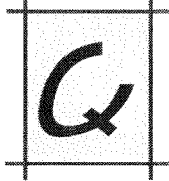


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# Queensland Council of Unions

Queensland Council of Unions submission to the House  
Standing Committee on Legal and Constitutional Affairs  
Inquiry into whistleblowing protections within the Australian  
Government sector ("the Inquiry")

29 August 2008

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## **Introduction**

1. The Queensland Council of Unions ("the QCU") is the peak union body in Queensland. The QCU has 35 affiliated unions covering around 350 000 Queensland workers.
2. The QCU considers that the introduction of Commonwealth legislation to protect public interest disclosures within the Commonwealth public sector (including Commonwealth funded bodies) is needed ("WBP Legislation").
3. These submissions are directed at the issues which arise from the terms of reference for the Inquiry. These submissions will address the following matters:
  - a. the purpose for any WBP Legislation;
  - b. the types of disclosures that should be protected by the WBP Legislation ("protected disclosures");
  - c. the categories of persons who should be able to make protected disclosures;
  - d. how protected disclosures are to be made and whether specific conditions should apply to a person making a protected disclosure; and
  - e. the scope of protection that should be afforded to a person making a protected disclosure.
4. In making these submissions the QCU notes that whistleblower protection legislation has been adopted in Queensland, New South Wales, Victoria, Tasmania, South Australia and the Australian Capital Territory. The QCU does not, for the purposes of these submissions, propose to compare and analyse the provisions of the state legislation. However, the QCU submits that any model proposed by the Committee should represent the best elements of each piece of state legislation.

## **Purpose of WBP Legislation**

5. The WBP Legislation should be premised on the understanding that the making of protected disclosures serves the public interest by bringing conduct which is unlawful, corrupt, dangerous, negligent and/or incompetent to light. The disclosure of such conduct ensures that the public service is administered fairly and transparently.
6. The QCU submits that the WBP Legislation should apply not only to the Commonwealth public sector, but to all enterprises that receive Commonwealth funding. The QCU believes that if an enterprise is in receipt of Commonwealth funding the enterprise should be subject to the same standards of fairness, transparency and accountability as the Commonwealth public sector.

7. Therefore, it is submitted that the purpose of the WBP Legislation should be to facilitate the making of protected disclosures and protect those persons who make such disclosures.

### **Types of Disclosures that should be protected by the WBP Legislation**

8. The QCU submits that the WBP Legislation should, at a minimum, provide for protected disclosures to be made<sup>1</sup> about conduct which:
  - a. amounts to a criminal offence (either State or Commonwealth laws);
  - b. amounts to misconduct ( see s. 1(b) of the *Public Interest Disclosure Act 1994* (ACT) ("the ACT Act");
  - c. is a danger to public safety (see ss. 18 and 19 of the *Whistleblowers Protection Act 1994* (Qld) ("the QLD Act");
  - d. is a danger to the environment (see ss. 18 and 19 of the QLD Act);
  - e. amounts to unauthorised or irregular use of public funds (See s. 4 (a) (ii) of the *Whistleblowers Protection Act 1993* (SA) ("the SA Act");
  - f. amounts to maladministration (see s. 16 and Schedule 6 of the QLD Act; and/or
  - g. is a breach of public trust (See s. 4 (2) (c) of the ACT Act),

provided that the person that engages in that conduct is:

- i. a Member of the Commonwealth Parliament;
  - ii. the Public Service Commissioner (as defined in the *Public Service Act 1999* (Cth) ("the PS Act");
  - iii. an Agency Head (as defined in the PS Act);
  - iv. an SES Employee (as defined in the PS Act);
  - v. an APS Employee (as defined in the PS Act);
  - vi. an acting APS employee (as defined in the PS Act);
  - vii. a director, board member, employee of a body that is in receipt of Commonwealth funding or is contracted to the Commonwealth.
9. The QCU submits that a person who makes a disclosure about conduct of the type referred to in paragraph 8 should be protected. In this regard the types of conduct referred to in paragraph 8 are substantially similar in nature to those already provided for in the various State Acts set out above.
10. As the types of conduct referred to in paragraph 8 are well known, and have been adopted in various State jurisdictions, there is little to be gained in delving into various examples of the conduct outlined. It is important to note that the QCU does not consider the conduct listed in paragraph 8 to be exhaustive. It is respectfully submitted that the Committee should ensure that the description of conduct, which can be the subject of a protected disclosure, should be framed in the broadest terms.
11. As set out above, the QCU considers that the conduct which could be the subject of protected disclosure should be extended beyond the

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<sup>1</sup> The classes of person who should be capable of making disclosures for the purposes of the WBP Legislation will be dealt with below.

Commonwealth public sector to entities that are either contracted to, or funded by, the Commonwealth.

