

CHAPTER ELEVEN

REMEDIES AND PENALTIES

11.1 There are various remedies and penalties associated with any whistleblower protection scheme. Generally, they may be divided into two categories depending on the related subject matter:

1. Those remedies and penalties associated with the wrongdoing itself; and
2. Those remedies and penalties associated with the protection of the whistleblower.

The Committee is keen to ensure that a range of remedies should be explored rather than limiting the restitution to merely a monetary matter. This attitude, reflected in Senator Chamarette's Whistleblowers Protection Bill 1993, is also endorsed by the Privacy Commissioner.¹ It is a feature of the Bill which the Committee believes should be retained in any future legislation of this nature.

Proven wrongdoing

11.2 When the investigating agency determines that in fact, an act of "wrong-doing" (as defined in the proposed legislation - see Chapter 9) has been committed, then certain remedial or corrective action must follow. If an allegation involving illegality or infringement of the law is substantiated, the matter should be referred to the relevant police force for confirmation of investigation and briefing of the relevant Director of Public Prosecutions. If an allegation of substantial misconduct, mismanagement, maladministration or waste of public funds is substantiated, then the Public Interest Disclosures Agency should report to:

- (a) the Chief Executive of the relevant government agency,

¹ Privacy Commissioner, evidence p.834.

- (b) the Director or head of the relevant private organisation or professional or industrial body;
 - (c) the Auditor-General; or
 - (d) the responsible Minister, Prime Minister or Parliament,
- whichever is appropriate.

The Agency's power to report should be exercised in respect of wrongdoing in all other categories; for example, it should be exercised in respect of the category of wrongdoing which threatens public health and safety or the environment.

11.3 The Attorney-Generals Department recommended that where an allegation of wrongdoing is substantiated, the subject of the whistleblowing should be liable to the relevant disciplinary or criminal sanctions which would normally apply.² The powers of report and referral exist, in part, for the purpose of performing a remedial function.

Victimisation of the Whistleblower - Orders for restitution

11.4 The Committee has referred in paragraphs 9.58-9.61 to the role of the Merit Protection and Review Agency in investigating complaints of victimisation and harassment. The Committee is of the view that where the MPRA is satisfied that a public sector whistleblower has suffered victimisation, the MPRA should make appropriate recommendations and orders regarding such victimisation. The MPRA should be empowered to make orders for restitution in relation to employment, such as re-instatement of former position, and orders for the protection of the whistleblower. Such orders should be binding and have the force of law. The order for restitution should not include any monetary awards for damages in relation to a finding of victimisation. The subject of claims for compensation is dealt with below under the heading: Tort of Victimisation.

2 Attorney-General's Department, evidence p.132.

11.5 The Attorney-General's Department recommended that where a whistleblower has suffered discrimination or harassment in relation to his or her employment, recommendations should be made as to the appropriate response. The Department considered this to be the business of "the agency responsible for protection".³ In the model proposed by the Committee, although the MPRA would be responsible for investigating complaints of victimisation in the public sector and making certain orders for restitution in cases where the complaint is substantiated, the Public Interest Disclosures Agency should have an oversighting and appeal role.

11.6 The appeal role of the Public Interest Disclosures Agency should be confined to a mediation process, whereby, in a non-adversarial setting, the MPRA and the parties to a finding of the MPRA (including the employer organisation) can have the opportunity to explore the issues further. The Public Interest Disclosures Agency should have powers to convene meetings, and to summons witnesses and experts for the purpose of resolving conflict. The MPRA should have accountability to the Public Interest Disclosures Agency, limited to the following matters. The MPRA should be required to furnish a report of the investigation and determinations made in cases of victimisation. In addition to participating as required by the Agency in a mediation process, the MPRA will be required to furnish the Agency with such further information and particulars as the Agency may deem appropriate in all the circumstances. Should the whistleblower remain dissatisfied with the finding of the MPRA, then the whistleblower should pursue the matter along conventional channels.

