CHAPTER TWELVE

WHISTLEBLOWERS PROTECTION BILL 1993 (SENATOR CHAMARETTE)

12.1 A Whistleblowers Protection Bill was first introduced on 12 December 1991 by Senator Vallentine. This bill lapsed following the 1993 federal election. Senator Chamarette subsequently undertook a rewrite of the Vallentine bill and tabled an exposure draft of a new bill on 26 May 1993. After further review and rewriting, Senator Chamarette introduced the Whistleblowers Protection Bill 1993 on 5 October 1993. The Senate referred the bill to the Committee on 27 October 1993.

Provisions of the Whistleblowers Protection Bill 1993

12.2 The objects of the bill are:

- to facilitate public interest disclosures about conduct reasonably believed to be illegal, improper or constituting a danger to public health or safety or to national security;
- to protect persons who are harassed or discriminated against for making such disclosures;
- to investigate the public interest disclosures and alleged harassment or discrimination;
- to promote the ethic of openness and public accountability; and
- to improve community perception of whistleblowers, in recognition of the fact that they are responsible citizens.

12.3 The bill proposes the creation of a fully independent Whistleblowers Protection Agency, headed by a Commissioner with power to investigate allegations of wrongdoing within Commonwealth government or government agencies. Disclosures made by public service employees, prospective employees, and members of the public are covered by the bill. Allegation of wrongdoing is defined in clause 6 to include where a person has committed:

(a) an infringement of the law; or

(b) a gross waste of public moneys; or

(c) an act constituting abuse of authority; or

(d) an act which substantially endangers public health or safety; or

(e) gross mismanagement of public moneys or property; or

(f) suppression of an expert opinion, finding or document prepared by another person.

12.4 The main functions of the Agency are varied. Clause 9 of the bill proposes that the Agency would receive from any person and investigate allegations of wrongdoing, allegations of prohibited personnel practices and allegations of harassment. The Agency would be required to take, or recommend the taking of, corrective action in instances where any allegations are substantiated. Further, the bill proposes that the Agency bring to the attention of the Parliamentary Joint Committee to be established to oversee the Agency, any matter which in the Commissioner's opinion the Joint Committee's attention ought to be drawn. Finally, the Agency would have the functions of protecting whistleblowers from prohibited personnel practices or harassment, promoting the ethic of openness and public accountability and improving the community perception of whistleblowers.

12.5 The bill provides protection to whistleblowers from 'prohibited personnel practices', as defined at clause 7, which may cause discrimination or victimisation in the workplace. Whistleblowers would be provided with protection from harassment or discrimination concerning appointments, promotion, disciplinary action, transfers and pay matters. Protection would be available subject to whether the whistleblower had reasonable grounds to believe that the disclosure was true and not made with the intent to deliberately mislead.

12.6 The conduct of investigations of complaints is detailed at Part 4. A complaint may be made to the Agency orally or in writing and may be made

anonymously. However, the Agency may decline or cease to investigate a complaint if there was insufficient information provided or it was frivolous or vexatious. Clause 24 specifies how investigations should be conducted and provides guidelines on the appearance of persons giving evidence to the Agency.

12.7 The Commissioner of the Agency would have the power to require information relating to an investigation to be provided in writing, including the production of documents or records. Alternatively, the Commissioner may require a person to attend a hearing to answer questions and produce documents. Persons would not be able to refuse to furnish such information or records on the basis that it may contravene the provisions of another Act, is contrary to the public interest or on the basis that they may incriminate themselves or be liable to a penalty.

12.8 Power for staff of the Agency to enter, search and remove material from premises is proposed at clause 28. The Commissioner may apply for a warrant from a Judge of the Federal Court to affect such action.

12.9 Remedies available to whistleblowers, including re-instatement, re-location and if appropriate compensation payments, are proposed in Part 5. The Agency may assist whistleblowers in obtaining injunctions to prevent prejudicial action being taken against a whistleblower. Where desirable, the Agency may arrange for counselling to be provided to the whistleblower.

12.10 Part 6 provides expansive reporting and review mechanisms. The Agency must refer to the Attorney-General any evidence which substantiates that an offence had been committed. Similarly, the bill details the reporting chain to be used by the Agency, including to the Governor-General, where breaches of duty, misconduct or evidence of a prohibited personnel practice are detected. The Agency is also given annual reporting obligations and may submit reports on its operations to the Prime Minister, for presentation to Parliament.

