

Commonwealth Ombudsman National Conference

Plenary Session 3: Openness in a secret world

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The Rudd Government was elected in November 2007 having committed itself to high standards of integrity, transparency, responsiveness and accountability.

Since the election, a range of measures have been introduced to ensure high standards of accountability and integrity within government.

As part of these reforms, in July 2008, the Attorney-General, on behalf of the Cabinet Secretary, Senator the Hon. John Faulkner, asked the House of Representatives Legal and Constitutional Affairs Committee to inquire into and report on whistleblowing protections within the Australian Government public sector.

As Chair of the Committee, I oversaw the inquiry and presented the report to the House of Representatives in February this year.

Today I want to take the opportunity to provide an overview of the recommendations made by the Committee in its report, as well as offering some observations on furthering an agenda of accountability and transparency in government.

Protection of public interest disclosures is part of an array of integrity reforms which are being undertaken by the Government. It is useful to outline some of the reforms so far.

- For the first time, integrity and governance functions have been brought together under a single minister, the Cabinet Secretary and Special Minister of State. This includes the agencies of the Commonwealth Ombudsman, Privacy Commissioner, Australian Public Service Commissioner, Inspector-General of Intelligence and Security, Auditor-General and the National Archives of Australia.
- The Government has introduced the Evidence Amendment (Journalists' Privilege) Bill 2009, which amends the professional confidential relationship provisions by inserting an objects clause stating that the object of Division 1A is to achieve a balance between the public interest in the administration of justice, and the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts.
- The Government has introduced legislation containing the first stage of reforms to Freedom of Information, including the abolition of conclusive certificates.
- The Government has released an exposure draft of the Government's FOI reform legislation on 29 March 2009. This includes the most substantial overhaul of the Federal Freedom of Information regime since the Act's inception. The structural reforms in the draft legislation, including the appointment of an Information Commissioner and an FOI Commissioner, will represent a major change in FOI administration, and are directed at creating a "pro-disclosure" culture.
- The Special Minister of State wrote to all agency heads in April 2009, to state that the starting point for considering FOI requests should be a presumption in favour of giving access to documents.

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- The Government has strengthened the Standards of Ministerial Ethics, introduced for the first time a Ministerial Staff Code of Conduct and on 1 July 2008 a Lobbying Code of Conduct came into force.
- The Government has established the Public Service Ethics Advisory Service to work with all APS agencies to enhance ethical awareness and decision making capabilities.
- For electoral and party fundraising the Government has introduced measures to lower disclosure levels and thus increase transparency, although these measures have yet to be passed by the Senate.

The purpose of each of these reforms is to enhance openness, accountability and transparency within the Commonwealth Government.

Openness, accountability and transparency in government are important for at least two reasons. First, the application of these principles helps to maintain confidence in our system of government – public confidence in their elected representatives, as well as public confidence in the public service. Secondly, these principles lead to better outcomes in public policy and administration.

Whistleblowing

Protecting whistleblowing - or public interest disclosures – is part of this broader public integrity framework. It is a framework that should be an essential feature of any modern democracy.

The Whistle While They Work Project defined whistleblowing as a ‘disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisation that may be able to effect action.’

At present, the Commonwealth is the only Australian jurisdiction that does not have legislation dedicated to facilitating public interest disclosures and protecting those who make them.

The House Legal and Constitutional Affairs Committee was asked to consider and report on a preferred model for legislation to protect public interest disclosures within the Australian Government public sector.

We sought submissions from Commonwealth and State and Territory agencies, non-government organisations, relevant professional associations, media bodies, unions, academics and from whistleblowers themselves.

The Committee held 11 public hearings in Melbourne, Canberra, Sydney and Brisbane. The hearings included two roundtable discussions with public administration experts, lawyers and academics held on 9 September 2008 and representatives of media related organisations held on 27 October 2008.

The key recommendation of the Committee was that the Australian Government introduce legislation to provide whistleblower protections in the Australian Government public sector, and that it do so as a matter of priority.

Principles

As a starting point, we recommended some key principles that we felt should guide such legislation:

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- It is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
- People within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
- People have a responsibility to raise those concerns in good faith;
- Governments have a right to consider policy and administration in private; and
- Government and the public sector have a responsibility to be receptive to concerns which are raised.