11.7 The Attorney-General's Department asserted that where recommendations are not acted upon, the agency should report to the Prime Minister or the Parliament.⁴ The Committee considers that non-compliance with recommendations or orders should form the basis of such a report.⁵ In addition, a

3 Attorney-General's Department, evidence p.132.

4 *ibid.*

5 The Committee has discussed the power of the Agency to provide special reports to the Parliament in Chapter 7. The MPRA already possesses this power.

system of "order registration" should be available which may render noncompliance with an order of the Agency a contempt of court for which the organisation or those responsible for orchestrating the noncompliance should be liable to a penalty. The "order registration" system would entail orders made by the Agency or the MPRA, being registered in the court of an appropriate jurisdiction.

11.8 The Committee considers that, where victimisation proves to have been particularly "blatant, severe and associated with malpractice" the matter should be referred to the police for prosecution if it appears that an actual offence has been committed. Such victimisation should be treated with the seriousness which it deserves and the offenders should be liable to fine and/or community service orders.⁶

Tort of victimisation

11.9 It is clear to the Committee that whistleblowers should be compensated for loss and injury suffered as a result of having been victimised for making a public interest disclosure. The whistleblower should be able to frame a civil action in tort for damages for loss of income, work related injuries induced by stress, loss of enjoyment of life and loss of reputation which may not be actionable under defamation laws. The Committee is of the opinion that expertise is required for the assessment of damages and such cases ought to be subject to the usual processes of judicial consideration.

11.10 The Whistleblower Protection Act 1993 (SA) created the tort of victimisation. Section 9 of that Act provides that where a person causes detriment to another on the ground, or substantially on the ground, that the other person or a third person has made or intends to make an appropriate disclosure of public interest information, that person commits an act of victimisation. The Act leaves open the definition of "detriment" noting in section 9(4) that it "includes" :

⁶ Geoff Dannock, Submission no. 11, p.6. This submission suggests that terms of imprisonment might be appropriate. The Committee disagrees and has commented on the use of prison penalties in paragraph 11.23.

- (a) injury, damage or loss; or
- (b) intimidation or harassment; or
- (c) discrimination, disadvantage or adverse treatment in relation to a person's employment; or
- (d) threats of reprisal.

11.11 Under the South Australian Act an act of victimisation may be dealt with as a tort and a victim may commence proceedings in a court seeking a remedy in tort. Alternatively, a complaint of victimisation may be lodged under the Equal Opportunity Act 1984. However, the two processes are mutually exclusive, and a victim having commenced proceedings of one kind, then cannot commence proceedings of the other kind. In effect, the victim must make an election.

11.12 The Committee is of the view that such an option should be available under the proposed whistleblower protection scheme. The Committee considers that the legislation should provide that a person who has suffered a detriment by virtue of having made, or intending to make, a disclosure may commence proceedings in a court in pursuit of a remedy in tort. However, the Committee recognises that access to justice in the court system remains problematical for many Australians. The huge costs and delays involved in litigation deter or prevent many potential litigants from seeking remedies at law to which they may be entitled. Accordingly, the Committee believes that an alternative forum and course of action should be available to whistleblowers who suffer victimisation. Such an alternative should be made available by extension of the powers of the Human Rights and Equal Opportunity Commission. Other than pursuing court action, recourse to the Commission may be the only means a private sector employee can use to seek a remedy.

11.13 The Committee recommends that whistleblower legislation make provision for a tort of victimisation. The Committee further recommends that, as far as is constitutionally able, the Human Rights and Equal Opportunity Commission through an extension of its powers be an alternative forum and course of action

available to public and private sector whistleblowers to facilitate their obtaining compensation for victimisation.

Rewards for whistleblowing

11.14 There was general agreement between those who addressed the question of rewards for whistleblowers that they should not be encouraged. Certainly the evidence to the Committee was that whistleblowers are not motivated by the thought of reward, rather they are generally motivated by public interest. As one submitter noted, whilst whistleblowers do not expect rewards, they should not expect to be victimised or disadvantaged for bringing matters of public interest to the community's attention:

I do not believe that whistleblowers expect to be rewarded, or should be rewarded for properly bringing matters of concern to public light. However, neither should they be penalised for their action provided it is undertaken in the public interest, and without malice".⁷

