POLICY POSITION
OF
WHISTLEBLOWERS AUSTRALIA AND
WHISTLEBLOWERS ACTION GROUP
ON
THE DESIGN OF
WHISTLEBLOWER PROTECTION LEGISLATION

'THE SWORD AND THE SHIELD'

AUTHORISATION

This document describes the position agreed to by the principal whistleblower groups in Australia concerning the requirements of effective whistleblower protection legislation for Australian jurisdictions.

SUMMARY

The institutional framework established in any Australian jurisdiction to encourage whistleblowing needs to separate the two principal dimensions to any act of whistleblowing, namely:

- the wrongdoing disclosed by the whistleblower acting in the public interest
- the reprisals suffered by the whistleblower because of the disclosure by the whistleblower made in the public interest.

This separation of issues is important because, whatever set of institutions are tasked with the responsibility for investigating the wrongdoing disclosed, there needs to be a distinct independent body charged with the responsibility for protecting whistleblowers from reprisals.

The principal plank of this policy position is that an effective program to combat corruption and maladministration in public organisations needs two arms:

- one to carry "the sword" with which to pursue and eradicate the wrongdoing disclosed by whistleblowers. This is the role of the governments anti-corruption forces, eg Police, Auditor General, anti-corruption commissions, Ombudsmen, and Director of Public Prosecutions
- a second to carry "the shield", with which to protect whistleblowers from the swords of those whose wrongdoings were disclosed by the whistleblowers. This should be the role of the Whistleblower Protection Body.

The contributing roles of this independent whistleblower protection body (WPB) should include:

- **an advisory role, provided to individuals and organisations regarding disclosure processes, whistleblower protection, support services and programs, and such**
- **a supporting role, through provision of education programs, counselling, channels for disclosures, protection of witnesses, re-employment assistance, safeguarding of documents, legal aid (to qualifying cases), and full case management**
- **an investigatory role, with respect to reprisals against whistleblowers**
- **a reporting role to Parliament, with respect to**
  - **allegations by whistleblowers of wrong doing, referred by the WPB to appropriate agencies charged with responsibilities for investigating such wrongdoing**
  - **allegations of reprisals against whistleblowers**
  - **investigations of reprisals.**

The WPB should be given the necessary powers to achieve its roles, including powers:

- **to overcome the active and passive defensive measures used by organisations in negating the claims of reprisals by whistleblowers**
- **to provide whistleblowers with a fair contest in administrative and legislative procedures dealing with allegations of reprisals against whistleblowers**
- **to provide remedies for whistleblowers against whom reprisals have been imposed**

OUTLINE OF THIS POLICY POSITION

This policy document sets out the agreed position of principal whistleblower groups in Australia under the following headings:

- **The flaw with Anti-Corruption Bodies**
- **The advantage of having an independent Whistleblower Protection Body**
- **Mutual Support between the Anti-Corruption and Whistleblower Protection Bodies**
- **Measures used in the Defence of "the System" against Whistleblowers**
- **Effective Whistleblower Legislation**

- **Providing a Fair Contest for Whistleblowers**
- **A Capacity for Healing the Wounds from Reprisals**

THE FLAW WITH ANTI-CORRUPTION BODIES

The first insight that whistleblowers would offer any Australian jurisdiction seeking to combat corruption waste and maladministration in its public service is the substantial record of anti-corruption bodies for destroying whistleblowers.

It is now a recognised world wide phenomenon, where Anti-Corruption cum Pro-Reform Authorities, instead of defending witnesses and whistleblowers and pursuing the disclosures made by "integrity workers" of major corruption/waste occurring in the system, turn out to act in defence of the system against disclosures and to pursue the most minor breaches of rules/protocols/policies by the whistleblowers making those disclosures.

Where we can point to examples of this in the record of Australia's NCA, or NSW's ICAC, or Qld's CJC, then it is not a property alone of Australia or NSW or of Qld or of their respective "systems"; those examples are instead demonstrations of a property of the dynamics of Anti-Corruption Bodies now well documented in other jurisdictions. It is thus a property that could become established in any such authority set up by any legislation or in any existing authority to which Whistleblower Legislation directed whistleblowers and their disclosures.

The jurisdiction with longest experience in legislating for the protection of whistleblowers, the USA, has documented this property in its administration and has completed a second effort in legislative reform to overcome this major defect in specific whistleblower protection authorities. What the USA observed in this regard, and what was done to correct it, must be instructive to Australian legislators. The study of existing Australian authorities may establish that the same defend-the-system syndrome that the USA identified can also arise in Australian jurisdiction, State or Commonwealth.

