CHAPTER THREE

WHISTLEBLOWING: THE INTERNATIONAL EXPERIENCE

United States developments in Whistleblowing Legislation

3.1 The United States was one of the first countries to pass legislation to protect whistleblowers through the enactment of the Civil Service Reform Act 1978 (CSR Act). The aim of the CSR Act was to provide protection from reprisal action for federal employees who genuinely blow the whistle on fraud, waste and abuse. In 1989, further federal legislation was enacted to protect whistleblowers with the passage of the Whistleblower Protection Act 1989.

3.2 Whistleblower legislation has been introduced in at least thirteen States in the US to protect both public and private sector employees. Additionally, there are as many as thirty different laws protecting employees who expose breaches of the law in areas such as environment protection, occupational health and safety, transport and civil rights.[1]

3.3 The US whistleblower protection scheme incorporates a reward system whereby whistleblowers may be financially rewarded for the reporting of wrongdoing. This practice acknowledges the ultimate saving to government which reflects the positive side of whistleblowing. This aspect of the US scheme is not one which the Committee considers should be retained in an Australian model. The subject of rewards for whistleblowers is discussed in Chapter 11.

3.4 The federal law for dealing with whistleblowing in the US has undergone refinement. The CSR Act created the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) to investigate and adjudicate allegations of prohibited personnel practices or other merit systems violations. Inadequacies of protection afforded to whistleblowers in the CSR Act were highlighted by the MSPB in 1984.

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1 John McMillan "Legal Protection of Whistleblowers", op.cit., p.207.

Statistics demonstrated that "no measurable progress had been made in overcoming federal employee resistance to reporting instances of fraud, waste and abuse. Indeed, the percentage of employees who did not report government wrongdoing due to fear of reprisal almost doubled between 1980 and 1983".[2] It was also found by Congress that a redefinition of the role of the OSC was required to change its focus from one of protecting the merit system to protecting the employee.

3.5 The miscued focus of the OSC had engendered employee distrust. The public's perceptions of the OSC was that it provided indifferent and in some cases adverse assistance to employees.[3] Fault was also found with some of the restrictive judgements of the MSPB and federal court which frustrated the ability of whistleblowers to gain appropriate redress against reprisals.

3.6 Accordingly, the Whistleblower Protection Act 1989 (WP Act) was enacted. One of its aims was to strengthen protection mechanisms for employees making disclosures about wrong doing and to prevent reprisal action. The WP Act defined the term whistleblower as a present or former federal employee who makes a disclosure in the reasonable belief that information divulged evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. John McMillan summarised the three main objects of the WP Act as follows:

- it ensures that allegations of illegality, mismanagement or wastage against federal agencies or officials are properly investigated;
- it provides protection for the employees who make those allegations; and

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2 L. Paige Whitaker, "Whistleblower Protections For Federal Employees", Congressional Research Service Report for Congress, 10 January 1990, p.2.

3 ibid., p.3.

- it ensures the punishment of any official who victimises another for making such an allegation.[4]

3.7 Protection may be invoked in four ways under the WP Act. The first option available is appeal to the MSPB regarding unfair treatment. Secondly, actions may be initiated by the OSC, or as a third option an individual right of action may be initiated.[5] The last option involves negotiation between the relevant parties in accordance with internally set procedures.

3.8 The role of the MSPB is to hear and rule on appeals by employees concerning any 'prohibited personnel practice' as defined in the WP Act. The OSC is now independent of the MSPB. Its main objective remains protecting employees, former employees and applicants for employment from prohibited personnel practices. In this capacity, the OSC receives and investigates allegations or may initiate inquiries of its own accord into possible prohibited personnel practices.[6]

3.9 In compliance with its reporting responsibilities the MSPB released a report in October 1993 entitled, 'Whistleblowing in the Federal Government: An Update'. In contrast to its 1984 report, results of a survey of federal employees indicated that there was a greater willingness to report illegal or wasteful activities. Regrettably, a corresponding rise in the number of employees who experienced or were threatened with reprisal action was also noted, although there seemed to be a decline in the severity of retaliation. Overall, the survey data indicated that a reluctance to report still persisted. The report concluded that "the value to the organisation of sharing information about wasteful or illegal activities has not yet been fully accepted by all employees and managers. To further encourage employees to

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4 John McMillan, "Legal Protection of Whistleblowers", op. cit., p.207.

5 Under the provisions of the Whistleblower Protection Act 1989, an employee, former employee, or applicant for employment has the independent right to seek review of whistleblower reprisal cases directly from the MSPB 60 days after the OSC closes an investigation or 120 days after filing a complaint with the OSC. L. Paige Whitaker, "Whistleblower Protections For Federal Employees", p.13.

