Whistleblowers Australia

"All it needs for evil to flourish is for people of good will to do nothing"- Edmund Burke

18 November 2010

Committee Secretary

Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

*Re **Evidence Amendment (Journalists' Privilege) Bill 2010(No. 2) and Evidence Amendment (Journalists' Privilege) Bill 2010***

Dear Secretary

Please find attached a submission to the Committee.

Due to the limited time frame this submission has not been adopted by Whistleblowers Australia. Nonetheless it is my submission as the National President of the organisation.

Should you wish further input concerning this submission or any other matter concerning whistleblowing or the introduction of transparency and accountability into our systems of public or private governance I would happy oblige.

Yours sincerely

Peter Bennett

National President
Whistleblowers Australia

P. Bennett, National President, Whistleblowers Australia.

November 2010.

Evidence Amendment (Journalists' Privilege) Bill 2010(No. 2) and Evidence Amendment (Journalists' Privilege) Bill 2010

Overview

As a matter of principle, the introduction of legislation which is aimed at protecting the safety and well-being of people involved in the public disclosure of information which serves the public interest must be fully supported.

The aim of this legislation is a small step towards such protection, and therefore it is supported in principle.

Generally, the primary aim of this Bill is to protect journalists, who disclose information which serves the public interest. Ostensibly, it is also intended to protect those sources or whistleblowers who provide the information to the journalists.

Though the bill seems adequate to protect journalists who publish information which serves the public interest, it is questionable whether the Bill provides suitable protection to those whistleblowers who are the source of the information.

In fact, it may be that the introduction of this Bill could lead naïve whistleblowers into a false sense of security, and thus leave them extremely vulnerable to other adverse action, which could place their livelihood, career, health and well-being in serious jeopardy.

Therefore until whistleblowers are provided adequate protection so that they may safely disclose information which serves the public interest, it may be best to pass this Bill, but defer its assent until effective whistleblower protection legislation is introduced.

Lastly but crucially, it should be noted that if whistleblowers had the legislative right to safely disclose information which serves the public interest then there would simply be little or no need for journalists to be provided with protection of the kind proposed by this Bill.

Whistleblowing proposals lack any Framework.

Good governance requires transparency and accountability in all matters which have a bearing on the public interest. Whistleblowing is fundamental to that process of transparency and accountability.

Whistleblowing protection legislation in both the private and public sector, shield laws for journalists and others, access to information under FoI, and perhaps a False Claims Act are all matters which should constitute the elements of public interest disclosure and the protection of whistleblowers.

Though this government has moved on the FoI, the failure to incorporate that legislation into a framework about public interest disclosures will undermine its effectiveness and intent.

Simply establishing journalist shield laws, without ensuring that whistleblowers are protected and have a right to disclose information in the public interest is a bridge too far. It may and probably will lead to whistleblowers being on the wrong side of the law with no way to retreat in safety.

It is simply a matter of bad governance by all political parties, to continue to proceed with whistleblowing legislation in this ad hoc disjointed fashion. The piece meal approach, such as this Bill is, will eventually lead to conflicts and inconsistency.

It is necessary to establish a Framework in which whistleblowing legislation should be developed. At present, there is inconsistency between the Corporations Act and related banking, superannuation and insurance legislation concerning whistleblowing. Yet they all fall under the jurisdiction of one Minister. Similarly the public sector provisions under the Crimes Act and the Public Service Act would be farcical if they did not have such a dramatic and adverse effect on the disclosure of public interest information which would serve the public interest. Bits and pieces of so-called whistleblowing protection clauses exist in various bits of legislation, all with their own definitions, interpretations and applications. Frankly, it is a recipe for disaster and a potential 'honeypot' for the legal profession. The losers will be the whistleblowers, and the public through a further stifling of access to information which if disclosed would serve the public interest.

Recommendation General

Until whistleblowers are provided adequate protection so that they may safely disclose information which serves the public interest, it may be best to pass this Bill, but defer its assent until effective whistleblower protection legislation is introduced.

Specific reservations. Dealing with this Bill in isolation.

Item 1 Journalists to provide 'informed advice'.