The principal example to come out of the experience of the USA was the Merit Systems Protection Board (MSPB), a federal body not unlike the Australian federal body, the Merit Protection and Review Agency (MPRA), and with roles not unlike those of the Grievance Directorates and Public Sector Equity Offices of the public service in the State Governments of Australia.

The MSPB in 1979 was given responsibility for protecting whistleblowers in the USA. The tendencies of the MSPB to harm whistleblowers rather than protect them led to amendments of relevant legislation in 1989 (the Whistleblowers Protection Act WPA). The principal impact of the 1989 WPA on the MSPB was to separate from the MSPB its investigative and prosecutorial arm with respect to reprisals against whistleblowers, and to put these functions into an independent agency, named Office of Special Counsel (OSC); thereafter it was the OSC that carried out the investigative and prosecutorial functions, as well as a role in litigating reprisals cases before the MSPB.

This separation, this independence, is a special property of the OSC - MSPB relationship, one not existing in those Australian jurisdictions presently with purported whistleblower protection legislation. In all these bodies, the investigative and prosecutorial arms of the administration activated in the defence of whistleblowers

against reprisals remain part of the anti-corruption bodies or public sector offices or police departments.

THE ADVANTAGE OF AN INDEPENDENT WHISTLEBLOWER PROTECTION BODY

The benefit to whistleblowers in the USA that has come with the 1989 WPA and the formation of the OSC is contained in the 1993 Annual Report of the OSC, page 3 which reads in part:

> "Although allegations of reprisals for whistleblowing are relatively few as compared to the number of federal civilian employees, the OSC regards ANY reprisal for whistleblowing as unacceptable. Accordingly the OSC's priorities are:
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> - to treat allegations of reprisal for whistleblowing as its highest priority
> - to review allegations of reprisal for whistleblowing intensively for any feasible remedial or preventative action, ...
> - to use every opportunity to make a public record of the OSC's aggressive pursuit of corrective action (especially in whistleblower reprisal cases), both to encourage other whistleblowers, and to affirm the emphasis given to corrective actions by the OSC".

This quote demonstrates the absence of compromise and the strength, the priority, the intensity and the aggression with which whistleblowers are protected in the USA. Have Australian anti-corruption bodies demonstrated this commitment to the defence of whistleblowers in the cases brought before the public notice of Australia?

In a jurisdiction such as the US, where whistleblowers obtain the level of support provided by the OSC, comparison can be made of whistleblowing reprisals versus other forms of discriminations and harassment that occur in the workplace. These comparisons can help to answer important questions raised in the whistleblower protection debate, questions that were no doubt raised prior to decisions taken by some Australian jurisdictions on their approach to the protection of whistleblowers; for example:

- Should we have yet another authority to protect the interests of yet another group suffering discrimination?

  The OSC's Complaints Examining Unit examines all complaints received and refers those warranting further investigations to the Investigation Division. In 1993, for every Equal Employment Opportunity (race, colour, sex, national origin, religion, age, handicap) complaint found to warrant further investigation,

there were 3.3 complaints of reprisals for whistleblowing warranting further investigation. These figures might indicate that the justification of a Whistleblowers Protection Body is greater than the justification for a Human Rights and Equal Opportunity Commission (HREOC). Australia has a HREOC operating independently of the MPRA.

- Won't whistleblowing protection avenues just lead to an avalanche of complaints from people who know they are poor performers and are just trying to save their job?

  In 1993, only 7% of complaints received based on EEO rights were found by the Complaints Examining Unit of the OSC to warrant further investigation. By comparison, 22% of complaints of reprisals by whistleblowers were referred for field investigation. Whatever the validity of fears about false or constructed complaints, the figures from OSC might indicate that the propensity for false claims is less with whistleblowers than with EEO groups. Australia has an Equal Opportunity Commission which was established despite fears of the false claims that might be made.

  No Australian jurisdiction as yet has the advantage of an OSC-type body. The Whistleblowers Study conducted by the University of Queensland team of Dr Bill de Maria and Cyrelle Jan has produced statistics on the lot of whistleblowers in one Australian jurisdiction at the hands of institutions purported to be protecting their whistleblowers.