6 ibid., pp.7-13 provides a detailed description of the role of the OSC.

share such information in a constructive manner, agencies must create non-threatening climates in their organisations in which such a practice is valued and rewarded."[7]

3.10 In order to achieve the goals of a higher incidence of reporting and a steep decline in the incidence of retaliation, the MSPB report suggested the following measures need to be taken. Agencies should:

- emphasise organisational change and improvements,
- examine their programs for selecting supervisors and managers,
- ensure that employees are properly informed about the sharing of information, and
- actually solicit employees' views and give employees feedback concerning those views.[8]

These measures are equally applicable in the Australian context.

Whistleblowing in the United Kingdom

3.11 The United Kingdom has no equivalent to the formal complaint system established in the United States through specialised whistleblowing legislation. The situation in the UK regarding whistleblowing is described as "a combination of restrictive government guidelines and inadequate legal protection [which] conspire to silence any employee from revealing matters of public concern and leave the employer free to punish them".[9]

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7 US Merit Systems Protection Board Report, "Whistleblowing in the Federal Government: An Update", October 1993, p.(iii).

8 ibid., p.35.

9 J. Cooper and D. Greene "Whistleblowers", Solicitors Journal, 20 November 1992, p.1166.

3.12 The British Government appears to have been hesitant to broaden protection for legitimate whistleblowers. Recent examples of whistleblowing in the UK have centred on the Intelligence and Defence areas of the Civil Service. The circumstances regarding disclosure of information about the sinking of the Argentine cruiser "General Belgrano" during the Falklands War (known as the Clive Ponting case) and publication of Peter Wright's book "Spycatcher" about MI5 operations, are examples of sensitivity in this area.[10] Following the Ponting case a new code of conduct was created for public servants. In particular, the new conduct code states that public servants facing 'a fundamental issue of conscience' should discuss it with their permanent secretary who will handle the matter. If the matter is consequently not resolved to the public servant's satisfaction the code requires that they carry out their instructions or resign. This code also stresses that the duty not to disclose information in accordance with the Official Secrets Act, is applicable to all currently serving or retired public servants.[11] The effect of secrecy provisions in Australian legislation is discussed in Chapters 8 and 9.

3.13 However legislation does exist to protect whistleblowers in limited situations. The Offshore Safety Protection Against Victimisation Act 1992, provides protection against dismissal action to offshore workers making public disclosures when acting as safety representatives. The Local Government and Housing Act 1989 requires all local authorities to appoint monitoring officers. The monitoring officer's responsibilities include reporting on "a proposal, decision or omission which has had, will have or is likely to have the effect of contravening any enactment or rule of law or any statutory code of practice. A second limb to the duty applies in respect of any maladministration or injustice".[12] Nonetheless, a survey on the use of monitoring

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10 Ian Cunliffe "Heroes or Villains: Balancing the Risk", Directions in Government, vol. 6, June 1992, p.18.

11 ibid.

12 A. Harrison, "In office and in power", Solicitors Journal, 21 January 1994, p.46.

officers powers found that most officers had not exercised their responsibility by issuing a report, in the three years since this duty was created.[13]

3.14 Partly in response to European Community Directive 391/89 concerning the safety and health of workers, the British Government announced that whistleblowing legislation would be introduced during the 1992/93 parliamentary session.[14] The aim of the legislation would be to provide protection to employees against victimisation and dismissal if they blew the whistle about health or safety issues at work. By early 1994, such legislation had not been introduced. A cross-party attempt to have the Government amend the Official Secrets Act to include a public interest defence for public officials revealing crime or fraud was defeated on 2 February 1989.[15]

3.15 In the courts, it has been held by Lord Denning that "the duty of confidentiality was overridden by the public interest in receiving information of misconduct and that the extent of the public interest should be wide extending to 'crime, frauds and misdeeds' and any misconduct that ought in the public interest, to be disclosed to others".[16] However, operating under current legislation, British courts do not have the power to protect whistleblowers against victimisation, dismissal, blacklisting or even refusal of an employer to reinstate.[17]

3.16 Draft guidelines concerning whistleblowing, which encourage sympathetic and fair hearing of bona fide complaints, were issued by the National Health Service in October 1992. Their aim was to resolve complaints informally with immediate

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13 ibid.

14 D. Brown and B. McKenna "Protecting 'whistleblowers' from victimisation", Solicitors Journal, 9 October 1992, p.994.

15 S. Goodwin and J. Jones, "Parliament and Politics: MPs' bid to safeguard 'the public interest' fails", The Independent, 3 February 1989, p.6.

