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sion commented, largely in response to the concerns expressed by Riley, Wyatt and others, that one of the things that had emerged from the conference was that Aboriginal people had not understood sufficiently well some of the legal technicalities and implications of the *Mabo* decision. He commented further that lawyers should take heed of these concerns and make some attempt to 'explain things better'. Of course, that is not what had been suggested. In fact the different legal interpretations and opinions were, on most occasions, clearly stated. What was of concern, however, was the shift away from a discussion on resource development and land rights (the conference pretext), to a discussion on points of law as understood and contested by various legal theorists and practitioners. Some dovetailed their arguments, others stood in direct opposition (as papers contained in the conference proceedings indicate).

There are many other critical matters that could be questioned and commented on here, for example, Bartlett's poorly informed understanding of the notion of a 'tribe' (see, for example, pp.30-31 of conference paper); his naive view being that, somehow, there will be no ambiguities about the membership of groups claiming collective native title. But ultimately those comments and questions can be tailored to just two. Firstly, are we to dismiss the struggle for the recognition of indigenous rights in relation to land when Aboriginal people are unable to meet the legal requirements as defined within native title at common law? Secondly, will the final recognition of native title, fought for so long and hard by Eddie Mabo and others, prove, ironically, to have given birth to a 'lawyers' picnic'?

There is no doubt that lawyers are a necessary and integral part of the process whereby Aboriginal people can, in some parts of Australia, and hopefully will in others, be able to lay claim to land. With respect to Western Australia, which remains without any form of land rights legislation despite the findings of the Aboriginal Land Inquiry,[4] such a part must be conditioned not by the promise of increasing litigation, but by a recognition of the complex and elaborate social, cultural and historical relations to land that are sustained by many Aboriginal people in this State.

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ADMINISTRATIVE LAW

Blowing the whistle

JOHN GOLDRING evaluates a new NSW Bill.

The *Whistleblowers' Protection Bill* 1992 (NSW) has received little public attention or discussion. It was introduced into the Parliament earlier this year as a result of the agreement between the Greiner Government and the Independents who hold the balance of power in NSW.

The Bill makes it a criminal offence for anyone to treat a public official detrimentally after that official, acting in good faith, has informed either the Ombudsman, the Auditor-General or the Independent Commission Against Corruption of alleged corrupt behaviour, maladministration or substantial waste. The public official is also given certain rights to apply for remedial action in the Government and Related Employees' Appeal Tribunal. It does not provide any other remedies or sanctions, and contains no definition of maladministration or substantial waste. 'Corrupt conduct' has the same meaning as it has in the *Independent Commission Against Corruption Act* — where it was recently construed by the NSW Court of Appeal in proceedings brought by former Premier Greiner.

There was no Parliamentary debate when the Bill was read a second time by the Deputy Premier, Mr Wal Murray. The first significant discussion was at a seminar organised by the Royal Australian Institute of Public Administration (RAIPA) to consider the legislation. The following comments are an impressionistic summary of the papers and discussion at that seminar, which was attended by over 70 senior public servants, but not by the promoters of the legislation, the NSW Cabinet Office.

It became apparent at the seminar that, when the legislation was being prepared, the Cabinet Office did not bother to consult the three agencies (the Ombudsman, the Independent Commission Against Corruption (ICAC), or the Auditor-General's Office) who will have to administer and enforce the legislation if it is enacted in its present form. Much of the Bill is indefensible, in terms of drafting and structure.

The whistleblowing issue has been part of the debate on administrative law and public administration in Australia for 20 years, since the Coombs Royal Commission into Australian Government Administration produced some discussion papers dealing with whistleblowers and their protection.

Whistleblowing has been debated in the United States fairly constantly over the last 20 years. The basic issue of protecting whistleblowers is one of

culture. The employment culture, the corporate culture and the union culture all regard 'dobbing' as bad. Those who are disloyal to the corporation or the union are ostracised. When a government is trying to corporatise its management structures, it is ironic that it should be trying to throw out one of the essential ingredients of the corporate structure — corporate loyalty.

