TABLE OF CONTENTS

WHISTLEBLOWING: THE QUEENSLAND EXPERIENCE

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Not long after my daughter first started attending primary school, she was playing at home with another little girl. When her friend threatened to tell my wife about something my daughter was doing which she shouldn't have been, my daughter admonished her with the words "dobbers kiss robbers".

This silly, seemingly harmless expression, that on any logical analysis is a complete *non sequitur*, in fact demonstrates one enormous problem we face in trying to encourage public officers to report misconduct in the public sector. The expression, clearly derived from school yard parlance, was used by pupils to discourage others from reporting misconduct of fellow students to teachers or to ridicule and isolate those who had.

If that attitude is inculcated into our children from their earliest school life, how can we hope to displace it in the workplace?

There are other expressions which mean the same thing and with which you are probably more familiar. For example, "he's a dog" and "you don't rat on your mates". The latter expression is quite insidious because it draws justification from the legitimate Aussie value - mateship; mateship in battle, mateship on the footy field, mateship at the pub on Saturday night or at the Sunday barbie.

Some have also argued that the reluctance of Australians to report criminal conduct or misconduct to persons in authority is intertwined with our historical distrust of authority.

Why encourage whistleblowing?

Whistleblowing benefits both the public and the public agency in which the reported improper conduct occurred.

The public benefits from whistleblowing include:

- action will be taken to stop the wrongdoing;

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- if someone is being unfairly advantaged, someone else is being unfairly disadvantaged - whistleblowing can stop this unfair treatment and help create a level playing field;
- preventing danger to the health and safety of people;
- preventing serious damage to the environment; and
- bringing the perpetrators of wrongdoing to justice.

The benefits to an agency from encouraging and protecting whistleblowers include:

- early identification of conduct needing correction;
- early identification of systemic weaknesses that make the organisation vulnerable to loss, criticism or legal action;
- creating an opportunity to put better work practices in place to prevent wrongdoing in the future;
- maintenance of a positive corporate reputation; and
- improving accountability in the agency.

Why people don't blow the whistle

I've already mentioned feelings of disloyalty to work colleagues. These are some other reasons:

- belief that nothing useful will be done;
- belief they do not have enough evidence of the wrongdoing;
- not wanting to become the subject of public attention; and
- fear of reprisals and disapproval from work colleagues and others.

How to encourage whistleblowing

How, then, do we encourage public sector officers to report significant wrongdoing in the workplace? The first step is obviously whistleblower legislation of the kind enacted in various jurisdictions in Australia and now enacted in Victoria, that does the following:

- recognises that it is in the public interest to report significant wrongdoing;
- provides avenues for reporting;
- provides specific protection for those who report; and
- provides avenues of redress in the event that a discloser is the subject of detrimental treatment.

Avenues of disclosure

I note that under the Victorian Act the Ombudsman has the primary role. Under the Queensland *Whistleblowers Protection Act 1994*, various agencies have a role:

1. Each public sector entity has responsibility for receiving and dealing with disclosures of wrongdoing about its own operations or officers.

2. The Crime and Misconduct Commission (CMC) (formerly the Criminal Justice Commission (CJC)) can receive disclosures from public officers about conduct that is official misconduct. Essentially, official misconduct is corrupt or other serious misconduct by a public officer. It must involve conduct that:

- is not honest or impartial;
- is a breach of trust;
- is a misuse of official information.

   The conduct must also be sufficiently serious to be a criminal offence or to provide reasonable grounds for terminating the officer's employment. Therefore it is very similar to the Victorian Act's definition of "improper conduct".

3. The Ombudsman's Office also has power to investigate complaints by whistleblowers of maladministration. Maladministration was only included in the Queensland Whistleblower's Protection Act at the request of the former Ombudsman. It is defined as "administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory, or taken for an improper purpose". Therefore, it covers an extremely broad range of conduct and in this respect the Queensland Act is wider than its Victorian counterpart.

It needs to be understood that in Queensland, the Ombudsman does not have jurisdiction to investigate operational actions of police officers. That is the role of the CMC.

Protections provided by the Queensland Whistleblower's Protection Act

I note that some of the protections in the Queensland Act also appear in the Victorian Act. For example:

- It is an offence to take action against a person in reprisal for a whistleblower making a disclosure. In Queensland it is an indictable offence punishable by two years imprisonment or a fine of 167 penalty units ($12,525). The equivalent offence in the Victorian Act attracts the same maximum term of imprisonment.
- A reprisal is also a tort and a person who takes a reprisal is therefore liable in damages to anyone who suffers detriment.
- There is a right to apply to the Industrial Commission or to the Supreme Court for an injunction where a reprisal has caused or may cause detriment to an employee.
- In proceedings for defamation there is a defence of absolute privilege for making a public interest disclosure.

- Public interest disclosures do not contravene any confidentiality requirement.

There are also obligations on public sector entities that extend the protection to whistleblowers.

- The most important one is that public sector entities must establish reasonable procedures to protect their officers from reprisals.
- It is an offence for any officer involved in the Act's administration to disclose information intentionally or recklessly about a public interest disclosure to unauthorised persons.
- A public sector entity must not refer a disclosure to another entity unless it first considers whether there is an unacceptable risk that a reprisal would be taken against any person because of the referral. The agency must consult with the person who made the disclosure if this is practicable.
- An entity that receives a public interest disclosure must provide reasonable information about action taken and the results to the discloser.
- Public sector entities must keep records of disclosures and report annually on the number of disclosures received and whether they have been substantiated.

Crime and Misconduct Act 2001

The Crime and Misconduct Act 2001 provides further protections to whistleblowers who assist the CMC in the performance of its functions. The CMC's functions include:

- receiving complaints of official misconduct against public sector officers; and
- receiving complaints of misconduct by police officers.

Therefore, any public sector officer who makes such a complaint is considered to be assisting the CMC in the performance of functions and may have the benefit of the protections afforded. The protections include:

- it is an offence to engage in prejudicial conduct because a person has assisted the CMC;
- the CMC may apply to the Supreme Court for an injunction where a person or organisation has engaged, or is proposing to engage, in such prejudicial conduct; and
- the CMC can also offer witness protection to persons who assist it in the performance of its functions.

How to make a public interest disclosure

So is there a best way to make a public interest disclosure? Here are some suggestions:

- Wherever possible, a person who makes a public interest disclosure should do so in such a way as to maximise legal protections available.
- Consider which entity is the most appropriate to receive the disclosure and in the best position to deal with it.

- Public interest disclosures only apply to information that a person honestly believes on reasonable grounds tends to show wrongdoing or a specified danger. Therefore, potential disclosers need to consider whether their information meets this test.
- It is also important to identify sources of support from inside and outside the organisation, including family members, without disclosing confidential information.
- If blowing the whistle internally, it is important for whistleblowers to consider who is best placed in the organisation to receive the disclosure. In some cases it may be preferable to report directly to the CEO rather than to the immediate supervisor. In Queensland, CEOs are obliged to report suspected official misconduct to the CMC.
- Whistleblowers should also specify to the recipient of their disclosure how they want to be contacted and how best to keep their identity confidential.

Common errors made by agencies in managing whistleblower disclosures

Agencies have a responsibility to deal with disclosures from whistleblowers in such a way that they are not unnecessarily exposed to adverse treatment. Agencies must avoid the following:

- failing to observe the confidentiality of a disclosure by passing the information through various hands, eg forwarding the disclosure through the chain of command;
- interpreting natural justice to mean that persons about whom a disclosure is made have an immediate right to details of it;
- allowing personal biases about the personality of the whistleblower to influence the assessment of the disclosure;
- not taking seriously concerns expressed by whistleblowers about the possibility of reprisal;
- ignoring potential conflicts of interest when deciding who should assess or investigate the disclosure;
- unreasonably delaying the investigation of the matter as a result of which evidence of wrongdoing is altered or destroyed.

Reprisals

For conduct to amount to a reprisal the conduct need only be a substantial ground for the detrimental act or omission even if there is another ground. I understand this is also the case in the Victorian Act.

However, reprisals can be camouflaged in subtle ways that make it difficult to establish that a detriment to a whistleblower resulted from making a disclosure and not from some other legitimate action or decision. Here are some examples:

- the whistleblower's position is made redundant or the office is restructured so that the independence of the whistleblower's position and responsibilities are reduced;
- the whistleblower is transferred for some seemingly legitimate work-related reason;
- the whistleblower's reputation in the workplace is undermined;

- the motives for making the disclosure are challenged;
- disciplinary action is taken against the whistleblower because of alleged indiscretions in the workplace or poor work performance; or
- the whistleblower is inundated with work and then branded incompetent when it is not completed.

