AUSTRALIAN PRESS COUNCIL

SUBMISSION

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Public interest disclosures

Australian Press Council Submission
to the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Whistleblower Protection within the Public Sector

Executive Summary

The Australian Press Council calls upon the Commonwealth government to introduce legislation to provide protection for individuals who make public interest disclosures. In order to ensure this legislation is effective, it should include the following:

- It should be an offence to penalise, discriminate against, harass, victimise or retaliate against an individual who makes a public interest disclosure.
- The legislation should establish an immunity from internal disciplinary action for making a public interest disclosure, including disclosures made to the public via the media.
- The legislation should establish an immunity from criminal prosecution for breaching any secrecy or confidentiality requirements in the course of making a public interest disclosure, including disclosures made to the public via the media.
- The legislation should establish an immunity from civil action for making a public interest disclosure, including disclosures made to the public via the media.
- The legislation should establish a right to claim compensation for loss or injury suffered as a result of making a public interest disclosure, including disclosures made to the public via the media.
- Government employees who do not fall under the *Public Service Act* should be included in the scope of any legislation dealing with public interest disclosures.
- Provision should be made for public interest disclosures by contractors who provide services to government and their employees.
- The legislation should make provision for disclosures to be made to the media in certain specified circumstances.
- Where a public interest disclosure has been made to a designated government agency or officer, that agency or officer should be required to investigate promptly and to publish the results of that investigation, together with any recommendations for rectifying action, when it is complete.

Australian Press Council Submission: Public Interest Disclosures in the Public Sector

In a perfect world, where every administration is efficient and effective, where every public officer is completely honest, and where every politician is sincere and willing to reveal error no matter how embarrassing, there would be no need for whistleblowers. Unfortunately, such a world exists only in the realm of fantasy.

The whistleblower performs a service to the public every bit as important as that performed by the police officer or the soldier. By reporting instances of maladministration, the whistleblower facilitates their rectification. Yet, in response to this service, whistleblowers are often severely punished, suffering damage to their careers, possibly receiving criminal convictions and even imprisonment.

Recent history gives many examples of whistleblowers whose actions have brought to light instances of malfeasance or structural inefficiencies and, in so doing, have resulted in positive action to address problems or improve procedures. The information which was alleged to have been disclosed by former officer of the Australian Customs Service, Allan Kessing, ultimately led to a review of airport security. Reporting of problems at the Bundaberg Hospital by nurse, Toni Hoffman, to a member of parliament resulted in a commission of inquiry and the extradition of Dr. Jayant Patel to Australia to face charges of manslaughter, grievous bodily harm, and fraud.

The Australian Press Council recognises that there is a need for confidentiality in both government and private administration. However, mechanisms that enforce confidentiality must be balanced by mechanisms that protect the rights of whistleblowers where they act in the public interest. At present, there is no balance between the high level of regulation that seeks to protect confidentiality on the one hand and the minimal amount of protection provided for whistleblowers on the other.

On the contrary, the potential penalties set down in the Commonwealth *Crimes Act 1914* for breaching secrecy or confidentiality provisions are severe, involving custodial sentences of up to two years for breaching s.70 or up to seven years for breaching s.79. On the other hand, section 16 of the *Public Service Act 1999,* which is the primary mechanism for whistleblower protection at the Commonwealth level, only applies to about half of all Commonwealth employees.[1] Furthermore, the protection afforded by s.16 is limited, both in terms of the individual or agency to whom information may be disclosed and the nature of the protection provided. Similarly, the extent of whistleblower protection at the state level can hardly be considered to be adequate. Several of the states have enacted legislation that aims to facilitate protected disclosures, but only the NSW *Protected Disclosures Act 1994* extends the protection to include disclosures made to the media.

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[1] Public Right to Know Coalition, *Report of the Independent Audit into the State of Free Speech in Australia*, 2007, p. 64

The Australian Press Council accepts that there may be sound reasons for requiring a public interest disclosure to be made to government officers rather than to the public. However, there are often instances where disclosure to a government officer according to prescribed procedure fails to result in action to address or prevent the conduct which is the concern of the disclosure. This was so in the case of NASA engineers who raised safety issues relating to the Space Shuttle. Failure to act on those concerns ultimately resulted in the Challenger disaster and the deaths of seven people. Similarly, the failure of health administrators to act on the concerns of Toni Hoffman in relation to events at Bundaberg hospital resulted in the deaths of patients treated by Jayant Patel. In such instances disclosure to the public, via the media, will often provoke positive action on the part of the government. This occurred, for example, when the media reported on security issues at Sydney airport, subsequent to which security was upgraded. Consequently, it is vital that any legislation which aims to facilitate the making of public interest disclosures make provision for such disclosures to be made to the media.

