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20th September, 2001
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(6 pages long)

The Chairperson
Finance and Public Administration Legislation Committee
Australian Commonwealth Government
The Senate
Parliament House
CANBERRA ACT 2600

Dear Sir,

Re: Submission for Public Interest Disclosures Bill 2001

This is my reply to the call for submissions for the *Public Interest Disclosure Bill 2001* currently referred to this committee. I understand that the deadline for submissions has been extended to Friday, 21st September 2001. I forward this submission by Express Post No. CN 3249203 today.

I take this opportunity to draw the Finance and Public Administration Legislation Committee's attention to some areas of concern. I do so as a member of the public who needed the protection the above bill seeks to give people who blow the whistle.

The concerns I outline below are areas where, I believe, the *Public Interest Disclosure Act 2001* can be rendered ineffective by any person(s) or agencies determined to suppress the disclosures and subsequent investigations. My concerns are based on my own experience of *bona fide* disclosure and its aftermath or from the experience of others I am assisting.

The *Public Interest Disclosure Bill 2001* is certainly a giant step in the right direction for the protection of persons who make *bona fide* public disclosures in good faith. It offers far more protection than the current statutes for whistleblowers making disclosures. However, I am curious from my own experience, in NSW, on how they can be effectively and efficiently supervised.

I raise my concerns as follows:-

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3. Interpretation

(1) In this Act, unless the contrary intention appears:

act includes investigate. However, there needs to be an instrument here to set out the proper investigation procedures, follow-up and/or reporting mechanisms and outcomes.

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3. Interpretation

unlawful reprisal means conduct that causes, or threatens to cause, detriment: There needs to be a description on what these might be. There are so many ways of disguising **unlawful reprisal**.

I give some examples of what I understand to be reprisals currently in use:

Disciplinary action, performance assessment, conduct and service review, assessment for interpersonal problems, being sent to Government Medical Officer (in NSW HealthQuest) for psychiatric or psychological examination or review, medical discharge, retrenchment, demotion, loss of higher duty status and return to substantive duty salary base, suspension with or without pay, L.W.O.P. keeping staff on a temporary or contract employment status - harassment, victimisation, haloing, mobbing or bullying or just plain unconscionable conduct.

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5 Disclosures during proceedings 8 Legal professional privilege

These are the areas most open to abuse. Because there can be misconduct behind the scenes and the abuse of power causing the furtherment of crime. I believe, one of the most popular abuses in NSW is the use of "Deeds of Release". This legal instrument effectively 'gags', constrains and restricts employees from making disclosures. There could be judicial complicity.

Examples - of concern, include:

- strike out motions - controlling what evidence can be used
- judicial error in handing down - dismissing a case or hidden agendas lawyer-based agreements.

There must be a provision to **explicitly prohibit contracting of "Deed of Release"**.

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Part 3 Proper authorities

10 Procedures

- (1) An Agency must establish procedures. This is excellent. It will be effective if there is a reporting authority who supervises the established procedures to ensure these are carried out.

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10 Procedures

- (3) The procedures to be established under subsection (1) must include procedure dealing with the following:

(c) protecting a person who makes a public interest disclosure from unlawful reprisals, including unlawful reprisals taken by public officials in relation to the agency: *What might these be?* There needs to be guidelines relating to these.

- (4) The agency must, in respect of a document setting out the procedure established and maintained in accordance with this section:

(b) make a copy of the document available to the public for inspection at all reasonable times, and

Where would this be?

Who would organise this?

Would this be available for viewing on request or in a manner similar to planning documents in local libraries?

Will concerned members of the public have to pay fees to view the disclosure?

This will render view costs the exclusive theatre of the waged public, unions and lawyers.