Who should be covered

Limited protections against victimisation and discrimination are provided to Australian Public Service (APS) employees who report breaches of the APS Code of Conduct under current whistleblower provisions (s. 16 of the Public Service Act 1999); however, only two-thirds of the 232,000 Commonwealth public sector employees are in the APS and covered by these whistleblower provisions.

Employees of agencies subject to the Commonwealth Authorities and Companies Act 1997 are presently excluded. These include organisations like the Australian Broadcasting Corporation and the Australian National University. Former employees, contractors, consultants, and the staff of Members of Parliament are also excluded.

The Committee recommended that categories of people who could make protected disclosures be expanded to include those who are currently excluded.

In addition, the Committee recommended that others who have an 'insiders knowledge' of official misconduct, can be deemed to be a public official for the purposes of the legislation.

Those could potentially include a volunteer or an employee of a state government entity with inside information of misconduct in the Commonwealth public sector.

What should be protected

Evidence to the inquiry showed strong support for the type of disclosures outlined in the terms of reference.

The Committee recommended that all of those disclosures should be protected except for 'official misconduct involving a significant public interest matter' because significance or seriousness may not be something that is immediately obvious and making a report conditional on significance or seriousness may set too high a threshold for people to be confident in coming forward.

In line with the evidence received, the Committee considered that grievances over internal staffing matters are not matters that concern the 'public interest' and should be addressed through separate mechanisms such as existing workplace personnel processes.

What protections should be available

The Committee recommended that legislation provide for protection against detrimental action (including victimisation, discrimination, discipline or an employment sanction) and immunity from civil and criminal liability.

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The unfair treatment of whistleblowers is a workplace issue that should be addressed through existing industrial relations law. Some limited protections are provided in the Workplace Relations Act 1996 and since 1 July 2009 by the Fair Work Act.

Industrial relations law could provide better protections for whistleblowers than a unique scheme. That is why the Committee has recommended that the right to make a public interest disclosure be recognised as a workplace right and infringements of that right ought to be dealt with by the appropriate workplace authority, now the Fair Work Ombudsman.

Compensation and existing rights of whistleblowers are to remain within the types of compensation and rehabilitation provisions available to employees generally, and mediation and dispute settlement would also be within the scope of provisions available to employees generally.

Where a person is not amenable to the jurisdiction of the industrial courts or tribunals, such as members of the Defence Force, then the Workplace Ombudsman may still investigate and issue an evidentiary certificate that adverse action has occurred.

Conditions

The Committee considered that the main condition which should apply in determining whether a disclosure is protected is the honest and reasonable belief of the whistleblower.

Decision makers should have discretion to protect those who materially fail to comply with the procedures for making a disclosure where a person has nonetheless acted in good faith in the spirit of the legislation.

The proposed public interest disclosure scheme aims to minimise the disincentives for people to make disclosures. Therefore, penalties and sanctions should not apply to those who do not follow the prescribed procedure or knowingly or recklessly make false allegations. The removal of protection in these circumstances is sufficient.

The Committee considered the merits of adopting a US-style reward system for whistleblowers such as the “qui tam” provisions in the False Claims Act. On balance, the Committee concluded that such a reward system would not contribute to the objects and purposes of the legislation.

In the Committee’s view, it is appropriate to provide for compensation to restore a person to the position they would have been in, if not for adverse treatment arising from making a disclosure. The legislation should not remove any existing legal rights in relation to damages.

Procedures

Research indicates that the vast majority of disclosures that are made are made internally. Legislation should encourage the making of disclosures with agencies because of their proximity to the issue and ability to effect action.

The Committee recommended that new legislation provide avenues for making disclosures to specified external agencies such as the Commonwealth Ombudsman and the Public Service Commissioner, for cases where people consider, on reasonable grounds, that their disclosure would not be handled appropriately within their own agency.

The success of the new legislation depends on the extent to which those within the sector have confidence in the system.

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Positive obligations on agencies are an important source of confidence.

Legislation should include strong positive obligations on agencies in receiving, acting on and reporting on disclosures.

The Commonwealth Ombudsman has a reputation and appropriate skills and experience in handling investigations into serious and sensitive public interest-type matters and in the Committee's view is therefore the most suitable agency to oversee the administration of the legislation.

The Committee recommended that the Ombudsman have new statutory responsibilities under the scheme including monitoring the system and providing training and education and reporting to Parliament on the operation of the system.

The Committee also proposed that the Ombudsman may publish reports on matters in the public interest that are raised under this scheme.