In my experience, the difficulty in investigating these matters is to establish that the making of the public interest disclosure is a substantial ground for the detriment suffered.

Case study

The following case study shows the limitations of whistleblower protections in some work situations. The then CJC investigated an alleged reprisal against the CEO of a local government body. The CEO had given information to the CJC of suspected official misconduct of councillors. The CJC sought an injunction to restrain the Council from terminating the CEO's employment. The Council argued that the provisions of the *Criminal Justice Act* under which the injunction was sought did not have any valid operation because of inconsistency with *the Commonwealth Industrial Relations Act 1988*. The judge at first instance agreed but the Court of Appeal held that the provisions of the *Criminal Justice Act* were supplementary entitlements which were not expressly or implicitly prohibited by the *Industrial Relations Act*.

However, that was not the end of the matter. Whether an injunction could or should have been granted, the relationship between the CEO and the majority of the councillors had deteriorated to such an extent that it would have been dysfunctional for the Council if the CEO had remained in office. The parties eventually reached an agreement for terminating the CEO's contract.

That was an unusual case but the limitations on external agencies such as the Ombudsman's Office to prevent whistleblowers from suffering some detriment reinforces the need for each public sector agency to take primary responsibility for protecting its own officers from reprisals.

I have searched for other cases on reprisals in preparing for this address but the only others involved civil actions for the tort of reprisal in which the plaintiff unsuccessfully claimed that the public sector employer was vicariously liable for the reprisals taken by its employees. In *Howard v State of Qld* [2000] QCA 223, the Court of Appeal held that "the nature of the tort identified in s 43 *[of the Queensland Whistleblowers Protection Act 1994]* is such that it may be committed only by the direct acts of a person or corporation and that vicarious liability for the acts of others is excluded."

The exception to this is where the officer of the public sector agency who takes the reprisal has sufficient control over the agency's governing mind that the agency becomes directly liable for the reprisal.

The Queensland Experience

I have held the position of Queensland Ombudsman for only six months. However, I am advised by my officers that the Office has dealt with relatively few cases categorised as whistleblowing. One of the principal reasons for this is that “improper conduct”, as

defined in the Victorian Act, would be official misconduct and therefore within the CMC's jurisdiction rather than the Ombudsman's.

My officers could only recall a few cases where complainants were treated as whistleblowers. They advised that in some of those cases, although care was taken not to reveal the complainant's identity during the investigation, other officers guessed who had reported the matter because the complainant had made his or her concerns known within the workplace before lodging the complaint.

Under the new *Ombudsman Act 2001* in Queensland, which commenced in December 2001, persons who cause or threaten to cause detriment to a person because the person has given information to the Ombudsman commit an offence, whether or not the person's assistance amounts to a public interest disclosure under the Whistleblowers Protection Act. Therefore, an allegation that such conduct has occurred would be investigated by my Office or referred to the CMC.

As mentioned earlier, the CMC also has a special role under the Whistleblower's Protection Act to receive disclosures involving official misconduct. The CMC also provides an advisory service to persons by explaining what is involved in making a public interest disclosure and the possible consequences.

Agencies in Queensland are required to report on public interest disclosures received in each financial year. The CMC's analysis of public interest disclosures for 2000/2001 shows that 17 complaints (involving 64 allegations) were received. Of these, 58 allegations were made by public officers complaining of official misconduct and five were complaints of reprisal. None of the allegations of reprisal was substantiated but 10 of the 58 allegations of official misconduct were substantiated. In considering these figures it needs to be understood that more than two-thirds of the complaints the CMC received were complaints of police misconduct and 75 per cent of those were made by the public. 16 per cent were made by police officers but most of those were senior officers acting under their statutory duty to report misconduct of fellow officers. Such reports are not classified as reports by whistleblowers.

Role of senior officers

Chief Executive Officers, Senior Executive Service officers and other senior officers are highly influential on the culture of the organisation and standards of ethical behaviour. It is vital that these officers set high standards of behaviour and are seen to encourage and support officers who disclose wrongdoing in the workplace. They should highlight the positives of such behaviour in terms of productivity, accountability and opportunities for improvements to administrative processes.

Impact of Whistleblower legislation on ethical standards

It is difficult to measure the impact whistleblower legislation has had on standards of ethical behaviour in the public sector. However, I would strongly argue that it is a necessary component of any effective accountability framework.

It is possible to measure whether standards of ethical behaviour have improved in an organisation. The CJC undertook such an exercise in relation to ethical standards of police behaviour 10 years after the implementation of the recommendations of the

Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report) which resulted in the establishment of the CJC.

In its report titled *Integrity in the Queensland Police Service - QPS reform update - March 2001*, the CJC concluded that overall standards of police behaviour in Queensland had improved over that period. The report also concluded that younger police are increasingly more aware of their legal and ethical obligation to report misconduct by fellow officers and are more likely to do so. However, many police are still reluctant to report their peers because of concern about the consequences, particularly the reaction of fellow officers.

The CJC's research indicated that police are most likely to report a fellow officer where criminal or corrupt acts are alleged and are least likely to initiate complaints about alleged excessive force or arrest-related matters.

Moving on

If you are giving advice to a whistleblower or potential whistleblower, you need to keep this in mind. In some cases, although the whistleblower may have reasonable grounds to honestly believe that wrongdoing has taken place, the subsequent investigation does not substantiate that belief to the point where action is taken of the kind the whistleblower considers appropriate and just. This may not be because the investigation was shoddy or the information was not taken seriously but because of the standard of proof required to substantiate such wrongdoing before a court or tribunal.

Whistleblowers who strongly believe that the wrongdoing has not been properly addressed can find it difficult to accept the outcome. Some have such a strong commitment to their complaint, that they can act in an obsessive manner creating further disadvantage for themselves. They know they are in the right and yet they are the ones being victimised.

Sometimes the whistleblower has to accept that the matter will not be resolved in the manner he or she considers just and fair and to adopt the attitude that what's happened has happened and it's time to move on. Accepting that this point has been reached is not the same as condoning the wrongdoing.

Conclusion

The sorts of problems I have highlighted in this address can manifest themselves regardless of the precision of the legislative framework underpinning whistleblower disclosure and protection.

I reiterate the following points:

1. Agencies must take primary responsibility for protecting their own officers who act in the public interest by reporting wrongdoing.

2. CEOs and other senior officers must support and be seen to support responsible reporting.

3. Potential whistleblowers, in considering how best to blow the whistle to protect their own interests, should ask themselves these questions:

- Do I have reasonable grounds for my proposed disclosure?
- Am I making my disclosure in the public interest or solely for revenge or personal or political gain?
- Will the way in which I intend making the disclosure maximise the legal protections available to me?
- Do I have sufficient evidence to support my suspicions without needing to gather further evidence from my workplace after the disclosure?
- Am I prepared for possible disapproval of my actions from fellow workers and friends?
- What sources of support are available to help me after I blow the whistle?

Reporting wrongdoing within one's own organisation is rarely an easy business. It takes courage. However, whistleblowers who work within the legislative framework so as to take advantage of the protections available, can do the right thing without jeopardising their careers or their health.

Further references:

"Exposing Corruption: A CJC Guide to Whistleblowing in Queensland", 1999 (available on the Crime and Misconduct Commission's website - www.cmc.qld.gov.au).

"Protected Disclosures Guidelines", NSW Ombudsman, 4th ed, 2002.

WHISTLEBLOWERS PROTECTION ACT 2001
A view from the Ombudsman's Office

John Benson and Marlo Baragwanath***

Edited version of a paper presented to a seminar held by the Victorian Chapter of the AIAL on 15 April 2002 in Melbourne.

Part 1: Overview of the Whistleblowers Protection Act 2001

Introduction

The Victorian *Whistleblowers Protection Act* 2001 (the Act) came into force on 1 January this year. The purposes of the Act are:

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies;
- to investigate such matters; and
- to protect persons who make disclosures and persons who may suffer reprisals in relation to the making of those disclosures.

While the Act itself is new, there is actually very little that is new in the Act. Individuals, who have been called whistleblowers since 1 January 2002, were previously called complainants by the Ombudsman and indeed by public bodies themselves. There are however some new concepts in the Act. These include:

- the protection given to whistleblowers;
- MPs and municipal councillors fall within the scope of the Act; and
- every public body, if it does not already have an internal complaints handling process, will be required to implement one. This process must be in accordance with the Act and the Ombudsman's guidelines.

An "umbrella" view of the scheme

Before going into the detail of the legislation itself, it may assist a better understanding of the Act to give an outline of the scheme.

