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6 August 2008

The Secretary
House Standing Committee on Legal and Constitutional Affairs
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Submission to the Commonwealth Government Inquiry into Whistleblower Protection

Background and Experience

1. The author is a director, founding partner and active principal of STOPline Pty Ltd which commenced in 2001 and whose core business is the provision of whistleblower hotlines services to both public (Victorian and Commonwealth) and private sector entities. In addition STOPline is the holder of a Private Security Business Licence and conducts corruption and misconduct investigations on behalf of client organisations.

2. In his prior policing career the author was Deputy Commissioner (Operations) in Victoria and Commissioner of Police for Western Australia. He was also involved in the management of Crime Stoppers in both states which of course is simply a system to encourage disclosures and protect whistleblowers albeit in relation to crime.

3. During the past six years at STOPline we have received many disclosures from whistleblowers and provided our services to government departments and private sector companies under both legislatively required processes and the application of self imposed internal policies relating to the facilitation and protection of whistleblowers.

4. We have conducted numerous investigations in regard to various forms of workplace corruption and improper conduct, some of which came to light through disclosures by whistleblowers. Because of our direct dealings with whistleblowers and their post event feedback we also have a considerable amount of knowledge about the expectations, concerns and workplace treatment of such persons.

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5. The author has also attended and/or presented at numerous state and national level conferences on corrupt conduct, governance and risk management. In addition he took part in the National Integrity Systems Assessment (NISA) project conducted by Griffith University and Transparency International (Australia).

6. For obvious reasons STOPline has kept abreast of various developments in legislative and best practice requirements relating to whistleblower facilitation and protection within the public and private sector both in Australia and overseas.

Legislative and other drivers in regard to whistleblowing

7. All states and territories except the Northern Territory have now implemented legislation in regard to the receipt and facilitation of disclosures by whistleblowers. The names and format of the legislation does vary quite dramatically in some cases but the intention of each piece of law is essentially to provide a safe way for genuinely concerned persons to report corrupt or improper conduct by public bodies or their officials.

8. Starting with the US corporate collapses of WorldCom and Enron in 2001 and then the 'big business scandals' at HIH, NAB and the AWB the private sector has faced demands which included the provision of mechanisms and protection for corporate whistleblowers.

9. Governments, business regulatory bodies and institutional investors all wanted to see improved corporate good governance. The result was a high level of activity by governments and oversight bodies, both here and overseas.

10. Key among the action taken in order to enhance corporate governance, particularly as it relates to the receipt and management of disclosures here in Australia, were the following pieces of legislative, regulatory or advisory activities or publications :

- **Australian Standard AS 8001-2008 "Fraud and Corruption Control".**

  AS 8001 recommends best practice include the use of an external reporting line.

  AS 8001 (para 4.3) prescribes the alternative means for staff reporting "*of unethical or illegal behaviour*";

  - *Through normal reporting channel;*
  - *Outside the normal reporting channels but within the entity; and*
  - *Through reporting channels external to the entity.*

- **Australian Standard AS 8004-2003 "Whistleblower protection programs for entities".**

  AS 8004 also highlights the requirement for an external whistleblowing hotline.

- **CLERP 9 Amendments to the Corporations Act 2001**

  Under Part 9.4AAA, any officer or employee of the company or contractor supplying goods or services, or contractor's employee can qualify for protection when making a disclosure. The legislation allows disclosures to be made to ASIC, the company's auditor or member of the audit team, a company director or senior manager or a person authorised by the company to receive such disclosures.

- **ASX "Principles of Good Governance and Best Practice Recommendations".**

  The Australian Stock Exchange (ASX) has recently promulgated an exposure draft regarding changes to the Principles of Good Governance. Under the amended Principle 3: *"Promote ethical and responsible decision making"*, the ASX has recommended that all codes of conduct should include: *...measures the company adopts to encourage the reporting of unlawful or unethical behaviour and to actively promote ethical behaviour...how the company protects those, such as whistleblowers who report violations in good faith, and its processes for dealing with such reports".*

  The recommendations also cross reference AS 8004-2003 "Whistleblower protection programs for entities"

- **Sarbanes - Oxley Act (USA)**

  The implications of the Sarbanes-Oxley Act have been significant in the USA and around the world. Its influence is not only felt by US companies and subsidiaries but also those non US issuers within the USA. Sarbanes-Oxley is also influencing the direction of corporate governance legislation in the European Union and Asia.

