House Standing Committee on Legal and Constitutional Affairs

Inquiry into Whistleblowing Protections Within the Australian Government Public Sector

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Introduction

I have been a whistleblower on two occasions, nearly a decade apart. These cases have provided the insights which underwrite this submission. In 1994, when I first appeared before the Senate Select Committee on Public Interest Whistleblowing, the Committee Chairperson Senator Newman remarked that if it could happen to a professor, it could happen to anyone. While this remark unduly elevates the role of the professor, it summarises the problem. Whistleblowing can befall anyone with a particular set of values who is in the wrong place at the wrong time. And once you blow the whistle, you will typically always be known as a whistleblower.

Whistleblowing results from regulatory failure. It has become important for three main reasons. First, deregulation has meant that the public sector workplace encompasses more private interest, and is more discretionary, than thirty years ago. Secondly, our systems are more complex, so that auditors require the inside information that the typical audit does not provide. Finally, monetary values have replaced the values of the public interest. In the current workplace, the whistleblower is an arbiter of those values but, an arbiter without support. Whistleblowers are the independent regulators.

The importance of the whistleblower is recognised in many studies in many countries. Dyck, Morse and Zingales (2007) [1] conducted a study of all reported cases of US corporate fraud between 1996 and 2004. They found that only 6% of the frauds were revealed by the Securities Exchange Commission and 14% by auditors. The media (14%) and industry regulators (16%) were more important regulators, but the most important regulators of all were the employees (19%). Whistleblowing is a problem of the age, not of the country.

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[1] Dyck, A., Morse, A. and L. Zingales (2007) "Who Blows the Whistle on Corporate Fraud?" *University of Chicago CRSP Working Paper No. 618.*

Australian whistleblowers encounter problems special to Australia. Cultural attitudes in Australia are antithetical to whistleblowing. In Australia, whistleblowing is acceptable in general, but not in particular. Whistleblowing is acceptable in another institution[*], but not in this institution and acceptable if it concerns life or death, but not fraud or mismanagement. The negative attitudes to whistleblowing have been reinforced by the failure to prosecute any individual or entity for retaliation against a whistleblower; and the failure to enable any of the recommendations of the Senate Committees which investigated whistleblowing in the early 1990s. Australia has failed its whistleblowers.

Just as all countries need to determine the optimal level of regulation, they need to determine the optimal level of protection for whistleblowers. We need to protect whistleblowers, but not overprotect them. No whistleblower deserves a lifetime guarantee. But they do deserve a level future playing field.

There are six principles which underscore this submission.

Legislation without prosecution is not legislation

Legislation acts as a deterrent but, without a prosecution, it is legislation in name only. Real legislation requires prosecutions. Without prosecutions, no whistleblower is protected.

Legislation is not enough

Whistleblowing today is not the same as fifteen years ago when the first Australian whistleblowing legislation was enacted. When firms are regulated, they respond, but not always in the way we expect. In the case of whistleblowing legislation, they have responded. Retaliation is now more invisible than fifteen years ago. The whistleblower is now capped, not sacked. The more discretionary the work environment, the more effective the retaliation. Retaliation occurs through exclusion and minimisation, not dismissal. Legislation alone cannot redress this retaliation. Education can.

[*] An institution in this case is a general term for a government department, a public institution or a non-government institution.

Whistleblowing in a university is not the same as in a government department

Universities and government departments both depend on government outlays, but universities are very different from government departments. In the university, there is both private and public funding. Private funding elevates the private interest, and reduces the public interest. In the university, the values of the institution become the values of the Vice-Chancellor. Many of our universities are sealed against outside regulation. Systemic problems occur because the culture is the homogeneous culture of the CEO. And systemic failure results because there is no questioning of that culture.

The whistleblower as a high risk employee

The whistleblower becomes a high risk employee, not just in the eyes of their employer, but in the eyes of other employers. The most successful whistleblowers are those who change their career or their country, or who are the identifiers of systemic failure (for example, Cynthia Cooper, the Enron whistleblower). The challenge is to protect all credible whistleblowers in their existing employment and from discrimination in future employment. There should not be a lifetime penalty for blowing the whistle.