Third party disclosures

Since the tabling of the report in Parliament in February, much of the public discussion regarding these proposed reforms has centred on the role that disclosures to third parties should play in the framework and what protections should be extended to those making such disclosures.

In determining the appropriateness of protecting disclosures made to third parties, particularly the media, the primary consideration must be how such disclosures could serve the public interest. If a form of disclosure cannot promote accountability and integrity in public administration, or otherwise serve the public interest, then the disclosure does not warrant protection.

Enabling protection for disclosures made to the media in certain circumstances could potentially act as a safety valve where particularly serious matters take too long to resolve inside the system and for matters that pose immediate serious harm to public health or safety.

The Committee recommended that Members of Parliament be recognised as an authorised recipient of public interest disclosures. This would complement the limited protections already afforded to those who provide information to parliamentarians under the Parliamentary Privileges Act 1987. The Standing Orders of each House should be amended to ensure that Members act responsibly in relation to the disclosures they receive.

Disclosures should be protected when they are made during the course of seeking assistance from legal advisors, professional associations and unions.

People are much more likely to make disclosures within their own agency or through other prescribed channels. The proposed scheme recognises that people can sometimes have good reasons to turn to third parties to seek advice or make a disclosure.

A key principle for the new public interest disclosure legislation recommended by the Committee is that government has a right to consider policy in confidence. The Committee has recommended that protection should not apply where it is established that a person has 'leaked' confidential information.

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Whistleblowing is distinct from 'leaking' where an official covertly provides information directly to the media intending to embarrass the government. Under the Committee's proposals, these types of unauthorised disclosures may not be eligible for protection.

Leaking breaches the trust between the public service and the executive. There may also be unintended consequences including unfairly implicating people in charges of misconduct, putting incomplete or erroneous information into the public arena and incorrectly anticipating that the government has determined that it will follow a particular course of action.

The media lacks a structured and rigorous system of investigating and assessing the risks of publishing a disclosure. It is not in the public interest that internal investigations are undermined or that workplace confidentiality is breached.

In just the last few weeks, we have seen Australian media organisations:

- Publish the details of a forged email which the journalist had not seen and which had simply been read to him over the phone.
- Break a news embargo by announcing the visit by the Deputy Prime Minister to Iraq prior to her arrival there – a mistake that could have had serious security ramifications
- Report a high level security operation that involved the raid of 19 houses and the arrest of several people on terrorism related charges prior to the operation being completed. The early release of this report could have endangered the lives of officials involved in this operation.

The British media seems to have even more trouble identifying the public interest, as shown for example by the controversy which erupted in July 2009 in the UK over media organisations engaging in large scale hacking into the mobile phones of celebrities, politicians and political advisers.

A free and independent media with access to information is a critical part of a modern democracy. There are countless examples of wonderful work done by the media in exposing corruption and maladministration. But the media is not, and can not be, a formal part of the official public integrity framework. We need to find a role for the media in the public interest disclosure regime, but in my view that role is likely to be a limited one.

Organisational culture

Missing from much of the discussion around the issue of whistleblower protection has been the need to build a pro-disclosure workplace culture. Although this was a strong theme in evidence given to the Committee, it has attracted almost no public comment since the tabling of the report.

Whistleblower protections are needed only when systems have failed to take public interest disclosures seriously, when systems have failed to deal with public interest disclosures and when employees making disclosures have suffered repercussions resulting from the making of the disclosure.

It is clearly preferable for employees to have disclosures treated appropriately and sensitively at the time of making the disclosure rather than having to take remedial action to return themselves to the position they were in prior to making the disclosure.

Many contributors to the inquiry noted that there is a strong culture within the public sector against those who question work practices. Organisational culture is as important as

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legislation in producing the desired outcome of facilitating public interest disclosures and supporting those who make them.

The Committee recognised that legislation alone is insufficient in bringing about cultural change and promoting accountability in public administration. In addition to legislation, there is an important role for leadership and education in promoting a more supportive environment in which people feel at ease in raising their doubts about workplace practice.

A critical recommendation of the Committee's was that the Commonwealth Ombudsman be given responsibility to provide assistance to agencies in implementing the public interest disclosure system. It was felt that this should occur through assistance to employees to promote awareness through educational activities and through an anonymous and confidential advice line.

Conclusion

Legislation to protect whistleblowers in the Commonwealth public sector is long overdue. I am looking forward to legislation based on the Legal and Constitutional Affairs Committee's report being introduced soon to the Parliament.