Law Institute Victoria

Submission

Government Lawyers' and Administrative Law & Human Rights Sections

Inquiry into whistleblowing protections within the Australian Government public sector

To: Secretary, House Standing Committee on Legal and Constitutional Affairs

A submission from the Law Institute of Victoria (LIV)

Date: 27 August 2008

Queries regarding this submission should be directed to:
Contact persons *Helen Blaskett* *Laura Helm*
Ph
Email

Contents

1 Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to contribute to the Inquiry into protections for public interest disclosures (whistleblowing) within the Australian government public sector currently being conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee). The LIV has a keen interest in the operation of whistleblowing legislation in Australia and has previously made submissions in relation to the Victorian legislation, the *Whistleblowers Protection Act* 2001 (Vic) (Victorian Act).

The LIV commends the Committee for conducting this wide-ranging Inquiry into whistleblowing protections and welcomes the opportunity to consider any report on its findings or recommendation of a preferred model. As the peak professional association for lawyers in Victoria, the LIV is committed to representing and supporting its members, the wider legal community and the general public on legal matters. In particular, the LIV supports its government and public sector lawyers who represent a significant sector of the legal profession and, for whom, the whistleblowing protections and proposed Commonwealth legislation in this area directly relate. This submission will address general matters relating to whistleblowing protections as well as specific matters raised in the Terms of Reference outlined by the Committee. The LIV contends a number of important issues relating to the proposed reforms.

2 General Comments

The LIV supports the general purpose of whistleblowing protections and the objectives that are outlined in various federal and state legislation. It is important that public officials are encouraged and supported when making public interest disclosures about wrongdoing within their organisation. This requires a substantial regulatory support framework to achieve a positive culture shift within the public sector.

The LIV supports a broad model for legislation to protect public interest disclosures within the Australian Government public sector. To this end, the LIV considers that whistleblowing protections should not be confined to public sector "insiders", noting that persons outside the public sector are often best placed to make disclosures about corrupt and other criminal activity within a government agency. The LIV considers that whistleblower legislation should provide protection to a broad range of people, but that the threshold for the types of disclosed wrongdoing should be high. The higher level of disclosed wrongdoing is commensurate with the high level of protection provided in whistleblower legislation and avoids unnecessary duplication that can occur with whistleblower protections and other complaint procedures offered by investigative agencies and other legislative regimes(see further below, sections 4 and 5).

Further, the processes for making such disclosures should be clear and unambiguous, including the clear identification of those agencies and authorities who receive and investigate whistleblowing disclosures. Once disclosures are made, whistleblowers require confidence in the investigative process that deals with the disclosure, including the ability to provide necessary protection from any adverse consequences of such disclosure.

Moreover, protection must be extended to persons beyond technical "whistleblowers", as once a whistleblower makes a disclosure it will be those who process the disclosure and become involved in the conduct of consequential investigations who will become most vulnerable. The investigative processes will often involve government and public sector lawyers, hence the LIV's great interest in these aspects. It is essential that any proposed legislative framework adequately scope the ambit of protection available to 'protected persons' and clarify the definition of 'whistleblower' to ensure harmony with existing State and Territory legislation.

3 A consistent and national approach

This submission recommends a consistent and national approach to whistleblowing protections and a more coordinated approach between the federal and the state governments. The LIV recognises that there is inconsistency in existing Commonwealth and state legislative provisions concerning whistleblowing protections. Such inconsistencies have been outlined in detail by Dr A J Brown in his Issues Paper [1] and they range from inconsistencies in the use of terminology in legislation including various titles; who is eligible for protection; what types of wrongdoing should be disclosed; and what types of protection are afforded.

In the Victorian legislation, for example, the term "whistleblower" is used but not actually defined. Similarly, there is some confusion and duplication in organisations that manage complaints. In determining how to deal with complainants, organisations need to determine whether a received complaint is a whistleblowing disclosure or a general complaint and, often, this is unclear.

