SUBMISSION BY

MEDIA, ENTERTAINMENT & ARTS ALLIANCE

TO

HOUSE STANDING COMMITTEE ON LEGAL AND CONSTITUIONAL AFFAIRS

INQUIRY INTO

WHISTLEBLOWING PROTECTIONS WITHIN THE AUSTRALIAN GOVERNMENT PUBLIC SECTOR

AUGUST 2008

The Media, Entertainment & Arts Alliance

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Introduction

The Media, Entertainment & Arts Alliance (the Alliance) appreciates the opportunity to provide input into the *House Standing Committee on Legal and Constitutional Affairs Inquiry into Whistleblowing Protections within the Australian Government Public Sector.*

The Alliance has for many years been concerned with the lack of strong whistleblower protection laws at a Federal level. Whistleblowers perform an essential public service in a modern democracy. They ensure accountability in government, reveal corruption, fraud, dishonesty and improper conduct, and raise public awareness of issues of public import often placing their careers and their reputations on the line. The Harvey and McManus Veterans Affairs Case, the Kessing Customs case and the Patel Case in Queensland have all highlighted this critically important role. These cases have also drawn attention to the poor state of legislative and common law protection and support for those serving the public interest.[1]

The Alliance believes that the introduction of rigorous Federal public interest disclosure legislation is critical to ensuring that public servants and journalists' sources are neither discouraged nor harmed in serving the public interest. The Alliance makes the following recommendations with respect to the terms of reference of this review.

1. the categories of people who could make protected disclosures:

a. these could include:

i. persons who are currently or were formerly employees in the Australian Government general government sector, whether or not employed under the Public Service Act 1999,

ii. contractors and consultants who are currently or were formerly engaged by the Australian Government;

iii. persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants; and

b. **the Committee may wish to address additional issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise;**

[1] For more information regarding recent Australian whistleblower cases see:
The Media, Entertainment and Arts Alliance 2008 report into the state of press freedom in Australia: http://www.alliance.org.au/resources/download/2008_press_freedom_report/; and;
The Media, Entertainment and Arts Alliance 2007 report into the state of press freedom in Australia: http://www.alliance.org.au/resources/download/2007_press_freedom_report/

The Alliance strongly supports whistleblower protection legislation applying to:

- Current employees of the Australian Government general government sector (that is, the Institutional sector comprising all government units and non-profit institutions controlled and mainly financed by government) be it employed under the Public Service Act 1999 or not;
- Contractors and consultants who were currently or were formerly engaged by the Australian government;
- Employees and former employees of contractors and consultants who were currently or were formerly engaged by the Australian government;
- Persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act1984, whether as employees or consultants and their employees.

The Alliance intends these definitions above to include, but not be limited to, the following categories of public servants:

- judicial officers;
- senators or members of House of Representatives;
- volunteers subject to the supervision of a Commonwealth government sector entity;
- members of the Australian Defence Force.

Furthermore, implicit in the scope of coverage outlined above the Alliance supports this protection being extended to the protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise.

The Alliance also recommends that protection should also be made available to the families and associates of whistleblowers who may be subject to reprisal action if they are employed by the government.

While outside of the terms of reference, the Alliance points to the need to fill in gaps left within the whistleblower safety net once protection is provided to employees within the general Government sector. The Whistleblower protection was introduced for the private sector in the Corporations Act and the Workplace Relations Act covering corporations, unions and employer organisations. However, unincorporated associations and the not-for-profit sector (not controlled or financed by the government) remain unprotected. The Alliance believes that these sectors require legislative protection along with other employees in the public and private spheres.

2. the types of disclosures that should be protected:

a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration,

breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment; and

b. the Committee should consider:

i. whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit; and

ii. whether grievances over internal staffing matters should generally be addressed through separate mechanisms;

With respect to the types of disclosures that should be protected the Alliance argues that any legislative definition should be broad and open enough to capture the multitude of public interest disclosures that may take place. This definition should focus on the "the public interest" and be guided by but not limited to a list including:

- illegal activity and any breach of the law,
- corruption,
- official misconduct involving a significant public interest matter,
- maladministration including any administrative action that is unjust, discriminatory or unfair;
- breach of public trust,
- scientific misconduct,
- wastage or misuse of public funds and resources,
- dangers to public health and safety,
- dangers to the environment;
- injustice;
- improper conduct
- any breach of any code of conduct including, but not limited to the APS Code of Conduct and the Parliamentary Service Code of Conduct;
- abuse of decision making powers;'
- any harmful or injurious actions against persons involved in a public interest disclosure.

3. the conditions that should apply to a person making a disclosure, including:

a. whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a)); and

b. whether penalties and sanctions should apply to whistleblowers who:

i. in the course of making a public interest disclosure, materially fail to comply with the procedures under which

disclosures are to be made; or

ii. knowingly or recklessly make false allegations;

The Alliance believes that with respect to internal disclosures through official channels, whistleblowers should be protected where they have an honest and reasonable belief that any public interest allegation made is true.