- **Financial Instruments and Exchange Law (Japan)(J-Sox)**

  The Japanese equivalent of the Sarbanes-Oxley Act requires Japanese companies to managerially assess internal controls and provide for the independent audit of the effectiveness of such controls.

- **Individual State Whistleblower Protection and Public Interest Disclosure legislation.**

  All States and Territories (except NT) have current legislation with differing terminology, process and practices but essentially with the intention of tackling corrupt behaviour and protecting whistleblowers.

  The Commonwealth Committee will have the opportunity to examine the operation of the various existing legislation as well as considering reviews such as the 2005 National Integrity Systems Assessment (NISA) as well as the soon to be released employee survey on whistleblowing by Dr A J Brown of Griffith University.

Whistleblowing defined

11. There is no globally accepted definition of 'whistleblowing'. After comprehensive discussion on the various definitions and descriptions the Senate Select Committee on Public Interest Whistleblowing (SCPIW 1994) chose to utilise the following wording:

> *"Whistleblowing is the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons that may be able to effect action."*

12. In our business activities and in this submission we have utilised that definition.

Format of Submission

13. In the following material the terms of reference provided to the House Standing Committee on Legal and Constitutional Affairs are presented in bold and the comments of the author are then presented for consideration by the committee members.

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

(a) these could include:

(a) 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,
(b) contractors and consultants who are currently or were formerly engaged by the Australian Government;
(c) persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants;

14. It is the view of the author that persons who fall into any of the above categories should be able to make protected disclosures under the proposed legislation. It is important to provide coverage to persons other than current employees of the public bodies concerned.

15. Many whistleblowers do wait until after they leave a place of employment before raising their concerns about workplace crime, corruption or misconduct. Often sub-contractors and consultants observe forms of illegal or improper behaviour; they are also less likely to fear the sorts of workplace recriminations that permanent staff may encounter.

(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;

16. In the view of the author the relevant legislation, prescribed procedures and whistleblower protection does need to be applicable to persons overseas and working as an employee, sub-contractor or consultant to a government department or agency. This would include persons engaged in AusAid activities, peace-keeping forces or other off shore activities funded or sponsored by the Federal Government.

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;

17. The forms of misconduct that are reportable and protected need to be as broad as possible. Among our private sector clientele at STOPline internal whistleblowers utilise the whistle blowing process for a broad range of behaviours that breach corporate codes of conduct but often would not be covered by existing legislation applicable to the public sector. One very common and organisationally disruptive example is bullying and harassment. Such workplace misconduct accounts for some 24% of the disclosures received at STOPline and there is ample research to demonstrate the very high emotional and economic cost of such behaviour.

18. A 2005 'People Matter' survey of 14,000 public sector staff by the State Services Authority in Victoria found that 21% had been bullied or harassed in the prior year and 37% had witnessed such behaviour in their organisation. (The 2008 'People Matter' survey is not yet concluded)

19. The linkage to dishonesty, whether created by the actual legislation or legal interpretation of precedent (as in Victoria) is a constraint. For example sexual harassment that in some instances can enter the realm of assault (including those of a sexual nature) is not covered by the Whistleblowers Protection Act 2001 in Victoria.

20. It is the authors view that the broadest possible definition of improper (or corrupt) conduct should be provided and that the legislation should not only be applicable to matters concerning dishonesty.

(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

21. There is danger in precluding a person from obtaining whistleblower protection on the basis of interpretation of their motivation. The real issue is whether the matter reported is illegal, corrupt and/or seriously destructive to the public body or its personnel. These limits should be set by the definition of improper conduct as prescribed by the proposed act.

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

22. This is another perennial issue. While matters pertaining to non-selection for promotion, granting of study leave and like matters may be readily handled by separate mechanisms within the Human Resources unit, they should not be automatically excluded by definition such as the bullying and harassment matters referred to above.

23. There is danger of what the author refers to in presentations as "HR handball". This is where allegations of corrupt or serious misconduct that actually requires factual investigation but are allocated to HR on the basis that it involves human (personnel related) behaviour.

24. Applied broadly such an interpretation can result in many matters being referred to staff who are not experienced or qualified to properly assess or investigate such matters.

25. Within the legislation there has to be enough scope to receive the disclosure through a prescribed process so that the whistleblower can receive the required level of confidentiality and protection. Once an initial assessment is conducted a determination can be made as to whether the actual activity disclosed (and the whistleblower) needs the protection of the act or not.

