SUBMISSION RELATING TO THE PRIVATE MEMBERS BILL ON WHISTLEBLOWER PROTECTION

Outline

We propose that the legislation has two serious deficiencies:

A. The Bill does not provide for a separate Whistleblower Protection Authority [hence **WPA**], empowered and resourced to ensure that whistleblowers survive the reaction to the Public Interest Disclosures [hence **PID**s] that they make
B. The Bill assigns roles important to the survival of whistleblowers to the Commonwealth Ombudsman

These deficiencies indicate that the legislation does not have in mind or otherwise contemplates the current forms of wrongdoing in Australian public and private sectors, that are amassing:

A. Accumulations of particular forms of wrongdoing and affected communities of victims, built up over years during which authorities turned a blind eye to the allegations of such wrongdoing and the treatment of whistleblowers , in some instances becoming involved or complicit in the wrongdoing disclosed and in the mistreatment of those who made the disclosures;
B. An increasing stream of Royal Commissions / Judicial Inquiries when the accumulations became just too large for parliamentary authorities to continue the denial of their plight

These accumulations of wrongdoing, we submit, are the outcome of:

A. The wrongdoing or corruption becoming systemic within the agencies and within the procedures agencies used for investigating PIDs and managing whistleblowers
B. gross failures by watchdog authorities such as the Ombudsman's Office to fulfill their role of investigating and reporting such systemic wrongdoing within the agencies for which the watchdog authorities like the Ombudsman have had oversight

Within documented cases of systemic wrongdoing within agencies, the types of provisions included in the Bill under evaluation, like the 'must investigate' provision, are consistently ignored without any interference by watchdog authorities such as the Ombudsman.

Within documented cases of systemic wrongdoing within agencies, the failure of the watchdog authority in its role as a 'sword' against wrongdoing appears to rob the watchdog of any will to act in its 'shield' role protecting whistleblowers.

In situations of systemic wrongdoing, WAG Qld proposes, a separate WPA devoted to ensuring the survival of the whistleblowers irrespective of the response taken by the agency or its watchdog towards the disclosed wrongdoing, poses the only viable course of action for ensuring such survival.

If the whistleblower survives, it is further submitted, then the witness and the voice against the wrongdoing remains viable. This surviving voice is the best chance for the original wrongdoing to be addressed and for any accumulation of crimes and victims to be prevented, where the level of wrongdoing is systemic.

The jurisdiction in the United States has established a separate WPA (the US Office of Special Counsel), and it has the False Claims Act, because that jurisdiction appreciates that systemic corruption has happened, is likely to be happening and is likely to happen again within its agencies. The US has just amended its legislation, by bipartisan support in its political system, in continuing development of a legislative framework that is based upon a separate WPA.

It appears that the Private Members Bill in the Australian Parliament, under evaluation by your Standing Committee, has been led to the two critical deficiencies, cited by our Group, by advice and inputs provided to the Parliamentary Member by researchers from Griffith University.

These researchers undertook a study into whistleblowing, a study steered by the Commonwealth Ombudsman, the Crime & Misconduct Commission [hence CMC] and other watchdog authorities. It was called the 'Whistle While They Work' Project [hence TWP].

The TWP, and the ideas arising from that research project, have been criticized by whistleblower organisations and a large number of whistleblowers because it simply assumes that agencies, like the Australian Defence Force, and watchdog authorities, like the Office of Ombudsman, have good intentions towards its officers who make PIDs, and are not systematic in how the disclosures by whistleblowers will be denied and suppressed. These two assumptions are challenged by many principal Inquiries and proposed Royal Commissions into the agencies of Federal and State Governments.

In support of these propositions, this submission offers comments on four topics

1. The scope of current Royal Commissions / Judicial Inquiries
2. The performances of the Commonwealth Ombudsman
3. The flaws in the Griffith University WWTW Study, in Summary and in Detail
4. The Sword and the Shield Approach to Whistleblower Protection jointly agreed by whistleblower organisations in Australia.

