

Submission No.	47
Date Received	M.L.

Public Service Commission

Please quote: TF_08_6049//DA013/WP

29 August 2008

Mr Mark Dreyfus MP
Committee Chair
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email to: laca.reps@aph.gov.au

RECEIVED
02 SEP 2008
BY: LACA

Dear Mr Dreyfus MP

Submission for the Inquiry into whistleblower protections within the Australian Government public sector

Thank you for your letter to the Premier dated 14 July 2008 regarding an inquiry into whistleblower protections within the Australian Government public sector. Your letter has been forwarded to this office as the Public Service Commission has responsibility for the administration of the *Whistleblowers Protection Act 1994*.

Public Service Commission

The Public Service Commission is an independent statutory body whose two key functions are to enhance public service human resource management and development, and to deliver focused program reviews in support of the government's efficiency agenda. The Commission's focus is to ensure our workforce delivers quality results for Queenslanders by improving the performance of the public service.

The Public Service Commission has responsibility for a range of ethics and integrity related matters within the Queensland public service, including the administration of the *Whistleblowers Protection Act 1994* ("WPA").

Whistling While They Work research project

Over the past three years, the then Office of the Public Service Commissioner and, more recently, the Public Service Commission, has been participating in the *Whistling While They Work* (WWTW) national research project, led by Griffith University, as an industry partner.

Level 3 61 Mary Street Brisbane
PO Box 15190 City East
Queensland 4002 Australia
Telephone +61 7 3227 6379
Facsimile +61 7 3224 6635
Website www.psc.qld.gov.au

ABN 73 289 606 743



Views expressed in this submission are not official Qld Government policy

This research has set out to describe and compare organisational experience under the various whistleblower regimes across Australia, with a view to identifying and promoting best practice in workplace responses to whistleblowing. The project has examined public officers' experience and attitudes towards whistleblowing across a wide cross-section of public agencies from the Commonwealth, New South Wales, Queensland and Western Australian Governments.

The first report of the project – Whistleblowing in the Australian Public Sector – is due to be released in early September 2008.

Review of the *Whistleblowers Protection Act* and Queensland Health inquiries

A review of the administrative responsibilities and agency implementation of the Queensland WPA was commenced by the then Office of the Public Service Merit and Equity in 2004 following a recommendation from the Parliamentary Crime and Misconduct Committee. This review was nearing completion when events at Bundaberg Hospital gave rise to two inquiries into the Queensland health system. The review of the WPA was put on hold while the inquiries were conducted.

The inquiries into the Queensland health system were in response to public concern about the quality and safety of public hospital services, particularly arising from the circumstances surrounding the appointment and practice of Dr Jayant Patel at the Bundaberg Hospital.

The Queensland Health Systems Review, conducted by independent consultant Peter Forster, (“the Forster review”) focused on reviewing administrative, workforce and performance management systems within Queensland Health. The Forster review examined systemic issues related to Queensland Health’s systems and its terms of reference did not extend to the investigation of individual complaints or grievances.

The Queensland Public Hospitals Commission of Inquiry, conducted by the Honourable Geoffrey Davies AO (“the Davies review”), investigated specific issues arising from the appointment of Dr Patel to Bundaberg Hospital.

The review of the WPA was re-activated in March 2006 with revised scope to consider the findings and recommendations regarding whistleblower protection made by the two inquiries. Both the Davies and Forster reviews identified a need for improvements in whistleblower protection. It is a measure of the complexity of the issues involved that the two reports came to different conclusions in some key areas. For example:

- An oversight role was recommended in the Davies review¹, but not supported by the Forster review²; and

¹ Queensland Public Hospitals Commission of Inquiry, 30 November 2005, 6.510.

² Queensland Health Systems Review, Final Report, September 2005, recommendation 9.21

Views expressed in this submission are not official Qld Government policy

- Disclosure to the media was not supported by the Forster review³, but was recommended by the Davis review⁴ (only after other disclosures are not resolved satisfactorily).

After the review was completed, a number of amendments to the WPA were recommended, and endorsed by the Government. These amendments were support by both the Davies and Forster reviews and allowed public interest disclosures to be made to members of Parliament, as well as extending protections under the Act to include employees on a common law contract of service with a public sector agency⁵.

Queensland observations

The Public Service Commission and the Queensland Government will watch with interest the changes that may occur within the Australian Government public sector in regards to whistleblowers. While I do not wish to make specific submissions about issues contained in the Terms of Reference for this inquiry, I would like to offer the Committee a number of observations from the experience in Queensland which the Committee may wish to consider.

- The WPA is one component of an integrity framework in Queensland which is comprised of organisations such as the Public Service Commission, the Crime and Misconduct Commission, the Queensland Ombudsman, the Queensland Audit Office, the Information Commissioner and the Integrity Commissioner.

The role of Integrity Commissioner was established in 1998 under the *Public Sector Ethics Act 1994* and this role is unique in Australia. The Commissioner's role is to primarily provide advice on whether public officials⁶ may have a conflict of interest. This confidential "sounding board" role offers senior public officials the opportunity to ensure that their decisions are made in an unbiased manner and in the interest of the public. The Integrity Commissioner may also give the Premier advice on issues concerning ethics and integrity standards and building the public's awareness about ethical issues.