In its essence, the scheme comprises two steps.

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- Step 1
  Receipt of a disclosure – information is received and assessed to see if it meets the statutory criteria in Part 2 of the Act. If it does, it is deemed under Part 3 of the Act to be a protected disclosure. Hence, the person, who disclosed the information, receives the protections under the Act.
- Step 2
  Is the disclosure a public interest disclosure? If it is deemed to be so, the disclosure must be referred to the Ombudsman, who will make a formal determination as to whether the matter is a public interest disclosure.
- If it is *not* a public interest disclosure, the whistleblower does not lose the protections of the Act. The matter may be resolved through other complaint resolution methods.
- If it *is* a public interest disclosure, the Ombudsman will decide who will investigate the matter. Whether matters are found to be substantiated or not, protection for the whistleblower continues. Furthermore, the body against which disclosure has been made owes ongoing obligations to the whistleblower.

The scheme in greater detail

Scope of the Act

The scope of the Act is wider than that of the *Ombudsman Act* 1973. The definition of "public body" comprehends municipal councils, and the definition of "public officer" comprehends MPs and municipal councillors.

What is a protected disclosure?

A complaint or allegation is only a protected disclosure if it is made in accordance with the Act and the Ombudsman's guidelines.

Section 5 of the Act, which sets out what matters constitute a disclosure, is a rather strange piece of legislative drafting. This section poses the question 'who can make a disclosure?' and goes on to provide the answer:

> a natural person who believes on reasonable grounds that a public officer or public body has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or a public body or has taken, is taking or proposes to take detrimental action.

Natural Person

Only a natural person can make a protected disclosure. If a disclosure is made to a public body by a company or a group (eg. a local residents action group), it is advisable for the protective disclosure coordinator to request that a single employee of the company or member of the group make the disclosure personally.

A complaint can be made in writing or orally and can be made anonymously. The complaint must be made either to the public body to which it relates or to the Ombudsman.

Improper Conduct

Improper conduct is defined as corrupt conduct, a substantial mismanagement of public resources, conduct involving substantial risk to public health or safety or the environment, which would, if proved, constitute a criminal offence, or an offence for which the officer could be dismissed.

The second reading speech for the Act speaks of this kind of conduct being serious wrongdoing – this is probably a good marker to bear in mind when contemplating this type of conduct. The Ombudsman's office will be interpreting improper conduct quite narrowly within the spirit of the legislation. The notion of corrupt conduct is being interpreted as requiring an element of dishonesty. Hence an allegation of medical negligence does not have the requisite dishonesty element, however if there is some kind of conspiracy or cover up in relation to the negligence, this may contain the relevant dishonesty.

Believes on Reasonable Grounds

Given the definition of a disclosure, the other question that must be determined is 'what constitutes a belief on reasonable grounds?'. The courts in other contexts have had much to say about this concept. As a starting point, one can say that a belief is something more than a mere suspicion.

"Reasonable grounds" is an objective test. It is whether a reasonable person in possession of the information would form a belief that the conduct occurred – the courts at times have referred to "reasonable probability".

Hence, whilst we cannot spell out with great clarity what constitutes reasonable grounds for believing something, we at least know that it is more than a mere suspicion, and is more similar to reasonable probability.

In order to ascertain whether or not someone has 'reasonable grounds', one needs to look at the facts and circumstances and evidence or proof that the whistleblower provides to substantiate his or her allegations. At this stage in the process, the onus is on the potential whistleblower to provide the facts, circumstances and evidence to justify the protections under the Act. It is not up to the public body to provide this for them.

If the allegation satisfies the indicia within Part 2 of the Act, it becomes a 'protected disclosure'. This means that both the allegation and the whistleblower enjoy the protection provided by the Act.

What is a Public Interest Disclosure?

If it is decided that a disclosure is a protected disclosure, the public body must next determine whether the matter is a public interest disclosure. Section 28 of the Act provides that this must be done within 45 days from the receipt of the disclosure.

In doing this, the public body must consider whether the disclosure "shows, or tends to show" that the conduct has occurred. Legal interpretation of this phrase in other contexts generally indicates that the disclosure reveals or makes known the conduct. In considering this disclosure to see whether it is a public interest disclosure, the

Ombudsman would expect the public body, where appropriate, to check its own records and speak further with the whistleblower.

If the public body decides that the matter is a public interest disclosure, it must refer the matter to the Ombudsman for a formal determination. If there are any doubts or queries when determining these matters, the Ombudsman's Office should be contacted to discuss the matter.

Referral and Investigation of a Public Interest Disclosure

When a matter is referred to the Ombudsman as a possible public interest disclosure, the Ombudsman will make a formal determination thereon. If the Ombudsman determines that a matter is a public interest disclosure, the matter must be investigated. The Ombudsman can undertake the investigation himself or refer it to the public body, the Chief Commissioner of Police, the Auditor-General, the Environmental Protection Authority or any other body the Ombudsman believes is best qualified to do the investigation.

In the case of a referral of the matter to the public body for investigation, Part 6 of the Act applies. Part 6 allows the Ombudsman to take over the investigation, if he is not satisfied with the actions of the public body in investigating the matter. Furthermore, Part 6 allows the public body to refer the matter to the Ombudsman, if considers that its own investigation is being obstructed.

Section 82 of the Act requires that the public body furnish the Ombudsman with a report of its findings and the steps taken in light thereof.

Protections Afforded to the Whistleblower

The protections afforded to the whistleblower under the Act comprise the following:

- immunity from civil and criminal liability and disciplinary action for making the disclosure;
- immunity from liability for breaching confidentiality provisions;
- protection from actions in defamation;
- right to sue for damages or to stop actions in reprisal;
- the Ombudsman and public bodies cannot reveal the whistleblowers identity in any reports made under the Act;
- it is an offence to reveal information as a result of a disclosure or investigation except in limited circumstances (s.22. Penalty – $6,000.00 fine and/or 6 months imprisonment);
- it is an offence to take detrimental action against a person in reprisal for a protected disclosure (s.18. Penalty – $24,000.00 and/or 2 years imprisonment).

Part 2: The Main Concepts within the Ombudsman's Guidelines

When dealing with whistleblowers it is important to be aware of the advice, which is contained within the Ombudsman's Guidelines (the guidelines). The guidelines cover each stage of the process and contain model procedures, which a public body can adopt. Note that s.68 of the Act requires public bodies to establish procedures for handling whistleblowers complaints. The guidelines can be found at www.ombudsman.vic.gov.au.

The following key areas are dealt with below.

1. The receipt of a disclosure;
2. The welfare management for the whistleblower and the protections available to him or her;
3. The natural justice concerns arising with respect to the subject of the complaint.

Receipt of a Disclosure

This should be a centralised process, as the process will often involve the public body's head office. The Ombudsman's office generally finds that it usually deals with the public bodies' head offices on the other matters that it investigates (eg under the *Ombudsman Act* 1973 and the *Police Regulation Act* 1958).

You should identify who within your organisation is to receive the disclosure so that the external or internal whistleblower can make a disclosure directly to them. The Dept of Justice (DOJ) is setting up a "Public Bodies Register", which will list all the public bodies who are subject to the Act and the relevant contact person within these bodies. Furthermore, the DOJ has also set up a central telephone service, which will provide people with the relevant contact details. It can be accessed by dialing 1300 366 356.

All staff should be made aware of the Act, and their body's procedures. In particular, reception staff and staff at call centres should be trained so that they are aware to whom they should refer a complaint if a person mentions the Act.

The guidelines advise that there should be two officers.

1. Protected Disclosure Officer (PDO):

   The PDO is the person who receives the disclosure and makes an assessment as to whether is a protected disclosure. There can be a number of these within large bodies or bodies with a regional structure. They are a contact point for advice about the Act and can receive disclosures. They are responsible for forwarding the protected disclosure to the protected disclosure coordinator.

2. Protected Disclosure Coordinator (PDC):

   The PDC has responsibility for the assessment of protected disclosures. They decide whether a protected disclosure may amount to a public interest disclosure, or whether it should be handled by some other complaint process. They should be of sufficient seniority to have direct contact with the CEO. Where the PDC is of the

opinion that the allegation may amount to a public interest disclosure, he or she must refer the matter to the Ombudsman for a formal determination.

The PDO and PDC can be one and the same person within an organisation. However, whilst these roles can be performed by the same individual, the guidelines make it clear that the roles of investigator and welfare manager must be separate from each other.

The guidelines are sufficiently flexible to allow a public body to out-source these roles if it does not want to perform them in house. This means that a nominated external consultant can receive and assess the disclosures. However, there is still a statutory responsibility upon the public body to make a final decision on whether the disclosure is a protected disclosure or public interest disclosure. Hence, the consultant can only have an advisory role.