At the RAIPA workshop, no-one criticised the desirability of exposing corrupt conduct, maladministration or substantial waste, which is the stated objective of the legislation. Several speakers pointed out, however, that none of these terms was defined. The Court of Appeal, in the Greiner/Moore case, had indicated the uncertainty about the term 'corrupt conduct', and at the workshop, the NSW Deputy Ombudsman, John Pinnock, in a paper highly critical of the Bill, indicated that he could not say what 'maladministration' in the Bill means. Nor does the legislation define 'substantial waste'. The Bill also uses the expression 'public interest' (found also in freedom of information laws and other areas of administrative law) but with little clarity as to what it may mean. That meaning must be supplied by the courts and tribunals.

The question posed by virtually every speaker and commentator at the RAIPA workshop was: 'Is the desirability of exposing corrupt conduct, maladministration or substantial waste confined to the public sector?' The events of the last ten years in Australia have demonstrated very clearly that corrupt conduct, maladministration or substantial waste occurs in the private sector as well. It is ironic that, although there may be reasons why the operation of the *Whistleblowers' Protection Bill* 1992 (NSW) is confined to the public sector, in NSW an ideologically driven government seems committed to reducing the public sector and transferring many traditional public functions to the private sector. Michael Taggart has pointed out[1] that one effect of privatisation and corporatisation may be to remove public law remedies from large areas of activity which traditionally are regarded as 'public'. In that climate, why extend protection to whistleblowers?

Some public managers quite clearly want to protect whistleblowers, but some do not. In NSW public administration there has been a culture of secrecy. To some extent, freedom of information legislation has broken it down. In New South Wales, unlike Victoria and the Commonwealth (and shortly Queensland), there is no requirement that reasons be given to people affected by administrative decisions. More than anything else, the requirement in the *Administrative Appeals Tribunal Act* 1975 (Cth), s.28, and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s.13, that reasons be provided to people affected by the decisions has opened up and changed the culture of Commonwealth and Victorian administration. Freedom of information legislation has helped. Some people, notably lawyers and doctors, are also members of professions as well as being public servants and their professional codes of conduct require them to keep some matters confidential. This complicates the issue; it raises problems which clearly had not been contemplated by the authors of this legislation. Are public officials the only people protected by the legislation? Will it extend to officers of privatised enterprises and part-time members of government bodies? Does it extend to consultants to government or contractors who undertake public functions as part of their contractual duties?

Private employees and private citizens who become aware of corrupt conduct, maladministration, or substantial wastes are clearly not protected.

Anyone may now complain to the investigating authorities named in the Bill or to other investigating authorities, but they are not protected, and some do go to ICAC, the Ombudsman, the Anti-Discrimination Board or the Judicial Commission. In my experience as an employee of a university — a public authority — I think now I should have blown the whistle on some activities, but I did not. There was no incentive.

A number of the papers also addressed the question 'What is protected?' As the Bill is drafted, it refers to complaints made *in good faith* on the *basis of reasonable suspicion* to a *restricted number of investigating authorities.* A number of the speakers pointed out problems with the definitions, which affect the scope and operation of the legislation and possibly the powers and functions of the investigating authorities, for example, the nature and function of the Ombudsman's Office and the Auditor-General.

Complaints to other institutions are clearly not protected. Complaints may get into the media. It may be more effective to go to Derryn Hinch than to the Administrative Appeals Tribunal or the Ombudsman. Lawyers may think it in their clients' best interests to go to the media.

There is a problem when public servants go to the media; if they do so without good reasons the result could be disastrous. There are unnecessary restrictions on public servants' communication with the media, but when people are revealing corrupt conduct, maladministration or substantial waste they ought to be protected. Other agencies, for example, the Anti-Discrimination Board or the Judicial Commission, may be better equipped to deal with the complaint, but complaints to them are not protected. Most importantly, an internal review mechanism within a department or agency may be a more effective way of dealing with many complaints (though it will be futile in some cases) but no protection is given to officials who complain internally.