The co-ordination of the integrity framework in Queensland occurs via a meeting of the Integrity Commissioners who meet on a quarterly basis to discuss issues of interest and concern. Having a broad-based integrity framework helps to ensure that ethics and integrity messages are disseminated in the widest possible way across the public sector.

- The experience of many Queensland public sector agencies is that managing the expectations of whistleblowers can be very challenging. Ensuring that whistleblowers

³ See previous note

⁴ Queensland Public Hospitals Commission of Inquiry, 30 November 2005, 6.512

⁵ *Whistleblowers (Disclosure to Members of Parliament) Amendment Act 2007*

⁶ The category of persons who may seek advice is set out in section 27 of the *Public Sector Ethics Act 1994*.

Views expressed in this submission are not official Qld Government policy

are aware of the circumstances under which they may make a public interest disclosure and awareness of the process that is to come, is vital to ensure that agencies are able to effectively manage the process and the whistleblower. The impacts of a poorly managed public interest disclosure can be widespread and negatively affect not only the whistleblower and agency, but impact on effective service delivery and employee morale.

Managing whistleblower expectations is a complex task. Managers need to balance providing sufficient information about the whistleblower process and the level of protection available to enable individuals, to make their own informed decision about whether to “blow the whistle”, with not wanting to discourage employees providing information which may have serious consequences for an organisation, such as the disclosure of corruption.

A greatly enhanced level of agency policies and procedures, as well as staff education, may hold some of the key for agencies, as would effective whistleblower support mechanisms to support employees who have “blown the whistle”. It would appear that these mechanisms could be subject to some level of legislative intervention, but the success, or otherwise, would be shown by the level of implementation at an agency and integrity agency level.

- The importance of the role of managers in the whistleblowing process has been underestimated to date. This group of staff potentially can impact greatly on the effectiveness, or otherwise, of public sector whistleblowing. The WWTW research also shows that managers are frequently the source of alleged reprisals against employees.

Given that the vast bulk of disclosures are made within organisations⁷, managers need to have the skills to identify potential public interest disclosures, provide sufficient information to employees about making a disclosure and then proactively support those employees who have made public interest disclosures. The value of whistleblowing to an organisation should be recognised and embraced by public sector managers. This message should be driven from chief executives and senior management.

The response of managers to whistleblowers, or potential whistleblowers, will determine the organisational climate for further disclosures and the level of confidence that employees place in management. A “healthy” public sector organisation is one that encourages its employees to report wrongdoing, supports those employees who do report and addresses any issues promptly.

- One of the challenges with the current generation of legislative frameworks is the focus on protections available to whistleblowers, rather than the management and outcomes of

⁷ Based on the WWTW research

Views expressed in this submission are not official Qld Government policy

disclosures. The principal object of the Queensland *Whistleblowers Protection Act 1994* is to “*promote the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector, danger to public health or safety and danger to the environment*”⁸. There are a number of issues in the WWTW research which would suggest that there may be other objectives that could be incorporated into legislation, such as actively supporting public sector employees who make public interest disclosures and ensuring that any disclosures are dealt with appropriately and, where necessary, action is taken.

- The complexity involved with the confidentiality of whistleblowing is another area of the legislation which public sector agencies have struggled with. Queensland legislation (as with most other whistleblower legislation), enshrines confidentiality⁹. Confidentiality is one of the protections available to whistleblowers and one which is often requested. However there are a number of complexities which may make confidentiality problematic in practice.

One difficulty is that the agency may not be able to practically guarantee confidentiality. It can be difficult to make enquiries, even on a preliminary basis, without drawing someone’s attention to the fact that a disclosure has been made. And, of course, procedural fairness will require a person who is the subject of allegations to be given an opportunity to respond.

The conduct of a whistleblower before making the disclosure can make confidentiality difficult, particularly if the whistleblower has spoken out about an issue prior to making a disclosure. Sometimes, due to the nature of the allegations, it is not difficult to deduce who has made the disclosure.

Even if agencies do take reasonable measures to protect a person’s identity, other factors can intervene which compromises confidentiality, such as the person being seen talking to managers or investigators, or reprisal action taken against an incorrectly identified whistleblower. If confidentiality is compromised, pro-active management action is often the only option available to protect a whistleblower. This further reinforces the importance of the role of managers in public sector whistleblowing.

Confidentiality, or the risk of compromising it, should always be part of an agency’s assessment of reprisal risk. This pro-active approach to considering the risk of compromising whistleblowers confidentiality can assist agencies raise the matter with a whistleblower and, if necessary, take steps prior to confidentiality becoming an issue.

⁸ Section 3 *Whistleblowers Protection Act 1994*

⁹ See Chapter 6 *Whistleblowers Protection Act 1994*

Views expressed in this submission are not official Qld Government policy

Thank you for the opportunity to provide this submission to the Committee. Should the Committee have any further queries please contact Donna Andrews, Principal Policy Officer, Workforce Policy on telephone

Yours sincerely

Bruce Wilson AM
Commission Chief Executive