26. Whatever the category the disclosure is determined to be, the decision as to whether the matter can and should be dealt with by specific HR, internal audit or other organisational units and their mechanisms is one for senior management of the public body who are then accountable for that decision.

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));

27. There is a problem associated with setting levels of seriousness as entry criteria in relation to illegal, corrupt of improper conduct. In the author's experience some complainants come forward with information that initially may seem quite low level but upon making an exploratory assessment the matter is readily identified as a more serious matter. On occasions the initial interview elicits information and evidence of serious matters not initially identified.

28. However it is both legitimate and important to codify the need for whistleblowers to be acting in an honest and reasonable belief that the allegation is valid. In our seven years of experience at STOPline we have had very few, if any disclosures that did not meet this requirement; on the other hand some allegations submitted with the most honourable of intentions as well as *honest and reasonable belief* were subsequently demonstrated to be wrong or inflated in regard to their seriousness.

(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

29. It is the author's view that the notion of providing penalties for failing to comply with prescribed procedures is neither necessary nor helpful. Prospective or actual whistleblowers are generally stressed to some degree and some are hurt, angry or disappointed; particularly as the majority have raised their concerns with line supervisors or managers to little or no avail. Because of their psychological state, their inexperience and in some cases fear, they can make genuine but poor errors of judgement.

30. There should definitely be penalties/sanctions for persons who the whistleblower legislation and mechanisms to *knowingly or recklessly make false allegations.*

31. In our experience in STOPline the incidence of whistleblowers making *false allegations* is extremely low. However it is the author's opinion that the provision of penalties/sanctions for those who may contemplate making (or actually lodge) false allegations is important in engendering organisational support for the legislation and its intentions. Particularly when discussing the perennial issue of the potential for making malicious complaints within competitive workplaces.

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;

32. There is ample evidence that many whistleblowers suffer negative consequences after making disclosures. This applies equally whether the entities are within the public or private sector.

33. A 2007 study by three US professors in a report "Who blows the whistle on Corporate Fraud" noted that employee reporting was not more widespread because they *"have considerable disincentives personally"*. In 82 % of the cases where whistleblowers were identified they *"alleged they were fired, quite under duress, or had significantly altered responsibilities as a result of bringing the fraud to light"*

34. This negative treatment is not confined to the private sector and the reporting of fraud. At STOPline we had similar feedback from whistleblowers in both public

and private sector organisations and in relation to serious and less serious misconduct cases.

35. These comments are also applicable to the issue of anonymity for whistleblowers and are raised again in that segment of this submission.

(b) immunity from criminal liability and from liability for civil penalties;
(c) immunity from civil law suits such as defamation and breach of confidence;

36. The Whistleblowers Protection Act 2001 in Victoria addresses these matters in Part 3 – PROTECTION OF WHISTLEBLOWERS in sections 14 to 17 and that form of protection is recommended to the Committee.

37. Section 18 provides an offence for taking detrimental action against a person in reprisal for making a disclosure and section 19 makes an 'offender' liable for damages.

38. The content of Part 3 (Attachment A) is recommended to the Committee as a model for providing the necessary protection for whistleblowers.

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

39. The manner in which disclosures can be submitted to public sector organisations has already been well and truly tested, seemingly successfully, in several jurisdictions within Australia. Obviously the committee will have the opportunity to select any one of those and compose a hybrid or draft their own. Once again the author holds the view that the current legislation (with the exception of section 108 – refer paragraph 52 of this submission) and the Ombudsman's guidelines here in Victoria are well worthy of adoption.

40. Point (a) above gives the options of making a disclosure to the *whistleblower's agency* or an *integrity agency*. In our experience one of the biggest problems where a disclosure is lodged internally is the difficulty some entities and their people have in keeping the matter confidential.

41. One of the most regular criticisms by whistleblowers about their own organisation is to the effect that "everyone" knew about the issue very soon after it was lodged. As a consequence alibis are concocted, emails deleted and documents shredded before a decision is made as to the class and calibre of the disclosure.

42. Another key issue is the availability for anonymous reporting. Based upon our considerable experience and research here at STOPline we consider anonymity to be a shield, not a mask. Again there is ample research and anecdotal evidence to support the recriminations and misery faced by whistleblowers. (Refer paragraphs 32 to 34 above)

43. For example In an Australian Compliance Institute survey conducted in 2004 reported that 80% of respondents believed that employees would be more likely to report unethical behaviour if they could do so anonymously.