  — various institutions were rated as fairly ineffective or very ineffective in dealing with disclosures by 78% to 100% of whistleblowers

  — 71% of whistleblowers experienced an average of 1.5 official reprisals and 94% of whistleblowers experienced an average of 4.2 unofficial reprisals, at the hands of those institutions

MUTUAL SUPPORT BETWEEN THE ANTI-CORRUPTION AND WHISTLEBLOWER PROTECTION BODIES

One role that was not given to the OSC in 1989, but was left with bodies such as the equivalents of the NCA and MPRA, was the investigation and prosecutorial functions with respect to the wrong doing disclosed by the whistleblower. OSC can investigate the reprisals against the whistleblower, but not the wrong-doings (corruption, waste, etc) against the system. Nevertheless, the OSC plays an important role in identification of wrong-doings and in influencing NCA-type authorities to carry out their responsibilities in investigating wrong-doings and prosecuting all offenders. The part played by the OSC includes:

- acting as a disclosure channel for employees and former employees to report wrong-doings

- requiring agency heads to investigate allegations if OSC determines that there is substantial likelihood that the information discloses wrong-doing

- safeguarding documents that OSC are empowered to obtain and statements by witnesses that OSC are empowered to obtain in investigating reprisals, and making these available to investigations by NCA-type bodies or agencies where these are relevant

- reporting to both Houses of Congress and the President the outcomes of investigations into wrong-doings carried out by NCA-type bodies upon referral to them of information from the OSC.

The results achieved by OSC's involvement, albeit indirect, in the pursuit of the wrong-doings disclosed by whistleblowers are described in its annual report. In 1993, 66% of disclosures made to the OSC were judged to have sufficient basis to merit further action, and were referred to agencies for investigation or review. The reports from these agencies showed that 67% of cases contained allegations substantiated in whole or in part by agency investigations. The onus put on agencies to investigate allegations in this way serves to reduce the volume of matters proceeding to NCA-type bodies.

In Australia, there is no Whistleblower Protection Body in any Australian jurisdiction, and there is little mutual support between the Federal and State anti-corruption bodies and Whistleblowers. The relationship instead is characterised by distrust and dispute, from which recurring enquiries into the activities of the anti-corruption authorities are a most prominent outcome.

MEASURES USED IN DEFENCE OF THE SYSTEM AGAINST WHISTLEBLOWING

The factors by which NCA-type and MPRA-type bodies can lead administrative systems in the defence of the total system rather than in the protection of whistleblowers will not be overcome solely by the establishment of an OSC-type protection body. Of equal importance is the sophistication of the legislation that empowers the Whistleblower Protection Body.

The sophistication of the legislation must be enough to counter the sophistication of the active and passive measures employed by agencies in defending the system against whistleblowers. Active measures include the normal reprisals against employment, but also include:

- **destruction or loss of documents**
- **constructions to attract exemptions from Freedom of Information processes**
- **determining complaints without providing the aggrieved person the opportunity to present evidence or argument, thereby forcing the aggrieved person to go to the next highest level of grievance investigation without reasons for rejection of evidence that was never allowed to be presented to the first investigation**
- **investigating by reference only to selected evidence or evidence on selected issues.**

Passive measures include the normal avoidance tactics of long time delays, claims that complaints were never received and claims that documents have been misplaced, staff have been changed, higher priority cases are dominating work assignments; passive measures also include a family of measures by which agencies and NCA-type bodies "disarm" themselves of the abilities to defend whistleblowers, by using:

- **narrow interpretations of their powers**
- **wide interpretations of embargoes or restrictions on their operations**
- **in-house unseen legal opinions questioning legal positions without resolving those legal questions**
- **in-house policies, usually "long established", supporting the need for management prerogatives (not defined), and acknowledging the practical realities of running public service departments, including the need for staff to be politically sensitive.**

EFFECTIVE WHISTLEBLOWER LEGISLATION

Effective whistleblower legislation must enable the responsible authority, OSC-type or otherwise, to overcome both active and passive measures undertaken to defend the system against whistleblowers. Again the USA jurisdiction gives examples of legislation benefiting from 15 years of operation in defence of whistleblowers and a major legislative effort by both Houses of Congress to improve protections and remedies.

To demonstrate the sophistication now incorporated into USA legislation, reference is made to both the Whistleblowers Protection Act (WPA) that formed the OSC (this was the legislation recommended for consideration by Tony Fitzgerald QC), but also to the Uniformed Services Employment and Re-Employment Rights Act of 1994. The USERR Act protects not only Reservists from employment disadvantages because of their absences on defence service, the USERRA also protects persons, Reservists or otherwise, who blow the whistle on breaches of the employment protection provisions of the Uniform Services Employment and Re-employment Rights Act. The USA thus has reached a stage of development of whistleblower protections where these are being incorporated into individual Acts in addition to the WPA 1989 general provisions administered by the OSC.