12. WBP Legislation ensures that the administration of the public service is fair, transparent and accountable, by protecting those that disclose improper conduct. Therefore the QCU considers that entities which are either funded and/or contracted to provide services to the Commonwealth should also be subject to the same obligations to administer those Commonwealth funds in a fair, transparent and accountable manner. More importantly the QCU submits that if a person has knowledge of improper conduct (as set out in paragraphs 8 a. to g. by an officer or employee of such a body, that person should be protected if they disclose that information.
13. An example of the need for such protection has been raised by an affiliate to the QCU, the Queensland Nurses' Union of Employees ("QNU"). The QNU has raised the need for greater protection of employees in the aged care sector who wish to raise issues in relation to the quality of care provided to residents of aged care facilities.
14. Although presently there are mandatory reporting requirements in relation to reportable assaults, many employees of aged care providers are reticent about raising issues relating to the quality of care provided, such as poor facilities, resident neglect or the misappropriation of public funds because of the potential for the making of such complaints to result in the termination of their employment, a reduction in the number of shifts or hours<sup>2</sup> or other less favourable treatment.
15. Aged Care providers are recipients of substantial sums of Commonwealth funding. There is a public interest in ensuring that these funds are dispersed appropriately for the benefit of aged care residents and to ensure that the highest possible quality of care is provided. WBP legislation which provides protection for disclosures in relation to poor facilities, resident neglect or the misappropriation of public funds would have a direct benefit in improving the quality of aged care in Australia.
16. This is but just one example of the benefit of allowing disclosures in relation to entities that are either contracted to or funded by the Commonwealth.

### **Persons who can make protected disclosure**

17. The QCU submits that there should be no restriction or limitation on the classes of persons who can make a protected disclosure.
18. The purpose of WBP Legislation is to allow for, and to protect, the disclosure of information about prescribed classes of improper conduct. The occupation of the person who holds the information is irrelevant. What is relevant is that the person in question has knowledge about conduct of the requisite character. If the person has that knowledge and is willing to disclose that knowledge (in accordance with the prescribed procedures) then they should be protected.

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<sup>2</sup> The aged care industry has a high level of casualisation.

19. Indeed it is relatively easy to envision circumstances whereby persons outside of the Commonwealth public sector (or funded/contracted entities) might be in possession of information that relates to improper conduct. In those circumstances the public interest would be served by that person disclosing the information that they possess. Therefore the QCU considers that there is no justification for excluding those persons from the protections offered by any WBP Legislation.
20. It should be noted that the QCU's submission on this matter is in keeping with the approach adopted by the *Whistleblowers Protection Act 2001* (Vic), the SA Act and the ACT Act.<sup>3</sup>

## **Procedure and threshold requirements for making a protected disclosure**

### ***Procedure***

21. The QCU submits that the procedure adopted for the making of a protected disclosure should be simple, clear and informal. At all times the purpose of the WBP Legislation must be remembered. Namely, the facilitation and protection of disclosures about improper conduct. There are significant barriers which prevent persons from making disclosures, the process adopted by the WBP Legislation should not present an additional barrier.
22. It is submitted that the WBP Legislation should not prescribe an exclusive form by which protected disclosures are to be made. The mere passing of the information in question to the appropriate person or entity should be sufficient so as to ensure that the disclosure meets the requirements of the WBP Legislation.
23. Many of the State legislative regimes require that in order for a disclosure to be protected the disclosure must be made to a specific entity or person.<sup>4</sup> However, the QCU submits that this requirement is unnecessarily restrictive and creates potential technical barriers to a person who wishes to disclose information.
24. Such an approach is also inflexible as it does not take into account the unique circumstances of each matter. Depending on the circumstances in question, it may be that a disclosure to the prescribed entity or persons is inappropriate or unworkable. In such circumstances the person wishing to make the disclosure has no option available to them.
25. More concerning is that this type of process potentially excludes a person, who has disclosed information about improper conduct, from protection merely because that person has disclosed the information to the wrong person or entity. The QCU considers that this type of approach allows form to triumph over substance.
26. A better and more inclusive approach is to adopt an objective test of reasonableness. If such an approach were adopted the WBP Legislation would provide that the disclosure must be made to the most reasonable and

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<sup>3</sup> See s. 5 of the *Whistleblowers Protection Act 2001* (Vic), s.5 (1) of the SA Act and s. 15 of the ACT Act respectively.

<sup>4</sup> For example see Part 4 of the QLD Act.

appropriate person or entity in the circumstances. Such a process would be consistent with the approach adopted by the SA Act.<sup>5</sup>

27. If such an approach were adopted it is envisioned that the WBP Legislation would provide a non exhaustive list of the entities or persons in which a protected interest disclosure should be made. As, this list would not be exhaustive, if it was reasonable and appropriate for disclosure to be made to another entity or person that disclosure would be protected.
28. The adoption of a process akin to that adopted by the SA Act would ensure that a person would retain the protection of the WBP Legislation irrespective of who their disclosure was made to, provided that the entity or person was reasonable and appropriate in all the circumstances. The QCU submits that this type of procedure would best serve the purpose of facilitating and protecting persons who make disclosures of improper conduct.