12.11 A Parliamentary Joint Committee on the Whistleblowers Protection Agency would be appointed under Part 8 to inquire into and report on the activities of the Agency and other matters highlighted to the Joint Committee by the Commissioner. Other duties of the Joint Committee would include examining the annual report and any tabled reports prepared by the Agency and reporting to both Houses on matters arising from the reports to which Parliament's attention should be directed, and inquiring into and report on any question relating to its duties that is referred by a House.

Comments relating to the bill

12.12 A range of comments regarding the Whistleblower Protection Bill 1993 were made in submissions and evidence to the Committee. Witnesses were advised that the bill provided a possible model which could apply to whistleblower protection and therefore had no direct endorsement from the Committee. The comments, based upon this understanding, which were expressed in evidence are summarised below.

Terminology

12.13 The South Australian Equal Opportunity Commissioner was "not satisfied that the legislation was sufficiently clear to enable persons to know what their rights and protections are under the legislation."[1] As an example problems with the definition of "wrongdoing" in clause 6 were cited. First, it was assumed that people understand the law and what is meant by legal and illegal conduct. Secondly, the terms "gross", "substantial" and "expert opinion" are prone to different interpretation based on personal experience.

12.14 Failure to define "discriminate" was viewed as a serious oversight by the Commissioner, who recommended reference to the definition used for this term in Federal Human Rights legislation. Also, the definition of "harassment" was seen as

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1 Commissioner for Equal Opportunity (SA), evidence p.393.

circular and subjective. The Commissioner suggested the term "victimisation," as defined in Equal Opportunity legislation, would be more appropriate.

12.15 The National Crime Authority commented that it may be difficult to prove the elements of suppression in an allegation of wrongdoing as defined in clause 6. The NCA suggested that a more objective or neutral term such as "withholding" or "failure to disclose" should be used.[2] The NCA also considered that the nature of assistance which may be provided to whistleblowers in clause 29, was imprecise.

Whistleblowers Protection Agency

12.16 Concern was expressed over the cost of establishing another Commonwealth statutory agency. Budget estimates for 1993/94 of comparative bodies such as the Ombudsman $6.6m and MPRA $4.9m, were offered as a guide to possible operating costs of a new agency. Accordingly, it was inferred that it would be "more efficient to draw upon the resources and expertise of existing bodies, rather than to create parallel authorities concerned specifically with whistleblowing."[3]

12.17 A number of submissions observed that potential problems with establishing a separate Whistleblowers Protection Agency might involve overlap and duplication of responsibilities, and competition for scarce, skilled resources.[4] For example, investigative powers of the Agency overlap with the Ombudsman's powers and many of the Agency's protective functions are covered, although not as comprehensively, by the MPRA. In fact, the Attorney-General's Department considered that "the extent of overlap of proposed Agency functions with the functions of the existing statutory bodies ... is so great that amendments to those [existing] Acts to

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2 National Crime Authority, evidence, p.439.

3 Attorney-General's Department, evidence p.124.

4 e.g. Australian Federal Police, evidence p.84; Attorney-General's Department, evidence p.126.

make adequate provision for whistleblowers would be preferable to a separate statute."[5]

12.18 Staffing of the Agency also attracted comment. It was questioned whether the Commissioner of the Agency needed to be a judge or lawyer, or should more appropriately be a person with a range of managerial or administrative skills rather than legal skills and experience.[6] ICAC noted the importance of Agency staff possessing the requisite skills and experience to be able to make "credible determinations" regarding victimisation allegations which were denied by management.[7]

12.19 The Queensland Whistleblower Study argued against a political appointee to head the Agency as proposed in clause 12 of the bill, suggesting that the position should be an officer of the Parliament. The QWS also suggested that the Agency should rather be a 6 member commission consisting of a legally qualified person, 3 whistleblowers nominated or elected by whistleblower lobby groups and 2 other well regarded community identities nominated by the proposed Parliamentary Joint Committee.[8]

12.20 Although the bill has no specific provision for internal disclosure mechanisms, several submissions supported this option. The Privacy Commissioner considered there were advantages from a privacy perspective in encouraging internal disclosure, although this was not to suggest that whistleblowers should be obliged to use internal channels before approaching the neutral agency.[9] ICAC argued that internal disclosure should attract the same protection as disclosure to an independent

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5 Attorney-General's Department, evidence p.126; See also Equal Opportunity Commissioner (SA), evidence p.392.

