The South Australian Whistleblowers' Protection Act

Matthew Goode reviews the background to this new legislation

The decision to enact the South Australian *Whistleblowers' Protection Act* was grounded in the policy recommendations of the Fitzgerald Royal Commission, the Ontario Law Reform Commission and the Gibbs Committee. However, while there seemed to be general support for the protection of whistleblowers, that surface consensus masked divisions about the defensible limits of the idea. As ever, for example, the interests of the media lay in as much protected disclosure as possible. By contrast, for example, Government bodies were concerned about the preservation of confidentiality.

Establishment of general principles

In developing a Whistleblowers' Protection Bill, the threshold issue was the establishment of broad principles. First, what institutions should be subject to the regime of protected whistleblowing? The key problem here was whether to extend protection to the private sector. The Fitzgerald Committee recommended that it should. South Australia also adopted this approach, for the following reasons:

- In terms of the public interest, the distinction between private and public sector is being blurred. The influence of privatisation is the most obvious example of this development.
- The consequence of excluding the private sector entirely would be that, if one local council did its own rubbish disposal and did it appallingly, it could have the whistle blown on it, but if it contracted out the same appalling service to a private company, it could not. This made no sense.
- There are hard cases at the overlap. For example, are universities public or private sector organisations?

However, it made sense to differentiate between the private and public sectors in balancing the public and private interests in disclosure of information. The private sector could hardly argue that it should be able to conceal information about criminal activity, the improper use of public funds or conduct that causes a substantial risk to public health, safety or the environment. On the other hand, while there is a public interest in disclosure of information that a public officer is incompetent or negligent, the same considerations do not apply to the private sector. If a company wants to keep secret the fact that its managing director has shown incompetence, so be it. The legislation is structured to reflect those decisions. The Western Australian Royal Commission into the commercial activities of the Western Australian Government came to a similar conclusion in its approach to this issue.

Nature of protection

The next issue was the nature of the protection to be offered to a genuine whistleblower. The debate centred around the protection of the employment of the whistleblower from victimisation arising from his or her disclosure of confidential information. Working from the principle that another agency should not be created if an existing one could do the job, South Australia did not follow the Queensland model of a new Criminal Justice Commission. In South Australia, the Equal Opportunity Commissioner covers both private and public sector employment. Further, she deals with discrimination in employment on grounds deemed to be contrary to public policy. Accordingly, she was selected as the most appropriate avenue for review of victimisation allegations.

A tort of victimisation

When the Bill was debated in the South Australian Legislative Council, the Opposition moved to create a tort of victimisation as an additional option for the victimised whistleblower, subject to the proviso that a person must elect which of the two alternative remedies he or she will pursue. A civil remedy was, strictly speaking, unnecessary. The Equal Opportunity system contains the power to make the equivalent of injunctive orders and award compensation for loss or damage. Nevertheless the Government decided to accept the amendment. The argument against giving a victim a choice of remedy is that the equal opportunity route is designed to reduce confrontation, and encourage conciliation and education if possible, unlike the court based option. However, this factor was not so great as to warrant rejection of the amendment.

The other central component for protection was obvious – protection was with respect to civil and criminal liability. This is common to all whistleblower protection schemes. The other options for protection were the creation of a criminal offence of taking reprisals and a public sector disciplinary offence. South Australia rejected both of these. The criminal offence was rejected as overkill, and contrary to the general principle of parsimony in the criminal process – that is, that the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it. The public sector disciplinary offence, if adopted, would not take into account the private sector aspects of the legislation. In any event, the Commissioner for Public Employment has power to take appropriate action against a member of the public service who failed to comply with legislative directions such as the *Whistleblowers' Protection Act*.

Key elements

The core of whistleblowing was, in non-technical terms, the disclosure of information in the public interest to an appropriate body for genuine reasons. This involves three elements:

- what information engages the

public interest sufficiently to warrant this protection?