16 D. Brown and B. McKenna, "Protecting 'whistleblowers' from victimisation", p.995.

17 J. Cooper and D. Greene, "Whistleblowers", p.1166.

supervisors according to internally drawn up procedures. If unsatisfied with the handling of the complaint, the whistleblower may refer the matter to higher management or a senior officer appointed to specially deal with such complaints. While referral to the Ombudsman is available in some instances, the guidelines stress the contractual obligation of confidentiality of employees and recommend that advice should be received from professional bodies before any disclosure is made.

3.17 In response to the limited protection available to genuine whistleblowers in the UK, some support groups and services have been established. For example, the Royal College of Nursing set up a whistleblowing service in 1991 and had received over 100 confidential allegations of maladministration or inadequate service to patients in its first twelve months of operation. The response of some hospitals has been to include 'gagging clauses' in work contracts which specifically prohibit disclosure of information to the press or 'authorised organisations'.[18]

3.18 Freedom To Care is an example of a whistleblower support group operating in the UK. It consists of a non-party political network of doctors, nurses, social workers, lawyers, academics, scientists and others working in the public services. The group supports employees who have been victimised for raising matters of public concern and lobbies for changes to the law, administrative procedures and the managerial culture to allow professionals the freedom to raise concerns without fear of reprisal.[19]

3.19 Public Concern At Work, launched on 14 October 1993 and operating as a legal charity, was established to help fulfil a perceived need in Britain. Its role is to encourage and enable employees to raise serious concerns at work, rather than turn a blind eye to a potential danger or feel compelled to blow the whistle outside. Public Concern At Work provides a range of consultancy, training and conciliation services for companies, public bodies, trade unions and professional associations.

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18 Editorial "For whom the whistle blows", The Independent, 28 April 1992, p.18.

19 'The Whistle,' Freedom To Care Bulletin, West Molesey, Surrey UK, November 1993, p.2.

It offers a free legal advice service and telephone helpline for people with serious work-related concerns. The strategy adopted by Public Concern at Work is to:

- provide free advice and assistance to employees and others with serious concerns about public dangers and malpractice
- encourage employers to set up procedures for employees to raise serious concerns
- seek to ensure that employees can use those mechanisms without fear of victimisation and in the knowledge that their concerns will be addressed
- publicise and reward good practice in the private, public and voluntary sectors
- research into the opportunities people have for raising serious concerns and the risks they take when doing so
- encourage people to play their part in preventing serious danger or harm to the public interest.

Public Concern At Work will not assist with any concern that is frivolous or vexatious and therefore normally needs to sight evidence supporting any claim before becoming involved.

3.20 Public Concern At Work was set up with financial assistance from charitable trusts and foundations. Its operating expenses are met in part by fees generated through consultancy and training services and research work. Other revenue is generated through subscriptions from individual and corporate supporters and charitable donations.

3.21 The initial report released by Public Concern At Work makes some interesting observations which corroborate the Australian experience as detailed to the Committee in submissions and evidence.

> The clear message from our advice line is that the way in which a public concern is raised by an employee in the first place is critically important. Employees do not know whether they will have to prove the concern, how they should handle it, who they should raise it with, what they should expect to be done to address it and where their responsibility for the matter will end. And this is before they consider whether their own interests may be jeopardised if they speak up.[20]

The report makes observations similar to those of the Committee when it states:

> We were struck by the number of public spirited people who were prepared to put the interest of their employer or of others first, even when this might entail considerable personal risk.[21]

3.22 Public Concern At Work is producing a series of monographs 'Speaking Up by Sector' which publish research into accountability within organisations and into ethical and legal issues across the public, private and voluntary sectors. These publications aim to stimulate and inform debate so that individuals are better able to identify their own responsibilities and organisations are better able to fulfil their responsibilities. Titles in this series include fraud and corruption in local government, the police, the defence industry, abuse in residential care, malpractice in medical research and individuality and conformity in the workplace.

3.23 The service provided by Public Concern At Work has the support and recognition of the Bar Council.[22] It is managed by a board of trustees and a director, who are advised by a Council comprising a diverse group of eminent citizens, professionals and academics. The Committee believes the general strategy of Public Concern at Work, together with the structure and funding of the services, provides a useful basis in which to adapt an Australian model for providing assistance

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20 Public Concern At Work, 'The Advice Service: First Report,' Lincoln's Inn House, 42 Kingsway London, January 1994, p.4.

21 ibid., p.4.

22 S. Ashworth, "Law: Help for the Whistleblower" Lloyd's List, p.487.

and support for whistleblowers. Counselling and support services are further considered in Chapter 9.

