AUSTRALIA'S RIGHT TO KNOW

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

Inquiry into Protecting Whistleblowers within the Australian Government public sector

August 2008

Summary

Australia's Right to Know (RTK) coalition believes the public have a right to know how they are being governed and in particular, a right to be informed about potential corruption or maladministration in government.

The coalition appreciates that public servants serve the public through serving elected representatives. However, at times, there may be conflict between that duty and the delivery of good government.

As the people closest to the machinery and administration of government, cases of maladministration or corruption are often discovered by public servants. Internal channels may not always be an appropriate or effective mechanism of addressing such issues. Exposure to the media may be the only or most effective means to inform the public and influence a positive outcome.

- RTK submits that a public servant should be protected from internal disciplinary action and from civil and criminal prosecution for making the disclosures under certain circumstances. It may also be appropriate for a public servant to have access to compensation for loss or injury suffered as a result of the disclosure.
- As an adjunct, a journalist should not be compelled to disclose the identity of a confidential source, unless a court is satisfied it is necessary to do so. A whistleblower may be discouraged from making disclosures that might reasonably be considered in the public interest unless a journalist is able to maintain confidentiality of their sources.

Introduction

Australia's Right to Know (RTK) is a coalition of 12 major media organisations formed in 2007 to address concerns about the state of freedom of speech in Australia including the public's access to information on how they are governed.

RTK believes the public has right to be informed about the administration of government programs and policies. The public should have access to government information except in cases where disclosure is not in the public interest: for example to protect the privacy of individuals, to protect national security or to protect cabinet confidentiality.

The public interest is served by exposing maladministration or corruption within the public service. This public interest overrides any embarrassment or other backlash against the government.

The potential penalties for public service whistleblowers for breaching secrecy or confidentially, as set out in the *Crimes Act 1914* are severe, and include possible imprisonment. A whistleblower may also suffer other consequences, including victimisation in the workplace and flow-on effects to their personal lives.

Whistleblowers need to be protected from retribution for their actions and as people well placed to identify improper activity, they should be encouraged to expose problems by having a range of mechanisms that allow public servants to bring issues to light.

Ability to disclose to the media

The media, which brings issues of public interest to the public's attention, is often the only or most effective way for a whistleblower to expose wrongdoings within government or its administration.

There are a number of examples to demonstrate that governments often only become aware of, or act on allegations made by whistleblowers once they have been aired in the media.

The Terms of Reference of the Committee anticipate that a whistleblower may make a disclosure to the media and be protected. Paragraph 5 refers to:

> whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted.

RTK strongly supports protection of disclosures made to the media.

However, RTK disagrees with the proposition that such protection should only be given to a whistleblower who discloses to the media once he or she has exhausted all official channels within government (political and administrative). In some circumstances, a public servant may make a judgement that allegations should be aired publicly in order to expedite appropriate action that may protect the safety of the public.

Two recent examples are relevant here:

- In 2005 *The Australian* published reports of Customs Officer Allan Kessing on lax airport security, after the reports had been ignored by his superiors. Only after the reports became public knowledge, was a $200 million program put in place to improve security.

  Allan Kessing was convicted of disclosing official information without authority. RTK believes Kessing should not have been prosecuted. He acted in the public interest to protect public safety and national security.

- Queensland nurse Toni Hoffman, had raised concerns about malpractice by Dr Patel with the police, the Queensland Coroner and her employer. Action was not taken and the matter was eventually raised with a Member of Parliament. The problems were brought to the attention of the public and Dr Patel was charged and extradited back to Australia. If she had gone to the media in the first place, immediate action could have been taken to address the danger to the health and safety of the Queensland public.

RTK believes these examples demonstrate that whistleblowing to the media is in the public interest and a whistleblower should not necessarily be required to pursue official channels within the government before resorting to the media, particularly in cases where non-disclosure risks endangering the public.

NSW is the only Australian jurisdiction that anticipates that a whistleblower can disclose to the media. Section 19 of the NSW *Protected Disclosures Act 1994* enables a whistleblower to disclose to the media but only after disclosure to a prescribed person. In both of the examples citied above, had a similar requirement been in place, requiring the whistleblower to go through official channels before going to the media, the problems may not have been brought to light in a reasonable time.

Under the conditions in sub-section 19(3) in the NSW legislation, a whistleblower may be stopped from disclosing to the media for six months after they have made the original disclosure through official channels. Even if the person to whom the whistleblower discloses the problem does not investigate the allegation, the whistleblower is not able to resort for the media for six months.

There is Parliamentary precedent for a recommendation for disclosure to the media by whistleblowers In 1994 the Senate Select Committee on Public Interest Whistleblowing accepted there were circumstances in which a person disclosing to the media without following a procedure should be protected. The Committee recommended that whistleblowing to the media should be permitted where it is "excusable in the circumstances". Factors that should be taken into account in deciding if such an action is excusable include the seriousness of the allegations, reasonable belief in their accuracy and reasonable belief that going through official channels might be futile or result in victimisation.

RTK position

Where a public servant makes a disclosure through official channels, he or she should be protected where he or she honestly believes, on reasonable grounds, that it is in the public interest that the material be disclosed and honestly believes, on reasonable grounds that the material is substantially true.

Further, legislation should permit a public servant, in certain circumstances to make a disclosure directly to the media without the need to first pursue official channels.

However, RTK recognises that disclosure to the media which bypass official channels warrants a higher threshold test than that which should apply to disclosures through official channels.