#### ***Threshold requirements***

29. The QCU submits that the only criteria that should apply to a disclosure are that the:
  - a. disclosure is about the type of conduct referred to in paragraph 8;
  - b. person making the disclosure reasonably believes the disclosure to be true;<sup>6</sup> and
  - c. person complies with the process outlined in the WBP Legislation for making the disclosure.
30. The QCU submits that if a disclosure meets these criteria there are no reasons why protection should not be afforded to the person who makes the disclosure. If the disclosure does not meet the criteria then the disclosure, and the person who makes it, are not protected.
31. A person's motivation for making a disclosure is irrelevant. If the information is of the requisite character and is disclosed in accordance with the WBP Legislation then the person disclosing it should be protected. The purpose of the WBP Legislation is, amongst others, to facilitate the disclosure of information that ought to be known. Therefore, provided that the information disclosed is of the type sought, there is no reason to deny protection to the person who disclosed it.
32. The QCU does not consider that the WBP Legislation should contain penalties or sanctions for person who does not comply with the procedures set out in the WBP Legislation. It is anticipated that the WBP Legislation will be beneficial in nature. That is, legislation designed to protect persons in certain circumstances. If a person decides not to comply with the provisions of the WBP Legislation, then that person forgoes any protection which might have been otherwise available to them.
33. It is respectfully submitted that in those circumstances the general law is sufficient to impose such penalties and/or detriments as are appropriate depending on the nature of the person's unprotected conduct.

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<sup>5</sup> See s.5 (3) of the SA Act.

<sup>6</sup> If the person is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated.

## Scope of protection

34. The QCU submits that a person should not be liable civilly, criminally or under an administrative action for making a protected disclosure. Immunity of this nature is common to the state Acts referred to above.
35. However, it is not submitted that this immunity should affect a person's liability for their own conduct which might be disclosed. That is, a person cannot avoid liability for their own actions merely by making a protected disclosure about those actions.
36. The QCU also submits that the WBP Legislation should provide for:
  - a. the creation of an indictable offence for treating a person less favourably, whether in their employment or otherwise, on the basis that they have made a protected disclosure or it is thought that they have made a protected disclosure;
  - b. the granting of injunctions, by either the Federal Court or to Australian Industrial Relations Commission (or its proposed successor - Fair Work Australia), to prevent less favourable treatment; and
  - c. the payment of civil damages if a person is treated less favourably, whether in their employment or otherwise, on the basis that they have made a protected disclosure or it is thought that they have made a protected disclosure, if they suffer a loss as a result of that less favourable treatment.
37. The QCU also submits that unlawful termination provisions of the *Workplace Relations Act 1996* (Cth) ("the WR Act")<sup>7</sup> should be amended so that the making of a protected disclosure is expressly stated as a ground on which a person's employment cannot be terminated. Such an amendment would be in keeping with s. 73 (2) (f) (i) of the *Industrial Relations Act 1999* (Qld).
38. Such an amendment to the WR Act would provide a timely and cost effective remedy to an employee who had their employment terminated due to making a protected disclosure. The amendment of the unlawful dismissal provisions, as opposed to the unfair dismissal provisions, is in keeping with the creation of an offence for less favourable treatment. Moreover, it ensures that the reinstatement remedy is available to all employees, irrespective of the factors that may exclude them from the unfair dismissal provisions (such as length of service or the number of employees at their place of work).
39. The QCU also submits that the definition of "injury" in the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the SRC Act") should be amended so that any injury arising out of or in the course of a person making a protected disclosure does not fall within the definition of "reasonable administrative action". The effect of this amendment would be to ensure that a person would be eligible for workers' compensation, pursuant to the SRC Act, for any injuries that arose out of or in connection with, the protected disclosure.

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<sup>7</sup> See s. 659 of the WR Act.



## Conclusion

40. Robust and extensive WBP Legislation is necessary to facilitate the disclosure of important information about improper conduct.
41. The QCU considers that the conduct which could be the subject of protected disclosure should be extended beyond the Commonwealth public sector to entities that are either contracted to or funded by the Commonwealth.
42. The QCU submits that the model adopted by the Committee should provide for the following basic elements:
  - a. that a protected disclosure can be made by any person;
  - b. that a protected disclosure can be made in relation conduct which:
    - i. amounts to a criminal offence (either State or Commonwealth laws);
    - ii. amounts to misconduct;
    - iii. is a danger to public safety;
    - iv. is a danger to the environment;
    - v. amounts to unauthorised or irregular use of public funds;
    - vi. amounts to maladministration; and/or
    - vii. is breach of public trust,

provided that the person that engages in that conduct is:

- A. a Member of the Commonwealth Parliament;
  - B. the Public Service Commissioner;
  - C. an Agency Head;
  - D. an SES Employee;
  - E. an APS Employee;
  - F. an acting APS employee; and/or
  - G. a director, board member, employee or independent contractor engaged by the Commonwealth or by a body that is in receipt of Commonwealth funding.
- c. that the procedure for making a protected disclosure should be simple and informal;
  - d. that a person who makes a protected disclosure should be immune from civil, criminal or administrative sanction; and
  - e. that a person who makes a protected disclosure should be protected from less favourable treatment as a result of making that protected disclosure.