Blowing the whistle on the Whistleblowers Protection Bill (Vic)

Public sector whistleblowers are vitally important. They can expose serious governmental misconduct that may otherwise escape scrutiny. Such exposure can help ensure that public organisations and officials are held accountable for their actions. And such accountability can lead to higher standards and better performance in the public sector. This is clearly in the public interest.

Three things flow from this. First, people should be encouraged to 'blow the whistle' on serious governmental wrongdoing. Second, genuine whistleblowers should be protected from reprisals. And third, mechanisms should be put in place to ensure that disclosures are investigated and dealt with in an appropriate manner.

The Whistleblowers Protection Bill, which was introduced into the Victorian Parliament earlier this year, is designed to meet these three objectives. The Bracks government's decision to introduce the Bill is to be applauded. So is its decision to circulate two earlier drafts for public comment. According to the Attorney-General, the submissions received in the course of this consultation process revealed widespread support for the aims, objectives and framework of the Bill. This is not surprising. Unfortunately, however, two aspects of the Bill remain troubling.

The first aspect is this: the Bill prevents persons from obtaining access to documents under the FOI Act to the extent that those documents reveal information 'in relation to' a disclosure made under the Bill. This blanket exclusion – which is separate from another exclusion for documents revealing a whistleblower's identity – is potentially far too broad. This is best illustrated by an example. Suppose that a public servant blew the whistle on a fraudulently conducted government tender by referring the matter to the Ombudsman under the Bill. On one view of the exclusion, the FOI Act would not apply to documents that related to the tender process itself or to documents created in the course of the Ombudsman's investigation.

Why should this be so? Why should those documents be removed from public scrutiny in this way? It is difficult to identify a convincing policy reason for such compelled secrecy. The public servant referred to in the example is unlikely to be dissuaded from blowing the whistle simply because documents relating to the tender process may subsequently be released under FoI. And what if the public servant has a legitimate grievance about the handling of their disclosure? Why should they be prevented from seeking to hold the Ombudsman accountable for its investigation by endeavouring to obtain access to the investigation documents? Why should they be prevented from seeking access to such documents under FoI? And what if the aggrieved public servant then wanted to 'go public' about the fraudulent tender process and the subsequent investigation? They will not be able to tell the full story if they are prevented from seeking access to the documents held by the Ombudsman.

This leads to the second aspect of concern: the Bill provides that the FoI Act does not apply to the Ombudsman's investigations under the *Ombudsman Act*. Intriguingly, this exclusion has nothing to do with whistleblowers at all. This is because investigations made under the *Ombudsman Act* are different from investigations under the Whistleblowers Bill. As such, the exclusion travels well beyond what may be necessary to protect whistleblowers.

In fact, the combination of the two exclusions shields the Ombudsman from scrutiny in all cases. This is manifestly undesirable. The Ombudsman performs an undeniably important role in our system of government. Nevertheless, the public should be able to seek to hold the Ombudsman accountable for its investigations. It is difficult to achieve that aim without information about how those investigations were conducted. And it is likely to be extremely difficult to obtain such information if the Ombudsman is not subject to FoI.

Critically, as the Bar Council and Law Institute indicated during the public consultation process, the exclusions are unnecessary. There is already adequate protection in the FoI Act to prevent sensitive information held by the Ombudsman from being released. Why, then, should the Ombudsman not be subject to the FoI Act? Why should the watchdog not be watched?

When the Whistleblowers Protection Bill was introduced into Parliament, the Attorney-General announced that 'all Victorians will benefit from the greater scrutiny of the public sector which this bill facilitates'. It is difficult to see how Victorians will benefit from the fact that the Bill removes the Ombudsman from scrutiny.

Jason Pizer
Jason Pizer is a member of the Victorian Bar.

Another version of this article was published in the *Age*, 4 December 2000, p.15.

The health of FoI in NSW — a long, long, long way to go to recovery

The release of the Annual Report of an Ombudsman or FoI Commissioner is always an excellent way of focusing one's mind on the state of health of FoI laws. As reported elsewhere in this issue, both here and in Canada all is not well.

The NSW Ombudsman's Annual Report for 1999–2000 has been released and its section on FoI makes for interesting and disturbing reading. (It is available on the Ombudsman's web site: http://www.nswombudsman.nsw.gov.au).

The following comments are meant to give a glimpse of some of the issues raised by the report.

Need for Review of FoI Act — proliferation of access regimes

The Ombudsman, like his predecessors, again calls for a review of the *FoI Act 1989* (NSW). An additional reason why such a review has become necessary is the fact NSW now has at least three information access regimes under:

- the *FoI Act*
- the *Privacy and Personal Information Protection Act,* and
- the *Local Government Act*

One could probably add two more regimes, one arising from the centralised push for agencies to have their own web sites and the other, for older documents, under the *State Records Act.*

As the Ombudsman notes:

> The existence of three separate systems has created considerable confusion for both users and the public officials responsible for administering the relevant legislation. [Annual Report, p.108]

The incompatibility of the regimes is noted and the report gives a useful précis of the advantages and disadvantages of proceeding under each scheme. An appendix to the report compares provisions of the three acts to illustrate the potential for confusion. Given the comments elsewhere in the report one can imagine gleeful agency decision makers using the confusion to refuse to supply information and to discourage applicants. The refrain 'oh the new privacy laws prevent us telling you this' is something I have heard now, on numerous occasions.

Features of agency conduct

In the absence of any separately issued investigation reports on specific agencies of issues, we have to rely on the Annual Report for some case studies plus other observations arising out of the complaints handling process and the Ombudsman's own audit of agency activities.