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Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs

Inquiry into whistleblowing protections within the Australian Government public sector

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

CCL appreciates the opportunity to file a submission to the House Standing Committee on Legal and Constitutional Affairs. Whistleblowing is an important aspect of any democratic government. It holds leaders and public servants accountable to the nation and makes it clear that corruption, serious maladministration, serious and substantial waste of resources and other serious misconduct will not be tolerated.¹ These protections are especially necessary when such misconduct can harm human rights and degrade governmental response to civil liberties claims in Australia.

The Situation

Whistleblowing, as defined by the Senate Select Committee on Public Interest Whistleblowing, is 'the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons that may be able to effect action.' Australian common law has not been accommodating to whistleblower protections, finding the implied duty of trust between an employer and his employees to be more valuable to the functioning of the law than the right of an employee to disclose confidential or even non-confidential information about the workplace. These common law duties existed in the private sector as well as the public

¹ In what follows, we will refer to all of these kinds of bad practice as serious misconduct. Following the Protected Disclosures Act 1994 (NSW) subsection 11(2), we take maladministration to include action or inaction of a serious nature that is contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, or based wholly or partly on improper motives. Other serious misconduct could include actions which set the public at risk, breach of public trust, or which risk damage to the environment.

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sector. Due to this common law interpretation, employees faced harsh repercussions for exposing illegal or illegitimate practices by their organization.

In the late 1980s and early 1990s, there were highly publicized corruption inquiries that made political whistleblowing a national issue. In 1989, the Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry) exposed the difficulties of disclosing valued anti-corruption information. The Commission found an urgent need for protection from reprisal in legislative form. Since then, every state and the ACT have adopted some form of whistleblower protection for the public sector. Now, the Federal Government needs to act as well.

In 2002, the Public Interest Disclosure Bill was introduced in the Senate, but this was not passed into law. In 2004 and 2005, several acts were passed aimed at protecting whistleblowers at the corporate and workplace level, but these again failed to address the public sector. This new inquiry is an opportunity to implement protections for whistleblowers.

Whom to protect

It is vital that employees of governmental organizations feel free to report on serious misconduct by the powerful men and women with whom they work. The corruption-free running of the various branches of government is not merely important for the integrity of the system, but because the impact of serious misconduct upon society at large, or as with the AWB and Abu Ghraib scandals, upon the world. Australia has protections in place for whistleblowers in the corporate, private sector,² but needs to extend these protections to those who work in and with government.

Because unchecked misconduct in any area is likely to spread and to get worse, and because the discovery of misconduct may be made by any person who deals with or is involved in public administration, the Parliament should provide protection to whistleblowers in the public service, to those who are hired by government contracts as independent contractors (and to their employees), and to consultants to and staff members of members of parliament. The distinctions between a government employee, independent contractor, or personal consultant are not relevant when a person is aware of serious misconduct. Whistleblowers must be free to expose wrongdoing, and the Parliament should extend protection to all those in a position to do it.

What to protect

Whistleblowers provide a valuable function of providing information about illegal or illegitimate behavior. A culture in which minor misdeeds are performed routinely may lead to more serious wrongs, especially where there is a culture of silence. There should be means by which such minor misdeeds as well as major ones can be reported and discussed within the public service without fear of reprisal. Basic mistakes of judgment

² Notably in part 9.4AAA of the Corporations Act 2001.

and innocent errors should also be able to be dealt with internally. Similarly, internal squabbles or legitimate differences of opinion as to proper policy are not matters that should be treated in the same way as revelations of serious misconduct.³

For major matters, both internal and external whistleblowing should be protected both by law and by the encouragement of a culture in which they are respected. It is a reasonable expectation that even with major matters, external whistleblowing will only be undertaken when the attempt has been made to deal with the matter internally. The New South Wales Protected Disclosures Act protects external whistleblowers only if they have first attempted to fix the problems by internal whistleblowing. But legal protection is needed for both internal and external whistleblowers.

