



Further submission of the Accountability Round Table to the Social Policy and Legal Affairs Committee on proposed Public Interest Disclosure Bills

We thank the Committee for the opportunity to make a further submission following the Committee Hearing.

The evidence and discussion at the Hearing.

We submit that the participants before the Committee represented a significant cross-section of relevant opinion, expertise and interests. We also submit that, while, for example, some concerns were raised about the clarifying of the role of the Public Service Commission and its Ethics Advisory Service under the proposed regime, no witness appeared to argue that legislation was not needed or that the legislation should not be the Bill referred to the Committee. This is not surprising having regard to the fact that the Bill essentially gives effect to the highly regarded bipartisan Report of the Dreyfus Committee by adopting best practice. As to the above clarification matter, as Professor Brown pointed out, it raises operational issues that ought to be able to be dealt with by the respective agencies by an agreed framework and, if further legislation is required, that ought to be easily and quickly managed.

We also submit that the discussion at the hearing confirmed the inadequacies of the protection, investigation, and compensation mechanisms of the present Commonwealth whistleblower system.. That reality has also been confirmed by the international reviews and reports of the UNCAC International Review and the OECD Working Group both published this year. (See analysis attached).

Ample time has elapsed for consideration and enactment of the 2009 report of the Standing Committee on Legal and Constitutional Affairs: *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*. There are already best practice systems operating elsewhere in Australia which demonstrate the feasibility and desirability of the enactment of a best practice Commonwealth scheme. If there has been resistance to a best practice public interest disclosure system from members within the Australian Public Service (APS) and a reason for that has been that they are apprehensive of disclosure of their own wrong-doing to their superiors or, in the case of misconduct of others, that those who should take action would not and that the wrong-doing would be disclosed to the media, then, ironically, that, in itself, would be strong evidence of the urgent need for a best practice public interest disclosure regime.”

Reasons for delay in implementing the Standing Committee on Legal and Constitutional Affairs Committee Report?

Any perceived personal concerns of some involved in the government process must not be allowed to subvert bi-partisan conclusion of a Parliamentary Committee whose recommendation best serve the people of Australia. Any concern that APS members might be exposed to the risk of untrue complaints that are not bona fide cannot be justified.¹ Any such concern is contrary to the long standing and fundamental principle that public office is a public trust.

Public Office – Public trust.

Attached is a paper analysing the history, relevance and status of this principle. As there discussed, there exists a fundamental fiduciary relationship between the members of the public sector² and the people that they serve. The people have the right to expect that the members of the public sector will act in the interests of the people and not their own interests. That is the fundamental obligation arising from any fiduciary relationship.

As discussed in the attached Paper the public office –public trust proposition is relevant and applicable as a matter of law to members of the public sector and their relationship with the people they serve. It is recognised

- in the criminal law in the elements of two common-law offences -- bribery and misconduct in public office and
- in administrative law as the ethical principle providing the foundations upon which that law was developed and is presently based and

It has been relied on as the legal basis for holding contracts illegal and for holding that conduct amounts to a criminal conspiracy.³

It may, therefore, fairly and accurately be described as a principle recognised by the common law. The fact that the common law has not taken it further is a reflection of the magnitude and complexity of the

¹ That risk can, of course, be significantly reduced with appropriate legislation (see e.g. s 48 of the Bill)

² That is those who are engaged in the three branches of government and those who may undertake the provision of government services through contracts and other arrangements for which they receive public funds. .

³ See attached Paper and discussion at p5, of *Horne v Barber* and *R v Boston*.

mega public trust that is our democratic system of government⁴ and the extent to which reliance has moved from the common law to legislation and regulation.

At the Commonwealth level, the principle recognises the fiduciary relationship between the members of the public sector and the people of Australia on whose behalf they act. We have entrusted enormous power, very significant and complex responsibilities and vast assets and income to be exercised and administered by the members of the public sector.

Having placed our well-being, our future and that of future generations in the hands of the members of the public sector, they have a fiduciary obligation to protect the interests of those they serve. This includes strengthening the integrity of our system of government. When members of the public sector have evidence that another member of the public sector is engaged in wrong-doing, their fiduciary duties oblige them to take the matter up. It is in the interests of all Australians to ensure that members of the public sector are encouraged to perform their fiduciary duties, including the disclosure to superiors of wrong-doing and that they are not punished or discriminated against for carrying out their fiduciary duties. Rather they should be supported and, where appropriate, compensated speedily and adequately for any harm they may suffer in doing so.

Viewed in this light, a failure by members of the public sector to introduce best practice in this area should be regarded itself, as a breach of the fiduciary duty attaching to their public trust relationship with the Australian people unless the introduction of best practice would in some perverse way cause greater damage to the public interest.⁵ We submit that there is no evidence that that would be the case here if the Bills before the Committee were enacted. Rather the absence of such legislation means that members of the public sector who seek to honour their fiduciary obligations by conveying information of wrongdoing to those with the responsibility to deal with it, are faced with a system which actively discourages them from doing so and allows them to be victimised and punished for doing their duty and leaves them to pursue inadequate compensation as best they can.

Public office -- Public trust; the Bills

The Bills seek to encourage and to protect members of the public sector who perform their public trust duties conscientiously by disclosing information about misconduct within the public sector to those responsible for dealing with it. It also strengthens the investigation of such information, enables compensation of those who do their duty but suffer as a result and discourages victimisation and punishment of those supplying such information. Its enactment would bring best practice in this area to the Commonwealth public sector

Public office -- Public trust -principle and the explanation for delay

⁴ See discussion in attached Paper.

⁵ The "sensitive information" topic dealt with in the Bill provides a regime to address such a situation.

Supplementary Submission 007.1

There is no information publicly available that would explain why the 2009 report of the Standing Committee on Legal and Constitutional Affairs: *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* has not been implemented

We submit that the public office public trust principle creates an obligation to proceed expeditiously with enactment of the recommendations.

Conclusion

We submit that it will be highly relevant for the Committee in its Report to consider and affirm the principle that public office is a public trust.

Further, we submit that, having regard to that central principle, the criticality of the Whistleblower protection system to our National Integrity System and the high quality of the Bills before it, the Committee should recommend the enactment forthwith of the two Bills.

Hon Tim Smith QC

Chair Accountability Round Table. [REDACTED]