Protect and pay whistleblowers?

In protecting whistleblowers, we need to consider the incentives and disincentives to blow the whistle. If the government requires whistleblowers to be their independent regulators, should they not also compensate, but not over compensate, those whistleblowers for this service?

A competitive model of regulation

The common refrain of whistleblowers is that regulators lack independence. Regulators minimise risk, but usually the risk of institutions, not the risk of the public. Too many regulators have been captured by the institutions they regulate. Should not the monopoly power of regulators also be regulated through competition?

Submission

What is an ideal whistleblowing law? Vaughin, Devine, and Henderson (2003)[2] attempt to answer this question by emphasising seven principles

1. Focus on the information disclosed, not the whistleblower.
2. Relate the law to freedom of expression laws.
3. Permit disclosure to different agencies in different forms.
4. Include compensation or incentives for disclosure.
5. Protect any disclosure, whether internal or external, whether by citizen or employee.
6. Involve whistleblowers in the process of the evaluation of their disclosure.
7. Have standards of disclosure.

These principles are the principles of experienced whistleblowing advocates. They provide a framework for the design of whistleblowing legislation and a standard against which whistleblower laws should be benchmarked. While all of the principles are important, the separation of the information from the informant is most important. It is the information disclosed that matters most, not who discloses it.

When the principles above are applied to the terms of reference of this inquiry, the following recommendations result

1. The categories of people who could make protected disclosures

1.1. All Australian residents and all who currently contract with or formerly have contracted with the Australian government, regardless of residency, must be able to make protected disclosures to an Australian authority.

1.2. There are three compelling reasons why this should be the case. First, government funds support the cash flows of many of our institutions, both public and private. All use of public monies should be subjected to the same standards of accountability. Observers of

[2] Vaughin, R., Devine, T. and K. Henderson: 2003, 'The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers', The George Washington International Law Review 35(4), 857-902.

wrongdoing should not be partitioned. It is the wrongdoing that matters, not who observes it.

1.3. Secondly, on more than one occasion I have acted as an intermediary, disclosing information to a regulator on behalf of an employee who fears retaliation. An intermediary, who acts on behalf of an insider, should also be protected.

1.4. Finally, corruption migrates across international boundaries. Money laundering and tax avoidance, for example, are international problems requiring international solutions. Whistleblowing requires an international solution. Non residents, who blow the whistle on matters where an Australian resident would be protected, should also be protected from discrimination under Australian jurisdiction.

2. The types of disclosures that should be protected

2.1. Like corruption, the public interest is difficult to prescribe and to measure. A public interest disclosure must be separable from other employment grievances. The public interest component must be identifiable, and there should be a measurable divergence of what is observed from what an independent regulator expects.

2.2. If there is too little detail on the types of public interest disclosure permitted, there may be insufficient information for whistleblowers and too much licence for regulators. If there is too much detail, other relevant disclosures may be excluded.

2.3. The list of types of disclosures cited in the terms of reference should include reference to two other matters. First, deceptive conduct should be listed. In particular, a whistleblower should be able to disclose a cover-up which prevented an internal complaint being properly investigated.

2.4. Secondly, the list should also include a reference to conflict of interest. Conflict of interest in appointments and in tendering for government contracts is a significant issue.

2.5. The best way to prescribe permitted types of disclosure is through example. All False Claims Act cases in the United States (including *Qui Tam* cases) are publicly listed. An agency receiving public disclosures should publicly list all disclosures received, while protecting the confidentiality of all parties.

3. The conditions that should apply to a person making a disclosure

3.1. The materiality and credibility of a public interest disclosure is the principal issue. Whether the matter is

(1) In the public interest

(2) Significant and

(3) A bona fide disclosure

must be determined by the agency receiving disclosures on a case by case basis. There should, however, be some general principles.

