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Federal Parliament
of the
Commonwealth of Australia

STANDING COMMITTEE

ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Inquiry into whistleblowing protections within the Australian Government public sector

Kevin Lindeberg

Terms of Reference

The Committee is to consider and report on a preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector. The Committee's report should address aspects of its preferred model, covering:

1. the categories of people who could make protected disclosures:
    a. these could include:
        i. persons who are currently or were formerly employees in the Australian Government general government sector*, whether or not employed under the Public Service Act 1999,
        ii. contractors and consultants who are currently or were formerly engaged by the Australian Government;
        iii. persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants; and
    b. the Committee may wish to address additional issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise;
2. the types of disclosures that should be protected:
    a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment; and
    b. the Committee should consider:
        i. whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit; and
        ii. whether grievances over internal staffing matters should generally be addressed through separate mechanisms;
3. the conditions that should apply to a person making a disclosure, including:
    a. whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a)); and
    b. whether penalties and sanctions should apply to whistleblowers who:
        i. in the course of making a public interest disclosure, materially fail to comply with the procedures under which disclosures are to be made; or
        ii. knowingly or recklessly make false allegations;
4. the scope of statutory protection that should be available, which could include:
    a. protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;
    b. immunity from criminal liability and from liability for civil penalties; and
    c. immunity from civil law suits such as defamation and breach of confidence;
5. procedures in relation to protected disclosures, which could include:
    a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two;
    b. the obligations of public sector agencies in handling disclosures;
    c. the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education); and
    d. whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted;
6. the relationship between the Committee's preferred model and existing Commonwealth laws; and
7. such other matters as the Committee considers appropriate.

COMMITTEE MEMBERS: Mr Mark Dreyfus QC MP *(Chair)* The Hon Peter Slipper MP *(Deputy Chair)* The Hon Kevin Andrews MP, Mr Mark Butler MP, Mr Petro Georgiou MP, Mr Daryl Melham MP, Mrs Sophie Mirabella MP, Ms Belinda Neal MP, Mr Shayne Neumann MP, and Mr Graham Perrett MP

RECOMMENDATIONS

Recommendation 1.

That the independent statutory **Australia Whistleblower Protection Authority ["AWPA"]** be established.

The AWPA's prime statutory duty, *inter alia*, shall be:

(a) to protect any public official or person who makes a public interest disclosure **("PID")** to either a proper public authority or, if necessary, Member of Parliament (State or Federal) or the media from any act of retribution by another;
(b) to secure probative evidence relating to the PID, and personal files relating to the public official whistleblower;
(c) to receive on-going progress and final report from the relative investigative authority on the PID;
(d) upon satisfying certain criteria concerning the nature (i) of the PID; (ii) ensuring its non-vexatious nature; and (iii) of the retribution and/or detriment, to fund from the public purse a legal action in damages or specific performance against the Commonwealth Government of Australia and/or its relevant agencies, other body or person who knowingly inflicts a detriment on a whistleblower relating or tending to relate to his/her PID; and
(e) to be accountable to the Australian people through an all-party **Parliamentary Australia Whistleblower Protection Authority Committee,** and that its responsible Minister be either the Federal Attorney-General or Minister for Justice either to whom the WAPA must provide an annual report for presentation and tabling in Parliament.

Recommendation 2.

That any deliberate act of retribution and/or detriment by another against a person who makes a PID to a proper authority, being so defined as a "judicial

proceeding" pursuant to section 31 of the *Crimes Act 1914,* be treated as a breach of section 36A of the *Crimes Act 1914.*

Recommendation 3.

That within *Crimes Act 1914*, the definition of "witness" be amended, as and where necessary, to include in its meaning "*any person making a public interest disclosure to a proper authority or other defined proper avenue.*"

Recommendation 4.

That section 10(1) of the *Public Service Act 1999 - APS Value* - be amended to include:

(p) The APS takes all reasonable measures to guarantee and maintain a "corruption free workplace" for all employees.

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1.0. A NEW MEANING TO A SAFE PUBLIC SECTOR WORKING ENVIRONMENT

1.1. The rights and duties in contracts of employment have advanced considerably since the landmark ***Ottoman Bank v Chakarian***[1] case was settled about a century ago. As far as dealing with public sector employment, these rights and duties need to be made responsive to the democratic demands on 21st century governments and authorities to be efficient, effective, open and accountable in their dealings.

1.2. Any remedy should advance these principles to a new understanding of what a safe working environment ought to mean for public officials in Federal/State/Local Government Crown employment in the 21st century.

1.3. The recent Bundaberg Base Hospital scandal which saw patients' lives being allegedly lost in operating theatres and intensive care units at the hands of a doctor who gained public sector employment on the grounds of *prima facie* false and misleading information concerning his qualifications is a prime example of a breakdown in the public sector where others working with the particular doctor were too afraid to speak out until one whistleblower, Ms Toni Hoffman, broke ranks at considerable personal risk.

1.4. It ought to be unacceptable anywhere within the Commonwealth of Australia to have any theatre and intensive care medical and/or nursing staff person being too afraid to speak out in such circumstances for fear of placing at risk his/her job security, financial and psychical wellbeing just because the public official wants to ensure that ethical and professional standards are upheld in their public sector workplace, let alone safeguard life itself.

1.5. Notwithstanding it being important to maintain public confidence in all government institutions, the question nevertheless arises why should whistleblower legislation be needed **before** the whistle can be blown safely in such a plainly unacceptable working environmemt?

[1] [1930] AC 277

1.6. In a democracy, the standards that secure patient wellbeing find their foundation in the expectations of civil society and of the judicial system that Federal/State/Local Government Crown employees will do no harm and obey the law at all times because it is an intrinsic part of public duty, and, in some cases, underpinned by certain public officials swearing oaths of office to uphold the law and to always act honestly, impartially and in the public interest.

