

AUSTRALIA'S RIGHT TO KNOW

RESPONSE TO WHISTLEBLOWER PROTECTION REPORT BY THE HOUSE OF
REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

JUNE 2009

EXECUTIVE SUMMARY

Australia's Right To Know (RTK) Coalition acknowledges the important work accomplished by the Committee in its report on a comprehensive whistleblower protection scheme for the Commonwealth public sector.

Its proposed Public Interest Disclosure Bill promotes the cause of accountability in public administration. In RTK's view, it takes some steps in the right direction towards encouraging public servants to speak out about wrongdoing and maladministration.

Taken as a whole, there is a commitment to promoting a pro-disclosure culture in a workforce that sadly too often has embodied the reverse.

However, it falls down in a number of significant aspects.

This leaves the federal Government well short of its pre-election promise to deliver a "best practice" approach to open administration. Other jurisdictions have whistleblower legislation that is not as restrictive as what the Committee proposes.

The main flaw is that the Report and Bill work from an inflexible presumption that there needs to be a high qualification for disclosures that warrant official protection. The proposed new system risks creating confusion and a complicated reporting pathway – the exact opposite of what the Committee is trying to achieve.

RTK's primary position is that the public interest is best served by exposing maladministration or corruption within the public service. This public interest overrides any embarrassment or other backlash against the government.

DETAIL

RTK endorses Recommendations 1 and 2 as fundamental underpinnings of a new Commonwealth whistleblower system: legislation to provide whistleblower protection and key principles that guide its provisions. The existing system is inadequate and a complete legislative overhaul is required.

The principles accept that it is in the public interest that public sector employees have the right to raise concerns about wrongdoings or malfeasance without fear of reprisals and that government and the public sector have a responsibility to be receptive to concerns that are raised.

RTK strongly supports swift action on Recommendation 6. For a whistleblower system to work effectively there must be protection for members of the public, as well as the administrative workforce, to make public interest disclosures about the Commonwealth public sector.

Recommendation 7 – “serious matter”

RTK believes there is a major problem with Recommendation 7. While the range of wrongdoing types (corruption, maladministration, wastage of public funds etc) is admirable in its comprehensiveness, the Committee has set a “serious matter” qualifier for protection – even those made through official channels.

This qualifier is inappropriate for some cases of wrongdoing that, at first blush may appear to be inconsequential, but which ultimately prove to be important matters of public interest. A perfect example is the expenses abuse by members of the UK Parliament. The initial early media reports of confidential claims for reimbursement of duck house purchases or moat cleaning bills were initially dismissed as trivial matters. Taken together, they amounted to very serious maladministration which has shaken the very core of the political system.

There are serious harms that do not immediately threaten. Yet there may be a clear public interest in disclosing them early because this can minimise harm or even ensure prevention, and at a lower cost than would otherwise be the case.

An arbitrary restriction on “serious matters” creates confusion and conflict. Agency managers quite often will dispute the judgment of junior officials about the seriousness of a wrongdoing, thus frustrating legitimate whistleblowing efforts.

In the view of RTK, any Commonwealth legislation must make it explicit that any matter falling into the range of activity listed in recommendation 7 can trigger a public interest disclosure through official channels.

RTK strongly supports Recommendation 9. The motive of a person making a disclosure should not be a factor in determining protection.

Recommendation 21 – disclosure to the media

As we argued in our submission to the Committee (August 2008) the media is often the only or most effective way for a whistleblower to expose wrongdoings within government or its

administration. We remain convinced that there are legitimate circumstances where media disclosure is warranted as an option. These include cases where an agency has not fulfilled its obligations to a whistleblower or the disclosure framework may not adequately handle an issue. Moreover, that initial exposure to the media may be the only or most effective way of ensuring the public are informed and that positive action is taken on important matters.

Again, the UK expenses scandal is a salutary lesson of the effectiveness of the media acting as a whistleblowing mechanism. Authorities were able to use a range of bureaucratic manoeuvres, including ineffective FOI laws, to prevent vital information on maladministration or wastage of public funds (to use two of the Bill's definitions) coming to light.

The Committee's own report acknowledges that disclosures to the media "provide an important check on procedure and a 'safety valve' for the system".

The proposed test required for third party media disclosures, suggested by Recommendation 21 would impose an extremely high bar on disclosure to the media and is completely unsatisfactory. The proposed Bill would set up no less than five tests to trigger protection for media disclosures:

1. The matter must first be disclosed internally and to integrity agencies
2. Relevant authorities have not acted in a reasonable time
3. The matter threatens public health and safety
4. The harm must be serious
5. The harm must be immediate.

A public health and safety test is too restrictive. As Dr A J Brown has noted in a letter to Senator John Faulkner (April 27 2009) there is no logical basis for restricting the protection of media disclosures to those matters. Such a test would exclude the type of official corruption exposed by the Fitzgerald Inquiry – a classic media exposure case that was raised by the Committee itself as justifying the need for a non-official whistleblowing channel. Brown argues – and RTK agrees – that the most prominent types of "integrity breakdown" brought to public attention via the media in the past few years would have failed the recommendation 21 test.

These include the 2005 publication by The Australian of reports by Customs Officer Alan Kessing on law airport security, the revelations of impropriety by the Australian Wheat Board and the exposure of bungling by immigration officials in the Rau and Solon/Alvarez cases.

Kessing, who is now fighting a High Court case to overturn a conviction for disclosing official information without authority, argues Recommendation 21 will do nothing to encourage whistleblowing. "It is basically suggested that people go through their department first and only then go to the media after who knows how long. By doing that, it becomes obvious who has gone to the media. It requires people to put up their hand and say: 'Hey, I want to get prosecuted.'"

RTK supports the flexible concept of "reasonable" time and firmly opposes any time limits for a media disclosure trigger, such as the six months set down under NSW's Protected Disclosures

Act 1994. As the Committee itself notes, “an arbitrary timeline would only serve to unduly complicate procedure and may not serve the public interest”.

RTK argues the protection should be in these terms:

- Where a matter has been disclosed internally and to an external integrity agency, or to an external integrity agency alone, and has not been acted on in a reasonable time having regard to the nature of the matter; or
- *Where a matter is serious and circumstances exist to make prior disclosure impossible or unreasonable.*

The second test would meet RTK’s requirement that adequate protection be offered to whistleblowers that expose corruption or maladministration, even if the problem is ignored by the bureaucracy or where an investigation has taken too long or has failed to resolve an issue. It offers appropriate sanctuary for officials who believe their own agencies would not respond adequately or who fear the ability of an external integrity agency to respond has been compromised .

RTK strongly disputes the central premise behind the Committee’s overly-complex Recommendation 21 test for media disclosures – that there is a need to limit or discourage approaches through unofficial channels. As The Committee’s report notes “most people appear to be reluctant to place themselves in the public eye by making a disclosure to the media” and “research indicates that disclosure to the media is not a preferred option for whistleblowers”.

With a proper pro-disclosure culture in place there will not be the “flood” of media disclosures the Committee evidently fears. RTK’s proposed changes will deliver the important “safety valve” a new whistleblower system needs.