Both the WPA (1989) and the USERRA (1994) show anticipation of the tactics that the highest administrations in the USA may use against whistleblowers, and provide for powers, checks and flexibilities that enable the OSC to defend whistleblowers; for example:

- **USERRA makes provisions for where the governments "Office of Personnel Management had failed or REFUSED, or is about to fail or refuse, to comply" with the USERRA provisions on protection of employment**

- **USERRA makes provision for "the case of disobedience of the subpoena or contumacy" with respect to subpoenas issued by the investigating authority requiring the production of documents or the attendance and testimony of witnesses**

- **Under the WPA, the OSC is able to investigate the appointment and promotion of Senior Executive Service (SES) officers. In Australian Public Service and particular State administrations, there are no appeals allowed against appointments within the SES. This "no appeal" provision has been used to refuse investigations introducing criticisms of selection processes as evidence of reprisals and discrimination against whistleblowers and EEO categories of officers. By comparison the 1993 Annual Report of the OSC describes its success in securing for an SES whistleblower "a settlement agreement by which the employees last four performance appraisals were expunged and replaced with 'outstanding' ratings, the employee was given two retroactive SES promotions and the agency agreed to pay attorney fees"**

- **the OSC identifies and is able to investigate and prosecute the more sophisticated forms of reprisals and discriminations, for example (from its 1993 Annual Report)**

- "deception or obstruction of the right to compete"
- "attempts to secure withdrawal from competition"
- "arbitrary or capricious withholding of information requested under the Freedom of Information Act"
- "unauthorised preference or advantage granted to improve or injure the prospect of employment of any person"
- "discrimination on the basis of conduct not related to job performance"
- "reprisals for exercise of an appeal right"
- "Solicitation or consideration of unauthorised recommendations"

It is in all these ways that whistleblower protection in the USA has matured, through experience of combating not only the wrongdoers whose activities whistleblowers disclose, but also of breaking through the barriers that the system uses to defend itself against the repercussions that whistleblower disclosures have on the public reputations of administrations and administrators.

Federal and State authorities in Australia do not appear to have reached the same depth of understanding of this "defend the system" syndrome as is currently held by US authorities. Australia has no OSC. There is no-one in Australian jurisdictions to stand beside the whistleblower as an advocate before the public sector authorities and/or the courts, as does the OSC before the MSPB, before the US Attorney General and before various US District and Appeal Courts. In considering the outcomes of principal whistleblower cases in Australia, the question must be asked whether current outcomes would have been different if Australians had whistleblower protection bodies like the OSC empowered by the type of legislation at work in US jurisdictions.

PROVIDING A FAIR CONTEST FOR WHISTLEBLOWERS

The description provided above of the WPA and the USERRA in the USA demonstrate measures incorporated into legislation and into procedures to ensure that a whistleblower's efforts to defend himself or herself against reprisals is a fair contest. These measures include:

- **provisions of powers and procedures to secure the evidence of reprisals (documents and statements of witnesses)**
- **provisions of legal representation, supported with investigations by experienced investigators, for whistleblowers before administrative Tribunals and before District Courts and Courts of Appeal**

- **categorisations of forms of improper practices against whistleblowers that include the more sophisticated forms of reprisals of which administrations have shown themselves to be capable.**

These measures are said to provide a fair contest in as much as they match or equate to the powers, resources, and categorisations of improper staff behaviour that have always been available to agencies and employers.

The provisions of USA legislation that make a major contribution to securing a fair contest concern the onus of proof and the standard of proof associated which proving reprisals. The second major reform of the WPA (1989) (the first being the creation of the independent agency OSC) was to change the requirements placed on whistleblowers in proving reprisals against them; in lieu of whistleblowers having to show that their disclosures were a "substantial" cause of reprisals against them, as was the case in the USA before the WPA (1989) and as is now the case in Queensland, whistleblowers in the US now have to prove that their disclosures were a "contributory" cause of the reprisals.

Whistleblower legislation in the State of Texas presumes that any disadvantages imposed against whistleblowers in the first 12 months after the disclosure is made are reprisals because of the disclosure, and the burden of proving otherwise lies with the employer.

