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5 October 2001

Ms Helen Donaldson
Secretary
Finance and Public Administration Legislation Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Donaldson

PUBLIC INTEREST DISCLOSURE BILL 2001

Thank you for your letter of 28 September 2001, in which the committee invites me to make a submission in connection with the committee's inquiry into the Public Interest Disclosure Bill 2001.

I hope that the following observations may be of some assistance to the committee.

I understand that the bill is substantially based on legislation in effect in the Australian Capital Territory. It would, therefore, be instructive for the relevant authorities of the Territory to be asked to comment on the experience of the public authorities of the Territory in administering that legislation.

I support the intention of the bill of providing protection for persons who make public interest disclosures, as appropriately defined by the bill, and ensuring that such persons are not subjected to any detrimental action because of making such disclosures.

There are, however, two significant difficulties with the way in which the bill proposes to carry out this intention, a substantial difficulty and a lesser one.

Definition of unlawful reprisal

The bill subjects to criminal penalties and to civil remedies the taking of unlawful reprisals when a person has made, or may make, a public interest disclosure. The definition of unlawful reprisal in clause 3 refers to conduct that causes, or threatens to cause, detriment to

a person "in the belief that any person has made, or may make, a public interest disclosure". Under this provision, a person who takes any detrimental action against a person while having a belief that another person has made a public interest disclosure would be guilty of an offence and liable to the civil remedies. The provision does not require that the detrimental action be taken because of, or in consequence of, an actual or potential public interest disclosure. There need be no link whatsoever between the detrimental action and the actual or potential public interest disclosure. Thus, if a departmental officer were to take disciplinary action against a departmental employee for alleged disciplinary offences completely unrelated to any actual or potential public interest disclosure, while having a belief that the employee has made, or may make, a public interest disclosure, that departmental officer would be in breach of the bill, even though the disciplinary action against the employee might be totally justified by the circumstances unrelated to the actual or potential public interest disclosure.

This provision may be contrasted with the provisions in the Senate's Privilege Resolutions and in the Parliamentary Privileges Act relating to the very similar offence of penalising a parliamentary witness. Both provisions (Resolution 6(11) of the Privilege Resolutions, and section 12(2) of the Act) provide that an offence is not committed unless the detrimental action against the witness is taken "on account of" the witness's evidence. There must be a clear link between the detrimental action and the witness's evidence for the contempt or the statutory offence to be constituted.

This is not a mere matter of drafting, but a substantive point which, if not appropriately provided for, may lead to serious difficulties and major injustice.

The Senate Privileges Committee has investigated many cases of alleged interference with witnesses. In nine of those cases, the witness who was alleged to be interfered with had other difficulties with the body of which they were a member or an employee. I draw attention to the 18th, 21st, 36th, 42nd, 55th, 57th, 58th, 72nd and 85th reports of that committee. The committee, operating under the Privilege Resolutions, had to determine whether detrimental action was taken against the witness "on account of" the witness's parliamentary evidence, or was unrelated to that evidence. In some cases the committee came to the conclusion that action was taken against a person for reasons other than the parliamentary evidence, and therefore no contempt was committed. In other cases the committee found that action was taken against a witness on account of the witness's evidence, and therefore a contempt was committed. Even in the latter category of cases, however, there was often a background of disputes between the witness and another body, and the committee had to carefully separate the link between the detrimental action and the witness's parliamentary evidence from other causes of dispute and grounds for detrimental action against the person. Had the committee been operating under the kind of provision proposed in the bill, the committee would have been obliged to find a contempt in every case where some detrimental action was taken against a person and there was a belief that the person had given or may have given evidence in a parliamentary forum. Alternatively, the committee would have had to radically reinterpret the relevant provision in order to avoid gross injustice to persons who took some action for reasons unrelated to the parliamentary evidence.

The experience of the Privileges Committee, and other experience, of which I have some, from the Parliamentary and the Public Service, suggests that persons who make public interest disclosures are also likely to be persons who have a history of disputes with their employing authority. In administering the bill, as it is currently framed, it would be necessary

to reinterpret the bill in the manner suggested or to visit injustice on persons and authorities who take legitimate action in relation to employees unrelated to purported public interest disclosures.

The difficulty would be even more serious than that. Experience also suggests that persons who have a history of disputes with their employing authorities are likely to use purported public interest disclosures as weapons in those disputes. Under the bill as it is framed, they could also use such disclosures as a means of rendering themselves immune from any legitimate action against them. An employee could make, or merely threaten to make, a purported public interest disclosure, the employing authority would then be in a situation of having a belief that the employee had made, or may make, such a disclosure, and then would be subject to the penalties and civil remedies of the bill if any action were taken against the employee, even on completely unrelated grounds and with ample justification. A troublesome employee could render themselves immune from all disciplinary action, however unrelated, simply by donning the mantle of an actual or potential "whistleblower". This is not a theoretical construct. In the Public Service the troublesome and offending employee who seeks to adopt the role of a whistleblower and thereby render themselves immune from otherwise appropriate departmental action is a well-known and quite frequently-encountered phenomenon. The bill would provide a charter for such people, who tend to collect in the Public Service and universities.

The defence contained in clause 22(2)(a), of just and reasonable grounds for detrimental action, arguably does not cover this point, and in any event is quite inadequate to the purpose. It would rely on a person being able to sustain that defence when prosecuted under the clause. This would seriously discourage any authority from taking legitimate action against any person who assumed the role of whistleblower.

The bill should therefore be amended to ensure that detrimental action against a person would attract the penalties of the bill only if taken on account of an actual or potential public interest disclosure, and this should not be regarded as merely a drafting change.

Inadequate remedies for vexatious disclosures

A related issued is that the bill does not provide adequate remedies against vexatious purported public interest disclosures.

A great deal of a department's or an agency's time and resources may be spent on investigating disclosures which are designed to tie up time and resources and are used as a weapon in disputes to inflict such wastage.

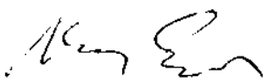
The provision in clause 31, making it a criminal offence to knowingly or recklessly make a false or misleading statement in the guise of a public interest disclosure, is inadequate for this purpose. It would be very easy to generate a series of vexatious complaints without knowingly or recklessly making a false or misleading statement.

What is required is some procedure whereby an impartial person or body, perhaps the Public Service Commissioner, could declare a person who has made a series of disclosures a vexatious complainant, whose disclosures would not be investigated unless approval for investigation is given by the Commissioner.

I reiterate that I support the intention of the bill and the policy of protecting persons making public interest disclosures. The other provisions of the bill appropriately pursue those ends, but the defects identified above need to be rectified before the bill proceeds.

Please let me know if I can provide any further information to the committee.

Yours sincerely



(Harry Evans)