The PDC also has the role of appointing an investigator if the Ombudsman determines that the matter is a public interest disclosure and refers the matter back to the public body for investigation. As with the receipt of the allegation, the investigation can also be out-sourced.

Welfare Management of the Whistleblower

The Act is quite unique because it protects both internal and external whistleblowers. The requirements to protect an internal whistleblower are of course more substantial. In addition, the person who is the subject of the allegations is also entitled to welfare management.

Internal Whistleblowers

An internal whistleblower is to be given sufficient protection to go about his or her job without harassment or victimisation from peers or superiors. The whistleblower should also be advised that his or her confidentiality will be protected as far as possible. This is particularly important when and if the matter reaches the stage of investigation, as it may be impossible to investigate without people becoming aware of the whistleblower's identity (eg. if only the whistleblower had access to a certain class of information). The whistleblower should be informed of this fact and told that the other protections within the Act will still apply.

External Whistleblowers

In the case of external whistleblowers, the rights and protections should be explained to them and also the confidentiality required under the Act. However, so far it is unclear what other protection they may require.

The Subject of the Allegation

The subject of an allegation is equally entitled to a welfare manager and support. It may be the case that an investigation will not be substantiated and this person, on becoming aware they are the subject of a complaint, may be very rightly upset. The allegation will most probably be very serious and as much as possible, their confidentiality should be protected.

Natural Justice for the Subject of the Allegation

The principles of natural justice should be followed in any investigation of a public interest disclosure. The principles of natural justice concern procedural fairness and aim to ensure that a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals, and enhances public confidence in the process.

Public bodies should take particular note of the following points.

- The person who is the subject of the disclosure is entitled to know the allegations made against him or her and must be given the right to respond. However, this does not mean this person must be advised of the allegation as soon as the disclosure is received or the investigation has commenced. Rather, it means that the subject of the allegation must have the allegations put to him or her prior to the conclusion of the investigation.
- All relevant parties to a matter should be heard and all submissions should be considered;
- If the investigator is contemplating making a report adverse to the interests of any person, that person should be given the opportunity to put forward further material that may influence the outcome of the report and that person's defence should be fairly set out in the report.

Part 3: General Discussion of "Corrupt Conduct"

The purpose of this part of the paper is to explain the concept of "corrupt conduct" as defined by the Act. Of all the types of 'improper conduct' comprehended by the Act, corrupt conduct is the most comprehensively described. It is the breadth of its description which may prove problematic, when public bodies seek to decide whether disclosed conduct is improper or not.

Corrupt conduct is defined in s.3 of the Act as meaning:

(a) conduct of a person that affects the *honest performance* of a public body's or officer's functions; or

(b) performance of a public officer's functions *dishonestly or with inappropriate partiality*; or

(c) conduct of a public officer, or former public officer, that amounts to a *breach of public trust*; or

(d) misuse of information or material acquired in the course of the performance of their functions (whether for a person's benefit, the public body's benefit or otherwise); or

(e) conspiracy or an attempt to engage in any of the conduct listed in (a)-(d).

The above definition is very broad. It could be considered to include any conduct which involves dishonesty, from taking stationery from the office for personal use, to the taking of bribes for the granting of a benefit eg. a planning permit or a pollution licence.

At its most basic, dishonesty or corruption could be considered to be the foregoing of a public interest for a private benefit. If the definition were to be left in these broad terms, it could result in trivial or minor infractions being the subject of whistleblower complaints. Fortunately, the definition can to some extent be read down by the requirement in paragraph (f) of the definition of improper conduct. This paragraph requires that such conduct, if proved, must constitute:

(a) a criminal offence; or

(b) reasonable grounds for dismissal of the public officer.

The second reading speech gives further confirmation that the conduct in question must be of a serious nature. Mr Wynne MP, speaking on behalf of the Attorney-General who was absent, stated that the conduct contemplated by the Act involves serious impropriety, and that the legislation makes it clear that public interest disclosures are about serious wrong-doings.

Similar Acts in other States define corrupt conduct in more precise terms. The NSW *Protected Disclosures Act* 1994 adopts the definition of 'corrupt conduct' contained in the *Independent Commission Against Corruption Act* 1988 (*ICAC Act)*. This contains a list (which is inclusive, not exhaustive) of conduct which may be considered corrupt. The list includes the following type of conduct: official misconduct, bribery, blackmail, fraud, violence, tax or revenue evasions etc. This provides some guidance as to what conduct is considered corrupt, ie it must be reasonably 'high level'.

If corrupt conduct under the Victorian legislation is seen to relate to dishonesty – as is contemplated in the provisions which further define corrupt conduct – then it differs from the NSW legislation which includes violence as corrupt conduct. Violence does not contain the requisite level of dishonesty to constitute corruption under the Victorian legislation.

In the case of *Balog v Independent Commission Against Corruption*,[1] the High Court noted that corrupt conduct was defined in ss 7, 8 and 9 of the *ICAC Act*. However, the Court went further and defined corrupt conduct as extending to:

> generally to any conduct of any person that adversely affects or could adversely affect the honest exercise or impartial exercise of official functions or which constitutes or involves the dishonest or partial exercise of official functions or a breach of public trust. It also includes conduct that adversely affects the exercise of official functions and involves any one of a number of specified criminal offences, including bribery, blackmail, perverting the course of justice and the like. Nevertheless, conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissing or dispensing with the services of a public official or otherwise terminating those services.

An interesting point to note is that many of the phrases used in this judgment have been specifically adopted in the Victorian legislation to further define corrupt conduct - particularly 'honest exercise', 'dishonesty', 'breach of public trust' and 'reasonable grounds for dismissing'.

A Victorian example of corrupt conduct was provided in the Supreme Court case of *Grollo, Grollo, Grofam Pty Ltd & Ors v Peter MacAuley*.[2] The Federal Court described corrupt conduct as the "improper interference with the due administration of justice under the law of the Commonwealth or with a view to the protection of an offender against the law from detection or punishment".

We now turn to consideration of some of the phrases used to further define corrupt conduct in the Victorian legislation:

1. Dishonesty

In *Peters v R*,[3] the High Court considered the tests for dishonesty in the English case of *R v Ghosh*[4] and the Victorian case of *R v Salvo*.[5] It should be noted that dishonesty requires both *mens rea* and *actus reus*.

2. Breach of Public Trust

In the case of *R v Woods*,[6] a breach of public trust was held to have occurred when a public officer had lodged fraudulent expense claims.

3. Inappropriate Partiality

Of all the terms used within the Act, the phrase "inappropriate partiality" had the least amount of commentary or discussion to be found, either in case law or in similar legislation. A phrase more commonly used is "lack of impartiality" rather than "inappropriate partiality". As partiality is defined as being the opposite of impartiality, discussions on a lack of impartiality may shed some light on what is meant by "inappropriate partiality". The ordinary meaning of "partiality" is to be "inclined antecedently to favour one party in a cause, or one side of the question more than the other". To be inappropriate it must be that it is not suitable to the case, or it is unfitting or improper.

Part 4: Draft practice note

CURRENT APPROACH OF THE OMBUDSMAN VICTORIA TO THE PHRASE "*REASONABLE GROUNDS FOR BELIEF*" IN THE WHISTLEBLOWERS PROTECTION ACT 2001

1. **Introduction**

1.1 This practice note is designed to help those within "public bodies" (as defined by the *Whistleblowers Protection Act* 2001 ("the Act") who are charged with the responsibility of assessing whether a disclosure made under the Act falls within the definition of a "protected disclosure" contained in part 2 of the Act.

1.2 It must be emphasised that each case must be considered on its own merits by reference to the relevant statutory criteria. This practice note is intended to give general guidance only and reflects the approach which the Ombudsman intends to adopt in relation to the definitions within the legislation. The Ombudsman's approach to these definitions will evolve over time with the use and operation of the Act.

2. **What is a "protected disclosure" for the purposes of the Act?**

2.1 One of the main purposes of the Act is to provide protection for people who provide information about serious impropriety in public bodies.

2.2 Such information must meet certain statutory criteria in order to be deemed a protected disclosure. It is critical to understand that not all information provided about impropriety will be considered to be a protected disclosure.

2.3 There is no definition in the Act of what constitutes a protected disclosure. However, section 5 states that:

"A natural person who believes on reasonable grounds that a public officer or public body –

(a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or

(b) has taken, is taking or proposes to take detrimental action in contravention of section 18 -

may disclose that improper conduct or detrimental action in accordance with this Part."