3.2. A policy of zero tolerance, that is, investigating all disclosures, is likely to crowd out substantial matters from being properly investigated. If there were no threshold of seriousness, the number of whistleblowing cases may markedly increase. In the United States, for example, more than 1000 False Claims law suits are now pending and, as Johnson (2004)[3] notes, *"Every day more than 1,000 people send e-mails to the Securities and Exchange Commission and every month an average of 2,000 people contact the U.S. Department of Defense Hotline."* Micro management of whistleblowing is not optimal. Identifying the extreme cases which lead to systemic failure is the highest priority.

3.3. However, there is one caveat. Minor corruption now, if unchecked, may lead to major corruption in the future. Minor corruption of one type may also be associated with unobserved major corruption of another type.

3.4. The Foreign Corrupt Practices Act of the United States uses red flags to signal corruption. Signalling corruption is one mechanism to prevent systemic failure. Public institutions should be rated by the number, type, significance and resolution of public interest disclosures that emerge from them. Ratings provide information on institutional governance.

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[3] R.A. Johnson (2004) *The Struggle Against Corruption: A Comparative Study.* Palgrave Macmillan.

3.5. Penalties should apply to both whistleblowers and institutions who do not comply with the prescribed procedures for disclosures.

3.6. Penalties should also apply to whistleblowers who make knowingly false allegations. False allegations reduce the credibility of all whistleblowers.

4. The scope of statutory protection that should be available

4.1. No whistleblower can ever be fully protected. It is impossible to protect an individual from the many possible forms of retaliation.

4.2. Protection can take various forms, but it is the effectiveness of the protection which is paramount. The best protection is afforded when regulators make clear rulings in favour of the whistleblower. Too often, regulators minimise the risk of an institution by not disclosing findings, by directing the institution to change procedures and by not penalising the institution. The institutions are then protected, and the whistleblower bears the risk.

4.3. Penalties for retaliation and discrimination are written into most existing Australian whistleblowing legislation, but they are penalties in name only. I am no better protected now under the Whistleblower Protection Act of Victoria (2001) than when I made public interest disclosures in 1993 and 2001.

4.4. Australia needs a prosecution for retaliation against a whistleblower. The United States False Claims Act allows the Department of Justice to support whistleblower law suits against a false claimant on the government. If a public interest disclosure authority supported a whistleblower in a civil action against an institution, it would provide a strong signal that whistleblowers were no longer on their own.

4.5. There are other non-statutory mechanisms which are simpler and may protect the whistleblower more effectively. Both of my public interest disclosures led to substantial changes in operating procedures. As a result of the disclosures regarding matters at the Royal Melbourne Institute of Technology (RMIT) in 1993, RMIT changed procedures relating to the reporting of travel and miscellaneous expenditures and to research conduct. RMIT also prescribed a statute making members of staff members of the University, thereby allowing them to appeal to the Visitor of the University.

4.6. As a result of the disclosures regarding matters at the University of Melbourne, the University as part of its personnel and procedures prescribes acceptance of payment or other forms of inducement to vary the result of a student, as a form of serious misconduct. The University also changed its student donation policy to prevent alumni from donating within 12 months of their graduation.

4.7. In both matters, I was given private assurances that I had acted properly and that I would be protected. These assurances were of little value. A public statement would have been better. Citations for good corporate conduct are not new. The Tokyo Stock Exchange, for example, in their yearly handbook, cites firms who engage in good corporate governance.

4.8. A simple remedy is to restore the whistleblower's credibility at the time of the whistleblowing. While most whistleblowing is deemed anonymous, in practice it is rarely anonymous. The whistleblower is usually known to be the whistleblower or assumed to be the whistleblower. If the whistleblower agrees, a public statement could be issued by the institution certifying that the whistleblower had acted in good faith, that the whistleblowing had led to changes in procedures, and that the whistleblower was to be cited for good corporate conduct. For many whistleblowers, this would go a long way to restoring their credibility.

