of parliament Rob Oakeshott and Tony Windsor, Prime Minister Gillard agreed in September 2010 to introduce whistleblower protection legislation to the Parliament, by 30th June, 2011. No legislation was intro-duced in 2011. In late 2012, after the failure of the Gov-ernment to introduce legislation throughout the year, Andrew Wilkie introduced a private members bill – the Public Interest Disclosure (Whistleblower Protection) Bill 2012 to the House of Representatives. The Government, despite stating that the bill fell short on practical grounds was prompted to re-introduce legislation in 2013.

Australia's first national protection law for whistleblowers came into effect on 15 January 2014, when the Australian Public Service whistleblowing scheme was replaced with the *Public Interest Disclosure Act 2013* (PID Act). The PID Act aims to:

- encourage and facilitate disclosure of information by public officials about suspected wrongdoing in the public sector;
- ensure that public officials who make public interest disclosures are supported and protected from adverse consequences; and
- ensure that disclosures by public officials are properly investigated and dealt with.

Under the PID Act, public officials reporting wrongdoing within Commonwealth public sector agencies will be guaranteed anonymity, and immunity from liability and disciplinary action. The Commonwealth Ombudsman is responsible for promoting awareness and understanding of the PID Act.

Whistleblowers Australia has raised a number of concerns about the Act, including:

- the role of investigator and protector is rolled into one body, the Ombudsman; and
- no whistleblower laws cover wrong doing by, e.g. politicians, intelligence agencies such as ASIO or ASIC, or people in the private sector.

It argues that Australia should replicate the US system, where whistleblowers can bring suit under the *Federal False Claims Act* and where the guilty party must compensate government, with the whistleblower possibly entitled to a bounty.

Nevertheless, confidence in this protection is anticipated to positively influence the reporting of wrongdoing by federal public service whistleblowers and will require ongoing monitoring. It is important to note that whistleblowers from the corporate, unincorporated and charitable sectors still remain largely unprotected.

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