11 Report on disclosures

(1) An agency that is required by an Act to prepare an annual report of its activities during a year for tabling before Parliament must include this report:

This is a much needed public resource:

*Will these reports be publicly available as a material resource? Will these be available in for free access to the public in parliamentary libraries or will fees be incurred to view these?
Who will oversee this function and ensure the annual reports are available? Most important who will ensure they are accurate?*

I ask the above because I 'disappeared' from my employers annual report by their rendering me absent without leave (L.W.O.P.) when in reality I was on Sick Leave Without Pay. This followed a work-related injury that resulted in a successful Victim's Compensation Tribunal pay out for 'pain and suffering'. The various remedies I sought were under ^{*}Workers' and Victim's Compensation, ^{*}Anti-Discrimination Act and currently Industrial law. ^{*}They were negotiated or commutated or 'out-of-court' settlements or occurred after my 'forced' resignation.

(2) The statistics to be included in the annual report are:

This would be far more effective if "statistics" included details and substance for the data provided. This could be done under subsection - 3 **Interpretation**.

This section has the potential to become a barrier. The current practice in NSW is that employers remove disclosure making employees. They are rendered to troublesome employees and disappear from reporting mechanisms. This is achieved by denial or suppression tactics. Employees become non-persons in the maze of suspension, L.W.O.P., S.L.W.O.P., long service leave, etc.

What mechanisms would the Committee propose to overcome this practice and ensure annual reports are accurate in this respect?

Public interest disclosures

13 Anonymous disclosures

The proposed Act does not attempt to address the *bone fide* reasons why people may wish to make an Anonymous Disclosure.

It does not address the issue of vulnerability of the person making the disclosure. Perhaps these reports could be stored and kept for future use. There is never smoke without fire. Someone else will eventually anonymously or properly disclose the same issues. The anonymous documents will need to be checked against the proper disclosing documents. Anonymous disclosures will certainly show an endemic pattern of activity in an agency that may need investigating by proper authorities.

Anonymous Disclosures could be used as a "cop out". Prevention is better than cure. The disclosures may bring to public light activities that need to be curtailed before they escalate and possibly come disciplinary issues affecting employment or come under the Crimes Act.

Who will supervise this?

(e) that the disclosure has already been dealt with adequately.

Who will deem this is the case? What instruments will determine this?

This relies on the integrity of the agency which may be corrupt. The supervision must ensure that barriers are not put in place to circumvent a *bone fide* disclosure from being effectively stopped by the judiciary. Among the mechanisms, I believe, currently in use in NSW are "Deeds of Release" and Judicial error judgements.

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18 **No referral**

A proper authority must not refer a public interest disclosure to another agency under section 15 or subsection 17(1) if, in the authority's opinion:

This would effectively stop the current practices used in NSW by medical officers, lawyers, unions and professional associations and hopefully stop the practice of sending the documents of complaint, identifying the person making the disclosure back to the employer. The employer has the final say on whether the complaint is valid. There is no further or proper follow up mechanism to ensure the disclosure is correct. This effectively silences the *bone fide* complaint and disclosure-maker.

I couldn't agree more with the spirit and purpose of this section. To many in NSW have been HealthQuested.

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20 **Progress report**

(2) Where a request is made under subsection (1), the proper authority to which it is made shall provide a progress report to the person or authority who requested it:

The wording shall needs to be replaced with the word "must".

(b) if the proper authority takes further action with respect to the disclosure after providing a progress report under paragraph (a):

(i) while the authority is taking action at least once in every 90 day period commencing on the date of provision of the report under paragraph (a); and

(ii) on completion of action.

(3) A progress report provided under subsection (2) must contain the following particulars with respect to the proper authority that provides that report:

(a) where the authority has declined to act on the public interest disclosure under section 14 that it has declined to act and the ground on which it so declined;

These sections have the potential to become a barrier. This requires carefully worded regulations and procedures. These procedures require a continuing presence and critical involvement of the persons this Act endeavours to protect - public disclosure makers erroneously termed whistleblowers and their representatives.

- * There needs to be a presence on the committee writing the regulations and procedures.
- * There needs to be a presence on the disclosure investigations. In a similar what to Whistleblower Australia (NSW Branch) attends the Police Integrity Commission meetings.

