SUBMISSION TO THE INQUIRY INTO WHISTLEBLOWING PROTECTIONS WITHIN THE AUSTRALIAN GOVERNMENT PUBLIC SECTOR

by

G McMahon[1]

THE NEED FOR PROTECTION OF WITNWSSES AND WHISTLEBLOWERS THE SWORD AND THE SHIELD

This submission advocates the need for protections, to persons alleging wrongdoing, or persons acting as witnesses to alleged wrongdoing, if integrity and accountability is to exist within the Australian Government Public Sector

Further, this submission advocates that protection can only be provided if the governance structures that underpin anti-corruption law enforcement provide for two mutually supporting but separate organizations, not one

The two organizations have the distinct but mutually supporting roles of:

- Investigating the allegations
- Protecting the complainant and the witnesses

The two functions are termed the **'Sword'** and the **'Shield'**.

This term was first coined by the Whistleblowers Action Group and Whistleblowers Australia in promulgating their national policy on Whistleblower Protection. A copy of that policy is attached

Australian organizations have learned that both the 'sword' organization and the 'shield' organization need to be established for any whistleblower protection program to be effective

This has been recognized by private industry, in no less a form than the Australian Standard AS 8004 – 2003 'Whistleblower Protection Programs for Entities'.

This best practice document has followed the Sword and the Shield doctrine, where it is careful to recommend that an entity establish both a Whistleblower Investigations Officer (the Sword) and a Whistleblower Protection Officer (the Shield) to manage whistleblower cases.

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[1] G McMahon, BE, B Com, MEngSc, BSc, MEconSt, BEcon, MPD
National Secretary, Institute of Management Consultants,
National Director Whistleblowers Australia
Fellow Australian Institute of Management
Author, Bullying Using Organizational Procedures, *Bullying from Backyard to Boardroom*, McCarthy et al, Federation Press, 2001
Author, Regulatory Capture, Causes and Effects, International Institute of Public Ethics Biennial Conference, iipe.org/conference, 2001

This mutual support approach needs to be followed within the public service entities as well as private organisations. Structurally, too, the organization for whistleblower protection within the total public service needs to consist of two separate bodies, one to be the 'sword' against wrongdoing, the other to be the 'shield' against reprisals.

Australia has ample examples of how the efforts at whistleblower protection can be undermined and reversed if only one of these two bodies is established. The principal examples of this failure, where only one of the two bodies is established, are

- The **'sword' only** approach – Qld's Criminal Justice Commission now Crime & Misconduct Commission [CJC/CMC] is a world renown example
- The **'shield' only** approach – The Australian Defence Force [Army]

CJC/CMC

Your inquiry will no doubt receive submissions about the rogue legal opinion used by this band of lawyers to excuse the Qld Cabinet of alleged criminal acts in destroying documents required for impending legal action – the Heiner Affair.

The Queensland jurisdiction has also been blind to other cases of the destruction of evidence.

Most elegant has been the 'mutual support' between the CJC/CMC and the Ombudsman Office with respect to the disclosures of one whistleblower, which involved alleged disposal of evidence required for judicial proceedings already on foot. In this matter,

- The Ombudsman found that any maladministration was associated with claims of suspected official misconduct, and required the whistleblower to take the allegations to the CJC/CMC.
- The CJC/CMC found that the allegations did not give rise to a suspicion of official misconduct, but may be maladministration and of interest to the Ombudsman's Office

Both 'Sword' organizations argued that the other should do the investigation, and refused to investigate the matter themselves. Both 'swords' knew of the others argument.

No investigation was carried out by either 'Sword' organisation.

The officers associated with these decisions were also officers associated with the decisions concerning investigation of the destruction of the Heiner documents

The Heiner Affair is one of five Whistleblower Cases of National Significance accredited by Whistleblowers Australia

A similar rogue legal opinion was used to excuse the forced transfer of whistleblower Jim Leggate, another Whistleblower Case of National Significance

The CJC/CMC were also at hand in a third Whistleblower Case of National Significance, that of Qld Police Inspector Col Dillon. Col Dillon was the police whistleblower who opened up the flow of evidence from honest police officers that rescued the Qld Fitzgerald Inquiry from failure.