2.4 For further clarification of the meaning of "improper conduct", the reader is directed to Practice Note No. 1 "Current approach of the Ombudsman Victoria to the definitions of "improper conduct" and "corrupt conduct" in the *Whistleblowers Protection Act 2001*."

2.5 The following is a guide to the approach that the Ombudsman intends to adopt in relation to the phrase "believes on reasonable grounds".

3. **Belief**

3.1 The High Court has defined belief as: "an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture".[7]

3.2 A mere suspicion that the conduct has occurred is not sufficient. The courts have held that suspicion is a lesser state of mind than belief.[8]

3.3 However, an honest belief that impropriety has occurred is not sufficient under the Act. Instead, it must be a belief based on reasonable grounds.

4. Belief based on reasonable grounds

4.1 For reasonable grounds of belief, the usual test applied by the courts is whether a reasonable person would have formed that belief, having regard to all the circumstances.[9]

4.2 This test is an objective one, that is, whether a reasonable person, possessed of the same information that the person making the disclosure holds, would believe that there was reasonable grounds to suggest that the improper conduct had occurred.

4.3 Similar to a belief, reasonable grounds for a belief is also taken to require something more than a reasonable suspicion.[10]

4.4 Nor can a belief be held to be based on reasonable grounds, where it is based on a mere allegation, or conclusion, which is unsupported by facts or circumstances. The existence of facts and circumstances are required to show that the reasonable grounds are probable. For example, it is not sufficient for a person to base a disclosure on the statement "I know X is accepting bribes to grant planning permits to Y developer". This is a mere allegation unsupported by any further facts and circumstances.

4.5 However, the requirement for facts and circumstances to be present to support a belief does not mean that it is necessary that the person have a prima facie case, merely that the belief be probable. The courts have held that "the standard of 'reasonable grounds to believe'…is not to be equated with proof beyond a reasonable doubt or a prima facie case. The standard to be met is one of reasonable probability".[11]

5. 'Reasonable grounds for belief' and hearsay evidence

5.1 The Ombudsman takes the view that in some circumstances, hearsay evidence may be used to establish reasonable grounds, provided that the hearsay is trustworthy. To determine the trustworthiness of the hearsay, the United States Supreme Court has developed a two part test.[12]

5.1.1 The first part of the test establishes the reliability of the information. It is satisfied if:

- the person tells how he or she obtained the information, either by personal observation, or in some other dependable way; or
- the information is extremely detailed, so that the average person would conclude that the person had knowledge of the facts and was not relying on rumours.

5.1.2 The second part of the test focuses on the credibility of the person providing the whistleblower with the information. Credibility can be established in a number of ways. Some examples of ways in which credibility may be established include: past reliability of the informant; making statements against one's interests; being a good citizen; being an eyewitness to an incident.

6. General Observations

6.1 The phrase "reasonable grounds for belief" requires more than a suspicion and the belief must have supporting facts and circumstances. While the Act is in its initial stages of operation, those who are unsure of its application should contact the office of the Ombudsman for further guidance and advice about the operation of the Act.

Endnotes

1 (1990) 169 CLR 625.
2 (1993) 45 FCR 336.
3 [1998] HCA 7 (2 February 2998).
4 [1982] QB 1053.
5 [1980] VR 401.
6 [1999] ACTSC 60 (17 June 1999).
7 *George v Rockett* (1990) 170 CLR 104 at 116.
8 *Holmes v Thorpe* [1925] SASR 286 at 291.
9 *Jackson v Mijovich* (unreported, NSW Sup Ct, 22 March 1991, Finlay J, No 30020/90).
10 *Seven Seas Publishing Limited v Sullivan* [1968] NZLR 663 at 666-7.
11 *R v De Bot* (1986) 54 CR (3d) 120.
12 The test is based on the cases of *Aguilar v Texas* (1964) 84 S Ct 1509 and *Spinelli v US* (1969) 89 S Ct 584.

BANDAIDS FOR AMPUTEES: WHISTLEBLOWING IN THE COMMONWEALTH

Paul Bluck*

Edited version of a paper presented to a seminar held by the Victorian Chapter of the AIAL on 15 Melbourne 2002 in Melbourne

The History

There have always been whistleblowers, and there have always been suggestions about how they should be handled. But a useful starting point for discussion occurred when Commonwealth criminal law was reviewed by the Gibb Committee in the early 1990s. As much as from anything else, it was noticed that there had been very few prosecutions under sections 70, 78 and 79 of the *Crimes Act 1914* which deal with unlawful disclosures by Commonwealth officers and the disclosure of official secrets. There are problems with the coverage and operation of both those provisions and the weapon of criminal prosecution is a blunt one. Did it cover Ministers – or could they unilaterally decide that any disclosure they made was lawful and appropriate, facing political sanctions only? On the practical operation issue, some of you would be aware of the recent proceedings against a former Defence official where the prosecution considered it impossible to show the jury evidence of the information allegedly disclosed. Gray J decided to uphold a claim of privilege, but to stay one of the relevant charges.

In part, the problem was addressed for public servants by former Public Service Regulation 35 which provided a comprehensive bar on the disclosure of official information, save with the express authority of the relevant Secretary. And, of course, there is a plethora of non-disclosure, confidentiality and secrecy provisions throughout Commonwealth legislation.

At the time when consideration was given to cleaning up this area of law, the relationship to whistleblowing was considered. Not every disclosure is mischievous; nor should every person with something to say about his or her workplace be branded as a criminal. The problem was that there was no way of "domesticating" the disclosures – subject to legislation in each case, it would usually be as improper for an official to disclose information to another official as to disclose it to the less critical end of the media. What was needed was a credible mechanism by which disclosures could be kept and dealt with in-house.

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There was a good deal of activity, and not much produced, for several years. In 1993, a Whistleblower Protection Bill was proposed by the Greens. At about the same time, the Senate Select Committee on Public Interest Whistleblowing was tasked with exploring the issue. It reported in 1994, recommending the creation of a new agency, the Public Interest Disclosures Agency, with overall direction by a representative Public Interest Disclosure Board. The Government response was substantially delayed because there were other reports which concerned related issues (eg the protection of confidential and third party information, the Australian Secret Intelligence Service and the Public Service Act) and to which a coordinated response could be given. In the meantime, a new Select Committee looked at unresolved whistleblower cases raised in the first inquiry.

When the former Government responded, in late 1995, it gave in principle support to the need for whistleblower legislation. Rather than a new agency, it proposed a whistleblowing role for the Ombudsman, the Inspector-General of Intelligence and Security and the former Merit Protection and Review Agency. The Ombudsman and the Inspector-General were to act where a whistleblower was not satisfied by the relevant agency's response. The intent was to create a system where disclosures could be made and investigated within the public sector and where whistleblowers could be protected from retaliation. The response suggested that the government did not consider public disclosures would ever be adequate.

The proposed legislation was not introduced before the 1996 election. Subsequently, the current Government, in early 1998, amended the Public Service Regulations to require agencies to establish procedures to deal with disclosures and to protect public servants from victimisation and discrimination for disclosures made. Those amendments were intended to have no more than an interim operation until a more comprehensive package could be passed as part of the *Public Service Act 1999*. I will discuss the operation of the current Public Service Act system separately.

In 2001, Senator Murray introduced the Public Interest Disclosure Bill 2001. The Bill was referred to the Senate Finance and Public Administration Legislation Committee for report in April 2002. As yet, the Committee has not conducted hearings on the Bill, which is modelled on a similar basis to the ACT legislation, although without a role for the Ombudsman. It would be wrong if this quick survey did not also refer to the Government's excision of the official secrets elements from the Criminal Code Amendment (Espionage and Related Offences) Bill 2001. The media had dubbed those elements "anti-whistleblower legislation", although the Attorney-General argued that they were little more than a restatement of the relevant provisions of the Crimes Act.

In one sense, then, the Commonwealth is where it was in 1993. There is once again a private member's bill under consideration, but there is still no general mechanism for investigating whistleblower disclosures.

The ACT

The Commonwealth Ombudsman is also the ACT Ombudsman. Under the ACT *Public Interest Disclosure Act 1994* (PID Act), the Ombudsman is a "proper authority" to receive disclosures, as are the ACT Auditor-General and ACT agencies. The ACT legislation is a comprehensive response to the problems created by whistleblowing.

It defines what sort of disclosure is covered – criminal, disciplinary or other conduct justifying termination of employment which is related to honest or impartial performance of functions, a breach of trust or misuse of information as well as conduct related to substantial public wastage, unlawful reprisal or danger to the health or safety of the public. It provides mechanisms for the lawful making of disclosures to "proper authorities" and protects disclosers from criminal or civil liability. It requires agencies to develop and maintain procedures for the making and investigation of disclosures. It assumes that disclosures may be made by people other than officials.