In order to facilitate public interest disclosures there are a number of features which any legislation must include. Omission of any one of these features has the potential to render the legislation ineffective. These features include immunity from prosecution for breaching obligations of secrecy or confidentiality; immunity from civil litigation, such as actions for defamation, breach of confidentiality or privacy infringement; immunity from internal disciplinary action; protection against reprisal or victimisation; and provision for compensation, including reimbursement of medical or legal expenses and compensation for injury in employment or injury to health.

Perhaps the most problematic aspect of any attempt to formulate an effective protection for public interest disclosures is the need to identify when a disclosure qualifies for the benefit of being protected. The kind of information which may constitute a public interest disclosure should include, but not be limited to, maladministration, corruption, misappropriation of public funds or public assets, wastage of public funds or resources, conduct which poses a threat to health or safety or the environment, any breach of a law of parliament, injustice, or any breach of a code of conduct. However the test is formulated, the emphasis must be on the public interest. For the purposes of making internal disclosures, or disclosures to the Ombudsman or to an officer designated to receive public interest disclosures, it should be a sufficient test that the employee 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.

The Council is strongly of the view that a whistleblower should be able to make a disclosure either to a member of parliament or directly to the public via the media and that the test to be applied in order to determine when disclosures to the media are protected should be framed as widely as is practical. A whistleblower should be free to approach the media to make a public interest disclosure in the following circumstances:

- Where they honestly believe, on reasonable grounds, that to make the disclosure along internal channels would be futile or could result in victimisation, OR

- Where the they honestly believe, on reasonable grounds, that the disclosure is of such a serious nature that it should be brought to the immediate attention of the public, OR
- Where they honestly believe, on reasonable, that there is a risk to health or safety, OR
- Where internal disclosure has failed to result in prompt investigation and corrective action.

The NSW legislation specifies that whistleblowers must wait for a period of six months after making an internal disclosure and then, only if no investigation has been completed and recommendations made, are they able to make a disclosure to the media. Six months is an excessive length of time to impose as a precondition to disclosing material to the media. Even a short interval could result in a continuation of any malfeasance or threat to health or safety. It should also be recognized that delay may be a deliberate attempt to frustrate the progress of any complaint or investigation. For that reason the Press Council urges that any waiting period be as short as is practical.

When determining who should be able to make a protected disclosure, it is important that the legislation extends well beyond the scope of the current protection available under the *Public Service Act*. Any public disclosure legislation should make provision for disclosures by government employees who fall outside of the *Public Service Act* and former employees, as well as contractors who provide services to government agencies and their employees. The importance of extending the scope of public interest disclosure protections to contractors has been greatly increased by the high levels of outsourcing which have characterised government workplaces in recent years, particularly where "temporary" employees, hired through an agency, may carry out duties in a government office for months or even several years. The protection should also be available to the families and close associates of whistleblowers, who may be subject to reprisal action if they are employed by the government.

Governments frequently see whistleblowers in a negative light, as a nuisance or even as a threat. Irritating though they might sometimes be, whistleblowers should be regarded as a valuable resource that has the potential to ensure that problems are rectified before they become intractable. The conservative view, that whistleblowers should be restricted to making public interest disclosures only to government officers, fails to recognise the fact that the whistleblower is often a product of an organisation that has failed to operate as it should, with both efficiency and integrity. In a disfunctional administrative environment, the whistleblower may be justified in the view that internal reporting mechanisms are not only fruitless, but their utilization would jeopardise his or her personal position. In such circumstances, only the ability to approach the media can ensure that the disclosure will result in action prompted by public debate. For this reason a public interest disclosure legislation that does not provide for disclosure to the media will be unsatisfactory.

The Australian Press Council

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues:
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

The Australian Press Council

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August 2008

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For details and biographies see: *http://www.presscouncil.org.au/pcsite/about/members.html*