17 Santaram Street
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2 October 2001

Ms Helen Donaldson
Secretary
Legislation Committee
Parliament House
Canberra ACT 2600

REVISED SUBMISSION RE PID BILL 2001

Dear Ms Donaldson

Thank you for your letter of 28 September 2001. My revised submission attempts to take your helpful guidance into account without detracting from my central point that it is disastrous to assume the integrity of designated *"Proper authorities"*, or to imagine that legislation would achieve the necessary reform of culture.

The principle espoused in your second paragraph is well appreciated, as are the limitations imposed on such committees. The purpose of my submission is to achieve fundamental amendment to the Bill. In order to maximise opportunity it is necessary to refer to the 'Toomer affair' because it demonstrates, perhaps better than any other case, that the 'proper authorities' cannot be trusted, and it demonstrates their exploitation of the corrupt administrative culture of misplaced 'loyalty'. His case ranks among the most disgraceful in Australia's administrative history, and has particular relevance to the proposed Bill.

Having confirmed the purpose of my submission, I would nevertheless hope that, if the committee chairperson sees fit, his or her tabling speech would include recommendation for compensation to Mr Toomer, as was done by Senator Shayne Murphy when tabling the report of the Senate Select Committee on Unresolved Whistleblower cases.

The particular relevance of Mr Toomer's case to the proposed Bill is as follows. In 1974 authority achieved its otherwise unachievable unlawful goal of removing him from involvement in grain ship inspection by demoting and transferring him to a remote non-grain exporting post as punishment for unauthorised and allegedly false disclosure to the media.

He was victim of bureaucratic protection of vested shipping interests, and remains victim of a deeply ingrained corrupt administrative culture that can never forgive public interest whistleblowers. His case demonstrates the extreme length to which authority went in achieving that improper objective, and in subsequent cover up to this day.

In 1975 investigating Royal Commissioner Paul Munro strongly criticised both the relevant disciplinary proceedings and subsequent medical proceedings that aimed to disempower and discredit whistleblower Bill Toomer.

Mr Toomer states that a senior public servant told him in the course of a public service inquiry in 1976 that the only thing he did wrong was to speak up to the media. Mr Toomer unsuccessfully explored all internal avenues, including writing directly to the Minister, before he disclosed to the media authority's willful continuing breach of important quarantine legislation in his area of responsibility.

I assure you from close inquiries in 1978 by a public service Promotions Appeal Committee under my chairmanship that there was nothing false about Mr Toomer's disclosures to the

media. In order to make the charge of falsity stick, authority wrongly and publicly attacked its own legislation as being unnecessarily strict.

My objection to the Bill in its present form is based on 23 years practical experience - not theory.

The 28 year history of the 'Toomer affair' demonstrates that each of the designated 'proper authorities', or their historical counterparts, demonstrated a vicious and extremely determined self-protecting response to his disclosures. The Bill as presently proposed, does little or nothing to preclude recurrence of such situations. The designated authorities are obliged to report to Parliament only those disclosures that the authority deems to be substantiated on investigation.

The Bill is said to be modeled on proven effective ACT whistleblower protection legislation. Whistleblower newsletters suggest that none of Australian State or Territory protection legislations has proved effective. Legislations in Australia thus far appear designed to provide an early warning system to ensure that word does not get out to the media.

For 28 years a succession of authorities deliberately muddied the waters to escape the point that Mr Toomer's problems with authority became manifest when he refused authority's inexplicable instruction to withdraw a fumigation order against the heavily rodent infested vessel 'Cedarbank' that was also without the mandatory valid deratting certification. Authority manufactured, and maintains to this day, the long proven falsity that his problems started when he refused authority's instruction that in future he and his staff were to estimate numbers of rats on ships.