It provides comprehensive protections for disclosers – retaliation is subject to disclosure, there is an offence of engaging in unlawful reprisals, officials can be moved to prevent retaliation, on the application of the Ombudsman or the person affected, a court can order an injunction related to a reprisal, and the making of an unlawful reprisal creates a liability to pay damages.

The Public Service Act

The Public Service Act and the regulations contain a scheme for dealing with whistleblowing. It includes a bar on victimisation and discrimination against APS employees who make reports to the Public Service Commissioner, the Merit Protection Commissioner or an Agency Head and gives the Commissioners the function of inquiring into reports made to them. The Public Service Regulations require Agency Heads to devise and maintain procedures for dealing with whistleblower reports and that the Commissioners investigate reports. The structure is one which assumes that reports should be investigated by agencies in the first instance, with the Commissioners becoming involved only if the discloser is not satisfied or if the matter is not suitable for investigation by the Agency Head. There is a threshold test of whether the disclosure is frivolous or vexatious.

The Commissioners' Annual Reports have not indicated that many reports have been made to them, a total of 13 in 1999-2000 and 2000-2001. Of those only one was under investigation by the Merit Protection Commissioner at the end of the latter reporting period – none of the 11 reports made to the Public Service Commissioner in those years was investigated. The reasons for declining investigation are instructive – seven were made by people other than current public servants, three were considered to be more appropriately dealt with by the relevant Agency Head and one was related to events prior to the introduction of the scheme. The Merit Protection Commissioner declined investigation of one matter that related to events before the new scheme. In the one case where an investigation by the Public

Service Commissioner was concluded in 1999-2000, no breach of the APS Code of Conduct was found.

This is not a criticism of the Public Service and Merit Protection Commission. Rather, it is a comment about the limitations imposed on it by the legislation. The scheme applies only to people employed under the Public Service Act – it has no application to disclosures by members of the general public, government contractors or people employed under agency specific legislation or as consultants. It provides protection from victimisation or discrimination only to public servants, despite the possibility that adverse consequences may be visited by officials upon contractors or agency clients; those actions would clearly be breaches of the Code of Conduct. The protection of officials making whistleblowing reports from defamation action is uncertain, although those reports are probably subject to qualified privilege.

More positively, the scheme applies to alleged breaches of the APS Code of Conduct, which is a wide category of improper actions. In conducting inquiries, the Commissioners have access to a range of investigative powers based on those of the Auditor-General – they may, for example, direct any person to provide information and can administer an oath or affirmation – and those are probably adequate for the purposes of any inquiry.

The numbers of reports made and dealt with understates the role of the Public Service Commissioner. The Commission has issued detailed guidance to agencies and officials on whistleblowing reports. Some highlights include:

- a 1997 paper based on the Public Service Bill 1997 which sets out the existing and proposed legal framework on whistleblowing;
- a statement of 5 November 1998 on the procedures adopted which notes that reports to the Public Service Commissioner would be made only where the matter was of such sensitivity that it could not appropriately be handled within an agency and that reports may be referred to other agencies. The process set out was one of assessment of whether the report fell within the relevant class and a fair and transparent investigation process;
- Advice 19 on Public Interest Whistleblowing which related to the Public Service Act 1999 was issued in advance of the commencement of that Act. It provides a summary of the proposed operation of the whistleblowing scheme and the need for agencies to ensure procedures were in place to enable disclosures to be made in appropriate circumstances; and
- Circular 2001/4 which dealt with the interaction between whistleblower reports made to Agency Heads or the Commissioners and misconduct action. The processes were intended to be separate, but it was contemplated that a whistleblower would be told whether action would be taken to investigate a breach of the Code of Conduct but that there would be no obligation to inform the whistleblower of the outcome.

The adequacy of agencies' procedures and actions has been considered by the Public Service Commissioner in the annual State of the Service reports. A possible

focus for inquiry would be the adequacy of the processes agencies are required to develop and maintain and the reporting of whistleblowing disclosures made to agencies.

The system and its administration are probably as good and specific as it currently gets in the Commonwealth – but should they and can they be made better? The coverage and protections provided by a whistleblowing scheme might be expanded outside Public Service Act employees. The scheme could provide a better filter against repackaged employment grievances and trivial issues raised to cause embarrassment and inconvenience. The scheme could deal with the possibility that it is used by so few people because there is a lack of trust in the protections able to be provided to a whistleblower.

The role of the Ombudsman

The Ombudsman deals with what might be seen as whistleblowing allegations in two distinct ways, depending on whether a Commonwealth or ACT matter is involved.

Where the issue relates to the ACT, it can usually be handled by the Ombudsman as a proper authority under the ACT PID Act. In the usual course of events, the complainant is asked for any information he or she may have to support the disclosure. Once that information is received, the disclosure is assessed against the standards in the PID Act:

- is it a public interest disclosure as that term is defined in the Act?
- is the disclosure frivolous or vexatious?
- is the disclosure trivial?
- is there a better way of dealing with the disclosure?
- has the disclosure already been investigated?
- has the disclosure issue already been determined by a court or tribunal?

In the course of an investigation, the Ombudsman can exercise any of his powers under the Ombudsman Act. Typically, we would make some inquiries of the relevant agency to assist the Ombudsman in assessing whether a matter can and should be investigated. We would tailor the approach adopted to ensure that evidence is not compromised. The Ombudsman would commonly write personally to the agency head, advising him or her about the investigation and seeking comments. Those comments and any information supplied might be sufficient to put an end to the matter – or they might point out a direction for further investigation. In the course of an investigation, we can compel the production of information and answers. Once an investigation is completed, the Ombudsman can report if he considers it would be useful to do so, and he can make information public. During the investigation, the Ombudsman, or any other proper authority, must make regular progress reports to the discloser.

My review of the ACT Ombudsman's Annual Reports suggests that disclosures are not common:

> 2000-2001 – three new disclosures and two carried over, related to (a) alleged impropriety by a senior officer of the Belconnen Remand Centre and other conduct issues (two substantiated, recommendations accepted), (b) management and employment in the Department of Urban Services (some issues better dealt with through workplace mechanisms, but compensation paid and discloser relocated), (c) and (d) events related to claims that some ACT school principals overstated enrolments (two matters, discloser failed to provide details or pursue matter), (e) alleged corrupt behaviour by staff member of ACT Government Solicitor (no action warranted after inquiry);
>
> 1999-2000 – five new disclosures, three finalised, relating to (a) alleged falsification of records, overstating of hours worked and improper financial practices by certain staff of an agency (being investigated by agency) and (b) alleged improper payments of salary loading to another employee who had ceased to act in a higher position (disclosure unsubstantiated, correct rate being paid), (c) alleged workplace harassment (matter taken up with Commissioner for Public Administration);
>
> 1998-1999 – received five and finalised six, relating to (a) alleged corrupt recruitment practices (being dealt with by agency), (b) alleged conflict of interest and interference with professional officer (dealt with by agency, which referred it to the Auditor-General), (c) alleged use of force by agency staff member (already being investigated by agency), (d) and (e) alleged staff management improprieties (disclosers decided not to pursue); and
>
> 1997-98 – two received and dealt with, relating to (a) alleged payment to a contractor for substandard work (dealt with by agency) and (b) allegation that employee working while on paid leave (dealt with by agency).

A problem with the Public Service Act approach, but not so much with the ACT legislation, is that the class of action which can become the subject of a disclosure is defined fairly narrowly and in exclusive terms. Legislative barriers to investigation should not be so high that they preclude investigation of matters which might warrant investigation.

The character and motive of disclosers can vary. Some are driven by a pure and idealistic desire to see right done. Some have long-running differences with management and personal vendettas to wage. Some seek to achieve by a disclosure the grant of a personal benefit or the removal of a personal threat. As is the case with some complainants to the Ombudsman, some are simply obsessed or mistaken. To make a decision based on those factors would, in many cases, require an inquiry into the whole of a person's employment history. It is usually safest and most productive to rely on an assessment of the disclosure itself because that is where the real danger to the public interest exists – that something improper is said to be happening and that something should be done about it.

