SUPPLEMENTARY SUBMISSION TO THE INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE AUSTRALIAN GOVERNMENT PUBLIC SECTOR

by

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THE NEED FOR PROTECTION OF WITNESSES AND WHISTLEBLOWERS THE SWORD AND THE SHIELD

1.0 Outline

1.1 This submission seeks to respond to submission 31 from the Commonwealth Ombudsman received by your Committee on 3 September 2008.

1.2 In his submission the Commonwealth Ombudsman appears to be presenting credentials which may appear to render the Office of Commonwealth Ombudsman suited to the responsibility for the role of protecting whistleblowers.

1.3 This supplementary submission seeks to rebut those purported credentials, both with respect to (a) the performance of that Office in it current justice role, and (b) the culture of that Office towards its current justice responsibilities.

1.4 Submission 45 to your Inquiry advocated the need for the protection of whistleblowers to be assigned to a protection organization (a Shield body), separated

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from any investigative organization (a Sword organization). That submission made references to the Ombudsman in general and to the Office of the Commonwealth Ombudsman in particular (including the Defence Force Ombudsman's role) as providing examples of why any proposed Shield organization needs to be separated from Sword organisations

1.5 It was thus submitted that the Commonwealth Ombudsman is a Sword organization, and not suitable to be a Shield organization. The credentials of the Office of the Commonwealth Ombudsman for the role of protecting whistleblowers need to be examined in detail, it is further submitted, and its record in its current justice role assessed for any comprehensive assessment of the true credentials of this Office

1.6 This supplementary submission proposes that the example of the Commonwealth Ombudsman offers a prime demonstration of the need for a separation of the Sword and Shield organizations if the protection of whistleblowers from reprisals is to be effective.

2.0 Conclusions of Original Submission

2.1. The conclusions offered in my original submission (No. 45) were as follows:

Whistleblowers and witnesses are the last line of defence against systemic corruption and other forms of wrongdoing.

Any public sector accountability can not claim to have integrity if evidence is destroyed and witnesses are intimidated.

To defend the last line of defence, whistleblowers and witnesses must be protected.

Single body whistleblower models have shown themselves to be unsuccessful in meeting the integrity objective.

The model that can succeed is a model based on two bodies with mutually supporting functions:

- *One to be **the Sword**, to investigate the wrongdoing, and*
- *One to be **the Shield**, to ensure the survival of the whistleblower and the witness, so that the whistleblower survives the denial, the delay, the destruction of the evidence and the defamation of the whistleblower that occurs while the captured 'Sword' organization is distracted from its duty:*
    - *Anti-Deny: The whistleblower or witness is given advice, assistance and representation in hearings and preparations therefor*
    - *Anti-Delay: Progress reports on the investigation are called for and the response reported to the Parliament*
    - *Anti-Destruction: The evidence of the wrongdoing is secured, witness statements are taken immediately after the disclosure*
    - *Anti-Defamation: The evidence of the proficiency of the whistleblower or the witness in their job, prior to the making of the disclosure of alleged wrongdoing, is secured*

3.0 The Performance of the Office of the Commonwealth Ombudsman

3.1. Studies[2] reported by the University of Technology in Sydney ("**UTS**") have exposed the unsatisfactory performance of the Office of the Commonwealth Ombudsman ("**OCO**"). Those studies report that: "... *surprisingly ... the Office is itself proactively reducing the amount of individual complaints it resolves through discretionary decision-making*"

[2] See paper by A Stuhmcke, Australian Journal of Public Administration, vol 67, no. 3, pp 321-339

3.2. The OCO has a wide discretion under section 6 the *Ombudsman Act 1976 (Cwlth)* **not** to investigate complaints made to it.

3.3. The UTS has produced data, with graphs of that data, demonstrating that only 27%, that is, one in four, of the complaints made to the OCO are finalized by way of an investigation. The other 73% are 'finalised' by way of the OCO exercising of its wide "section 6 discretion" not to investigate the complaint.

3.4. As far as the OCO acting as a 'Sword' organization, it acts to deny three times the number of investigations as it undertakes. Would these not also be the performance figures of the OCO as a Shield organization if the OCO was given the Shield role?

3.5. It is submitted that such a performance measure is like that of a public railway system that only provides one train in four from the published train schedule, or a hospital that only treats every fourth person who arrives in an ambulance. The OCO has the same selection ratio as in the children's nursery rhyme – "*Eanie, meanie, mynie, Mo*" – turning investigations flowing from complaints into a game of chance, where only the 'Mo' complaints get an investigation.

3.6. A complainant, on this analogy, has to be in the "Mo file" to get an investigation by the OCO, and in this analogy, 25% of investigations would get finalized by way of such an investigation – that is the same order of magnitude investigation rate as has been portrayed by the UTS.