11.15 A feature of the United States legislation involves the granting of financial rewards to whistleblowers in recognition of savings achieved by the government through the exposure of wasteful practices and wrongdoing. However, this practice has not been adopted in the South Australian whistleblower legislation, nor is it proposed to be included in draft legislation under consideration in other Australian States and territories. The United States system was criticised in evidence to the Committee. It was observed that:

The American system is now a bounty hunting arrangement ... It seems to me that [rewarding whistleblowers] is an incorrect and dangerous inducement on which to expect people of goodwill to come forward. They should come forward on the old fashioned basis of just being ethically disturbed with what they see.⁸

7 See Geoff Dannock, Submission No. 11, p.5. As to the reference of 'malice', see the Committee's comments at paragraph 9.37.

8 Dr William De Maria, evidence, p.1066.

11.16 The Privacy Commissioner raised strong objection to the notion of rewards for whistleblowers, by referring to comments made in evidence to the Elliott Committee Inquiry into Fraud on the Commonwealth. The Commissioner asserted:

It is different once you turn the community from being a disinterested participant in the criminal justice process into a self interested participant ... I think the proposal involves a fairly fundamental shift in current social arrangements and it must have some significant implications for the privacy of individuals.⁹

11.17 The former Commonwealth Ombudsman, Mr Alan Cameron, in a submission to the Elliott Committee, commented upon a proposed scheme to reward whistleblowers. The scheme, which was similar to the United States scheme, proposed that whistleblowers should be rewarded by the payment of up to 50% of the amount recovered which had been originally lost due to fraudulent activity. Mr Cameron drew attention to the administrative difficulties associated with such a scheme, including:

- . The scheme may involve the payment of very considerable amounts of public monies;
- . The scheme may be a disincentive to whistleblowers if the whistleblower was aware that the funds had been dissipated beyond recovery; and
- . On what basis would discretion be exercised to determine what percentage which whistleblowers should receive?¹⁰

11.18 The Elliott Committee received further, mostly negative, comments in relation to the proposed scheme. These included conflict of interest concerns, difficulty in relying on evidence from a witness with a direct pecuniary interest, social and privacy implications and baseless or unprovable allegations being made in the hope of pecuniary reward. The Elliott Committee concluded that:

9 Privacy Commissioner (Mr Kevin O'Connor), evidence p.833.

10 Commonwealth and Defence Ombudsman, evidence p.37.

As it is a citizen's duty to report fraud, theft etc. and it is part of the responsibilities of public servants to do the same and there is no proof that reward systems promote whistleblowing, the Committee considers the benefits of the proposal do not outweigh the difficulties.¹¹

11.19 EARC also considered a system of rewards for whistleblowers through the award of a percentage of the savings which result from their disclosures. EARC considered that the giving of awards "is contrary to one of the purposes of the scheme which is to encourage the development of appropriate ethical standards as part of the normal standards expected of public sector employees. Accordingly the Commission does not recommend, at this stage, that provision for rewards be built into the scheme".¹²

11.20 **The Committee agrees with these conclusions and recommends that a system of rewards for whistleblowing should not be included in the whistleblower protection scheme proposed in this report.**

Penalties for false allegations

11.21 The Committee discussed this matter in paragraphs 9.64 - 9.65, recommending that it should constitute an offence if a person knowingly makes a false allegation and where such an offence is proven, the person should be subject to a penalty of a fine and/or community service orders.

Imprisonment as a penalty option

11.22 The Committee has considered the use of imprisonment as a penalty. The Committee accepts that where proven wrongdoing has involved illegality or infringement of the law, normal legal processes would presumably follow which,

11 Elliott Committee Report, op.cit., pp.92-4.

12 EARC Report, op.cit., p.184. See also Greg Sorensen, evidence p.1158.

subject to the law which has been transgressed, may involve imprisonment as a part of the penalty provisions.

11.23 However the Committee believes that cases of victimisation or harassment of whistleblowers or of whistleblowers knowingly making false allegations, are primarily crimes against the person with public interest ramifications. The Committee does not consider imprisonment to be a suitable penalty in such situations and has recommended the imposition of community service orders (and/or in addition to fines) to be a more appropriate penalty. (see paragraphs 9.83 and 11.8).