This section needs to define - feedback, and to whom. The persons who need feedback are the public, the government, the investigating authority or committee, agency and disclosure maker.

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Part 4 **Unlawful reprisals**

23 **Function to assist complainant**

(2) A proper authority must provide a person who has suffered an unlawful reprisal with access to counselling services if requested by the person to do so:

This section needs to consider the treating doctors requirement to help their patient access counselling if the treating doctor deems it necessary. The doctor has a duty of care for the welfare of the patient. The patient must agree voluntarily to counselling. It must be the counsellor of the disclosure maker's choice. [NSW provides Employee Assistance Program]. *Who will pay for the counselling services? Who is the client? The disclosure maker or the agency disclosed?* This ensures the disclosure maker is protected from professional privilege challenges. The employee must have access to any reports written about them. The disclosure maker needs assurance that reports arising from counselling cannot be used to their detriment. They are especially vulnerable and easily compromised in medical review, discharge or in victims or workers' compensation or civil liability tort issues involving their employer.

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25 **Consent to relocation**

Section 24 does not authorise the relocation of a public official in relation to an agency to another position in the agency without the consent of the public official.

This section can be blocked if the agency is the employer. For example, if they act as a rehabilitation or return to work adviser in conjunction with the relocating agency. The employing agency needs to be effectively removed from the future or on-going discussions. Another factor influencing the outcome of successful relocation is employer funding for the service providers at the relocated agency. By non-payment of provider accounts the employer can influence the provider's relationship with the relocated employee.

The employee must be told of any OH&S and disciplinary issues affecting their employment them if they choose to remain. There must be effective supervision from outside to ensure their continued welfare within the agency whose activities have caused employee disclosure. There is urgent need for supervision if the employee should choose to work from home as a relocation option. *Who will contact them at home and by what method - in person visits, direct contact, courier, phone, fax, internet, e-mail, Australia Post, etc?*

27 **Application for injunction or order**

This needs to be looked at in conjunction with section 13.

(d) grant an injunction in terms of court considers appropriate.

What courts will make these injunctions? Supreme, Federal and High Court actions are expensive. Not all disclosure makers have investments or property to mortgage against the cost of legal expenses.

Legal costs, court timetables are an effective barrier to prompt resolution, complexity of existing statutes requires legal knowledge and access to legal assistance and this is cost prohibitive. Not all employees are union members or have unions who are prepared to fight their legal issues. Many are covered by Enterprise Agreements negotiated by others with more powerful workplace lobbies.

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30 Confidentiality

This is a positive guard for anonymous disclosure makers. Anonymity protects them. Disclosure makers can be easily identified. They are identified by signing their disclosure. Even, when their name is suppressed from the employing agency they can still identify disclosure makers - by what they reported or by the knowledge of the facts.

32 Limitation of liability

This section is good as it covers the rights of the disclosure maker. This section needs an explicit "contract out under deed of release" clause. This is an urgently need to protect disclosure makers from estoppel by "Deed of Release" or other legal or contractual instruments.

Overall

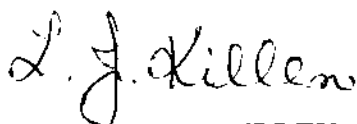
1. The Finance and Public Administration Legislation Committee and procedure writing committee needs the critical involvement of the public disclosure makers or their representatives in organisations - Whistleblowers Australia Inc., etc.
2. The Finance and Public Administration Legislation Committee procedure and guideline writing committee needs the continued representation of the private member who raised the Act.

This ensures that the spirit of the proposed Act continues to be evoked at all stages its preparation. This will ensure the Act is not watered down or rendered ineffective by ambiguously worded or open-ended regulations, procedures and guidelines.

I thank the Finance and Public Administration Legislation Committee for your attention to my submission to the *Public Interest Disclosure Bill 2001* currently before you.

I look forward to hearing more about the progress of this Bill through the committee and The Senate.

Yours faithfully,



LESLEY JANE KILLEN (Ms.)