3.7. Whistleblowers will fare poorly under the protection of an organization that undertakes its existing justice role with such apparent reluctance, by exercise of its wide discretion under section 6 of the *Ombudsman Act 1976 (Cwlth).*

4.0 The Culture at OCO

4.1. The UTS studies also demonstrate that the OCO staff currently carry a case workload which is 50% less than what it was before the OCO surrendered to the section 6 "denial/no-investigation discretionary" strategy.

4.2. It is submitted that a critically important element in whistleblower protection is the profile that integrity occupies within the OCO as an organization to which complaints may be made.

4.3. The concern commences with the use of language that would term a section 6 denial of an OCO investigation as a 'finalisation.'

4.4. The concern continues when the UTS reports that the UTS figures for the percentage use of the denial-of-investigation discretion are almost twice that reported by the OCO.

4.5. Two cases bring some perspective to the detriment to the investigative culture of OCO that has accompanied the allegedly excessive use of the section 6 denial discretion. The two cases selected deal with important principles for the protection of whistleblowers, namely:

- The obligation to record and report disclosures; and
- The obligation to provide protection.

5.0 Case 1 –'Granny-napping'

5.1. This case involved an arrangement between a hospital and a nursing home to transfer an eighty-year-old partially blind war widow suffering dementia to the nursing home when the adult child holding the medical power of attorney objected to the transfer and gave directions that it was not to occur. A letter from the

hospital to the nursing home informed the nursing home of the objection but sought the nursing homes agreement to make the transfer in the face of such unequivocal knowledge.

5.2. An adult grandchild was first to arrive to comfort the war widow at the nursing home. The nursing home had recorded the complaint made by the grandchild that the transfer had been bullying by the hospital. The following day, the two adult children who held the medical power of attorney are recorded by the nursing home as attending an interview with the nursing home and complaining that the transfer had occurred against their specific direction.

5.3. It is open to conclude that the matter involves serious allegations against the nursing home of providing health care without permission and of serious assault. The relevant ***Criminal Code*** defines assault to include moving a person without the person's consent, and defines an assault against a person older than sixty years as a serious assault.

5.4. The requirement to report becomes an important factor in this matter. Nursing homes come under the *Commonwealth Aged Care Act* wherein it is mandated that nursing homes must report allegations of assault to the police and to the Department of Health and Ageing ("**DHA**").

5.5. The DHA refused a complaint about the involvement of the nursing home, stating that the nursing home had power 'to receive' patients, but without any consideration of the requirement to report 'reportable assaults'. If the complainants thought that the police needed to be informed, DHA argued, then they could do that themselves. When the complaint was subsequently made to the OCO, it exercised its discretion not to investigate the matter.

5.6. Importantly, the OCO did not give as a reason for exercising the denial discretion, that it only investigates one in four complaints, and that this complaint had 'missed

the draw' so to speak. The OCO's culture appears not to value the modus operandi of integrity in all its dealing found in openness and transparency.

5.7. Instead, the culture of the OCO seems to have been affected by a perceived need to argue, not that it can only investigate one case in four, but that the use of the denial discretion is justified by the merits of each case. The need to argue this when the facts fall the other way appears to have caused the culture of the OCO to become defensive and determined in the face of the reaction from the community of 'unlucky' complainants who missed the draw and are being dismissed in yet another injustice, this time from the OCO.

5.8. In this 'granny-napping' case study, the OCO shifted from the issue of whether or not an allegation had been made to whether or not an assault had been made. The OCO required the complainant to prove who at the nursing home had been involved in the assault before it would accept that an assault had been made. The relevant Act requires the obligation to report to follow the making of an allegation, but the OCO shifted 'the law' to require there to be a proven and particularized assault before the obligation to report arose.

5.9. In the same vein the OCO required the consent issue to be 'abundantly clear' and 'in writing' where the law only required an objection to be made orally and to be 'an indication of a wish' for treatment not to be given. In short, the OCO ignored the law.

5.10. Whistleblowers making disclosures of wrongdoing and allegations of reprisals will not survive if their purported protector excuses the wrongdoer by exercising the denial discretion. Whistleblowers will have no confidence in a culture of a protection authority that shifts from what <u>can</u> be established (the allegation) to what <u>cannot</u> be established without investigation (i.e. which staff physically moved the war widow); and then makes what cannot be established without investigation the trigger for reporting the assault when the law requires what can be established

to trigger the report to the police. Whistleblowers, too, will have no confidence in a culture of a protection authority that, having shifted the law, then uses rogue legal concepts (that an objection to being moved and to receiving health care must be abundantly clear with previous permissions withdrawn in writing, when the law only requires an indication of a wish not to receive health care, an indication that can be orally given) to deny any investigation.