The Canadian position

3.24 There is currently no widespread legislative cover to protect whistleblowers in Canada.[23] However, at a provincial level, isolated cover is available for disclosures about wrong doing in the areas of environment, health and safety. Legislation such as the Ontario Environmental Protection Act states that no employer may dismiss, discipline, penalise, coerce or intimidate an employee for complying with environmental legislation.[24] The Province of Ontario seems to be leading the way in public discussion of the issue of whistleblowing and in the introduction of legislative protection in Canada.

3.25 In 1986 the Ontario Law Reform Commission issued a report on Political Activity, Public Comment and Disclosure by Crown Employees. The report adopts the perspective that whistleblowing constitutes an exception to the common law duty of confidentiality as applied to public service employees. Three main issues are examined in the report:

(a) Must the whistleblower have reasonable grounds for his/her belief that there had been misconduct?

(b) Whether good faith must be proved, and

(c) To what bodies or persons was it legitimate to blow the whistle?[25]

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23 L.J. Brooks, "Whistleblowers...Learn to love them", Canadian Business Review, Summer 1993, p.20.

24 L. Ramsay, "New attitude emerging on 'whistleblowers'", The Financial Post, 21 August 1993, p.s18.

25 "Canadian law reform report on `whistleblowing' by public servants" Australian Law Journal, No.7, Vol.61, July 1987, p.321.

A general conclusion reached by the Commission was that "an attempt must be made to protect Crown employees who resort to whistleblowing where it is in the public interest to disclose the pertinent government information, whether confidential or non-confidential. At the same time, it is essential to ensure that over-zealous employees do not abuse what we consider to be an essentially extraordinary right to release such information".[26]

3.26 Legislation providing whistleblower protection to civil servants was tabled in the Ontario legislature on 4 November 1993.[27] Under the proposed legislation civil servants will be able to lodge their allegation with a specially appointed counsel which is similar to the US federal whistleblower law. However, passing confidential information to the media or opposition parliamentarians would continue to be prohibited. This proposed legislation has not been fully debated as at July 1994.

3.27 The federally enacted Access to Information Act 1985 protects public servants when releasing information, if they act in good faith and with due authority. Unfortunately the protection provided under this Act is considered to be uncertain because its provisions are potentially ambiguous and contradictory.[28] This Act also authorises the Information Commissioner to disclose to the Attorney General, any information which can be substantiated by evidence, relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution.

3.28 Other measures proposed to facilitate whistleblowing include the suggestion of the national Auditor General that a fraud hotline be set up to allow public servants to anonymously report misuse of public funds.[29] In the private sector

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26 ibid., p.322.

27 L. Papp, "Civil Service `whistleblowers' get protection", Toronto Star, 5 November 1993, p.A16.

28 I. Hansen, "Freedom of Expression, Whistleblowing and the Canadian Charters", Canadian Parliamentary Review, Spring 1990, p.31.

29 ibid., p.30.

in Canada, an increasing number of large firms are appointing internal ombudspersons to investigate complaints and protect both the interests of the complainant and alleged wrongdoer alike. This push has been prompted by company directors being made directly liable for payment of fines for breaches of environment laws.[30]

Recent legislative activity in New Zealand

3.29 In June 1994 a Whistleblowers Protection Bill was introduced as a private member's bill in the House of Representatives by the Opposition spokesperson on Justice.

3.30 The bill provides for the disclosure of public interest information which is defined as information relating to any conduct or activity in the public or private sector that concerns the unlawful, corrupt or unauthorised use of public funds or resources; is otherwise unlawful; or constitutes a significant risk or danger, or is injurious to public health or safety, the environment or the maintenance of the law and justice.

3.31 To be an appropriate disclosure the information must be disclosed to a Whistleblowers Protection Authority and can be made by any person who believes on reasonable grounds that the information is true or if not in a position to so do, believes that the information may be true and is of sufficient significance to justify its disclosure so that the truth may be investigated.

3.32 The bill provides for the protection of persons who have made disclosures to the Authority and for remedies for persons who encounter discrimination or harassment. The Whistleblowers Protection Authority is to be appointed as an officer of Parliament. The Authority's functions would include investigating any disclosure of public interest information made to it and providing

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30 L.J. Brooks, "Whistleblowers ... Learn to love them", p.20-21.

advice, counselling and assistance to prospective or protected informants. The Authority would have the power to recommend remedial action as a result of its investigation and, if no action is taken after a reasonable time, it may report the matter to the Prime Minister and the House of Representatives.

3.33 Indications are that the New Zealand Government supports the concept of whistleblower protection in principle, although whether it would support this particular bill or introduce its own legislation is yet to be determined.

3.34 **The Committee acknowledges that legislative action on whistleblower protection is occurring in a number of comparable international legislatures and believes that the experience and future developments within these legislatures should be monitored with a view to benefiting from their experiences.** (see paragraph 7.37)