

The Chairperson
Finance and Public Administration Legislation Committee
Australian Commonwealth Government
The Senate

JOINT SUBMISSION ON THE PUBLIC INTEREST DISCLOSURE BILL 2001

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1 We are making submissions on the Public Interest Disclosure Bill 2001 ("The Bill") on the basis of our first hand experience attempting to report matters involving corrupt conduct/maladministration in two different NSW State Government agencies covered by the NSW Protected Disclosures Act 1994.

EXPERIENCE A (Gerard Crewdson)-I knew about and attempted to use the NSW Protected Disclosures Act 1994 to report corrupt conduct/ maladministration occurring within my agency in 1998 to the then principle officer of the agency. The disclosure was referred to a corrupt official possibly without the principal officer even knowing about the contents. He simply ignored the disclosure by baldly denying that there was ~~no~~ corrupt conduct or maladministration without any attempt to substantiate this claim..I then attempted to use external agencies under the Act-the NSW Ombudsman and the ICAC. These agencies ignored the particulars of my disclosures and focused on more general systemic issues. Recommendations were then made to change policies and procedures without identifying any individual wrongdoing. No attempt was made to protect me from reprisals which were severe and ongoing.

EXPERIENCE B (Pascale Bourot)-I did not know about the NSW Protected Disclosures Act 1994 when in 1998 I attempted to report entrenched maladministration/ corrupt conduct occurring within my workplace management. I only knew of the official grievance procedures. These had been taken over by that same corrupt management. My fellow staff were too intimidated to raise grievances. I was subjected to immediate reprisal action by my management and I subsequently attempted to report my concerns to Head Office Management. My concerns were ignored. I was unaware that Head Office Management were already acting with workplace management to remove me from my employment and destroy my career, my reputation and livelihood

POSITIVES OF "THE BILL"

- 2 "The Bill" has a number of features that I believe are an improvement on the NSW PDA Act These include:
- Sec 12 Any person can make a disclosure under the Bill. Presumably they do not need to be an employee in the public Service (as is the case under the NSW PD Act) Presumably "any person" could include ex employees
 - Sec 3 definition of unlawful reprisal covers reprisal against a public official as a result of their not partaking in misconduct
 - Sec 5 allows for a court or tribunal to refer information arising in proceedings that could amount to a public interest disclosure to an authority under the Bill
 - Sec 10, 11 and 20 of the Bill have procedures and reporting provisions critical to the functioning of such an Act
 - Sec 23 importantly makes assistance mandatory where person reports unlawful reprisal
 - Sec 24-25 offers scope for intervention strategies to ameliorate reprisal actions so long as consent of person disclosing is maintained
 - Sec 26 importantly imposes an individual tort liability on person causing unlawful reprisal
 - Sec 27-28 importantly provides for an injunctive remedy against reprisal action

POSSIBLE PITFALLS

- 3 Sec 3 Interpretation does not include a definition of "investigate"
- Agencies can subvert and thwart the making of disclosures by instituting in response a broad review process focused on generalities and procedures instead of investigating the particulars of

the disclosure. Or they might ignore information contained in the disclosure about past conduct of an officer or officers and instead investigate their current conduct after they have been forewarned of the allegations made against them. Of course they are then on their best behaviour. I believe there needs to be a definition of "investigate" within the Act expressly excluding such ruses.

- 4 Sec 5 "Disclosures during proceedings" needs to be accompanied by (in implementation of the Act) judicial education on its existence and purpose. In my own experience of courts and tribunals the judges or judicial members have not welcomed and been at times "blind" to information tending to show corrupt conduct by public officials.
- 5 Sec 8 Legal professional privilege should I think be expressly qualified by the exceptions within the Evidence Act (Cth) where privilege does not attach to communications between client and lawyer in furtherance of crime, tort or abuse of power
- 6 Sec 14 "Frivolous etc disclosures " while necessary is open to abuse as a mechanism for an agency not willing to deal with meritorious disclosures and wrongly declining them under these categories
In order to address this possibility I believe the Bill should incorporate a review or appeal mechanism against such dismissal decisions.
One of the chief dangers of the whole Bill is that it does not seem to allow a person to go beyond the designated proper authorities to any higher or external authority if the proper authority fails to deal properly with disclosure. There appears to be a single process of dealing with the disclosure with no review or appeal mechanism available.
The Bill needs to make provision for the possibility of the designated proper authorities themselves failing to act properly under the Bill.
- 7 Sec 32 Limitation of Liability should include an express prohibition against contracting out of the Act by DEED of Release settlement between the agency involved and the person making disclosure
- 8 The Bill needs to be more specific about how proceedings can be taken under sec 22, 26 27 and 28 of the Bill-for example in what courts? are any statute of limitations applicable ?
- 9 The Bill will only achieve its objects and protect persons making bona fide public interest disclosures if the proper authorities are genuinely committed to and understand those objects (and not just a commitment on paper) The Bill and its protections must be well publicised so that persons making public interest disclosures are aware of its existence. Provision must also be made for persons who make what would be public interest disclosures under the Bill to be treated as such even if they are at the time unaware of its existence and the protections it affords.
- 10 Critical to the implementation of the Bill would be the creation of regulations and procedures giving detail to the Bill's provisions. There should be public involvement, scrutiny and a similar submission process as this when regulations and procedures developed.

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