For example, a disclosure made directly to the media could be protected where:

(a) the employee honestly believes, on reasonable grounds, that is in the public interest that the material be disclosed; and
(b) the employee honestly believes, on reasonable grounds that the material is substantially true; and
(c) the employee honestly believes on reasonable grounds either that:

    i. to make the disclosure through internal channels is likely to be futile or result in the whistleblower [or any other person] being victimised; or
    ii. the disclosure is of such a serious nature that it should be brought to the immediate attention of the public.

RTK submits that in addition to protection for disclosing directly to the media in certain circumstances, there should be legislative protection for a public servant to make a disclosure to the media after disclosure through official channels has proved unsuccessful. However, we believe the six month period set out in the NSW legislation is too long and should be reduced to say two months.

RTK submits that whistleblowers who disclose through official channels and to the media should be immune from both internal disciplinary action and civil and criminal prosecution for making disclosures and should have a right to claim compensation for loss or injury they suffer as a result of making the disclosure.

Journalists' sources

When a whistleblower discloses information to the media, there may also be legal and other consequences for the journalist to whom the disclosure is made.

Consequently, as an adjunct to protection for the whistleblower, RTK recommends robust protection for a journalist to protect the identity of his or her source in appropriate cases.

The potential consequence of a lack of effective protection combined with the determination by some authorities to track down the source of disclosures (as seen in the recent raid by police of the offices of Western Australia's Sunday Times) discourages a whistleblower both initially coming forward, and, in cases of inadequate or improper handling of an internal disclosure, from disclosing that to a journalist.

RTK believes that the current provisions relating to journalists' sources contained in the Commonwealth Evidence Act are inadequate.

Division 1A of the Evidence Act seeks to give the Court a discretionary power to protect a confidential communication including a communication between a journalist and a source. The legislation is inadequate, as it requires a journalist to reveal the

identity of a source, *unless* a court is satisfied otherwise. Further, the legislation restricts the circumstances in which the court may exercise its discretion. Journalists who refuse to disclose such information can be charged with contempt, fined or imprisoned.

Effective protection of journalists' sources should instead be based on a presumption that a journalist should only be required by a judge to reveal a source on strictly limited grounds of compelling public interest.

The Harvey and McManus case [1], although heard in Victoria, indicates the Commonwealth Evidence Act would be unable to provide protection in appropriate cases.

The Case

In 2004 the *Herald Sun* published an article "Cabinet's $500 million rebuff to veterans" by Michael Harvey and Gerard McManus. It suggested the government had agreed to only five of the 65 recommendations of a review of veterans' entitlements and appeared to contain information from confidential Department of Veterans Affairs documents. The article was acutely embarrassing for the government. A DVA investigation revealed that during the three days before publication, calls had been made from telephones associated with DVA officer Desmond Kelly to telephones connected to Harvey.

Kelly was charged with the *Crimes Act* 1914 (Cth) offence that he communicated a document which came into his possession by virtue of being a Commonwealth officer and which it was his duty not to disclose.

Harvey and McManus refused to make statements to the police during investigations into the alleged offence. They were both called to give evidence in the prosecution of Kelly and both refused to answer questions on the grounds that to do so might disclose the identity of a confidential source. Both were charged with contempt of court.

Kelly was later convicted but his conviction was quashed on appeal. Harvey and McManus pleaded guilty to contempt and Judge Rozens convicted them and, after contemplating a custodial sentence, fined each $7,000.

Relevance to Part 1 Evidence Act (s126A-126D)

In the McManus and Harvey case, Judge Rozens discussed the Commonwealth *Evidence Act* provisions which seek to protect journalists' sources and concluded that if they had been available to the court in Victoria, he would not have been able to exercise his discretion to direct that evidence of the identity of the source did not need to be provided.

The Commonwealth Act provides that a court may direct that evidence does not need to be given where it finds it would disclose a protected confidence, document or identity.

In making its decision there are certain matters the court must take into account including the probative value and importance of the evidence, the

[1] *R v Gerard Thomas McManus and Michael Harvey* [2007] VCC 609

gravity of the offence and the availability of other evidence concerning the matter. Accordingly if the identity of a source is clearly relevant to the case in hand and is not available elsewhere, as a matter of practice, it is unlikely the factors set out in the legislation would allow the judge to exercise his or her discretion.

In addition, section 126D of the Act states that nothing in the legislation will prevent a judge from requiring a witness to give evidence of a communication (ie a leak) or document made in committing a fraud or offence or an act that renders a person liable to a civil penalty.

Accordingly where the leaking of the information is a criminal offence, even where the disclosure is in the public interest, the judge will be prevented from exercising this discretion.

Judge Rozens commented[2] that:

> "(the) legislation ensures that the protection would not be available where the evidence was necessary to prove the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty. The case against Mr Kelly was completely circumstantial and it could not be said that the evidence of Messrs McManus and Harvey would be anything other than probative and important. Nor could it be said that other evidence was available to fill the gap caused by their refusal to give evidence. I think it is beyond argument that the offence alleged against Mr Kelly would have fallen within the parameters of the section 126D.

Right to Know proposal

RTK proposes legislation should provide that a journalist cannot be compelled to disclose the identity of a confidential source unless a court is satisfied that it is necessary to do for one or more of the following reasons:

- protection of the national or international security of Australians; or
- prevention of the commission of a serious crime; or
- protection of the physical safety of any person; and
- it is in the public interest to do so.

We respectively urge the Committee to recommend to the Commonwealth and State governments the enactment of uniform shield legislation that contains the above elements.

[2] Paras 23 and 24