In the Commonwealth context, and in the ACT if the PID Act does not apply, the Ombudsman uses existing powers to deal with whistleblowing. The Ombudsman can receive anonymous complaints, and complaints by people who do not wish the agency concerned to know who they are. These complaints can be dealt with like any other, although there may be some practical issues inhibiting investigation. For example, a complainant's name may not be referred to in correspondence or interviews, and the Ombudsman's complaint system may limit access even by staff members – but it may be difficult for the Ombudsman's investigator to ask direct or useful questions if he or she cannot disclose anything relevant. The Ombudsman is informed about whistleblowing complaints, and is often personally involved in their investigation. For example, the Ombudsman might write to an agency head about the complaint, and seek an assurance that a staff member or contractor whistleblower will not be the subject of retaliation.

As almost any form of retaliation would require some administrative action by the agency, the Ombudsman might be able to investigate it and could be expected to take a firm approach. The Ombudsman would be able to investigate many of the actions that might amount to retribution against an actual, suspected or potential whistleblower. He could look at proposed prosecutions, improper use of regulatory powers and the refusal of benefits. But he is specifically precluded by his Act from investigating personnel or disciplinary action taken in relation to current employees of an agency. Were the situation to arise, I suspect the Ombudsman would consider reporting evidence of misconduct to the agency head or Minister (under subsection 8(10) of the Ombudsman Act), making a disclosure of information to the Public Service Commissioner or the Merit Protection Commissioner or suggesting that the whistleblower take the matter up with the Commissioners. But the Ombudsman's approach of dealing personally and directly with an agency's senior management is usually sufficient to ensure that nothing adverse will happen.

One approach that has been followed, especially where there is some basis for concern, is for the Ombudsman to decline to investigate a whistleblower's complaint but then to decide to investigate the action, or some related action, on his own motion. One effect of this is that there is no complainant whose welfare or career might be jeopardised. Another is that there is no room for argument about the identity of the whistleblower or his or her motives. And another is that the Ombudsman remains in clear control of the scope of the investigation and can decide for himself when he is satisfied that enough has been achieved. In one case, the Ombudsman selected from a number of issues raised by a whistleblower the one that he considered his office could best investigate. The outcome achieved was an excellent one, with the agency recognising its processes needed change and that it should be inviting staff to raise concerns they had. The original complainant did not agree – the investigation had, in his view, been a whitewash and the Ombudsman had been taken in by the agency. The Ombudsman and the complainant agreed to differ, but the changes to agency processes would mean that staff members with the same concerns he had could be guaranteed a credible internal inquiry.

This raises a further issue with whistleblowers. No matter how independent and impartial the investigator, and what level of resources have been directed to the investigation, some people will not be satisfied by assurances that no misconduct was found. Even where misconduct has been found and acted on, some whistleblowers will not be satisfied by what has been achieved. The investigator may feel properly constrained, by privacy considerations if by nothing else, from inquiring into or disclosing any disciplinary or similar action and this is seen as a coverup. In the whistleblower's eyes, either the investigation was superficial or the investigator has joined the conspiracy.

In these circumstances, it is understandable that some whistleblowers often feel the need to continue to agitate the matter further – there is a Commonwealth matter which since the 1970s has been raised, to my knowledge, with the Ombudsman, the Public Service Commissioner, at least one Parliamentary Committee, the Administrative Appeals Tribunal and several Ministers and other Parliamentarians. Nothing of much substance or of any current relevance has been found, despite several inquiries and a vast expenditure. But the whistleblower has continued to agitate his concerns and to raise the matter every time any remotely related issue becomes prominent in the news.

MEMBERS MAKING THEIR MARK

*Senator Barney Cooney**

Edited version of a speech to an AIAL seminar held in Canberra on 20 June 2002

Romance and modest dreams

Don Quixote is a romantic figure because he dreamed that a bygone age was still current and that he could live in a way that vindicated the best of it. He tilted against what he saw as the forces of darkness and hoped thereby "to right the unrightable wrong".

Romance can engender noble aspirations though there is sometimes a risk that these will end in disillusion. Still it may lead on to great change. The great romantics, the great dreamers have achieved much. Is it feasible to have dreams of the modest kind and thereby capture a modest goal?

The executive, parliament and the courts

The following are propositions sometimes seen as romantic and built upon dreams of a former golden age. First, that Parliament is in command of the initiation and passage of the bulk of the legislation enacted through its chambers; secondly that it exerts effective quality control over the Executive's actions; and, thirdly that it is just as energetic in doing so as are the Courts. Still "to dream the impossible dream" can be rewarding. In any event given the political composition of the Senate, Parliament is now more about its constitutional task than might once have been the case.

Insights into parliament

High Court judge, Sir Gerard Brennan, and Clerk of the Senate, Mr. Harry Evans, are two people with a fundamental understanding of the Legislature and its relationship with other institutions. I quote from them both to bring out varying insights about Parliament. They both deal in their analyses with the control of legislation and the scrutiny of the Executive's administration.

On 7 August 1990 the then Justice Gerard Brennan gave the Blackburn Lecture to the Law Society of the Australian Capital Territory entitled "Courts, Democracy and the Law". During it he said:

> The theory of responsible government, which made the fate of an Executive Government dependent upon the confidence of the Parliament was, so to speak, turned on its head by the political dependence of the majority members of the Parliament on the Executive Government. Policy formulation became primarily an executive function. As the pressure on legislative time intensified a

> virtual monopoly over initiatives for legislation passed to the Executive Government. The influence of Ministers in debate, whether in the party room or in Parliament, was enhanced by the support they could command from the public service.

Later Sir Gerard stated:

> As the wind of political expediency now chills Parliament's willingness to import checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed.

The following words of Harry Evans appear in the *Australian Journal of Public Administration* for March 1999 under the heading "Parliament and Extra – Parliamentary Accountability Institutions".

> Parliament generates the political noise and political heat that has to arise from the public exposures by the accountability institutions for their work to have any effect.

A little later this passage appears:

> In short, accountability is essentially a political process. It operates not in the stratosphere to which extra – parliamentary bodies are sometimes thought to be elevated, but in the swamp of politics, where the fermentation generates the volatile substances to keep them aloft.

The final paragraph concludes:

> In spite of its debilitation, then, parliament is the key to maintaining accountability, even through extra- parliamentary bodies, because it is the principal forum of the political process and because accountability relies ultimately on the political process. Those bodies depend on that process for both their existence and their work.

The infrastructure of the political process

The structures within which the political process works include the Senate, the House of Representatives, the Cabinet, the ministry, the party rooms, the subgroups or factions, and the committees. I want first of all to deal with the party room. The work it carries out is crucial to the political health of Australia. The way it does that work is typical of what happens in the other structures.

The backbencher in the party room

Sir Gerard Brennan talks of the government party room and the crucial influence therein of the ministers. This is an acute observation. I would describe the influence of the shadow ministers in Caucus in the same way. But that is not the end of the matter. Members of the backbench can do much in the party room and in the party committees. Recently they have led the Government to make major changes to its terrorist

legislation. People like Marise Payne, Bruce Baird, Christopher Pyne, Julie Bishop and Petro Georgiou are considerable political figures.

For the party room to work at its best there needs to be trust between all its members. This requires them to be open and candid with each other. There have been times in the history of the party room where this has not been the case.

My experience is with the Labor Party but I am confident that the situation is the same in all parties, or at least in the major ones.

I remember being told early in my parliamentary career that the problem with giving Caucus a full and frank account of things was that one or more of its members would almost certainly pass the information on to the media. There may well have been some truth in this; but preventing the back bench from doing so meant that leaking became the prerogative of the Cabinet and perhaps the Ministry. There was then need to create a climate and culture where each person could have confidence in all others and they in him or her. That need will forever persist.

What happens in the party room is crucial to what happens later. It is there that the members of the back bench have the opportunity of influencing decisions which, once made, they are bound to support. They cannot realistically expect to gain changes to those decisions in the Chambers of the Parliament. That is why it is reasonable for them to expect a full and frank briefing on matters when their party meets in formal session in the party room.

The principle explained by Gordon Bryant

On 20 October 1974 the then Minister for the Capital Territory the Honorable Gordon Bryant put out a paper entitled "The Backbencher and his Role in Government" in which he said:

> The Caucus is therefore 95 in number. It is a large meeting but its leadership is closely knit and vigorously minded in the pursuit of its point of view. In ts deliberations, every member is equal. The Prime Minister has one vote, I have one vote and the last arrived member has one vote and the majority prevails. When the Caucus reverses a Cabinet Decision, that is not a rebuff but an exercise in democratic government. Every constituent of a Labor held electorate should be gratified that the person they elected is not a cipher or a vote in a numbers game managed by an executive but a significant contributor to the decision making.

The backbench needs to be vigilant

There are those who would see Gordon Bryant's words as touched with romance. Yet he described the way Caucus is structured to work. Still, it is a place where the Executive can gain great advantages for itself, and, not always in the most candid of ways. It is therefore incumbent on the backbench to remain firm and forever vigilant.

