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07 August 2008

Dear Inquiry Secretary

Please find attached a submission by Australian Lawyers for Human Rights to the inquiry into whistleblowing protections within the Australian Government public sector for the consideration of the Committee.

Jessica Casben and Rebecca Minty are in Canberra and stand ready to give evidence at a hearing if required.

Kind regards

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Submission to the inquiry into whistleblowing protections within the Australian Government public sector

"All that is necessary for evil to triumph is for good men to do nothing"¹

In 2006 Australia joint sponsored the United Nations High Commission on Human Rights Conference which was titled 'Anti-Corruption Measures, Good Governance and Human Rights' held in Poland. And yet at that stage, and still currently, Australia lacked any form of cohesive national framework for the protection of whistleblowers – arguably a key cog in the good governance wheel.

Who We Are

Australian Lawyers for Human Rights Inc (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).

ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of over 1,300 people, with active National, State and Territory committees.

Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

ALHR is a member of the Australian Forum of Human Rights Organisations. It is a member of the Commonwealth Attorney General's NGO Forum on Human Rights, and the Department for Foreign Affairs Human Rights NGO Consultations.

¹ As attributed to Edmund Burke.

Issues addressed by ALHR include anti-terrorism laws, refugee and migration issues, proposed reforms of the Human Rights and Equal Opportunity Commission, amendments to anti-discrimination laws, and Australia's National Human Rights Action Plan.

To help lawyers use human rights remedies in their daily legal work, ALHR runs seminars on the use of international human rights standards in daily legal practice, in areas such as family law, tenancy, anti-discrimination, crime, corporations, land and environment, and employment. We have recently commissioned a training package on human rights law that we hope to roll out to articled clerks and Australian Public Service (APS) graduate intakes.

The Current Position

"Consistent case study evidence indicates that whistleblowing, even when acknowledged to be meritorious, typically results in victimisation of whistleblowers."²

ALHR believes that the current protections accorded to Australian Government employees under s.16 of the *Public Service Act 1999* (Cth) (**PS Act**) is piecemeal as it merely prohibits reprisals. ALHR supports the Committee's investigation into legislation to protect public interest disclosures within the Australian Government public sector.

ALHR believes that given the fraught nature of whistleblowing the only way to adequately address the various competing interests and concerns is in legislation.

A useful and comprehensive starting point for assessing the protections whistleblowers should be afforded under any proposed scheme should be the current statutory frameworks in place around Australian states and territories. The table below from Bowden³ provides a good indication of the current state of play.

Protection	Yes, is provided	No
Confidentiality for whistleblower's identity	All states and territories, on conditions	
Prohibition against reprisals	All states and territories	
Injunctions against reprisals under the Act	Vic, Q, ACT, Tas, NT	NSW, WA, SA
Proceedings for damages	All states except NSW	NSW
Right to relocate	Q, ACT (conditional)	Vic, Tas, NSW, WA, SA, NT
Indemnity against civil and criminal proceedings	All states	
Absolute privilege against defamation	Q, ACT, Vic, NSW, Tas, NT	SA, WA
Anonymous disclosures allowed	Q, Vic, Tas, NT, and NSW by implication	SA, ACT, WA
Protection if released to media	NSW (conditional)	No other states permit release to media

² Jubb, Peter B. 'Whistleblowing: a restrictive definition and interpretation', *Journal of Business Ethics*, 21, 1999, p 77, quoting several references.

³ Bowden, P. 'A comparative analysis of whistleblower protection' as presented to the Australian Association for Professional and Applied Ethics 12th Annual Conference, 28-30 September 2005, Adelaide.

ALHR believes that a national framework should aim to consolidate and build on the protections already offered by the States and in so doing afford protection at each level identified above.