A provision in the Ombudsman legislation allows the Ombudsman to investigate a complaint, even though he would normally decline to do so because there is an alternative remedy, if he thinks the alternative remedy would be futile. Sometimes complaining about Caesar to Caesar does not work.

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Some complaints may be unfounded, malicious, vexatious, or ill-considered just as some are genuine. Judgments have to be made as to whether or not a complaint is in good faith. Sometimes a malicious complaint, by revealing corruption, waste or maladministration, may result in beneficial changes to the administration. However, an unfounded or malicious complaint can do untold harm to the career and personality of officials. The interests must be balanced. Malicious or frivolous complaints must be discouraged and the interests of conscientious officials who act properly must not be damaged by malicious, vexatious or unsubstantiated complaints.

Whistleblowers ought to be protected from:

- actions for defamation,
- prosecutions under the Public Service or Public Sector Management legislation or any other legislation,
- disciplinary proceedings,
- discrimination, and
- detrimental treatment.

There are questions also about the burden of proof. Who is required to prove that action was taken in a way that would detrimentally affect the whistleblower, or that it was a consequence of the actor knowing that the whistleblower had complained?

The only proposed sanction is a criminal sanction, which means that the prosecution (not the whistleblower) must prove every element of the offence beyond reasonable doubt. If the remedy were not a criminal penalty there would be a good case for raising a presumption that detrimental action is taken in retaliation against whistleblowing.

At the RAIPA seminar, there was general agreement that a criminal sanction and appeal to the Government and Related Employees Appeals Tribunal (GREAT) are not the best sanctions. Speakers suggested that there should be provision for injunctions; for a special agency to conciliate and mediate. Two principal speakers suggested that the objectives would be met more than adequately by simple amendments to the industrial relations and anti-discrimination legislation to provide that retaliatory conduct against whistleblowers is not a ground for victimisation, discriminatory treatment or dismissal.

The NSW Bill has not been as well thought through as the 70 clauses of the Bill proposed by the Queensland Electoral and Administrative Review Commission. That Bill might provide a better model for NSW but there are strong arguments that amendments to the industrial relations and anti-discrimination legislation would be just as effective. The workshop produced a common view that whatever goes into the Parliament should not be the current Bill, and that the Government needs to go back to the drawing board to come up with something that addresses fundamental flaws of structure, of substance and of drafting. The Government had to come up with a Bill, otherwise the Independents would not continue to support it. The present Bill looks like an expedient. However, most seminar participants hoped that the legislation will not die simply because people are highly critical of its current form.

John Goldring is the Dean of Law at the University of Wollongong.

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INTELLECTUAL DISABILITY

When the law won't lock them up

BILL GLASER discusses proposals for a service delivery program for intellectually disabled offenders by Disability Services Victoria.

Community stereotypes about intellectually disabled offenders die hard, even in the government departments which are responsible for providing programs and services for them. At least, that is how it appears in the latest proposals for a 'service delivery system' for such offenders which was unveiled by Disability Services Victoria in September of this year. Despite a decade of legislative and service reform which saw the abolition of arbitrary detention of intellectually disabled people, the introduction of independent third parties during police questioning of them, the provision of justice workers to offer specialist support, and the beginnings of community-based service development, Disability Services still seems to favour a model of the feeble-minded menace who must be kept out of society, whatever the cost.

This is not to say that the proposals are entirely Dickensian. There is an acknowledgment that regional community specialist services have to be established, although the guidelines for these are rather vague and the amount of money allocated per region to develop them ($25 000 initially) is minuscule. What is of concern, however, is the recommendation of a 'highly supervised and structured accommodation program' for offenders who might be serving a community-based disposition but who 'have committed acts of violence or indecency which seriously violate community norms and in most circumstances would normally receive a custodial sentence and cannot be safely managed in the general services system'. This 'accommodation program' will require offenders to 'voluntarily' lock themselves up for an indeterminate period of time in a facility which,