4.9. The whistleblower should also be interviewed at a fixed time after the whistleblowing, for example five years, to assess how they have been protected. The effects of whistleblowing are long-term, and those long-term effects need to be monitored.

4.10. The whistleblower also needs to be protected in employment matters external to the institution. A simple mechanism would be for the institution to provide a mandatory reference certifying that the whistleblower had acted in good faith, that the whistleblowing had led to changes in procedures, and that the whistleblower had been cited for good corporate conduct.

4.11. Federal and State discrimination laws should now also include specific provision to prohibit discrimination against whistleblowers. In 2005, the United States Supreme Court tightened the Federal law against sex discrimination (Title IX) to prohibit retaliation against anyone who blows the whistle on unequal treatment. All Australian discrimination laws should prohibit discrimination against whistleblowers.

4.12. The measures discussed in paragraphs 4.8-4.11 are designed to provide cost effective mechanisms to underwrite the credibility of the whistleblower.

4.13. Protection for whistleblowers should include immunity from criminal liability and from liability for civil penalties.

4.14. Protection for whistleblowers should include immunity from civil suits such as defamation and breach of confidence.

5. Procedures in relation to protected disclosures

5.1. The Senate Select Committee on Public Interest Whistleblowing (1994)[4] recommended the establishment of an independent agency, the Public Interest Disclosure Agency (PIDA) to receive public interest disclosures, to arrange their investigation and to ensure the protection of whistleblowers. The PIDA would report to Parliament, maintain statistics and records of cases, survey whistleblowers, and be governed by a Public Interest Disclosure Board. It would be a clearing house for public interest disclosures with the widest coverage constitutionally possible.

5.2. The model that the Senate Select Committee proposed in 1994 is the model that I have always supported. It has four principal advantages. First, most of the whistleblowers who testified to the first Senate inquiry identified the lack of independence of existing agencies as the main reason for establishing a new agency. The Committee recognised that for whistleblowers to have confidence in the disclosure process, there would have to be a separate agency which specialised in whistleblowing, and was regarded by whistleblowers as independent and accountable. This argument is as valid in 2008 as it was in 1994.

5.3. Secondly, the model proposed by the Senate Select Committee separates the investigation and protection roles of the disclosure process. This is important because, under existing agencies, once the investigation is over, the protection stops. The protection process is necessarily longer-term and needs to be separately managed.

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[4] *In the Public Interest,* Report of the Senate Select Committee on Public Interest Whistleblowing, August 1994.

5.4. Thirdly, the Senate Select Committee proposed that the PIDA would have an educative role, which is essential to changing the culture of whistleblowing. In the long term, it is education, rather than legislation, which will best protect whistleblowers.

5.5. Finally, the establishment of a PIDA would serve to unify whistleblowing legislation across Australia at Federal and state levels. A common complaint of regulators and whistleblowers has been the lack of uniformity of legislation.

5.6. The Senate Select Committee model requires one refinement, the need for specialist ombudsmen. The 2001 Senate Committee Inquiry into Higher Education[5] recommended the establishment of an ombudsman for Higher Education. Higher education and health are two sectors where whistleblowing cases are common, principally due to the opportunities for wrongdoing which result when public and private funds are combined in a framework with limited accountability. Specialist ombudsmen are required because the problems in these sectors are more specialised; for example involving issues of research and medical misconduct.

6. Education

6.1. Education is the most effective protection for whistleblowers in the long run. The economic and social value of whistleblowing has been significantly underestimated.

6.2. A representative employee typically understands that whistleblowing is a very negative experience. Most would never want to be a whistleblower. That perception needs to be inverted.

6.3. All employees in the public sector should be required to satisfy a compliance test that they are aware of whistleblowing procedures and that they are aware of the benefits of whistleblowing. These provisions should be written in to any legislation.

6.4. Outside the public sector, all company directors should be required to satisfy a compliance test demonstrating awareness of the procedures to investigate public interest disclosures.

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[5] *Universities in Crisis.* Report of the Senate Committee into Higher Education, 2001.