CURRENT COMMISSIONS OF INQUIRY

The Royal Commission into Child Abuse will inquire into the crime of abuse and its effects on the victims. The Commission is also to investigate the failures by authorities, who received disclosures about these crimes, to address these disclosures where there was a duty under law for the authorities to do so. The wrongdoing that is at issue is alleged to have been **systemic** rather than *ad hoc*, because those in authority to address the abuse covered it up instead, and mistreated whistleblowers who would not comply with the cover-up policy or stratagem. This allowed the wrongdoing to continue, and great accumulations of crime and injury to develop, it is submitted.

The organisations that are expected to draw attention in this way will not just be churches and sporting organisations from the community, but also public sector organisations such as Australian Embassies and the Department of Foreign Affairs, and the Queensland Justice and Judiciary administrations that became involved in the Lindeberg disclosures about the Qld Government's John Oxley Centre (also called the Heiner Affair). The failures of Police Forces and Public Prosecutors to act upon disclosures from both the private and public sector will further evidence **the systemic wrongdoing** that allowed perpetrators for decades to wreak misery upon generations of children, their families and their own children.

The current **Review into the CMC** in Qld, and the **Carmody Inquiry Part I** (not including the Heiner Affair) **and Part II** (about the Heiner Affair), plus the **Victorian Parliamentary Commission of Inquiry into Child Abuse**, demonstrate the accumulation that has occurred of cases of child abuse, without it being dented or diminished by the efforts of the Ombudsman or the CMC (or its equivalents in other State and the Federal jurisdictions) who now face allegations of complicity by commission and by omission in the cover-up of the wide ranging abuse.

The DLA Piper Review of Alleged Sexual Abuse and othe Abuse in the Australian Defence Force. The several hundred cases, judged to be plausible instances of abuse in the Australian Defence Force, are also under consideration for inquiry by way of a Royal Commission. The DLA Piper Report listed the seventeen (17) Inquiries and Reviews into military justice issues in the last 21 years to 2010, including the 2005 Senate Inquiry that found systemic wrongdoing in the Australian Defence Force military justice system. The disciplinary side of the military justice system was taken out of the control of the commanders in the ADF, because the commanders had proven unreliable in using the disciplinary powers without abusing those powers.

The Matthews Inquiry in 1994 (non-enforcement of mining lease conditions by the Queensland Government), and the Davies Inquiry 2005 (health department administration

supporting a surgeon who was killing his patients) are examples of systemic wrongdoing by government agencies. The Australian Wheat Board (the Cole Inquiry) and the Reserve Bank of Australia are two prominent authorities under investigation for involvement by the agencies in alleged corruption, and for seeking to benefit financially from allegedly corrupt practices, as a matter of organisational business strategy. In all these instances, it is not an individual perpetrator at the centre of the wrongdoing but the whole of an organisation (except for a lone whistleblower).

In the case of RBA Bribery Scandal, the whistleblower is a person in the role of company secretary. In the AWB, the whistleblower is a Federal Police Officer reporting directly to the top of that organisation.

The provisions of the Bill under evaluation have no apparent appreciation as to how the protection of the whistleblower is to be effected in situations where the corruption is systemic.

PERFORMANCE OF THE OMBUDSMAN'S OFFICE

The Ombudsman's Office in 2004 (Redress of Wrongs procedures) and 2005 (treatment of minors) was a principal of one and an initiator of another of the inquiries into the Australian Defence Force. That was then.

Since 2005, the Ombudsman's Office stands accused of allowing to pass proven instances of where the Chief of the Defence Force and Chief of Army have refused to comply with legislative provisions that required these commanders to take steps that would provide due process to soldiers complaining of mistreatment and reprisal. The Ombudsman's Office stands accused of misleading a Senate Committee on the issue of whether complaints had been received by the Ombudsman's Office of reprisals against soldiers after they made a complaint to their superior officers.

Research into the operations of the Commonwealth Ombudsman, undertaken by Professor Anita Stuhmcke of the University of Technology Sydney, demonstrates that the Ombudsman's Office only investigates one out of four of the complaints that it receives. Three out of four whistleblowers who may complain to the Ombudsman about reprisals, upon the figures published by Professor Stuhmcke, will have their complaint referred back to the agency against whom the whistleblower is alleging reprisal.