6 Equal Opportunity Commissioner (SA), evidence p.395.

7 Independent Commission Against Corruption, evidence p.739.

8 Queensland Whistleblower Study, evidence p.1027.

9 Privacy Commissioner, evidence p.837.

agency such as that proposed in the bill. However, ICAC agreed that prior internal disclosure should not be required before disclosure to the Agency.[10]

12.21 Dr Jean Lennane commented that in relation to accountability of the Agency, the bill does not specify any time limits under which the Agency must respond to whistleblowing allegations. Delays in dealing with complaints is an important health issue for whistleblowers. Additionally, Dr Lennane suggested that to monitor the effectiveness of Agency operations, ongoing consumer satisfaction surveys should be conducted by an external, reputable academic body reporting to the Parliamentary Joint Committee.[11]

12.22 With regard to Agency reporting requirements, the NCA felt it may be inappropriate that the Governor-General be included in the reporting chain described in clause 34. The NCA noted that there was no equivalent provision in the Ombudsman Act 1976. Also, the bill was unclear about what powers the Governor-General was expected to exercise which could involve that office in political or controversial matters. The NCA suggested that it would be more appropriate for the Prime Minister or Parliament to receive reports instead of the Governor-General, being a procedure which is used in other Commonwealth legislation.[12]

Legislative coverage

12.23 From a whistleblower's perspective, it was proposed that any legislation should be as broad in its coverage as possible. The QWS and Greenpeace argued for provisions, where possible, that cross Federal/State jurisdictions. This emphasis was needed to counter inadequacies perceived by whistleblowers with established independent watchdogs and to encourage uniform levels of cover for whistleblowers

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10 Independent Commission Against Corruption, evidence p.737.

11 Dr Jean Lennane, evidence p.708.

12 National Crime Authority, evidence p.440.

in State legislation.[13] The Attorney-General's Department assessed the bill's coverage of public administration as "very broad." Allegations of wrongdoing extended beyond the Gibbs Committee proposals to include summary offences, some decisions that are subject only to administrative law remedies and the suppression of an expert opinion, finding or document. The Department commented that "overall, this coverage appears to be potentially broader than the schemes which currently operate in other jurisdictions."[14]

12.24 The broad range of responsibilities given to the Whistleblower Protection Agency comprising investigation of complaints, protection of whistleblowers and arranging counselling, were viewed as potentially incompatible. Two submissions in particular commented that these functions are distinct in nature and require different skills.[15] Potentially, the grouping of these functions under the responsibility of one body could lead to confused perceptions (whether deserved or not) of its role and loyalties.[16] QWS suggested that the counselling function could be easily performed by specialist private sector or whistleblower support groups.

12.25 Another perceived shortcoming of the bill was that it ignores existing secrecy provisions and investigatory channels which deal with matters of national interest. The Attorney-General's Department argued that this lack of reference to the "application of secrecy provisions in existing legislation (either by recognising that such provisions apply or by exempting whistleblowers from them)" makes the bill defective.[17] It was also argued, in keeping with the recommendations of the Gibbs

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13 Queensland Whistleblower Study, evidence p.1024 and Greenpeace Australia, evidence p.1292. See also Human Rights Commissioner, evidence p.11;

14 Attorney-General's Department, evidence p.125.

15 Attorney General's Department, evidence p.126; Equal Opportunity Commissioner (SA), evidence 396.

16 Queensland Whistleblower Study, evidence p.1026.

17 Attorney-General's Department, evidence p.126. See also Privacy Commissioner, evidence p.837: who asserts that the bill has a clear intention to provide protection for breaches of secrecy provisions which might attract criminal sanction, but observes that there appears to be no specific provision included in the bill to cover such occurrences.

Report, that the existing investigatory power of the Inspector-General of Intelligence and Security makes it the most appropriate authority to inquire into matters of national security and intelligence.[18]

Investigative powers

12.26 The Committee received considerable comment concerning the investigative powers of the proposed Whistleblowers Protection Agency. For example, the Law Society of NSW believed that the Agency should not investigate anonymous complaints, that a whistleblower's name should not be released unless and until the individual's consent was obtained and that a person under investigation should not only have the right to make a submission to the Agency, but have the right to call evidence before an inquiry and be represented by another party.[19]

12.27 Conflicting views on protection from self-incrimination were also received. The Law Society of NSW strongly recommended that clauses 25 and 26 be amended to ensure that a person appearing before an inquiry would be excused from having to provide information or documents or answer questions which would contravene a law, incriminate or, make such a person liable to a penalty or where information was the subject of legal professional privilege.[20]

12.28 The Australian Federal Police on the other hand, considered that the bill "does not take sufficient account of the existing provisions, principles and requirements underlying the application of the criminal law and laws of evidence."[21] In contrast to the view of the Law Society of NSW, the AFP believed that employees subject to investigation by the Agency should not be able to decline to disclose

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18 Attorney-General's Department, evidence p.125; National Crime Authority, evidence p.439.