Competing Interests

Any national legislation should aim to address the needs of the stakeholders outlined in the 1991 report by the Electoral and Administrative Review Commission *Report on Protection of Whistleblowers*:

- 1 The interests of the public in the exposure, investigation and correction of illegal or improper conduct, and dangers to public health and safety.
- 2 The interests of the whistleblower are being protected from retaliation, and in seeing that proper action is taken on the whistleblowing disclosure.
- 3 The interests of persons against whom allegations are made in good faith which turn out to be inaccurate, or, worse still, against whom false or misleading allegations are made.
- 4 The interests of an organization affected by a whistleblowing disclosure in not having its operations unduly disrupted, causing unwarranted interference with its pursuit of its business or administrative goals.⁴

The Way Forward

Dr De Maria provides a comprehensive analysis of the desired outcomes of effective whistleblowing legislation in his paper "The Victorian Whistleblower Protection Act Patting the Paws of Corruption?" ALHR has followed Dr De Maria's analysis of whistleblowing legislation dividing the legislations' role into four distinct areas⁵ addressing the key features ALHR considered necessary for an effective and comprehensive system for each.

1 **Implementation Features**

Independent Body

The creation of an independent body responsible for hearing and investigating whistleblowers claims should be considered by the Committee. At the very least this should be an option for circumstances where a matter is too sensitive to be raised within an employee's agency, or where efforts to achieve a satisfactory resolution of a complaint within the agency have failed.

For example, McMillan states that '*whistleblowing lends itself to being primarily managed within the agency that is actually involved with the disclosures, with oversight by a range of 'compliance' agencies when appropriate*'.⁶ As McMillan identifies, recourse to an external body also helps protect the identity of a complainant, thereby reducing the risk of reprisals.

⁴ As quoted in Solomon, D. 'Whistleblowers, and governments, need more protection' as presented to the Democratic Audit of Australia, February 2006, University of Queensland.

⁵ De Maria, W. 'The Victorian Whistleblower Protection Act Patting the Paws of Corruption?' as presented to Staff Seminar Department of Business Law and Taxation, 3 May 2002, Monash University.

⁶ McMillan, John (2005) *Freedom of Information and Whistleblower Legislation: An Australian Perspective*, Speech delivered to the 9th Asian Ombudsman Association Conference, Hong Kong, 30 November 2005.

Existing Frameworks

Alternatively the existing framework encompassing a legislative requirement in the PS Act for Agencies to develop procedures for dealing with whistleblowers has the benefit of providing flexibility for Agencies to design procedures that best meet their organisational and operational requirements.

The existing framework could be further enhanced through increasing resources in the area of information and training. The publication of a best practice guide (such as the Australian Public Service Commission's good practice guide to 'handling misconduct'), and provision of training and awareness campaigns in the APS to ensure employees are aware of how the framework operates should be considered as part of any new arrangements. Whistleblower training could be incorporated into employee induction training and regular updated training could be held to help create a culture of transparency, where the likelihood of whistleblowers being stigmatised is reduced.

Consideration of the various stages of the whistleblowing process may assist the analysis of required legislative reform. For example if a whistleblower has made a submission or complaint and hasn't received a response in a specified number of days it may be appropriate to protect the whistleblower's right to approach the media without retribution.

Importantly, any public sector procedures in relation to protected disclosure should be open and transparent. They should not only be drafted in clear and simple terms but also publicised so that employees are well aware of their existence and how they operate. Direct accountability of agencies to Parliament and the public through annual reports, and a duty to disclose any misconduct that is established would be a welcome element of this transparency.

2 Scope

Government Employees

The legislation should cover all government employees be they Politicians, staffers, departmental employees, or employees of agencies or authorities and should have extra-territorial application.

Government Contractors

Many public functions are now carried out by private or semi-private organisations. In fact, in a 2002 study, Australia's rate and level of privatisation of Government services over the past decade was found to be one of the largest among OECD countries and in dollar terms was second only to the UK.⁷ Therefore it is important that the coverage of any statutory scheme is determined by the nature of the functions carried out by the authority, rather than an artificial consideration of whether the organisation is classified as 'public'.

As such ALHR believes that the 'location' of the whistleblower is to a great extent irrelevant. An external supplier of legal services who discovered an abhorrent breach of the law should still both blow the whistle and have their interest protected in doing so.

⁷ De Maria, W. 'The Victorian Whistleblower Protection Act Patting the Paws of Corruption?' as presented to Staff Seminar Department of Business Law and Taxation, 3 May 2002, Monash University.