The post Fitzgerald Review of the Qld Police Force found that the treatment of Inspector Col Dillon by the Police Service, after the Fitzgerald Inquiry was completed, was 'anomalous in the extreme' – Inspector Dillon was transferred to a position reporting to an officer three levels lower in rank than Inspector Dillon. The CJC/CMC who served on the Review Steering Committee failed to do anything to correct the anomalous treatment, and it worsened.

Eventually Inspector Col Dillon was assigned to a 'corridor gulag' – no office or desk or chair or tasking.

Three out of Australia's five Whistleblower Cases of National Significance are a product of alleged failures by the CJC/CMC to 'shield' the whistleblower, nor wield the 'sword' upon the wrongdoing

The failure of the 'sword' organization to wield the sword on wrongdoing is a phenomenon so common that it has a name – **Regulatory Capture**.

'Capture' of the 'sword' organization can be caused by a number of factors.

Firstly, the governing legislation can cause this flaw

The Ombudsman's Office can be limited in its involvement until after the entities own investigatory processes are completed. Entities in this regime can simply delay their processes and change the circumstances of the whistleblower [restructure / transfer / …as with Leggate and Dillon] such that the task before the Ombudsman becomes too problematic for the under-resourced Ombudsman's Office to redress. The Defence Force Ombudsman's Office allegedly has succumbed to this form of 'capture'.

A one year timeframe for persons to have their matter dealt with by their entities and reach the Ombudsman phase of their complaint, as is the case in Queensland, assists this process of 'capture'

External persuasion can also modify an Ombudsman's Office from pursuing proper process. Again the Defence Force Ombudsman provides a primary example. Faced with a legitimate military 'Redress' application against the Chief of Army, the DFO required the Chief of Army in another case study to redress one of three wrongs – but the DFO allowed the Chief of the Defence Force to refuse to accept that the document headed 'Application for Redress of Wrongs' was a Redress Application. This refusal to accept that the redress was a redress allowed the CDF to avoid having to give reasons why the redress of the other two wrongs was refused when the CDF was the Chief of Army who made the original decision.

In questioning the DFO for this apparent leniency, the DFO stated that one redressed matter was enough for the applicant, that the military justice system had made progress since all the Senate inquiries into that system had been completed, and that the applicant should be happy with that result. An emotion of sympathy for the hard times faced by the military in overcoming the appalling shortfalls in the military justice system was 'capturing' the DFO into a position of accepting continuing shortfalls in that system

These two externally initiated forms of 'capture' can lead to a third more entrenched form of capture – a culture of capture – internally activated by the vision held by the Ombudsman's Office of its role.

One State Ombudsman's Office may have exhibited such a culture, in the job application of the successful candidate for an Assistant Ombudsman position in that Office. This application from an internal candidate, already acting in the role, espoused a theoretical principle in support of investigating alleged wrongdoing, but immediately thereafter explained the practical and political restraints that the applicant would impose on themself when putting that theoretical principle into application.

The outcome from such capture is always the same outcome – the outcome that occurred for whistleblowers Lindeberg, Leggate and Dillon in the three aforementioned Whistleblower Cases of National Significance – they all lost their positions, their careers, and their employment

The role of the **'Shield'** whistleblower body is to protect the whistleblower so that the whistleblower survives the denial, the delay, the destruction of the evidence and the defamation of the whistleblower that occurs while the captured 'Sword' organization is distracted from its duty:

- Anti-Deny: The whistleblower is given advice, assistance and representation in hearings and preparations therefor
- Anti-Delay: Progress reports on the investigation are called for and the response reported to the Parliament
- Anti-Destruction: The evidence of the wrongdoing is secured, witness statements are taken immediately after the disclosure
- Anti-Defamation: The evidence of the proficiency of the whistleblower in their job, prior to the making of the disclosure of alleged wrongdoing, is secured

If the whistleblower survives, the last line of defence in our system of justice and accountability remains intact – the 'Sword' organization in this scenario will be worn down into performing its duty through the capacity of the true witness to face the investigation

Australian Defence Force (Army)

In this organization the situation exists where there is a ‘Shield’ body, but there is no ‘Sword’.

In fact, the ADF has two whistleblower protection bodies – one for the Head of the Defence Department, and another for the Chief of the Defence Force.