- what is the test for genuineness in a whistleblower?
- what restrictions, if any, should the legislation impose on the ability of the whistleblower to go public?

Each of these questions has key implications for the scope of the Bill.

The Bill originally contained the following definition of "public interest information":

"public interest information" means information that tends to show:

(a) that an adult person (whether or not a public officer), or a body corporate, is or has been involved (either before or after the commencement of this Act):
(i) in an illegal activity; or
(ii) in an irregular and unauthorised use of public money; or

(b) that a public officer is guilty of impropriety, negligence or incompetence in or in relation to the performance (either before or after the commencement of this Act) of official functions;..."

This definition was *relatively* uncontroversial, but some of its features require further comment:

- The restriction of the first part of the test to adults. This involved competing policy considerations, relating to the identity of alleged child offenders.
- The possible width of the term "incompetence". The term appears in the equivalent Queensland legislation. However, a number of other approaches have been taken in other jurisdictions. In the final analysis, it was the Local Government Association which persuaded the Government to change the definition. The Association argued, in effect, that the relevant public interest related to the *effects* of incompetence rather than the mere fact that it existed. The Bill was amended to replace the concept of "impropriety, negligence or incompetence" with the word "maladministration" and defined it to include "impropriety and negligence".
- The vagueness of the descriptive language used. However, any attempt to cast a net which will adequately cover the range of possible misconduct in both private and public sectors necessarily contemplates a deal of uncertainty.
- When the Bill was debated in the Legislative Council, the Opposition moved to amend the definition to add "the substantial mismanagement of public resources". The Government agreed to this amendment. It was thought that the Bill covered this conduct in any event, but there could be no objection to making it an express requirement.

Disclosure to proper channels

The next problem was whether a protected disclosure should be only via "the proper channels" or to the media. This involved competing arguments.

Ultimately, South Australia rejected the position taken by the Gibbs Committee and the New South Wales Bills that protection was conditional on disclosure via an official channel. South Australia agreed with the Queensland and Western Australian recommendations on this aspect.

The course South Australia adopted in the Act is to require disclosure to a person "to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure". The legislation deemed disclosure to an appropriate authority to be reasonable and appropriate. Certain appropriate authorities are listed, such as a Minister of the Crown; in relation to illegal activity – the police; in relation to the police – the Police Complainants Authority; in relation to fiddling public funds – the Auditor-General; in relation to public employees – the Commissioner of Public Employment; in relation to a judge – the Chief Justice; in relation to public officers who are not police or judges – the Ombudsman. However, some contentious issues arose:

- There was some pressure to make MPs "appropriate authorities". The Government did not agree to this. The Bill enacts a very powerful weapon indeed, once a disclosure falls within its scope. It provides complete protection against all legal action. It therefore potentially protects the leakage of confidential information from all levels of the public service. If a Member of Parliament was an "appropriate authority", then any member of the public service could with impunity leak information to any Member. This would seriously compromise the integrity of any Government.
- The Commissioner of Police requested that the Anti-Corruption Branch of the Police Force be made an appropriate authority in relation to allegations of corruption and the like. The Government considered this very carefully, and the Bill was amended to reflect the role of that Branch.
- It was put to the Government that there may well be new "appropriate authorities" created in the future. The Bill was amended to give a regulation making power to add and delete appropriate authorities.

What is a genuine whistleblower?

The third issue was the most difficult. In general terms, how do you define a genuine whistleblower? There were widely varying perceptions on the definition of a "whistleblower", which are often based on subjective attitudes towards whistleblowing as an activity. The consultation process for the Bill greatly assisted in developing an appropriate approach.

Initially, the Bill required a whistleblower to believe that the disclosed information was true. However, the Bill also created a defence to victimisation of a whistleblower if the disclosure was false or not made or intended in good faith. Further, it was a criminal offence to make an allegation knowing it to be false or misleading.