Electoral and Administrative Reform Commission (EARC) Qld recommended that whistleblowers need only prove that their disclosures were a "cause of any significance", and that specific criteria for employers to meet in defending charges of reprisals be established in legislation - both recommendations by EARC were omitted from Qld's legislation by the Queensland Government, typical of all governments in Australia to date still hesitating to provide real protections for whistleblowers.

The USERRA(1994) requires only that the whistleblower show that the disclosure was "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of" such disclosures.

There is also a precedent from existing Australian legislation for establishing a fair contest with respect to the onus and standard of proof. The Defence Re-establishment

Act (DRA) (1965) provides for the protection of the civilian employment of national servicemen and Reservists. In proceedings under the DRA, the Reservists has to prove the disadvantage he or she has suffered in their civilian employment, but the burden of proof falls on the employer to prove that the disadvantage was imposed for reasons other than the obligation to render defence service.

It is recommended that Australian authorities assess the impact of the onus and standard of proof applied in the investigation of whistleblower cases in Australia, so as to gauge if it is the unreasonable requirements placed on whistleblowers that has rendered so many of these cases still unresolved.

Overall, Australia's understanding of whistleblowing would benefit from an assessment of the absence-of-a-fair-contest on the failure to resolve so many whistleblowers cases in Australia, and whether the contest was rendered unfair because of the destruction of evidence, the heavy burden of proof, the absence of legal resources, a combination of these factors, or other barriers.

A CAPACITY FOR HEALING THE WOUNDS FROM REPRISALS

The concept of "healing" is understood with respect to the administration of public sector units following a corruption inquiry. Certain authorities in Australia have part time or contract officers who move into administrative units after the units have been investigated for corruption, waste, etc, and have had corrective actions ordered, to assist those administrative units to comply with those orders and/or cover any temporary short falls in skills or capacity caused by those corrective actions.

Whistleblowers and their careers and reputations are also deserving of a healing process. Should Australian authorities find truth in the allegations of reprisals made by whistleblowers, the question might be asked how are the situations now held by these vindicated whistleblowers to be healed.

The US jurisdiction again gives a lead.

The OSC is able to be both pro-active and reactive in effecting a healing process for vindicated whistleblowers.

OSC's pro-active abilities stem from its power to stay administrative practices being made against whistleblowers until the OSC's investigations are completed. OSC gives its highest priority to the investigation of reprisals against whistleblowers. The wounds to whistleblowers and their families caused by inordinate delays in investigations while the whistleblower is on no pay or reduced duties are minimised through powers and procedures available to the OSC.

The strength of OSC's reactive strategies stem from the flexibilities its powers give the OSC in generating remedies and solutions to the wounds inflicted on whistleblowers. These include:

- **facilitating settlement agreements, the components of which can include:**
  - **— revision of performance appraisals**
  - **— awarding of promotions retroactively (including SES)**
  - **— payment of attorney fees**
  - **— payment of cash performance awards**
  - **— withdrawal of memoranda**
  - **— resumption of former duties**
  - **— arrangements for an arbitrator acceptable to the employee to resolve further disputes**
  - **— removal of the employee responsible for the harassment (including through voluntary retirement)**

- — expungement of termination, allowing the employee to resign with back pay and a satisfactory reference for future positions

- — through the USERRA (1994) provision, arrange for a position of like seniority status and pay at another agency (for federal public servants)

- conduct prosecutions before the MSPB of individuals identified by OSC investigations as likely to have initiated improper practices against a whistleblower as a reprisal to the latter's disclosures of wrongdoing.

An indication of future measures that may further improve the effectiveness of whistleblower protections provided by the OSC may lie in the powers OSC now have with respect to officials engaged in prescribed political activities. OSC can apply, in the case of state and local government officials found to have violated the Hatch Act, to the MSPB for an order withholding funds from agencies failing to remove or acting to reemploy such officials.

CONCLUSION

Whistleblowers Australia, the Whistleblowers Action Group and their members have been largely responsible for the establishment of two Senate Select Committee enquiries into public interest whistleblowing, and for State Government commissions of enquiry into State anti-corruption bodies.

For what has happened to individual whistleblowers in the past, we direct the authorities of all Australian jurisdictions to the many, too many, submissions that these enquiries have received from whistleblowers.

For the future of Australia's public administration, please accept these propositions for the reform of the legislation and the institutional framework related to Whistleblowing in Australia. Those propositions distil the practical lessons learnt through the pain of individual whistleblowers and the experience of jurisdictions determined to succeed in their policies to combat corruption, waste and maladministration in their public organisations.