Submission No 9a

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20 November 2008

Supplementary submission to the inquiry into whistleblowing protections within the Australian Government public sector

Dear Inquiry Secretary

Please find attached the supplementary submission by Australian Lawyers for Human Rights to the inquiry into whistleblowing protections within the Australian Government public sector as prefaced in our evidence to the Committee on Thursday 16 October 2008.

Thank you again for your time and consideration.

Kind regards

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General

It is the opinion of ALHR that the first step in considering what level and form of protections we want to see our whistleblowing protections take is to firmly establish the purpose of this legislation. Is it to promote a 1984 reminiscent Big Brother-esque society where everyone is watching everyone else for personal gain, which is arguably the slippery slope '*qui tam*' starts to slide down, or to support and enable disclosure of concerns in order to achieve resolution / change? With this question as the starting point, many of the other issues such as motivation and third party disclosure become a little less blurred as their relevance to the foundation of the protections is clearer.

Disclosures

Any legislation should extend to protect disclosures relating to the activities of public officials (and others occupying positions of public authority) and should contemplate types of activities including official corruption, fraud, theft, criminal conduct, abuse of office, serious threat to public health and safety, official misconduct, maladministration as well as misappropriation of public resources and funds.

Coverage should not be limited on the grounds of proximity and international character. The requisite test should be the links to Australian public interest and Australian Government activities.

ALHR acknowledges that ideas of corruption and misuse depend greatly on personal ideals, which a clear distinction between public interest and simple disagreement is necessary. A good example of this distinction can be found in the Queensland *Whistleblowers Protection Act 1994* where s 17(2) contains the clarification that a disclosure about 'a substantial waste of public funds' does not extend to a disclosure 'based on a mere disagreement over policy that may properly be adopted about amounts, purposes and priorities of expenditure'. By definition, a disclosure about a 'policy that may properly be adopted' is not about wrongdoing.

ALHR considers that staffing matters should not be included in the scope of applicable disclosures. However we do support the Ombudsman's point that a blanket prohibition on their inclusion may be too restrictive as ostensibly staff related matters could actually be in the public interest and relate to broader policies e.g. implementation of recruitment policies. Again we point to the 'different lens' approach which would lead to the overarching question

– does this impact on the public, is its function of public interest? In the given example broad recruitment policies are arguably in the public interest as it is just as much the non-APS public as the APS employees that are interested in the policy should they be want to join the APS ranks.

Intention

It is the submission of ALHR that the Ombudsman's thoughts on motivation are not an entirely relevant, or perhaps more accurately, an appropriate test. The public interest should be the underscoring factor. Although there may be scope for ensuring deterrence of vexatious or malicious claimants, this could perhaps be achieved further down the line.

ALHR believe that a distinction can be drawn between malicious and vexatious claims that are knowingly false and/or misleading, good faith but ill-informed claims, malicious but well-informed claims and well informed claims made in good faith. As a result it is the submission of ALHR that the focus of protections should be on a *bona fide* principled disclosure, that is the disclosure itself, not the whistleblower. The motivation of the whistleblower should be irrelevant provided that they can satisfy the 'good faith' test of 'an honest belief held on reasonable grounds' that their disclosure is true[1].

ALHR acknowledges that this style of examination is by its nature an inherently subjective test and it is unlikely that the requisite considerations that need to be made can be adequately drafted in legislation; as a result the assessment will need to be made on a case by case basis. This is why ALHR considers that exhaustive, proscriptive lists should be avoided in favour of something broader and more foundational such as *public interest.*

Scope of protections

ALHR believes that any legislative protections should extend to all public servants; this may sound self-evident but as it stands approximately half are currently not employed under the Public Service Act.

ALHR can see no reason why ex-employees should fall outside the protections. There was no difference in the function of their duties and their knowledge at the time of their

[1] This approach is has several precedents in existing Commonwealth legislation: see the Ombudsman Act 1976, Inspector-General of Intelligence and Security Act 1986 ss33, 34, the Privacy Act 1988 s67, and the Human Rights and Equal Opportunity Commission Act 1986 s48.

employment and given the absence of protections during the course of their employment their failure to disclose at that time should not be held against them.