44. On 4 August 2008 the author attended an Institute of Internal Auditors presentation by Cynthia Cooper, the internationally acclaimed whistleblower in the US WorldCom fraud case which helped create the wave of activities to enhance corporate governance across the world (Refer also paragraph10 above). One of the two key points she made in conclusion was that whistleblowers must be given the option of anonymity. The other was the need for the capacity for reporting to locations independent of the organisation where the improper conduct is occurring. (This second aspect is canvassed below at paragraph 48)

45. Here at STOPline 64% of whistleblowers request total anonymity and 43% of those are happy for us to know their identity but do not want it provided to their employer. The principal reason for this is that they lack faith in their organisations capacity to keep their identity confidential. In other words it is not about suspected corruption at the top of the organisation; simply an incapacity to handle the matter with the required level of discretion and confidentiality. Also interestingly the majority of whistleblowers we have encountered state they or others have already raised their allegations/concerns with their line management and little or nothing appears to have been done in response.

46. The common myth in regard to providing anonymity for whistleblowers is that in such a model the organisation will be flooded by vexatious and/or vindictive disclosures. This has not been or experience at STOPline. The State whistleblower legislation in Victoria, Queensland and Tasmania all provide anonymous reporting so their experiences and opinion in that respect would be available to the committee.

47. There is a clear need for integrity agencies to promulgate guidelines and provide training but they can only do so much. In spite of the activities of the Ombudsman's office here in Victoria, most public sector employees have a low level of understanding or knowledge of their rights and obligations under the Whistleblowers Protection Act. That is of course until the entity receives a disclosure and has to turn rhetoric into reality. A problem is that often by the receipt of the next disclosure the individual who handled the inaugural matter has 'moved on' and another uninitiated person has to learn 'on the run'. (This issue is canvassed further in the next segment of this submission).

(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;

48. Permitting a third party to receive disclosures is important in regard to providing the independence that celebrated whistleblower Cynthia Cooper makes as a key point in her presentations. (Refer paragraph 44 above) and endorsed by Australian Standards (AS8001).

49. Here at STOPline we have also discovered that because disclosures to public bodies occur infrequently in many public sector entities, there is a low level of understanding and experience in handling the matters in keeping with the legislation and Ombudsman's guidelines.

50. Third party providers, particularly if their core business is the facilitation of whistleblowing, are able to be more effective and efficient in the receipt and handling of disclosures than most internal disclosure officers, who after all invariably have had no training, have little understanding of what may comprise evidence and usually have this role and its responsibilities on top of their principal workplace duties. There is also the additional problem of loss of continuity (and prior experience) created by the current high levels of mobility within and among agencies. Finally absences on recreational and other forms of leave create similar problems.

6. *the relationship between the Committee's preferred model and existing Commonwealth laws;*

51. The only point the author would make here is to draw the committee's attention to the other legislative requirements relating to whistleblowing included in the list of matters at paragraph 10 above.

7. *such other matters as the Committee considers appropriate.*

52. The Whistleblowers Protection Act 2001 (Victoria) at Section 108 provides that information acquired in the course of or as a result of the receipt or investigation of a disclosure under the provisions of the Act is not admissible as evidence in legal proceedings. (Refer Appendix B)

53. This means that if the Ombudsman requires a public body to have a 'public interest disclosure' formally and fully investigated, the evidence acquired cannot be further used in legal proceedings. This extends to situations where a public body may wish to dismiss an employee for corrupt or serious misconduct and such action is challenged in an industrial tribunal. Surely this is an undesirable situation and one the Commonwealth should avoid?

54. The author has been involved in such cases where an investigation has acquired direct evidence of serious misconduct sufficient to take steps to dismiss but a public body client has then had to obtain the services of another external expert to address the matter without any access to the product of the prior enquiries under the Act.

55. Similarly if evidence of a criminal offence is acquired, other than certain exemptions including criminal or disciplinary proceedings against a member of the police force it cannot be used. The author is aware that the Ombudsman has raised this legislative problem with the Department of Justice and there is hope that an amendment will soon take place.

Conclusion

56. The opportunity to make this submission is greatly appreciated and the author is willing and able to provide further information in support of the assertions made if it is of assistance to the committee.

Yours sincerely,

R (Bob) Falconer APM

Chairman, STOPline Pty Ltd

APPENDICES

Appendix A – Part 3 of the Victorian Whistleblowers Protections Act 2001

Appendix B – Section 108 of the Victorian Whistleblowers Protections Act 2001