19 The Law Society of NSW, Submission no. 105, p.1-2.

20 ibid., p.2.

21 Australian Federal Police, evidence p.82.

information on the grounds that they would incriminate themselves. However, the AFP made the proviso that any information released by the Agency as a result of a direction to provide information, should not be admissible evidence in proceedings against the person complying with the direction. An exception to this would be if the person was subject to disciplinary or criminal proceedings for the supply of false or misleading information in consequence of a lawful direction.[22]

Protections and remedies

12.29 The NCA observed that the bill does not appear to provide any protection for whistleblowers from criminal proceedings in respect of their disclosures.[23] The Privacy Commissioner commented that privacy protections in the bill could be strengthened with respect to the subjects of whistleblowing. He suggested that "a confidentiality clause, similar to that provided for whistleblowers, be included for all other individuals party to the allegation."[24] Dr Jean Lennane recommended that 'forced' referrals of employees for psychiatric examinations should be included in clause 7 as a prohibited personnel practice[25]

12.30 The Privacy Commissioner commented that it seemed appropriate to canvass a range of options in the provision of remedies and forms of assistance, rather than rely on financial remedies alone.[26] Also, the NCA suggested that there should be provided "a power to apply to the Federal Court of Australia to determine a question with respect to the exercise of a power of the Agency or the performance or proposed performance of a function by the Agency."[27] The Law Society of NSW

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22 ibid., p.83.

23 National Crime Authority, evidence p.440.

24 Privacy Commissioner, evidence p.837.

25 Dr Jean Lennane, evidence p.707.

26 Privacy Commissioner, evidence p.837.

27 National Crime Authority, evidence p.440.

recommended that in relation to clause 31, access to the Federal Court for the granting of an injunction should be also available to "the person who is the subject of the prohibited personnel practice or harassment."[28]

General comments

12.31 Many witnesses, through their submissions and evidence, were heartened that the issue of whistleblowing, including discussion of appropriate legislative cover, protection and remedies for genuine whistleblowers, had been elevated to a broad examination by the Commonwealth through this Committee. Whistleblowers Australia commented in relation to the Whistleblowers Protection Bill that:

> If the proposed legislation purports to acknowledge whistleblowing as a civic responsibility, then the title 'Whistleblowers Protection Bill' infers a theme directed towards the security and well being of the whistleblower. The title and theme of the legislation is an acknowledgment that an established need exists to preserve and protect the rights of a person who makes a disclosure in the public interest.[29]

The Australian Medical Association was also positive and welcomed the bill "as an innovative and timely response to a genuine community need."[30] Support for the bill was also expressed in many other submissions.[31]

12.32 The Committee acknowledges the constructive comments and suggestions that it has received relating to the Whistleblowers Protection Bill 1993.

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28 Law Society of NSW, Submission no. 105, p.2.

29 Whistleblowers Australia, evidence p.701.

30 Australian Medical Association, Submission no.27, p.1.

31 See for example Greenpeace Australia, evidence p.1292; United Scientists for Environmental Responsibility (USERP), Submission no.62, p.2; Australian Institute of Company Directors, evidence p.882. The institute broadly supported the objective of the bill, but recommended that its application be confined to the public sector only; Christina Schwerin, evidence p.490; Human Rights Commissioner, Submission no. 82, p.23.

The Committee has made recommendations in accordance with its terms of reference that whistleblowing should be the subject of Commonwealth legislation and on the form that the legislation should take. In making its recommendations the Committee considered the model for whistleblower protection proposed in the Whistleblowers Protection Bill, together with the comments on the bill received in evidence. A number of these proposals and comments have been incorporated into the Committee's recommendations.

12.33 For example, the Committee's proposals as to what persons and organisations should be covered by whistleblowing legislation are similar to the extent of cover proposed in the bill and its views on the protection that should be extended to both whistleblowers and the subjects of whistleblowing is in accord with the general thrust of protections proposed in the bill. The Committee agrees with the creation of a new agency, but proposes a different structure and functions for the Agency to those proposed in the bill.

12.34 The Committee acknowledges the valuable contribution that the Whistleblowers Protection Bills of both Senator Vallentine and Senator Chamarette have played in generating debate within the Commonwealth arena on the subject of whistleblowing. In particular the Committee recognises that many aspects of the bill have been adopted and included, in one form or another, in its own recommendations.

12.35 **The Committee concludes that with the introduction and passage of whistleblower protection legislation in the form recommended in this report, further parliamentary consideration of the Whistleblowers Protection Bill 1993 should not be required.**

Senator Jocelyn Newman
Chair
August 1994