ALHR suggests that again using a different lens helps to further clarify this points – instead of looking at the person's employment *relationship*, the decision-maker could look at their functions, duties and access to information and the formal / facilitated capacity in which the information was gained and disclosed.

Furthermore ALHR would like to note that such a classification would see the class of protected persons extended to include contractors and consultants. A considerable amount of Government legal work is outsourced to various panel member firms. In fact, the legal fraternity in Canberra would be decidedly lacking a top tier status but for the sheer amount of work generated by the Government. Surely we cannot provide what is essentially a loophole for the protection of sensitive information by 'outsourcing' it. Client confidentiality is a different concern.

ALHR believes that the issue of anonymous disclosures needs further consideration. Although the arguments against the acceptance of anonymous disclosures are persuasive; if the intent is to protect the public interest, does it really matter who flags the issue? If there is no requirement on the whistleblower to substantiate or prove their claim but rather this is done under the investigative powers of an independent body the anonymity should make no practical difference. Furthermore, if the purpose of whistleblowing investigations is to ensure the conduct under examination is stopped or prevented from occurring in the future then there is no element of apology or accountability to the particular whistleblower, as a result knowing the identity of that person is largely irrelevant.

Compensation

ALHR is of the opinion that there should be a clear distinction between a model that provides for *compensation* and *reward*. It is not the act of whistleblowing that affords the payment but rather the detriment suffered by the whistleblower in making their claims and, arguably, in putting the public interest ahead of their own. If motive is taken out of the picture and whistleblowing is assessed on the merit of the information alone, with no consideration of the intention behind the disclosure, then the problem is essentially a moot point for the payment of compensation is not going to act as a financial reward or windfall but rather to attempt to place the whistleblower in the position they would have been in had they not disclosed and suffered reprisals as a result.

The US system of '*Qui tam*' that sees the whistleblower stands to gain a percentage of the fraud proceeds if and when recovered through prosecution is thus an undesirable model. ALHR strongly supports the statement by Melissa Parkes in her submission that under this approach whistleblower protection is a *sword*, not a *shield*.

Independent body

ALHR believes that in considering where the responsibility for whistleblowing investigation should lie, consideration should be made to promoting a cultural shift. By that we mean, ensuring that the underlying principle should not be of blame or 'dobbing in' but rather public interest and the value and importance of protecting it. In this way making the organisation one that is more firmly positioned within the *public* as opposed to utilising the Australia Public Service Commission seems a better fit; particularly if protections are extended further than strictly APS employees.

The Ombudsman, for example, with a role of safeguarding the community in its relationship with Australian Government agencies and investigative powers may be well placed.

Sanctions

ALHR fully supports the Ombudsman's statement that the purpose of the legislation should be to facilitate genuine disclosures - not to be a new weapon available to the state to penalise dissent. However in the absence of a *bona fide* claim no protections should be provided to the would-be whistleblower which would leave them open to internal discipline, and prosecutions for fraud, defamation and theft and even prosecution under s 137.1 of the *Criminal Code* for providing false or misleading information to an Australian Government agency.

Third party disclosure

The arguments of the Right to Know coalition are compelling regarding the impetus that media disclosure can create to solving a problem. However although the arguments are convincing, in the current void of whistleblower protections, supports and investigative processes they are not nearly as fervent if exactly these deficiencies were rectified. A whistleblower may be induced by payment for selling their story, they may be supported by the public's outrage at the goings on and support for their coming forward, they might be

pleased that the attention sees change, or at least notice - but if they have an independent body that can deliver all these same things then there seems little room for argument that they should be afforded all the protections should they choose not to go through the designated channels.

ALHR believes that a practical solution may be found in the provision of timeframes in which action (and more specifically, levels of action) must be taken on any claim by the independent authority. The result would be that prolonged inaction would permit media disclosures and whistleblower protections; however any public disclosures outside the legislated timeframes would fail to see the whistleblower protected. Such conditions are imposed in NSW legislation which provides that after 6 months of inaction media disclosures will be protected.