5.11. The OCO's investigative culture appears to be characterized by a propensity to represent the law as it plainly is not, so as to justify a strategy to deny justice to complainants and thereby circumvent the very purpose for which Parliament established the OCO.

5.12. It is submitted therefore that it would not be unreasonable to suggest that the OCO would not act with any more sympathy or more integrity when dealing with whistleblowers than when it dealt with a complaint concerning a defenceless war widow grandmother.

6.0 Case 2 – The Expulsion

6.1. Submission 45 set out a case study wherein an Australian Defence Force ("**ADF**") whistleblower was suspended from service for 14 months, without pay and without any disciplinary process being followed to impose this punishment.

6.2. The examples of the alleged deny-delay-defame-destroy actions taken against this whistleblower were set out in that submission.

6.3. As part of that case, a request was made to the OCO under its Defence Force Ombudsman's ("**DFO**") role to investigate the imposition of the punishment. The DFO wrote to the Army formation, and a response admitting to the punishment was given by the officer who imposed the alleged punishment to his military superior.

Whatever transpired with that admission, no response was ever forwarded by the DFO to the whistleblower.

6.4. A factor as to why the DFO went silent on this alleged 14-month illegal punishment may be that the DFO, at an earlier stage of the treatment of the whistleblower, had refused to require the Army authorities to follow Defence Instructions and regulations on giving reasons for decisions made affecting the whistleblower. The whistleblower had sent to the DFO a comparison as to how the DFO had acted in a similar fact situation years earlier in the DFO's history, and sought the current DFO to act as it had done on that earlier occasion. It is submitted that natural justice in decision-making is based on consistency and predictability in similar fact circumstances.

6.5. The comparison was a direct example of what the studies by the UTS uncovered - the pattern of withdrawal by the OCO over time from its proper justice role.

6.6. In the case more recently before the DFO, it may have occurred to the DFO that the earlier failure by the DFO (the failure to protect the rights of the ADF member to reasons for decisions) was the cause now for the ADF (i.e. Army) to be acting as though the member had no rights under the Defence Instructions. The only 'Sword' organization in the Defence environment, the DFO, had surrendered over to the Defence authorities the entitlements of the whistleblower ADF member to proper processes over grievance and whistleblower protection. In the new instance, the ADF authorities were denying the whistleblower any rights to proper process over the imposition of a punishment of 14-months suspension without pay. The OCO, by ignoring the wrongs done to the whistleblower in the first transgression by the ADF, may have found itself neutered in any renewed attempt to, this time, stand by its role responding to wrongdoing. It would have been difficult for the DFO to admit any contribution to this escalated situation, now of an alleged illegal punishment causing thousands of dollars in loss of income and revenue to the whistleblower, because, at an earlier, less serious instance, the OCO turned a blind

eye to the alleged breaches by the Army authorities of their own Defence Instructions.

6.7. Whatever protections whistleblowers in general might be given by any new whistleblower protection legislation, those protections will be too quickly and easily lost if entrusted to an OCO which surrenders directive or normative enforcement of those protections in a simple-minded attempt to appease the offending department.

7.0 The Dr. A. J. Brown Study '*Whistling while they work*'

7.1 It is submitted that the Commonwealth Ombudsman's submission tries also to gather credentials for the OCO as a whistleblower protection authority, or as a potential candidate for this important role, by describing its role in initiating and steering this recent $0.5million study into whistleblowing.

7.2 The September 2008 Dr. A.J. Brown Report ("**the Brown Report**") has not been available for very long, and detailed study of its hundreds of pages is not yet completed; however, an initial assessment in key areas, appears to suggest that it may be a $0.5m opportunity missed.

7.3 Many worthwhile projects in fact fail in the beginning, and, as is often the case, their ultimate failures and shortcomings may only be established at the end of the project. It is submitted that the Brown Report appears to be a regrettable case in point.

7.4 Its steering committee clearly lacked a seat for a whistleblower representative. This is demonstrated by the flawed assumption embodied in the research from its inception that wrongdoing within public sector organizations is an *ad hoc* events, and that whistleblowing is essentially a '**dobbing**' phenomenon of a colleague reporting on an occasion of *ad hoc* wrongdoing.

7.5 Ever since the University of Queensland studies into whistleblowing 15 years earlier, carried out by Dr Bill De Maria and associates, it has been understood by state of the art research and the whistleblowing protection lobby that whistleblowing is primarily or essentially a '**dissent**' phenomenon of a whistleblower against systemic corruption within and across public sector organizations or significant parts of such bodies.

7.6 The **Leggate Whistleblower Case of National Significance** was about a mining authority requiring its mine inspectors not to report any breaches of the lease conditions. In short, Crown decision-makers had decided not to enforce their own laws, but were requiring the inspectors to take responsibility for the non-enforcement. Mr Leggate acted in dissent about the organisation's allegedly illegal, non-enforcement policy.