The simple and widely known proven truth as to the real start of Mr Toomer's problems with authority was hidden by the several 'proper authorities' along the way. The latest incident was on 26 April 2001 when authority cleverly deceived the Federal Court by way of the following 'explanation' for refusing compensation. It was tendered for the first time on the morning of the substantive hearing:-

> *"The respondent concluded that there were several reasons why special circumstances had not been demonstrated, including:*
> - *it was the applicant's choice not to work under the direction of others;*
> - *that choice resulted in disciplinary action, demotion and transfer;*
> - *the applicant decided to accept retirement in 1980 on grounds of ill-health;*
> - *the applicant was not victimised but was generally treated fairly and equitably, and*
> - *the Commonwealth bore no direct responsibility for the applicant's misfortune."*

The first, second, fourth & fifth points are totally false! The third point is grossly misleading!

This explanation by authority is reported verbatim in the Federal Court's 'Reasons for Judgment' of 26 July 2001 re V503 of 2000.

No normally competent public official could possibly make such error by accident, especially as the relevant authority was provided with proven truth via the closely reasoned 135 page decision of 12 April 1990 by the Administrative Appeals Tribunal.

Authority's determination to maintain such deceit was further evident in what followed. When confronted by the truth in the form of a comprehensive affidavit by Mr Toomer, authority successfully objected to the Court that it should not be received into evidence.

In approximately 1983, Attorney-General Senator The Hon Gareth Evans refused me permission to disclose to Mr Toomer's solicitors what I learned about his case in the course of my official duties.

On 4 January 2000 Mr Toomer applied to the Minister for Finance & Administration for compensation for the consequences of the totally unjustified assurance in relation to himself that was given [orally and covertly] by authority to influential shipping representatives to remove him from involvement in ship inspection.

His application was referred for comment by the Office of Merit Protection Commissioner, which responded by letter of 2 February 2000. The author, who headed a so called 'inquiry' in relation to Mr Toomer, stated rightly that he was *"fully familiar with the circumstances of Mr Toomer's allegations."* His letter totally ignored the applicant's clearly stated basis for requesting compensation, and grossly misrepresented the entire situation. The blatant breach of the published APS code of conduct and APS values demonstrates that 'proper authority' lacks integrity.

The exercise that was headed by the author of the letter was not in fact an inquiry but a comprehensive review based on tainted papers. The only person who gave evidence was Mr Toomer. He was not offered or given representation or assistance. John Dwyer QC concluded that the exercise was unlawful; of unclear purpose; its report seriously flawed, and would be accorded no weight in judicial proceedings. Mr Dwyer concluded that the inquiry was unlawful because the agency was not empowered to inquire in relation to former Commonwealth employees. Authority simply ignored such inconvenient evidence.

I believe that the exercise was also unlawful for another reason. The Act under which the agency operated precluded commencement or continuance of inquiry whilst the subject person is engaged in related judicial proceedings. The agency's exercise commenced and continued whilst Mr Toomer had closely related judicial proceedings in train before the Administrative Appeals Tribunal [AAT].

The exercise was under Ministerial requirement to take the AAT's findings into account. The agency's report of 339 pages and 210 page history attachment, contradicted, negated, and disregarded the AAT's key findings. The report falsely painted Mr Toomer as a rebellious officer of uncertain job competence who was suspended from duty for nearly a year on mental health grounds and who accepted retirement on medical grounds.

In reporting untruthfully that the conveniently labeled *"dispute"* started with Mr Toomer's refusal to estimate numbers of rats on ships, the agency ignored a key AAT finding that his problems commenced previously with his refusal of authority's inexplicable instruction to withdraw a fumigation order against 'Cedarbank'. The AAT also found that the requirement to estimate numbers of rats was out of date at the material time and inefficient. The agency's report covered up bureaucratic protection of vested shipping interests.

It also went outside its terms of reference in seeking to discredit me. Without hearing any evidence from me, the report implied that I botched the appeal hearing with a view to profit. I emphatically deny both accusations.

The proponent of the agency's conclusions and decisions remains faceless. Whilst its report was signed by the agency's board members, an official disclosed that the members *"took the decisions on the conclusions to be drawn themselves."*

The strength and discernment of the corrupt administrative culture that is a major factor behind authority's untrustworthiness is also evident in my own case. At the time of hearing Mr Toomer's promotions appeal I had been a full-time Chairman of Promotions Appeal Committee for approximately nine years, and previously an elected part-time member of such committees. Our Committee reported the truth, to no avail. I then blew the whistle internally. Authority promptly and publicly demonstrated lack of confidence in my competence. Having seen what happened to Mr Toomer, I wasn't game to blow the whistle externally, albeit shattered by the experience. Authority let me off lightly by granting retirement on medical grounds at age 54. The only retribution that I am aware of is the attack on my integrity in the report of the government agency in relation to Mr Toomer. Further defamation may or may not be evident in deleted paragraphs of documents accessed under FOI.