In general this Bill is supported but further amendments seem to be necessary to give full and specific effect to the intended outcomes**.** One of course presumes that a genuine intent of the Bill is to protect whistleblowers.

The Bill puts no obligation on journalists (or others) to advise whistleblowers, that they remain at risk if they make a disclosure under other legislation or common law.

Despite the fact that a journalist or other person "has promised an informant not to disclose the informant's identity" as a means to protect the well-being of that informant/whistleblower, this is simply not sufficient to protect the interests or well-being of the whistleblower.

There must be an obligation on a journalist, or other person to inform a whistleblower, that they still may be identified by order of the court or by other means other than by a journalist or other person. The journalist or other person must have an obligation to advise the whistleblower or informant that they may face serious criminal or other charges under the law or civil action for breaches of fidelity and loyalty and perhaps action under libel laws.

It is not unreasonable to suspect that a whistleblower, ignorant of the legal ramifications of making a public interest disclosure could be " inadvertently" misled into believing advice that journalists cannot be made to disclose the source of information.

A gullible or naïve whistleblower could easily put their entire well-being at risk in the mistaken belief that a journalist could unreservedly 'protect' the whistleblower's interests if they disclose information which serve the public interest.

Therefore, it seems reasonable for journalists or others who may be approached to be given public interest information to have a legislated obligation to make the informant or whistleblower very aware of the risk that such disclosures may have to their well-being.

Recommendation; 1

Append additional clauses, which puts an obligation on journalists (and others) to properly inform any whistleblower or informant of the potential risks of breaching criminal or other laws, or facing common law action involving fidelity and loyalty or libel

Item 2 'Journalists' OR 'other people'.

If the 'Brandis' amendment is carried and 'journalist' is replaced by 'other people', then the name of the bill should be changed.

Recommendation:2

I suggest a change such as; **Evidence Amendment (Journalists' <u>and Others</u> Privilege) Bill 2010.**

Item 3 Clarification about the pre-eminence of 'public interests'

Re 126D Protection of journalists' sources

(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.

(2) The court may order that subsection (1) is not to apply if it is satisfied by a party to the civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of the identity of the informant outweighs:

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly, also in the ability of the news media to access sources of facts.

The courts seem ill informed about the "likely adverse effects of the disclosure of the informant" and deal with such disclosures in isolation. However the impact of such disclosures on the public interest go much further than the individual. Such disclosures are a deterrent to other 'informants' coming forward with relevant public interest disclosures of wrongdoing. The compounding injury to the public interest, the cultural norms and organisational processes, far outweighs the damage done to an individual. Yet this aspect has been given no consideration within this Bill. Furthermore the damage done to the individual by their disclosure can be horrendous and strangely the courts seem oblivious to such harm.

The ‘Brandis’ Explanatory Memorandum (para 3) notes the likely conflict of various forms a public interest. Reference is made to the weight of public interest concerning “national security” and the “administration of justice” and the need to ensure that such matters are given pre-eminence over other public interest matters.

However subparagraph (2) above does not emphasise those public interest matters which should be given a higher weighted rate when considering whether to disclose the identity of an informant.

Too often in matters of public service accountability or in the interest of protecting the “good name’ of organisations and their executive management, information which would have benefited the public interest has been stifled and withheld. The courts have found that it is not being in the public interest to identify wrongdoers, while at the same time, having no qualms to identify whistleblowers who exposed malpractice and other offences against the public interest.

Similarly legal professional privilege is virtually a licence to conceal information in the interest of those who pay the legal bill even though the public interest would be better served if information was disclosed.

Legislation which can be used to shield the interests of some at expense of the greater public interest is an abuse of process. The courts need clear guidelines, which give pre-eminence to the disclosure of information in the public interest and the protection of whistleblowers to ensure that such disclosures can be made without risk to the whistleblower or the informant.

Recommendation 3

Subparagraph (2) is not strong enough to help guide the courts as to the weight of particular conflicting public interest matters which should be given pre-eminence in determining whether the identity of whistleblowers can or should be disclosed.

In particular in sub-paragraph (2) (a) it is vital that the courts take into account not only the likely adverse effect on the individual whistleblower but on the national culture of disclosing wrongdoing.