BANDAIDS FOR AMPUTEES: WHISTLEBLOWING IN THE COMMONWEALTH

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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);
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> 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);
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> 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
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> 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.