7. False Claims Act

7.1. The United States False Claims Act is the most effective legislation for combating fraud on the US government. It is also the most important legislation for US whistleblowers.

7.2. The False Claims Act is effective for whistleblowers for four main reasons. First, it integrates fraud recovery with whistleblower protection. The whistleblower receives protection under the Act, and very specific protection

"*Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection."*

7.3. Secondly, the False Claims Act is economically significant. Since the 1986 amendments to the False Claims Act, more than $20 billion of fraud has been recovered. In an economic impact assessment of the 1986 amendments in 1996, William Stringer[6] estimated the deterrence of fraud due to the False Claims Act amendments to be to be more than 10 times the fraud recovered. Furthermore, the False Claims Act is cost effective. In the health sector, the US government is recovering $15 for every $1 invested in False Claims Act health care investigations and prosecutions. The False Claims Act is often termed a deficit reduction Act. The Taxpayers Against Fraud Centre in Washington refers to it as a powerful public-private partnership for uncovering fraud.

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[6] W. Stringer (1996) "The 1986 False Claims Act Amendments: An Assessment of Economic Impact" *paper commissioned for Taxpayers Against Fraud.*

7.4. Thirdly, the False Claims Act has an appealing generality. A claim refers to "any request or demand for money or property where the United States government provides any portion of the money or property demanded" Helmer, Lugbill and Neff (1994).[7] A false claim refers to any fraud associated with the claim and extends beyond simple financial fraud to false reporting of results, environmental and safety violations, kickbacks and defective testing. Its generality means that it provides a framework across all sectors of the US economy. In the 1980s, more than half the False Claims lawsuits related to defence contracting. In the last ten years, more than half have related to health care. In health care, Dyck, Morse and Zingales (2007) found that 46% of fraud was uncovered by employees and, of the more than 1000 False Claims lawsuits pending, 630 are related to health.

7.5. Fourthly, a False Claims lawsuit allows for fraud reduction not only for a given organisation but, if it is a member of a larger group, of the group itself. James Alderson, the Chief Financial Officer of North Valley Hospital in Montana blew the whistle on the secret accounting practices of the Quorum Health Group in Montana. He filed a lawsuit three years later and, thirteen years after he blew the whistle, his case was settled. In the interim, the Hospital Corporation of America, the parent company of Quorum, had reimbursed the US government $840 million. False Claims lawsuits lead to a more general reduction of fraud than investigations of individual matters.

7.6. The most contentious aspect of the False Claims Act is that, in compensation for the risk and effort in filing a lawsuit, the whistleblower may be awarded between 15 and 25% of the fraud recovered. The average whistleblower award since 1986 is 16.84%.

7.7. The False Claims Act is so effective that thirty states of the US now have their own False Claims Acts. Dyck, Morse and Zingales (2007) conclude that since the False Claims Act has been so effective in combating fraud against the federal government, it should be extended to corporate fraud. Australia needs a False Claims Act.

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[7] Helmer, J., Lugbill, A, and R. Neff (1994) False Claims Act: Whistleblower Litigation. The Michie Company. Charlottesville.

Summary

This submission has argued for a number of changes, whish are summarised below.

Public Interest Disclosure Agency

An independent agency should be established to receive public interest disclosures, arrange their investigation and ensure the protection of whistleblowers.

Whistleblowers

All Australian residents, and all who contract with or have contracted with the Australian government, regardless of residency, must be able to make protected disclosures.

False Claims Act

A False Claims Act should be enacted with the public interest disclosure agency assuming a role similar to that of the US Department of Justice.

Deceptive Conduct

Deceptive conduct can be the basis for a public interest disclosure.

Discrimination

Federal and State discrimination laws should prohibit discrimination against whistleblowers.

Education

A compliance program should be established for employees and company directors.

Corporate Governance and Monitoring

Public institutions should be encouraged to recognise good corporate conduct, and to monitor the long term effects on the careers of whistleblowers.

Dr Kim Sawyer

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