This is what allegedly happened to the whistleblower who went to the Queensland Ombudsman with disclosures about allocations of water in the Murray Darling river system – the Ombudsman referred the matter immediately back to the agency, and the whistleblower lost their staff and duties within a few days of making the disclosure.

The Private Members Bill under investigation, for example, proposes that agencies ***'must'*** investigate disclosures received. In a situation of a systemically corrupted administration, this ***'must'*** will not be carried out. If the Ombudsman allows this non-compliance to pass, as has been happening allegedly in redress of wrongs situations in the Australian Defence Force, no investigation will occur. The agency will then use the Ombudsman's breach of the legislation to claim that the agency's failure to investigate was proper, and that the whistleblower making the complaint was irrational or obsessed. The whistleblower seeking protection will be vulnerable to further reprisals.

It has been the consistent failure of watchdog authorities with overwatch duties of the ADF that has allowed the ADF to accumulate nearly a thousand known plausible cases of abuse. The Ombudsman's folly in this regard was emphasized when the Ombudsman, after 2005, began praising, to other agencies, the administrative military justice system of the ADF. DLA Piper's Report recommending a Royal Commission into abuse demonstrates just how ineffective has been the investigation capacity of the ADF to which the Ombudsman attached his high recommendation. The Ombudsman and DLA Piper appear to have evaluated two different agencies, so far apart are their conclusions.

FLAWS IN GRIFFITH UNIVERSITY'S WWTW STUDY

The Commonwealth Ombudsman was a principal, with the CMC, on the Steering Committee for this research. It must thus take joint responsibility for the flaws in this research.

In summary, the steering board and its researchers

A. Accepted a limiting Term Of Reference imposed by the Steering Committee, a TOR that asserted that the watchdog authorities were doing a good job, and that thus the performance of the watchdog authorities was not to be part of the research.
B. Accepted an assumption that all agencies were 'well intentioned' towards the making of Public Interest Disclosures [PIDs] by their staff and towards the treatment of whistleblowers, and
C. Accepted the ADF as a body to be studied in research, that is, accepted the ADF as a body which met the assumption of being well intentioned towards its whistleblowers, and accepted that the Ombudsman's Office, ADFIS and the Inspector General ADF, had been doing a good job ib their overwatch of military justice decisions in the ADF.

The well intentioned agency assumption is important to the rationale of the Ombudsman in its treatment of whistleblowers, because it allows them a justification for referring whistleblowers back to their agency – this is what the Ombudsman does in three out of four cases. If the Ombudsman was to admit that agencies can be systemically corrupted, the Office of Ombudsman would lose any justification for referring a whistleblower back to the agency that might be ill-intentioned towards any whistleblower.

The Whistle While They Work Project, thus, has only a partial coverage, rather than a comprehensive coverage, of whistleblower situations, and the associated bullying and reprisals that are experienced by public servants in the Public Sector in Australia.

Robert Needham, Chair of the Queensland Crime & Misconduct Commission announced the beginning of the Project, back in February 2005. Needham chaired and hosted the first meeting of the Steering Committee for the Project.

On 25 November 2009,however, in response to yet another scandal in the Queensland Government relating to funding for sport, Needham is reported to have stated:

> ***I would be interested in ways in which public servants can be empowered to say no.***

After $1million in funds and public servant hours, the Griffith University research Project appears to have failed to deliver this primary outcome for its Partner Organisations

The Project has simply failed to address the forms of systemic wrongdoing, systemic bullying and reprisals. The sports rort allegations may have been a recent example of a continuing phenomenon. The coverage that this Project has provided is of the minor or secondary or lower volume forms of whistleblowing, bullying and reprisals taking place in government offices, namely worker against co-worker in ad hoc and occasional instances of wrongdoing.

The Project, and its conclusions and recommendations, may thus constitute a Health & Safety risk for the majority of public servants who make public interest disclosures about wrongdoing in their workplace, or face pressures from their organisations not to do so.

The risk may occur where the conclusions and the recommendations of the Project are applied in situations that have not been researched and analysed by the Project.