The tactics used by Defence authorities to turn the whistleblower protection bodies against the whistleblower is genuinely elegant.

The first rule effecting this turnaround is one that stipulates that the ‘Shield’ bodies are not allowed to investigate the disclosures made by the whistleblower – Rule 1

The second rule effecting the reversal is one that requires any investigation into the disclosed wrongdoing to cease once the whistleblower seeks protection from the ‘Shield’ authorities – Rule 2.

An Army Unit or School, say, seeking to end investigation into disclosed wrongdoing within its walls (bullying, discrimination, drug commerce, fraud, say) have endeavoured to apply to the ‘Shield’ authorities on the whistleblowers behalf, or falsely claim that the whistleblower has sought the protections of the ‘Shield’. This can be done so that the School or Unit can then apply Rule 2, and cease the investigation

The whistleblowers on the other hand, say, a commander or an instructor, seeking to protect their men and women in uniform from wrongdoing, have had to refuse whistleblower protections for themselves from the ‘Shield’ bodies so as to keep the onus on their Units and Schools to continue with the investigation of the wrongdoing.

If a ‘Sword’ body was operating in the Australian Defence Force, the commander or instructor could seek protections for themselves and their members from the ‘Shield’ without having to put at risk an investigation into the wrongdoing that has beset them.

Unfortunately, in the Australian Defence Force, the closest thing to a ‘Sword’ body is the DFO, and the legislative regime, forces of persuasion and sympathetic identification with the ‘uniforms’ appears to have caused the phenomenon of ‘capture’ to deprive the DFO of any edge to their ‘Sword’.

Apart from the DFO, the integrity of any ‘sword’ wielded by the Australian Defence Force is best exemplified by the hallmark investigations by Chief of Army Cosgrove (the Burchett Inquiry) and by the current Chief of the Defence Force, in 2006, into bullying at Defence Schools. The Burchett Inquiry appeared to take on the properties of a ‘black hole’ for disclosures that did not make it to the ‘Sixty Minutes’ program. The 2006 investigation reported that there was no bullying at Defence Schools.

During the 2006 CDF's investigation into bullying, however, allegations of unacceptable behaviour (including discrimination and bullying) by senior officers against officer trainees were made by an instructor at one of the Army's prestige training establishments.

During the CDF's investigation, as one of several examples, disciplinary action was undertaken against the instructor for being absent from parade at the death bed of the instructor's mother.

The allegations of bullying and discrimination were not investigated, and the instructor was suspended from parading for 14 months without any disciplinary procedure.

In the end, the Head of the Defence Registered Training Organisation tore up all actions taken against the instructor except for the suspension, and ordered that the instructor was not to be posted to an Army School.

A legal opinion from an Australian Army Legal Corps COLONEL that treatment of the instructor was a notifiable incident was passed over in favour of an opinion from a Captain on the staff of the Head of the Defence RTO, that officers can be suspended for long periods without the need of disciplinary procedures.

The Head of the Public Service refused submissions that the Public Service should intervene in the treatment of the instructor, claiming that military personnel are outside the ambit of the authority of the Commonwealth Public Service.

On all experiences of this matter, the case study appeared to confirm the effective absence of any 'Sword' within Defence to investigate wrongdoing. The instructor refused to seek protection of the 'Shield' authorities, after the School ordered that a COLONEL investigation officer cease his investigation of the bullying and discrimination – the School claimed that the cessation of the COLONEL's investigation was appropriate because the instructor had asked for whistleblower protection.

A 'sword' organization within Defence appears to be a necessary addition to the Defence Whistleblower Protection schemes if bullying and discrimination at Army Schools is to be arrested

In this organization, without an independent Sword, commanders of parts of the organization essentially investigate themselves.