This would then address the key disconnect between Government and the significant amount of work that is procured by the government but provided by a third party private corporation.

Defining Whistleblowing

Unlike the UK *Public Interest Disclosures Act*, ALHR is of the opinion that any Australian equivalent should clearly define whistleblowing to distinguish between a complaint about workplace conditions and breaches of employment conditions. These issues, although by no means less important than whistleblowing, should be dealt with using the current workplace relations framework, including the 'misconduct' and 'review of actions' provision under the PS Act. If the current framework for workplace grievances and review of employment actions are insufficient they should be reviewed, but not included in a catchall of whistleblowing legislation.

3 Protections

Whistleblowers should be indemnified from both civil and criminal prosecution (including defamation) as well as any breaches of confidentiality.

With regard to adverse impacts on employment whistleblowers should be able to apply for injunctions against termination actions by their employer and have access to avenues for appeal against any adverse action taken by their employer. Further, employees should be able to access the unfair dismissal provisions under the *Workplace Relations Act 2006* (Cth) (**WR Act**) on the same basis as any other employee whose employment is terminated.

ALHR is mindful that there must be a level of protection against frivolous and vexatious claims. ALHR recommends that protection schemes from other jurisdictions be considered in determining any requirements for merit.

For example other jurisdictions incorporate concepts such as the need for an 'overwhelming of immediate concern for public interest, or the health and safety of the public', based on a 'reasonable belief' of wrongdoing. Some require the whistleblower to hold a reasonable belief that there was no other viable alternative for airing the grievance.

4 Support Services

A necessary component of any whistleblowing legislation is facilitation – promoting the view that whistleblowing is something that is done in the public interest, and providing support to whistleblowers.

Whistleblowing can be an incredibly effective tool for targeting and weeding out corruption across the spectrum of government activity but can only realise its full potential in rectifying, and in the longer term, preventing corruption and misconduct if it is utilised.

Whistleblowing is fraught with risks to the professional and personal life of a whistleblower. Statutory protection therefore needs to be comprehensive and readily understandable to potential whistleblowers, to give them confidence in the system prior to deciding to speak out.

Agencies should provide support and assistance to whistleblowers including counselling at various stages of the process. This could be encompassed by the services provided by agency Employee Assistance Programs.

Consideration should also be given the whether compensation should be available to whistleblowers who have suffered reprisals or discrimination as a result of their actions consideration should be given to the source of these funds. ALHR is of the opinion that if it is the activities of public bodies being held to account public funds should be made available.

An Australian Charter of Rights

The introduction of a Charter of Rights in Australia would indirectly afford protection to whistleblowers through better protecting rights such as freedom of expression and association.

ALHR is a strong advocate for a national Charter of Rights and believes that should Australia implement a charter there should be clear linkages between any whistleblowing legislation and the Charter.

Private Sector Protections

In light of the current focus on anti-corruption and whistleblowing in the public sector, ALHR is of the view that a review by the Government of whistleblower protections for private sector employees is appropriate. Any review should be made with a view to augmenting protections in legislation including the *Corporations Act 2001* (Cth), the *WR Act* and protections provided by the Australian Competition and Consumer Commission.

Recommendations

- That the current protections afforded public sector employees in the *Public Service Act 1999* (Cth) be supplemented and developed on by the introduction of standalone legislation protecting public sector whistleblowers.
- That the Committee aim to develop a national framework that consolidates and builds on the protections currently offered at a State and Territory level.
- That the creation of an independent body responsible for hearing and investigating whistleblowers claims should be considered by the Committee.
- That the Committee consider the openness and transparency, particularly direct accountability of agencies to Parliament and the public, of any procedures recommended.
- That any legislation should cover all government employees and extend to protections for external suppliers of government services.
- That whistleblowing be clearly defined so as to distinguish between protected disclosures and complaints about workplace and employment conditions.
- That protections afforded under any legislation extend both civil and criminal prosecution (including defamation) as well as any breaches of confidentiality.
- That any whistleblower legislation also provide for support and assistance to whistleblowers at various stages of the process.
- That the Committee consider the possibility of a review by Government of whistleblower protections for private sector employees.