1.7. Let it not be thought that such a duty to obey the law does not also apply to elected representatives, indeed, it might be argued that it is a higher duty on them in a democracy.

A special class of Employment

1.8. Lord Greene MR in ***Hivac Ltd v Park Royal Scientific Instruments Ltd*** [1946] Ch 169 appears to have recognized that one class of employee may be treated differently to another. He said at 174:

> *"...It has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. Prima facie it seems to me on considering the authorities and the arguments that it must be a question on the facts of each particular case. I can very well understand that the obligation of fidelity, which is an implied term of the contract, may extend very much further in the case of one class of employee than it does in others."* (Underlining added)

1.9. It is therefore submitted that a public official's binding duty is to act honestly, respect truth and to conduct oneself lawfully in the service of the Crown at all times. However, within his/her contract of employment, that duty **must be reciprocated** by the Crown, and therefore, it is suggested that this meets that category of "*...may extend very much further.*"

Corruption-free workplace in Crown Employment

1.10. It is therefore submitted that a "corruption-free workplace" guarantee ought to be legislated as an industrial/human right for Crown employees because it underpins good governance principles within the Commonwealth of Australia. It ought to be adopted within all jurisdictions under the *Constitution*. This recommendation may find further authority and

justification in Australia's international obligations under the UN Human Rights International *Convention on Civil and Political Rights*.

1.11. The idea that the "Crown" must legislate to protect its employees (or a citizen as the case may be in certain circumstances) from reprisal as a consequence of making a PID appears illogical. It is open to be seen as a glaring reason why there is so much public disillusionment in government because at its core and motivation a PID may be reasonably described as "**a non-violent act of disclosure to enforce and/or ensure compliance with the law by the Crown**" and any whistleblower ought, by a matter of natural function of government, be guaranteed protection just as police officers or soldiers normally are in carrying out their sworn duties honestly and lawfully, indeed even lauded for blowing the whistle.

1.12. Its perplexing aspect is that there is a binding duty in a society governed by the rule of law - well founded in case law - on the Crown and every branch of the Executive to always comply with the law, and therefore, for any government to provide such a visible sign of addressing an apparent 'non-protection deficiency' by the introduction whistleblower protection legislation, the Crown/government itself is confirming that any reprisal might be otherwise carried out against a whistleblower with impunity, even by the Crown itself against one of its own employees who was only trying to ensure, by honouring his/her public duty, that the Crown behaved as the law requires and the people expect it to.

1.13. In ***Eastern Trust Co v McKenzie, Mann & Co***[2] the Privy Council said: "*...It is the duty of the Crown and of every branch of the Executive to abide by and obey the law ... it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.*"

1.14. It is submitted that if a public official is forced to blow the whistle to rectify a breach of the law or certain conduct which may be placing public safety in jeopardy, it must arguably give rise to a breach of contract of employment on the part of the Crown, and consequently such breach ought to be open to remedy in the courts at the Crown's expense.

[2] [1915] AC 750 at 759

1.15. It is submitted that such an undertaking of public funding in these circumstances takes on the same colour as happens from time to time when governments, for the public good, quite properly offer rewards to members of the public for information concerning great public health concerns and/or a personal loss through murder, kidnapping, rape and the like e.g. the Daniel Morecombe Disappearance. In offering such rewards, governments generally enjoy widespread community support.

1.16. It is suggested that the 2006 observation of Lord Goldsmith, the UK Attorney General represents a balanced view of government by the rule of law:

> *"...(The rule of law) is not simply about rule by law. Such a proposition would be satisfied whatever the law and however unfair, unjust or contrary to fundamental principles, provided only that it was applied to all. The rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society....*
>
> *All the organs of state – the executive, legislature and judiciary – have a shared responsibility for upholding the rule of law. This is not to down play the responsibility of the courts – they provide the critical long-stop guarantee – but the rule of law will only have real meaning in practical terms in a society in which all organs of the state are mindful of their obligations to respect it."*[3]

1.17. It is submitted that the AWPA should oversight the disbursement of adequate monies to fund such an action but not involve itself in the actual running of the case because otherwise it may be perceived as a conflict of interest.

1.18. In respect of any government claiming that it cannot be held accountable for all such breaches as to have warranted a PID to rectify the breach, it is submitted that such an argument must fail because it would tend to undermine the principle of ignorance of the law. Windeyer J in ***Iannella v French*** [1968] HCA 14 at 26 said "*...the rule that ignorance of the law is not an excuse has been called, and happily called, "the working hypothesis on which the rule of law rests in British democracy": per Scott L.J. in* ***Blackpool Corporation v.***

[3] *"Government and the Rule of Law in the Modern Age"* in the LSE Law Department and Clifford Chance Lecture series on Rule of Law 22 February 2006.

***Locker** (1948) 1 KB 349, at p 361. It applies in respect of statute law just as much as to the common law, and in some civil proceedings as well as in criminal cases. Its main justification is expediency. "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."*

1.19. It would obviously assist any public sector whistleblower/plaintiff in any such claim of damages and/or specific performance against the Crown, if section 10(1) of the Public Service Act 1999 were amended as **Recommendation 4** suggests.

1.20. It is suggested that the AWPA be run by an independent board made up of eminent jurists, and other respected community members, with nominees having to enjoy bipartisan support of the **Parliamentary Australia Whistleblower Protection Authority Committee <u>before</u>** appointment. The period of appointments should be no longer than 5 years. It is further suggested that no AWPA Board member or senior full-time official be appointed who has had any party political association for 10 years prior to appointment.

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KEVIN LINDEBERG

8 August 2008