7.7 The **Lindeberg Whistleblowing Case of National Significance** (a.k.a. "**the Heiner Affair**" and/or "***Shreddergate***") was about government by the rule of law centering on the willful destruction of public records by executive government (i.e. an entire Cabinet) to prevent their known use as evidence in foreshadowed judicial proceedings whose known contents concerned the abuse of children in a State-run youth detention centre. Mr Lindeberg, acted in dissent of the government's allegedly criminal act in ordering the destruction of those documents and that evidence.

7.8 The **Dillon Whistleblower Case of National Significance** was about a police force collecting its share of revenue from illegal activities. (See the Fitzgerald Commission of Inquiry into Possible Illegal Police Conduct). Mr Dillon acted in dissent of that systemic corruption referred to by the participants as 'The Joke'.

7.9 The Bundaberg Hospital saga was about a hospital bureaucracy that supported a doctor who had a good rate for post-operational rates of bed-clearance (a parallel here may exist with section 6 'finalisations') – a bed clearance was a bed clearance

(even by *prima facie* unlawful death), whatever was the outcome for the patient (a finalization is a finalization, whether there was an investigation or no investigation).

7.10 The OCO's unrelenting adherence to the belief that wrongdoing is only *ad hoc*, has caused disclosures made to the OCO being returned back to the Department in which the wrongdoing occurred, to the immediate harm of the whistleblower. The adherence to this view by the OCO may be behind some of the frustrations felt by complainants suffering the section 6 denial-processes. For example;

- When the OCO denies the complainant an investigation of their complaint, the OCO has to explain itself without the information that the investigation would have uncovered. What the OCO did, in the case of the 'granny-napping', was to express **a belief** as to whether nursing homes would act in the way alleged by the complainant. That belief appears then to underlie the judgment then exercised that the decision not to report, and the decision not to investigate the non-reporting, is 'not unreasonable'.

- When the OCO sees that there may have been wrongdoing by the public servant(s), the OCO may still argue that they acted in good faith – termed 'good faith criminality'. Again, in the face of crimes committed in good faith, the OCO may argue that the failure to report the alleged serious assault of the war widow, and the refusal to investigate were 'not unreasonable'. This notion of the OCO undermines the principle that ignorance of the law is not excuse and has an undoubted, and undemocratic, tendency to place public officials above the law.

7.11 The Brown Study has suffered irretrievably from this presumption, that whistleblowing is about 'dobbing' and not about 'dissent'.. Its approach to surveying public servants has not contemplated that the source organizations also had to be rated for the level of systemic wrongdoing established in the organization. Nor has the Brown Study prepared itself to deal with any hierarchy to the types of

wrongdoing that can occur and the associated level of response by the corrupt organization. Nor has the Brown Study prepared for the hypothesis that the many instances, found by the Brown Study, of public servants (not making any disclosure of observed wrongdoing) making only one disclosure of observed wrongdoing and remaining silent thereafter is a group behaviour displaying the phenomenon of **compliance** rather than an aspect of whistleblowing.

7.12 The Brown Study, on first appraisal, appears to be a product of its steering committee, a body composed mainly of Sword organizations. The Brown Study may thus only represent a view of the public service held by those responsible for minimizing wrongdoing within the service, and consequently has introduced the perverse element of self interest into the equation of what the Brown Study investigated and of what the Brown Study is now able to report.

8.0 Conclusion

8.1. The OCO has achieved only a one-in-four rate of finalization of complaints by way of an OCO investigation of those complaints. The rest - 73% of them - are 'finalised' by not being finalized, and are left instead for the aggrieved person to endure without any sense of justice being attempted, let alone served.

8.2. It is submitted that the OCO's culture appears to have been distorted from its statutory duty of fulfilling its justice role by means of:

- Requiring the complainant to prove the wrongdoing before an investigation is allowed, where the law requires the investigation to prove or otherwise the complaint which need only raise a reasonable suspicion of wrongdoing;
- Avoiding clear instances of breaches of legislation, by shifting instead to areas of the complaint that are less clear or that can be described as not

abundantly clear through the application of rogue laws and bogus interpretations;

- Putting on an unrelenting face to the world that OCO is doing its justice role, and that public service departments only exhibit wrongdoing of an *ad hoc* nature; and
- Having a pre-disposition to assume, without inquiry or investigation, that public service departments would not act in a manner alleged in complaints, and that any transgressions would have been made in good faith.

8.3. It is therefore submitted that, under this apparent OCO performance, together with its apparent culture and related distortions, that the protection of whistleblowers shall be highly tenuous in the OCO's hands, and should be resolutely avoided.