The committee must give special consideration to information that touches on human rights and civil liberties. A fundamental purpose of government is to protect the rights of the governed. Violations of these rights as a result of malfeasance, corruption, gross incompetence, or waste must be reported without fear of repercussion. We must provide protection for those individuals who, for the sake of the public interest, take risk to their personal and professional lives to expose system failures. Whether or not such volatile information is embarrassing to the government should not be a concern.

How to protect

Information that exposes fraud, corruption, or gross incompetence needs to be revealed for the sake of well-functioning government, but the exposure of these facts can subject the whistleblower to condemnation, reprisal, and legal consequences. In 1997, the *Queensland Whistleblower Study* found that 71 percent of whistleblowers suffered official reprisals, and 94 percent suffered unofficial reprisals. This is unacceptable. The constitution may provide basic protection against some actions by virtue of the implied freedom of political communication, but protection against reprisals requires legislative action.

It is vital that people feel free to whistleblow. To that end, whistleblowers must be protected in the following ways:

- Anonymity must be available. Whistleblowers must be allowed to report information without their names being exposed. This can be implemented through several schemes, which include facilitating the provision of information anonymously, exclusion of the whistleblower's identity as a subject of investigation, or imposing a duty on the recipient of the information not to reveal the whistleblower's identity. Although absolute anonymity cannot be ensured in every case, the investigating authorities should strive to maintain the anonymity for as long as possible.

³ Widespread debate about policy options is an important part the democratic process. Freedom of information laws should ensure that information about the options is made public. That however is not the concern of whistleblower protection.

- Immunity from legal action must be available. This must include immunity against disciplinary proceedings or defamation suits.
- Protection against reprisals must be assured. This should be accomplished by criminalizing acts of reprisal, and by exposing agents of reprisal to civil lawsuits.

In New South Wales, legal protection is given against ‘action causing, comprising or involving any of the following: (a) injury, damage or loss, (b) intimidation or harassment, (c) discrimination, disadvantage or adverse treatment in relation to employment, (d) dismissal from or prejudice in, employment, (d) disciplinary proceeding.’⁴

Financial security must be ensured. In the United States, under the False Claims Act, a whistleblower ‘may be rewarded all the relief necessary to make the employee whole’, which can include reinstatement, back pay, litigation costs, and attorney’s fees. In Australia, clause 1317AC of the Corporations Act makes causing a detriment or threatening to cause a detriment to whistleblowers an offence, and clause 1317AD provides for compensation to people so harmed.

Australian jurisdictions that do provide protection for whistleblowers provide that in order for the protections to go into affect, the information must be disclosed internally or to a ‘proper’ or ‘investigating’ authority. These authorities include Ombudsmen, police, Auditors-General and inspecting authorities. If these fail to act appropriately, external whistleblowing to journalists or members of parliament is sometimes protected.

It is possible to set up an internal disclosure structure without the need to go outside the organization. A recent template for internal whistleblowing is the Australian Standard AS 8004 *Whistle-Blower protection programs for entities* (AS 8004). These procedures and structures have been applied to corporations, who can comply with the law via external or internal disclosure paths. These types of systems need to be implemented for federal government agencies just as they have been applied to the private sector.

It is important to encourage whistleblowing for the sake of efficiency and legitimacy, but this should be done through structural benefits and ease rather than direct monetary compensation. It is important that truth-telling not be monetized as a good for which one is paid, but as a public service that is the duty of every citizen.

In addition to carrots that induce whistleblowing, it may be thought practical and useful to institute various sticks to ward against false accusations. These schemes should focus more on deterring baseless allegations than on investigating accusers. It should be a sufficient defence that the whistleblower has reasonable grounds to believe the information provided is true.

- The most important protection a whistleblower requires is that against reprisal and retaliation.

⁴ Protected Disclosures Act 1994 section 20.

The implementation of these reforms on a national level will serve to encourage honesty, discourage corrupt and illegal activities, and ensure a government that is more responsive to the needs of the people.

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