Respondents to the consultation process were not happy with this requirement for two reasons. Firstly, as a general proposition, many were concerned that it catered too much for a person who was very credulous and/or self-deluding. Secondly, that a person could genuinely believe that the information was true – thus attracting the protection – and still be aware of the possibility that it was false – thus also being guilty of the offence.

As it happened, the respondents in consultation preferred the test in the Queensland Bill that there must be a belief on reasonable grounds that the

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World Review

A survey of some recent international developments

British Telecom and MCI Communications have announced that they have formed an alliance to provide worldwide value added telecommunications services.

• In order to stimulate the development of Russia's domestic telecommunications infrastructure, the Russian Ministry of Communications has announced that it is postponing the issue of licences to develop international communications systems.

• Nine Asian carriers have signed a Memorandum of Understanding to build the Asia Pacific Cable Network – cable which will link Singapore with 8 other Asian nations. It is envisaged that the fibre link will be over ten thousand kilometres.

• Telstra's hopes of operating a second general carrier licence in Malaysia have been thwarted by the Malaysian Government's decision ruling out full deregulation of their telecommunications industry.

• The German Government has revealed plans to privatise Deutsche Bundepost Telekom and its related postal companies, whilst the French Government has also announced that France Telecom will be privatised and the country's telecommunications sector will undergo a major overhaul.

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is not quite that simple. I believe that while these countries feel their way towards a free society, we need to take this concept of balance into account. Sometimes broadcasters will make exactly the same choice they would have made in Australia, Britain or the USA. But every now and then they may feel that reality is literally millions of people working desperately hard to pull themselves up by their own bootstraps and hesitate to set fire to their world.

Indonesia has surprised me by its sheer diversity. Secessionism is not abnormal – it is endemic. And I sometimes wonder how anyone can run the place at all. Another surprise has been how fiercely proud ordinary Indonesians are of their nation. We won our independence too easily to care so deeply.

Conclusion

As a codicil to all this, let me anticipate some reactions and say that I am not suggesting that existing regimes should be sacrosanct. Nor am I saying that governments should be encouraged to tell broadcasters what to say and how to say it. This is not a disguised plea for censorship. But I do feel that the more we understand our neighbours, the less comfortable we will be with "publish and be damned". That might just turn out to be prophetic.

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information is true. The Government agreed for the above reasons and this became the test in the Act.

The second point is a little more subtle. The Commissioner for Equal Opportunity commented that the requirement that the person genuinely believe that the information is true created an unfair distinction. The distinction is best put as follows:

> *"As a matter of fairness it would seem to me that the Act ought to protect the fair-minded and objective person, who is unable to make up his or her own mind about the truth of the allegations, to the same extent as it protects the person who rashly accepts and believes everything he or she hears."*

This point was accepted. Accordingly, the test of belief on reasonable grounds is supplemented by an alternative as follows:

> *"... is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated."*

It will, of course, be necessary for a public awareness campaign to educate the public about the legislation. I look forward to co-operating with all concerned parties in that process.

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Prosecutions

The New South Wales legislation provides for a two year limitation period in which proceedings are to be commenced. The written consent of the Attorney General is required before proceedings can be instituted.

Most of the State Acts provide for fines or imprisonment or both as penalty for breach of the provisions discussed above. In New South Wales, the maximum fines range between $4,000 and $10,000 for individuals, depending on whether the conviction is summary or on indictment and $50,000 for corporations. The maximum sentences range from 2 to 5 years.

In *Miller's* case, which was decided in 1988 under the New South Wales legislation, the journalist was fined $500 after the court took into account her character, her belief (based on legal advice given to her employer) that she was not breaking the law and the fact that the legislation was relatively new. This penalty was upheld on appeal in *Donaldson v TCN Channel Nine* in 1989. The production company was fined a total of $25,000 for the offences of causing the use of a listening device, possessing the tape recording of the conversation and communicating it to viewers.

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