The conclusions and recommendations from the Project have standing for situations

- where the whistleblower has disclosed wrongdoing by co-workers & supervisors,
- where the agency is a well intentioned agency that shares the employees concern for the wrongdoing to be removed, and
- where the bullying and reprisals are less serious in nature,

that is, essentially in co-worker wrongdoing, bullying and reprisal situations, colloquially termed as **the 'dobbing' whistleblower** situation

The conclusions and recommendations, however, do not appear to be drawn from a deliberate and structured analysis of situations

- where the whistleblower has disclosed wrongdoing by the organization and by its management, or has objected to the bully treatment that they have received
- where the agency is affected by systemic corruption and bullying, and is intent on a close-out of any disclosures about its wrongdoing, and / or,
- where the bullying and reprisals are more serious and very serious in nature,

that is, where the employee is showing resistance or dissent to wrongdoing by the organization, termed in the research literature as **the 'dissent' whistleblower** situation.

Professionals engaged in whistleblower advisory, whistleblower protection and whistleblower support activities need to exercise a duty of care towards all employees, both to whistleblowers and to persons contemplating making a disclosure. All employees should be shown a duty of care in any advice, protection measures and support that is provided to them prior to, during or after a disclosure has been made, and / or a suspected reprisal has been experienced.

Such activities by integrity professionals should not be carried out recklessly, without regard to the assumptions and scope limits and background circumstances from which guidelines and factors have been deduced.

The Press Releases and interviews, submissions and papers from the Project, do not appear to be accepting this boundary between what has been researched and analysed, and what has not.

The conclusions and recommendations from the Project may be being advanced as a set of guidelines for all whistleblower situations, bullying environments and reprisals.

The Project does contain some secondary data and anecdotal evidence that is useful for the more serious and more dissent oriented whistleblower bullying and reprisals. Even the bulk data from the co-worker oriented survey is helpful. The secondary data, the anecdotes and bulk results, however, only serve to identify that the occurrences of systemic corruption, systemic bullying and dissent whistleblowing are a real part of the public service in Australian jurisdictions.

These circumstances of systemic wrongdoing thus should have been a part of any comprehensive study of whistleblowing in Australia.

The Project is unable to define the critical parameters, the relationships, the risk rates and other information sufficient to provide guidelines for the more serious bullying and reprisal situations, and for dissent whistleblowing / systemic corruption scenarios.

As a result, there is the prospect, real and immediate, that the Whistle While They Work Project may become part of the problem for whistleblowing management in the systemic wrongdoing scenario, as well as part of the solution where the wrongdoing of co-workers is the issue at hand.

At worst, the Project may be acting to paint the situation for whistleblowers and bullied workplaces in Australian jurisdictions using colours that are much rosier than the real situation merits.

The Griffith University Study [GUS] documents appear to have more the characteristics of a consultants report. The terms of reference for that consultancy may reflect only the view of our bureaucracies, the views held by the client organizations, and this may have led to a major omission.

The GUS documents may not have the characteristics of independent research extending the state of knowledge of organizational dynamics associated with wrongdoing against the public interest.

The causes for this limitation on the applicability of the Project appear to be:

- the failure of the Project to consult with whistleblower organizations early in its development, so as to gain the whistleblower perspective, persons who have seen the corruption and experienced the bullying and the reprisals
- the large scale consultation effort that was made, which was focused on the agencies and watchdog authorities, and which led to an apparent bias favouring the perspectives of these stakeholders

Some technical aspects to the Project contributed to its failure in important regards:

- The Definition used for whistleblowing diluted the figures on whistleblowing with disclosures that had no public interest relevance (and thus were not about whistleblowing). Efforts to cure the study of this dilution effect tended to confuse the analysis with switches during argument amongst multiple populations of different types of 'whistleblowers'
- The cross-sectional survey acted to omit from analysis most whistleblowers and bullied staff who had or would experience termination as a result of their whistleblowing, including those who simply exited the organization to free themselves from any involvement or association with the wrongdoing and / or any of the pressures and stress experienced because of the bullying
- The linkages to the state of knowledge about whistleblowing were underdeveloped. This was the case with respect to knowledge from past research, from the major whistleblower cases, and from recent inquiries arising from disclosures by whistleblowers
- Critical parameters, such as the seriousness of the allegations made, and the degree of systemic corruption established within agencies and watchdogs, were crudely structured or over-simplified. Any peaks in the stratifications that would be expected to dominate these parameters were smoothed out by the crude treatment and simplifications.