Neal Blewett is the author of "A Cabinet Diary" published in 1999. It gives an excellent sense of how a governing party carries out its task. The following paragraph dealing with

Caucus and discussing events which occurred on Tuesday 28 April 1992 appears on page 103 of the book.

> A caucus explosion followed questions from Langmore about the Fairfax float. It turns out that while the float purchasers are all Australians, shares could then be sold to foreigners, with an individual entitlement of up to five per cent as long as such foreigners have no controlling interest or any links with the dominant Conrad Black group. Thus we could have a foreign non-controlling ownership of forty per cent or fifty per cent or more. Schacht was his furious self, denouncing this as contrary to the caucus resolutions; it was an abrogation of a decision fought over for five months. Dawkins bluntly told him caucus had been wrong. The goals of the resolution simply could not be achieved under the existing foreign investment powers. Barney Cooney, ever suspicious of executive behaviour, then attacked the cabinet for misleading caucus on the issue by not giving them this information. With growing signs of an unseemly revolt, the question was referred to the caucus economics committee.

The Executive is able to cooperate

The party room and the party committees can have a crucial effect on the Executive whether in government or in opposition. As chair of the Caucus Legal and Administrative Committee on the 31st March 1995 I received a document from the Honorable Duncan Kerr, then Minister for Justice, entitled "The Government's Record on Civil Liberties Concerns". This addressed "the suggestion that the Government, and in particular the Attorney-General's portfolio, does not give sufficient weight to civil liberties concerns". The suggestion had been made at the Committee and the Minister responded. The document went through a number of pieces of legislation to demonstrate how they had all struck "a balance between the civil liberties of members of the community and the need for effective and accountable law enforcement procedures". This position had been reached after considerable input from the Caucus Committee. The legislation referred to in the document included the Evidence Bill 1994, the Crimes (Search Warrant and Powers of Arrest) Amendment Act 1994, the Crimes (Forensic Procedures) Amendment Bill 1995, and the Model Criminal Code Bill 1994. Members of Caucus achieved changes to them through the party committees which, given party protocols, they would have been unable to do in the Parliament.

The process of decision making in the party room: the public mood and conscience

In dealing with legislation the party room is not bound by precedent or by legal logic. Consequently there will not necessarily be the consistency in decision making to be expected where that is done in accordance with set laws. Caucus is much influenced by the thinking of the electorate. But a powerful determinant is the sense of what is right and what is wrong held by the members, both as truly motivated individuals and as part of a group, with a proud history of having participated in reform for over a hundred years.

Democracy and the rule of law

The public mood is a powerful factor in the party room. A democratic system is founded on the proposition that the majority of electors will determine the colour of the Government. That factor is a chief determinate in guiding an elected politician to his or

her decision about a matter. Yet Australia is a civil society living under the rule of law. It needs to reflect that in the life of its community. It requires an exercise of judgement, either by parliamentarian or judges, to say when legislation has exceeded the rule of law. True conscience is a reliable guide in reaching the right conclusion. It is a powerful force in the party room even on those rare occasions it does not triumph.

Political reasoning and judicial reasoning in decision making

The laws under which we live come chiefly from decisions of judges and parliamentarians. The High Court interprets the Constitution and declares when Commonwealth statutes are invalid. There is curial examination of the lawfulness of the actions of the Executive. Tribunals review administrative decisions on their merits. All this tends to create the impression that judicial reasoning and political reasoning are quite similar. This though is not so.

Judges deal with the problems of individuals whether of people, corporations, institutions, or government. Parliamentarians must meet the challenges confronting the nation, and various communities within it, as well as particular men women and children who seek their help.

Courts are guided by set principles, as to procedure, as to evidence, and, as to substantive law, in reaching their decisions in a way a politician is not.

The curial task involves a particular process of thinking through to a decision in the light of these factors and this is not akin to the political one; nor should it be.

Different processes: sometimes there is tension

Political decision making is unstructured and differs from that pursued by courts which are bound by defined principles and procedures. Accordingly a jurisprudence-like learning has not developed around it. This has lead to a certain unease in the analysis of political decision making by lawyers and a similar unease in the analysis of legal decision making by parliamentarians. Yet a good society depends on both working in an appropriate harmony. There has in recent times been some unhappy tension between judges and members and this has been given public expression. The *Wik*[1] decision led to a vociferous reaction to the High Court in the Senate. Asylum seeker matters have been the occasion of public discord between federal judicial and political officers.

Political reasoning closer to that of journalists

Learned and experienced journalists with a commitment to the truth provide a better model to good political thinking than do the courts. Alan Ramsay writes in *The Sydney Morning Herald*. He has a profound understanding of the political system and what moves members of Parliament to action. He has a thorough knowledge of history. He has a deep experience of the vicissitudes of life. He is forever conscious of the need for any viable party to have a purchase on wide support in the electorate. At the same time he is fully committed to seeing things done according to conscience. These are the things which underpin the best of political reasoning.

Courtesy and grace in debate

Courtesy and grace are forever needed in debate. A civil society cannot be at its best unless its constituents treat each other civilly. Louis H. Pollok as a senior judge of United States District Court for the Eastern District of Pennsylvania had an article printed in the American Bar Journal for May 1998. It was reprinted in the Australian Bar Gazette for December 1998. Previously Louis Pollak had been Dean of the law schools at Yale and the University of Pennsylvania. He said:

> Problem-solving and consensus-building are exercises in civility - steps in the creation of the civitas, the civil state of our ideals. In recent years we seem to have taken fewer such steps. Apparently preferring division to community, we shy away from joint purpose.

In seeking the best of societies we need to appreciate the good offered and done by its different institutions and the call for courtesy and respect between them.

Need for wider understanding

There is need for a wider knowledge and understanding of how decisions are made, who by, and through what processes. This is necessary in a vibrant and participatory democracy. In his paper of October 1974, Gordon Bryant said:

> Modern society needs effective decision making apparatus, close parliamentary scrutiny and participation in Government and more participation in decision making, not less of it.

To this end it would be interesting to hold a conference on political, legal and journalistic decision making and the relationship between them. It may lead to a wholesome enlightenment. A topic might be: “The processes of fact finding by courts, administrative tribunals, royal commissions, and estimate committees”. Another that would be absorbing is: “The way matters to do with the Royal Commission into the building industry have been dealt with by the Courts, and the Senate Committee”.

Need to see processes as complementary

In addressing the decision making processes which sustain a good civil society both those legal in nature and those political should be seen as complementary to each other. They affect the rule of law upon which the quality of our community depends. The Constitution, the Parliament and the Courts are the principal sources of our laws. They are particularly important in Australia which lacks a Bill of Rights of any sort.

Parliamentary committees: The Scrutiny of Bills Committee

There is a mixture of factors including a sense of what is right and decent used by parliamentary committees reasoning through to their conclusions. Take for example the Senate Scrutiny of Bills Committee in which I take great pride, because of its work, and because of its membership. I have the utmost respect for my colleagues on that Committee. I say the same about those people who have formed the secretariat, and those who have provided its legal advice, over the years.

The process it uses to draw its conclusions is a political one though not in a partisan sense. Its members would agree with Sir Anthony Mason then Chief Justice of the High Court who in an article in *The Financial Review* of 1 October 1993 said:

> The protection of fundamental rights is essential to the preservation of the dignity of the individual and to the modern concept of democracy.

Sir Anthony went on to say:

> Once that is accepted it is inescapable that the courts have a central role in enforcing fundamental rights whether those rights have a constitutional or statutory source or look to the general law for protection.

Given the premise upon which Sir Anthony relies, Parliament has a basic responsibility to see to it that everyone in Australia lives under the safeguard of the rule of law. The first of the criteria against which the Scrutiny of Bills tests legislation is whether Bills or Acts of Parliament "trespass unduly on personal rights and liberties". This gives the members of the Committee wide and adequate scope to measure legislation against what is fair and decent. They use their sense of what is right and proper and according to good conscience to reach their conclusions. They do not think in a formal legal way but their reasoning is truly effective.

With this test the Committee is at large in assessing legislation. It allows comment on bills dealing with such issues as due process, with the creation of offences and their penalties, with economic measures, with migration, with asylum seekers, with terrorism, with the imposition of levies, with bankruptcy, with insurance and with data – matching.

Parliament courts and civil live

Parliament and the Courts need pursue the great human objectives. This is particularly so where Australia has no Bill of Rights. It is in this context members can and do make their mark.

Endnote

1 *Wik Peoples v Queensland* (1996) 141 ALR 129.