The Alliance believes that where a whistleblower discloses information in the public interest to the media then the thresholds should be higher and should include the following standards:

(a) the whistleblower honestly believes, on reasonable grounds, that is in the public interest that the material be disclosed; and
(b) the whistleblower honestly believes, on reasonable grounds that the material is substantially true; and
(c) the whistleblower honestly believes on reasonable grounds either that:
    i. to make the disclosure through official internal channels might be futile or result in the whistleblower being victimised; or
    ii. internal disclosure has failed to result in prompt investigation and corrective action; or
    iii. the disclosure is of such a serious nature that it should be brought to the immediate attention of the public; or
    iv. there is a risk to health or safety.

NSW Whistleblower legislation currently ensures that whistleblowers wait for a period of six months after making an internal disclosure before going to the media. The Alliance believes that there a number of foreseeable circumstances where such a period would be too long where, for example, public health safety is at risk. The Alliance argues that if a time restriction or waiting period be introduced that it be shorter than six months and that there should be exceptions made available based upon the list above at (c).

4. the scope of statutory protection that should be available, which could include:

a. protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;
b. immunity from criminal liability and from liability for civil penalties; and
c. immunity from civil law suits such as defamation and breach of confidence;

The Alliance supports the following protections being afforded to whistleblowers at a Federal Level noting that many of these are already commonly available at a state level:

- **Internal protections:** In terms of internal investigations – an obligation on agencies to protect those who make disclosures, for example, by preserving the confidentiality of the person's identity, relocating them to a safer position, and providing them with a progress report on the investigation of their allegation;
- **Statutory protections:** Statutory protections of a person who makes a disclosure against disciplinary and criminal action by reason of having made the disclosure;
- **Criminal sanctions:** Making it an offence for someone to take detrimental or reprisal action against a person who has made a disclosure;
- **Civil remedies:** The creation of rights of action for civil damages to redress an unlawful reprisal including reimbursement of medical or legal expenses and compensation for injury in employment or injury to health;
- **Injunctions:** Creating a procedure for an injunction to restrain an unlawful reprisal.
- **Immunity:** Immunity from liability for civil penalties; civil law suits such as defamation (including a defence of absolute privilege in a defamation proceeding and actions regarding the confidentiality of information); and civil suits on breaches of confidence;

5. procedures in relation to protected disclosures, which could include:

a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two;
b. the obligations of public sector agencies in handling disclosures;
c. the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education); and
d. whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted;

The Senate Select Committee on Public Interest Whistleblowing's 1994 report *In the Public interest* stated that:

> *"Whistleblowers should be protected where they make a disclosure of "wrongdoing" within the meaning of the legislation, to the media, where to do so is excusable in all the circumstances. In determining whether it is excusable in all the circumstances the factors to be taken account of should include the seriousness of the allegation, reasonable belief in their accuracy*

and reasonable belief that to make a disclosure along other channels might be futile or result in the whistleblower being victimised."

The Alliance agrees with statement and believes that whistleblowers should have the legislated right to make disclosures to a third party including the media where it is "excusable to do so." The conditions outlined above under term of reference three detail the circumstances in which the Alliance believes it would be excusable.

7. such other matters as the Committee considers appropriate.

The Alliance believes that the committee needs to consider a number of the recommendations of the Senate Select Committee on Public Interest Whistleblowing's 1994 report *In the Public interest*. In particular the Alliance supports the following:

> *"The Committee recommends that Legal Aid Commissions be informed that whistleblowers and action arising from whistleblowing ought to be considered as one of the categories of actions for which legal aid may be granted, if the applicant is otherwise assessed as eligible. The Committee encourages community oriented legal services to provide legal assistance and advice to whistleblowers and associated persons"*

The Alliance would also like to raise the issue of journalist shield laws and journalists privilege. Federal Parliament in 2007 passed the Evidence Amendment (Journalists' Privilege) Act 2007. This introduced a new section into the Evidence Act 1995 (Cth) to allow journalists facing trial to refuse to disclose the identity of their sources. However the Alliance remains concerned that this protection remains significantly limited by the fact that this protection is simply at the discretion of the court.

The Alliance believes that there needs to be more vigorous protection of a journalist's source to provide journalists the ability to not disclose their sources in legal proceedings. Without this certainty, a chilling effect remains despite the introduction of the Evidence Amendment (Journalists' Privilege) Act 2007 will remain.

The Alliance recommends that the Commonwealth Evidence Act be amended so that in the first instance journalists cannot be compelled to disclose the identity of a confidential course unless the court is satisfied that there is a compelling public interest reason to do so including:

- protection of national or international security of Australia; or
- prevention of the commission of a serious crime; or
- protection of the health and safety of any person.

The Alliance believes that in accordance with the Government's Election Commitment guarantees should be put in place to ensure that journalists are not prosecuted in the case of reportage that merely embarrasses the Government.