In the case study cited, to give examples of the **deny-delay-destroy-defame** regime that whistleblowers in any organization can face without a sword and a shield:

- the local commander allegedly **denied** the whistleblower the redress of grievance avenue to which every soldier is entitled
- this acted to **delay** any investigation by 2 years
- when the Head of the Defence (Army) Registered Training Organisation allowed a redress of grievance 'investigation', it was **denied** an investigating officer of the

rank required by the Defence Inquiry procedures (a captain was appointed to investigate a brigadier who was four ranks higher)

- the junior investigation officer then **denied** the whistleblower an investigation on the principal matters, deciding not to investigate, and then reached a recommendation without interviewing the brigadier
- that investigation took 14 months (the period of the suspension), **delaying** the process which still had to go two more levels before the DFO would look at the matter
- the computer record of the students results was decommissioned and no longer existed (**destroyed**)
- the whistleblowers emails and computer records and documents on the defence server were completely **destroyed**
- The notes of a 'murder of colonels' who composed the **defamatory** material were **destroyed**
- The whistleblower was **denied** the particulars about the time and place that events described in the allegedly defamatory material occurred, and was thus **denied** the value of any witnesses because the whistleblower could not tell any potential witnesses when and where the alleged actions by the whistleblower occurred
- The Head of the Defence Registered Training Organisation (Army) decided to reject the defamatory reports written about the whistleblower (including the criticisms about attending his mother's deathbed), a substantial upholding of the redress of grievance application, but decided to **deny** the whistleblower continuance of employment at any school and stated that Chief of Army would be approached to see the rules could be changed to allow disciplinary action to be taken against officers who lodge redress complaints, in the form of an inability to perform their Defence role(**defame**)
- The whistleblower was **denied** a case officer provided for by Defence instructions
- The whistleblower was **denied** by order any contact with the witnesses to actions that were the basis of the defamatory material written about the whistleblower
- The Defence Registered Training Organisation (Army) is required to act in accordance with the Australian Quality Training Framework, and these undertakings were **denied** to the whistleblower instructor

A 'sword' organization within Defence appears to be a necessary addition to the Defence Whistleblower Protection schemes if bullying and discrimination at Army Schools is to be arrested

If a 'sword' was in place, out of the control of the commanders, commanders perhaps apprehensive about causing a case of bullying at their School to appear on the Inquiry into Bullying being conducted by the Chief of the Defence Force,

- An investigation of the treatment of the gender and employment status groups would be more likely to proceed at the hands of the 'Sword', if not from a determination within the 'Sword', then because the following operations of the Shield
- All the instructors who expressed their concern at what was happening could have added their voice to the single instructor who made a formal disclosure
- The instructors could then seek the protections of the 'shield' organization, such as to

- Prevent the destruction of the defamatory notes, the student academic records and the instructors emails and other electronic documents
- Obtain witness statements from witnesses able to support the instructor, and this would be so even if the instructor was ordered not to parade and not to contact other military personnel
- Disclose to the students, allegedly suffering the discrimination, the disclosures made by the instructors for the protection of students from alleged unfairness
- Report to the Parliament of any notifiable incident reports by full COLONELS in the Australian Army Legal Corps that the Chief of Army or Chief of the Defence Forces was ignoring
- Report the appointment of any officer of inappropriate rank as the investigation officer
- Report the refusal by any investigating officer to investigate matters required to be investigated by the terms of reference
- Report the failure to appoint a case manager of appropriate rank to manage the employment circumstances of the whistleblower instructions
- Report the behaviours of the Defence RTO (Army) to the third party auditor to which all RTOs in Australia must submit periodically so as to show compliance with the Australian Quality Training Framework
- Report to the Police the destruction of evidentiary materials needed for any civil legal action

Conclusion

Whistleblowers and witnesses are the last line of defence against systemic corruption and other forms of wrongdoing.

Any public sector accountability can not claim to have integrity if evidence is destroyed and witnesses are intimidated.

To defend the last line of defence, whistleblowers and witnesses must be protected.

Single body whistleblower models have shown themselves to be unsuccessful in meeting the integrity objective.

The model that can succeed is a model based on two bodies with mutually supporting functions:

- One to be ***the Sword***, to investigate the wrongdoing, and
- One to be ***the Shield***, to ensure the survival of the whistleblower and the witness, so that the whistleblower survives the denial, the delay, the destruction of the evidence and the defamation of the whistleblower that occurs while the captured ‘Sword’ organization is distracted from its duty:
    - Anti-Deny: The whistleblower or witness is given advice, assistance and representation in hearings and preparations therefor

- Anti-Delay: Progress reports on the investigation are called for and the response reported to the Parliament
- Anti-Destruction: The evidence of the wrongdoing is secured, witness statements are taken immediately after the disclosure
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