Among persons who gave evidence to the Senate Select Committee on Public Interest Whistleblowing on 25 March 1994 was Mr Boris Budak, Legal Adviser to the Merit Protection & Review Agency [MPRA], and later acting Merit Protection Commissioner. He confirmed that the agency was not a place for whistleblowers to come with matters technical [page 1236], and that the Agency was not empowered to investigate in relation to former Commonwealth employees [page 1242]. Mr Budak's honesty and frankness was not rewarded. He was not appointed as Merit Protection Commissioner.

Authority in the form of the MPRA wrongly wrecked the reputations of two officers of excellent repute with the Australian War Memorial [AWM]. In 1995 Federal Court's Justice Finn made a strong judicial attack on the MPRA for its pursuit of Messrs Mc Kernan and Kelson, managerial officers with the AWM, and questioned the performance of two Ministers. Mr McKernan subsequently stated *"I can only conclude that the Minister decided that the MPRA, like a Rottweiler, should be let off the leash. What I still don't know, is why."* Small wonder that other victims question authority's integrity.

The reason for the subsequent abolition of the MPRA is not known.

Prospective whistleblowers are more likely to respect a protection Bill that provides unlimited retrospectivity. Authority has frustrated recommendations by informed parliamentarians, and senior legal counsel, that Mr Toomer be compensated. His case is known widely and is publicly proclaimed by Australia's two major whistleblower protection groups as among their validated cases of national importance.

My experience with his case, and with a handful of others, suggests that the only effective solution is for public interest disclosures to be lodged with an independent outside body empowered to investigate and report directly to Parliament. Any member of that body should be empowered to report to Parliament if they so wish. The members should be selected by an independent outside body comprising non-legalistic representatives of a wide spectrum of the community. Preferably, the selectors and selectees would have no prior or foreseeable future connection with any Parliamentary person or party, or with any Commonwealth or State agency.

Yours sincerely

Keith Potter.

[Keith Potter]

Enclosure:

Consequences for Mr Toomer and his family arising from authority's unjustifiable commitment to influential shipping representatives to remove him from involvement in ship inspection.

ENCLOSURE

SOME OF THE CONSEQUENCES FOR MR TOOMER AND HIS FAMILY
arising from
AUTHORITY'S UNJUSTIFIABLE COMMITMENT TO INFLUENTIAL SHIPPING REPRESENTATIVES
TO REMOVE HIM FROM INVOLVEMENT IN SHIP INSPECTION

The major and virtually unavoidable consequences were :-

1. Became permanently unemployable.
2. Financial destitution.
3. Lived in sub-standard conditions.
4. Separated frequently from family, with unsettling effect on children.
5. Forced moves of household.
6. Children forced to change schools, and to attend schools of lesser standard than we aspired to.
7. Children ignorant of real causes and blamed me.
8. Unremitting stress in household.
9. Unable to take holidays to relieve stress.
10. My image as a husband and father suffered.
11. Wife's health suffered.
12. Wife reqired to participate in compulsory psychiatric examination of myself.
13. Unjustifiably declared unfit for duty on grounds of mental imbalance.
14. Wife deliberately pressured by officials.
15. Forcibly and publicly transferred "in the public interest" to other duties in another State.
16. Pressured to accept retirement as only solution.
17. Retirement monies earmarked for wife unlawfully witheld on eve of retirement.
18. Marriage break-up with consequent costs of divorce and re-establishment of new lives.
19. Obliged to report 'details of employment' when the Commonwealth had no genune desire to re-employ me.
20. Reported fit to resume duty elsewhere than in the quarantine service, but was not re-employed anywhere.
21. Subject to contentious and discriminatory post-retirement decisions by Commonwealth agencies.