The Credibility of the Project also suffered as a result of practices used and claims made by the Project:

- The Project did not include the possibility of the systemic wrongdoing / dissent whistleblowing situation in its analytical framework. Retaliation rates including bullying from higher management were dominating the retaliation rates against co-workers, by 3 to 1. This was one of 10 figures that suggested that some agencies may be exhibiting systemic wrongdoing
- The Project claimed that it had discovered the strength of retaliations coming from higher management, when the literature appeared to show that other researchers were well advanced, by as much as 10 years, upon this 'discovery' by the Project
- The Project criticized whistleblowing organizations and academics as having an 'anti-dobbing mentality', when these stakeholders had been on the record for a decade about systemic wrongdoing, systemic bullying and mobbing, regulatory capture and dissent whistleblowing
- The figures on retaliation rates are biased by the absence from the survey of the terminated whistleblowers. Termination is the worst form of retaliation imposed upon whistleblowers. Adopting methods that leave terminated whistleblowers out of the data collection appears to be a major flaw affecting all results
- The Project referred to the whistleblower cases in Dempster's book, Whistleblowing', as 'mythic tales'. This may reflect a reluctance by the Project to accept as real the major whistleblower cases or as real the evidence that they offer about systemic corruption amongst watchdog organizations, who comprised all bar one of the Partner Organisations of the Project
- The Press Releases advertised retaliation rates as low as 22%. This data was gained from self-nominating whistleblowers. The 22% figure was selected when sections of the study for known whistleblowers reported that the retaliation rates might be 66%. The 66% figure, if adjusted for a likely percentage of terminated whistleblowers, might have been 80%
- The Project was inconsistent, where it dismissed other research for using methods that the project also used. This is a major loss of consistency and integrity in the

analysis. The Project dismisses prior research because of the way that that research formed its study group of whistleblowers, but then the Project uses the same methodology for gathering its own group of known whistleblowers

- The Project made an assertion without research on a matter important to protection from reprisals and bullying. The Project stated that *only in very rare cases is the nature of the reprisal such that it could meet the legal thresholds required to prove criminal liability on the part of any individual*
- The Project used language like *absence of commitment, violation of systemic procedural justice* and *less positive reporting climate* when words like 'the presence of systemic wrongdoing' and 'oppressive bullying environments' seemed to have at least the same likelihood
- The Project did use the systemic wrongdoing scenario, not to explain the results from the Project survey, but to argue mitigation of the error made by the Project in the Definition of whistleblowing
- The Project claimed that reprisals against whistleblowers were ***unlikely to involve a single decisive blow such as a sacking,*** but the Project did not collect data from whistleblowers who had been terminated
- The Project rejected one result from the survey of managers and case handlers, by claiming that the unexpected result indicated that the managers did not know their own organization
- The prospect that the conclusions and recommendations may be close to or aligned with **government spin** on the integrity of our administrative and justice systems, and remote from the experiences of whistleblowers and bullied staff

It is recommended that the Federal Government organize for such research to be done again, independent of the watchdog authorities that have misdirected the Griffith study away from any meaningful consideration of principal dynamics faced by whistleblowers and bullied staff in Australia's public sector workplaces.

Best practice research methods need to be employed.

THE NEED FOR PROTECTION OF WITNESSES 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.

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]

Significant Cases

Primary concern about the role of watchdog authorities arose from the rogue legal opinion used by lawyers within Queensland's CMC 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. This jurisdiction has had whistleblower legislation since 1994.

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

Summary

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
    - Anti-Defamation: The evidence of the proficiency of the whistleblower or the witness in their job, prior to the making of the disclosure of alleged wrongdoing, is secured