Griffith UNIVERSITY

Griffith Law School
Griffith University
Gold Coast Queensland 4222
Australia
Telephone +61 (0)7 5552 7737
Facsimile +61 (0)7 5552 8667
www.griffith.edu.au/whistleblowing
Email *A.J.Brown@griffith.edu.au*

22 December 2008

Submission No 68

Mr Mark Dreyfus QC MHR
Chair, House of Representatives Standing Committee
on Legal & Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Mr Dreyfus

Whistleblowing Legislation Inquiry

I am writing to thank you for the opportunity for members of the *Whistling While They Work* project team to address the Committee's whistleblowing legislation inquiry once again, in Brisbane on 28 October 2008.

Belatedly, I would also like to offer some final suggestions to the Committee on issues relevant to your report. These are along the lines that would have been made in Brisbane on 28 October 2008, had time permitted. They are consistent with the findings and recommendations contained in our project report, 'Whistleblowing in the Australian Public Sector' (and in particular chapters 5, 6, 9, 11 and 12), but are intended to help the Committee further come to grips with two of its terms of reference:

4. *the scope of statutory protection that should be available... including compensation for any breaches of this protection; and*

5.b. *the obligations of public sector agencies in handling disclosures.*

For reasons that will be made clear, I will address these specific terms of reference in reverse order.

1) Obligations of public sector agencies in handling disclosures

Issues

Since publication of our report in September 2008, the many discussions in response to our findings have confirmed that the most important obligation that the legislation needs to make clear, is the obligation upon public sector chief executives, as employers, to provide a workplace in which it is safe for employees to speak up with their concerns about possible wrongdoing. This logically includes:

- An obligation to ensure that the workplace (including at managerial levels) is educated to understand what should happen when concerns are aired;
- An obligation to provide appropriate support to employees who speak up;

- An obligation to assess the risks of intra-organisational conflict, workplace reprisals or management reprisals as a result of a disclosure being made;
- An obligation to act to minimise or mitigate those risks;
- An obligation to take action to identify and deal with employees (including managers) who fail to act appropriately or fail to exercise appropriate judgment in respect of the handling of any circumstances surrounding employees who speak up;
- An obligation to acknowledge and take responsibility for mistakes in the handling of any circumstances surrounding employees who speak up; and
- An obligation to take all reasonable steps to ensure that employees who speak up are able to continue their careers, or placed in a position where they are able to pursue an alternative career, having suffered the least possible disadvantage in terms of personal or organizational treatment as a result of having spoken up.

It is becoming clearer that these obligations are more akin to employers' other responsibilities to ensure their organization functions in a way which recognizes and protects the occupational health and safety (OH&S) of employees, than has previously been recognized in research and policy-making relating to whistleblowing. As discussed in our report, there has been a tendency to treat whistleblowing as something 'rare and special' when in fact this is not the case – and hence also to overlook the reasons why the obligation to properly recognize and support employees who make internal disclosures, should be treated as a basic, routine part of public sector management.

Professor Richard Johnstone, who attended in Brisbane, is an expert in regulatory frameworks pertaining to prevention and minimisation of OH&S risks, and would have emphasized these basic points had time permitted.

You will also have noted from chapter 11 (pages 271-227) of our report that there has been some significant confusion in some States regarding the interrelationship between the protection entitlements available under public interest disclosure legislation, and standard employee compensation schemes.

Suggestions for Committee

Should time permit, it would be valuable for the Committee, Parliament or the Government to extract any advice from Comcare or the Department of Employment, Education and Workplace Relations (DEEWR) regarding how these obligations might be best articulated and enforced, in a manner consistent with the existing obligations of employers in related areas of OH&S. I note that neither Comcare not DEEWR made any submission to the inquiry, nor am I aware that they provided oral evidence.

The state of OH&S regulation and enforcement is itself somewhat up in the air, with the present Government having also initiated a review of the Comcare scheme in the Commonwealth public sector, as well as moves towards a more seamless national approach to OH&S regulation more generally.

Even if time does not permit the Committee to obtain more evidence from Comcare or DEEWR, I believe it may be very valuable for the Committee to note in its report that there are important links – hitherto unappreciated – between issues of whistleblower management and issues of OH&S, and to recommend that the Government frame the legislation in a manner that:

- Maximizes the potential contribution that the Commonwealth regime of OH&S regulation can and should make to helping agencies realize and meet their obligations to provide a safe reporting environment for employees; and
- Eliminates the current potential for confusion or conflict over the right mechanisms and technical requirements for the enforcement of these obligations in the case of matters covered by the new public interest disclosure legislation.