The LIV suggests that this confusion undermines the objectives seeking to be achieved in this area. On this issue, the LIV endorses the comments made by the Commonwealth Ombudsman in the Foreword to Dr Brown's Paper:

> There are now many laws around Australia that guide how disclosures in the public sector can be made, how they should be acted on, and how those who make them should be managed and protected. There are variations in style, coverage and principle among different laws. There are strengths in some laws that other jurisdictions could heed. There are weaknesses in all laws that need

[1] Dr A J Brown, "*Public Interest Disclosure Legislation in Australia: Towards the Next Generation*", An Issues Paper, November 2006

> to be addressed, perhaps by common answers...His [Dr Brown's] call for a national and coherent approach deserves special attention.[2]

Similarly, in referring to the current Committee Inquiry, Chairperson Mark Dreyfus QC, highlights that *"[m]ore effective and comprehensive protection for whistleblowers can increase the likelihood of public interest disclosures being made."*[3] The LIV supports this view and recommends that all legislation in this area be reviewed and a more consistent, national approach be considered. In this regard, we consider that there may be constitutional scope to consider bodies established formally within a state's public sector. Commonwealth legislative initiative to codify 'whistleblower' protection could be borne of the commendable measures to harmonise other Commonwealth law with State and Territory law.

For example, within the Victorian public sector there are bodies such as universities whose recurrent higher education funding derive from the federal government and which have been held to be "trading" and "financial" "corporations" able to attract the direct application of federal legislation.[4] These are currently being reviewed to harmonise functionality and operative legislative provisions.

4 Terms of Reference paragraph 1 - Categories of people who could make protected disclosures

The LIV notes that the Victorian Act provides for whistleblowing protection to any "natural person". In contrast, the majority of existing Commonwealth legislation and other state jurisdictions limit protection to those with "inside knowledge", such as "public officers" and employees. At all times, a substantive 'public benefit' test should be applied.

The LIV supports the level of protection afforded by the Victorian Act and considers that the categories of people who could make protected disclosures in a preferred model for the Australian public sector should be wide and include "all natural persons", including those categories that are outlined in item 1 of the Terms of Reference..

There will be situations where outsiders will be best placed to initiate and provide the pertinent evidence substantiating an allegation of serious wrongdoing. Those outsiders frequently have a pivotal position in being able to identify such serious wrongdoing and thus make a credible disclosure initiating investigations. For example, there are many persons working in the private and charitable sectors that can become aware of maladministration and be in a position to make a disclosure.

---

[2] Issues Paper, Foreword by John McMillan Commonwealth Ombudsman, Bruce Barbour NSW Ombudsman, and David Bevan Queensland Ombudsman.

[3] House of Representatives Standing Committee on Legal and Constitutional Affairs, Media Alert, *New Inquiry – legislation to protect whistleblowers in the Australian Government public sector*, issued 11 July 2008.

[4] *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303 (23 March 2001).

Further, extending protection to a wider category of people is particularly important in light of the increasing reliance on the private sector in the contracting and outsourcing of some public sector services. Adequate enforceable protection mechanisms must be considered to guarantee a whistleblowers immunity and anonymity.

Of crucial importance is the protection of persons who are not actually "whistleblowers" themselves, but play an essential role in relation to the investigation of matters that attract whistleblower protection. It cannot be overemphasised that where there is an investigation into serious misconduct, those undertaking or facilitating the investigation may need as much, if not more, protection than any initial whistleblower. Similarly, in situations where a whistleblower has confided in another person and shared information about a wrongdoing, that other person needs to be afforded similar whistleblowing protection.

Whistleblowing protection should be provided to a 'defined' person class, including those persons who are not themselves whistleblowers but who play an essential role in relation to the investigation of matters that attract whistleblower protection. Further, when considering the definition of whistleblower, it is also important to consider the types of disclosures sought to be protected under the legislation. It is important to ensure that, in both areas, the objectives of the legislation are being addressed and that clear processes exist in meeting these objectives.

5 Terms of Reference paragraph 2 – types of disclosures that should be protected

The Victorian Act limits the types of protected disclosures to those involving "improper conduct" or "detrimental action"[5]. Improper conduct is defined to include "corrupt conduct" [6] and is limited to conduct that, if proved, would constitute a criminal offence or reasonable grounds for terminating the employment of the person engaged in the conduct. These definitions apply to the more serious types of wrongdoing and relate to substantial mismanagement of public resources and conduct that poses a substantial risk to the public. Other states arguably have a lower level of wrongdoing that can attract a wider range of lesser complaints.

The LIV prefers a narrower definition of types of disclosures as the preferred model. We propose that it should be disclosures of serious wrongdoing that, if proved, would constitute grounds for criminal prosecution or at least summary dismissal for serious misconduct that should be caught by the proposed whistleblower legislation. Those items listed in 2a of the Terms of Reference would fall within this preferred type of disclosure, but generally those listed in 2b would not. The LIV considers that the efficacy of whistleblower processes would be compromised if "protected disclosures" are to extend to broader categories of grievances, internal processes and minor misdemeanours that can be readily dealt

[5] Section 5, and as defined in section 3.