2) Compensation for breaches of protection

Issues

This aspect of your terms of reference is addressed second, to emphasise that – for the same reasons – the Committee should recommend that an enforceable right to compensation should be recognized as arising for employees wherever (a) an agency or its managers fail to take reasonable steps to discharge the above duty of care to provide a workplace in which it is safe for employees to speak up, and (b) any disadvantage or damage follows. The *Wheadon* case in chapter 11 of our report (pages 273-4) suggests that this is in effect the common law position.

Until now, there has been an assumption that compensation should be available where there are acts of *direct reprisal* against an employee who reports wrongdoing. This is in part because legislation has placed a focus on the criminalization of reprisals. However this has itself then complicated the question of when non-criminal liability will arise, as discussed in chapter 11. More broadly, however, it has also complicated the question of *what types of breaches of duty* should give rise to such potential liability, and when these are duties that attach to organizations as employers, more than to individuals.

The evidence in chapters 5, 6 and 9 of our report has now revealed that the assumptions that liability should only or primarily attach to individuals, and be for direct reprisals, are misplaced. This is because the most common types of detriment suffered by whistleblowers as a result of negative workplace and management reactions are not those to which criminal liability is likely to ever attach; and because often, detrimental effects on whistleblowers are difficult to sheet home to specific acts of ill-intent or even severe negligence on the part of individuals. Instead they are more likely to relate to general lack of organisational support, care and attention in the prevention and minimization of workplace tensions and conflict.

The current terms of reference of your inquiry tend to reflect the original assumption, that compensation is a remedy intended to be available in the wake of direct reprisals ('victimization', 'discrimination' etc). It is important that the Committee's report recognize that this is probably the wrong paradigm, and that mechanisms are needed for ensuring that agencies provide restitution to employees who suffer any disadvantage from their role in the reporting process, as a means of preventing the need for the employer-employee relationship to become adversarial, and without individual matters needing to reach the scale that would justify a major piece of civil litigation.

Suggestions for Committee

Again, it would have been useful if Comcare or the Department of Employment, Education and Workplace Relations (DEEWR) had been able to provide the Committee with advice on the most appropriate means of ensuring the enforceability of the obligation to protect Commonwealth employees, in response to chapter 11 of our report. If time does not permit the Committee to seek this advice, then the Committee might wish to recommend to the Government that it needs to explicitly address this issue in its response and in the legislation.

The issue of an effective right to restitution/compensation for breaches of the employer's duty to support and protect, is obviously closely related to the question of forum, already canvassed in our report. To that end, if time permits, it may be desirable for the Committee to seek advice from DEEWR as to the feasibility of more clearly embedding these obligations in workplace relations law, and DEEWR's response to the idea of granting a power to award compensation for breaches short of wrongful dismissal, to the Australian Industrial Relations Commission.

Finally, the Committee should note the outcome in a recent Victorian case, in which Ombudsman Victoria has recommended that compensation be paid to a number of mistreated public sector whistleblower, rather than leaving them to exercise their right to initiate civil action under the Act. The case is referenced very briefly on page 66 of the Ombudsman Victoria 2007-2008 Annual Report. This is actually a nationally significant case because only the Victorian legislation places any oversight agency (in this case the Ombudsman) in a position where it has reasonable prospects of observing at first hand the way in which an agency has managed a whistleblower, in a direct and timely way. This also places the Ombudsman in a good position to recommend when the breakdowns are such that action needs to be taken, including restitution or compensation.

The Committee might consider recommending that – in addition to other enforcement mechanisms – whichever Commonwealth agency is given responsibilities as the lead oversight agency for the public interest disclosure regime, also be given an express power to make recommendations about restitution or compensation in respect of individual or agency failures to properly discharge their duty to provide employees with a workplace in which it is safe to report wrongdoing. This power should be accompanied by an obligation on agencies to respond to the recommendation in a timely fashion, and a further power for the Ombudsman to report to Parliament or publicly on the matter, as is the case with existing Ombudsman investigations.

I hope these suggestions, while not as timely as I wished, are nevertheless still useful to the Committee on some of the more complex issues addressed by our research.

If there is anything I can do to assist the Committee further, I would be happy to do so. Please accept the research team's gratitude to the Committee members and secretariat for the great courtesy we have been shown throughout your inquiry.

With best wishes for your deliberations.

Yours sincerely

Dr A J Brown
Senior Lecturer, Griffith Law School
Project Leader, *Whistling While They Work ARC Linkage Project*