[6] Section 3.

with under other processes. The LIV considers that grievances over internal staffing matters should generally be addressed through separate mechanisms, however an effective mechanism for escalating these complaints must ensure the integrity of evidence and protection of confidentiality.

Many agencies and organisations provide internal complaints and review processes for minor matters as do those agencies who provide complaint processes for the wider community eg Ombudsman. The LIV considers that unnecessary duplication would occur if the types of disclosures to be protected under whistleblowing protections were too broadly based.

6 Terms of Reference 3 and 4 – conditions applying to disclosure and statutory protection

Anonymity and immunity from legal action are two of the key protective measures that are dealt with differently in the State legislative regimes. Issues of anonymity and immunity from legal action are cornerstone principles that directly impact on the effectiveness of public disclosure protection legislation. The LIV considers it extremely important that these principles are preserved and are dealt with in a way that promotes the integrity of the legislative processes and its ultimate objectives.

7 Terms of Reference paragraph 5 – procedures in relation to protected disclosures

A legislative regime for dealing with whistleblower complaints needs to:

- Clearly identify who can make a protected disclosure;
- Clearly identify what a protected disclosure actually is;
- Set out a simple process for investigation of whistleblower complaints;
- Provide an effective means of protection for whistleblowers against liability for any breaches of confidentiality and against reprisals; and
- Be easy to understand and easily accessible to those who want to be whistleblowers.
- Provide a robust and effective framework to investigate and prosecute breaches of the 'whistleblower' law with weighted appropriate penalties for contraventions.

Whistleblower legislation also needs to stand alongside and complement existing legislative regimes that deal with the handling of complaints. While the legislative provisions of some states require that a complainant make use of internal whistleblowing mechanisms first, other states' legislative provisions are not so clear. Some Victorian agencies dealing with complaints have experienced difficulty in determining whether complaints fall within the definition of "protected disclosures" under the whistleblower legislation (eg complaints against police). LIV members report that processes providing for matters to be referred to various

external agencies for determination as to whether they are protected disclosures or not are often time consuming and inefficient.

The LIV recommends a more coordinated and clear approach for internal and external agencies handling protected disclosures and other complaints so that those persons making complaints are afforded the greatest accessibility and trust in the processes that offer protection.

8 Other general matters

8.1 Use of terms such as 'whistleblower'

The term "whistleblower" appears in the title of the Victorian Act but is not actually defined in the Act. The LIV suggests that the term "whistleblower" is problematic and should be clarified and defined if it is to be used in proposed Commonwealth legislation. The preferred LIV position, as outlined above, is that Australian legislation at all levels adopt a more consistent and uniform system of legislation, including a uniformity in title, purpose and, where practicable, definitions.

As intimated above, it is imperative that protection is afforded to persons other than the initial whistleblower, so as to extend to persons who play an essential role in relation to the investigation of matters that attract whistleblower protection. Otherwise the efficacy of the whistleblower processes will be seriously compromised, if not destroyed altogether.

8.2 Establishment of independent Whistleblower protection commission/agency as 'one stop' shop

The LIV recommends that the Committee consider streamlining the processes for dealing with whistleblowers by establishing a clearer "one stop" regime for the handling of complaints. As outlined above, there are problems with duplication among internal and external agencies when dealing with complaints that fall within the whistleblower protections and there needs to be greater clarity in any proposed legislation as to the handling of these complaints. Whistleblowers need to know who to contact at that first instance and understand the process that deals with their complaint.

The LIV recommends that a dedicated agency, perhaps the Commonwealth Ombudsman, should act as the primary gatekeeper for whistleblower complaints. An agency with primary responsibility for dealing with whistleblower complaints can more efficiently deal with whistleblowers and other investigative agencies as required. This more streamlined approach would be consistent with a preferred national and coordinated model recommended by the LIV in this submission

Some members also support the establishment of a discrete commission against corruption as the agency that coordinates processes and organisations involved with managing whistleblower disclosures. On this view, if serious wrongdoing is to be captured by effective whistleblowing processes, it is imperative that a specialist dedicated, 'one stop' agency that is appropriately resourced with

requisite expertise in dealing with such difficult matters and which is not liable to be diverted by other considerations, takes charge of the process.

In its call for a national and coordinated approach, the LIV suggests that the Committee consider whistleblowing protections as a harmonisation of laws project that may be appropriate for COAG or SCAG to address. This Inquiry provides the Committee with a timely opportunity to fully address the range of issues that whistleblowing protections have raised both at a national and state level and examine workable solutions to better meet the aims of legislation in this area.