

FREEDOM OF INFORMATION AND WHISTLEBLOWER LEGISLATION: AN AUSTRALIAN PERSPECTIVE

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Introduction

I welcome this opportunity to address the Asian Ombudsman Association Conference on the important topics of freedom of information (FOI) and Public Information Disclosure (or whistleblower protection). The topics are necessarily of interest to any Ombudsman, because of our shared commitment to promote transparency and accountability in government. My personal interest in these topics goes back much further, to the 1970s when the campaign for FOI legislation in Australia was spearheaded by an organisation that I had jointly founded, the Freedom of Information Legislation Campaign Committee. A sister organisation established by the same group – engagingly titled Rupert Public Interest Movement – was similarly active in promoting whistleblower protection legislation. It is pleasing to know that FOI and whistleblower protection are both now part of the legal framework to ensure open government in Australia. This conference provides an excellent opportunity to share some of the Australian experience with Ombudsman delegates from Asia and other countries.

‘Open Government’ is now both a catchword and a fundamental doctrine in democratic government. It is nevertheless a truism that open government will never be attained in its purest sense, and that societies and governments will never be completely open. Confidentiality, privacy and secrecy are commonplace in all forms of transaction, not just in government, but also in commercial, social and personal interaction. While accepting that inevitability, it is equally important to grasp that information is both the lifeblood of democracy and a currency of power. Democratic and responsible government thus requires that the public—who ultimately provide both the source and legitimacy for governmental power—has a right to know how it is being governed. Relationships across government and with the public depend upon an effective flow of information. ‘Open government’ is designed to facilitate that information flow and to ensure that the public is fully informed about government processes and decision-making. In short, ‘open government’ provides a means to promote public accountability.

Freedom of Information and whistleblower legislation are important elements of ‘open government’. FOI legislation provides for a public right of access to documents held by governments and their agencies. The legislation enables members of the public to

become better informed about the basis for government policies and decisions. It also provides a means for individuals to obtain access to personal records held by government agencies. Whistleblower legislation provides a further layer of public accountability, by protecting the disclosure of illegal, immoral or illegitimate practices committed by an organisation or an employee of that organisation. Whistleblowers are increasingly being recognised as playing a vital role in healthy and effective management in public administration, as in the private sector.

Administrative Law Reform In Australia

The impetus for administrative law reform to provide more open government in Australia blossomed in the early 1970s. In 1972, and after 23 years in opposition, an about-to-be elected Labor government promised to enact a Freedom of Information Act along the lines of the legislation introduced in the United States in 1967. Ten years elapsed before that promise came to fruition. During that period, the merits of FOI legislation were debated widely in the Australian community. A royal commission¹, two public service committees² and a committee of the Australian Parliament³ also considered the matter. In debate that frequently crossed party lines, Bills for an FOI Act were considered at length by two successive parliaments. The Australian FOI Act was finally enacted under a Liberal-led coalition government in December 1982. A strong theme in the debate was whether FOI legislation would run counter to core features of the Westminster system of responsible government, as it operated in Australia. Opponents of FOI legislation argued that executive secrecy was needed in some degree to safeguard the following features of Westminster government:

- collective ministerial responsibility ('cabinet solidarity'), which requires all ministers to consider themselves equally responsible for and bound by the decisions of the executive government;
- individual ministerial responsibility, which is said to hold each minister personally responsible for all decisions made and carried out by his/her department;
- a politically neutral public service, which is not involved in partisan controversies, and is able to serve any government with an equal degree of loyalty and efficiency regardless of the government's political persuasion; and
- personal anonymity of members of the public service, so that particular views are neither ascribed to individual public servants nor seen to be at variance with the views ultimately expressed by the executive government.

The Australian Parliament, in enacting FOI legislation, implicitly accepted that the arguments predicting an undermining of the Westminster system of government had been overstated. This view was well put by the 1979 Senate Committee report on the FOI Bill:

¹ Royal Commission on Australian Government Administration, *Report*, Australian Government Publishing Service, Canberra, 1976.

² Attorney-General's Department, Report of Inter-Departmental Committee, *Proposed Freedom of Information Legislation*, Australian Government Publishing Service, Canberra, 1974; Attorney-Generals' Department, Report of Inter-Departmental Committee, *Policy Proposals for Freedom of Information Legislation*, Australian Government Publishing Service, 1976.

³ Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978*, Australian Government Publishing Service, Canberra, 1979.

Very often people have alleged the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient way of doing things, immune from public gaze and scrutiny. We are indeed seeking to put an end to that. What matters is not the convenience of ministers or public servants, but what contributes to better government.⁴

Also contributing to the developing climate of 'open government' during this period were some significant judicial developments in administrative law. Two decisions of the High Court of Australia were particularly important. In 1978, in *Sankey v Whitlam*,⁵ the Court held that it was ultimately for a court and not the Executive government to decide whether documents should be disclosed for the purpose of court proceedings. Then, in 1980, in *Commonwealth v John Fairfax & Sons Ltd*,⁶ Justice Mason observed, in rejecting a Commonwealth attempt to restrain the publication of confidential government documents, that restraints on publication of government information that serve no purpose other than protecting the government from review and criticism are unacceptable in a democratic society. Both decisions signalled a refusal by courts to accept that the Executive government had an inherent right to decide where the boundary between openness and secrecy should be drawn.

The 1970s was also a period in which a new system of administrative law was being developed in Australia. Three key legislative developments in this period preceded the FOI Act and reinforced the concept of 'open government': the *Administrative Appeals Tribunal Act 1975*, *Ombudsman Act 1976*, and *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The first of these established a new general administrative tribunal—the Administrative Appeals Tribunal—with power to review on the merits a wide range of administrative decisions made by ministers, public servants, statutory authorities and various tribunals. The Ombudsman Act established a more informal avenue of complaint through a Commonwealth Ombudsman, with the power to investigate administrative acts and to recommend remedial action, including the power to report to the Prime Minister and to Parliament. The ADJR Act established an avenue by which the legality of Australian government administrative action could be reviewed by a new and simple procedure in the Federal Court of Australia. Each of these new forms of external oversight and public accountability of executive action was designed to operate independently of the established parliamentary and political process.

With the enactment of the FOI Act in 1982, the basis for 'open government' in Australia was firmly established. The concept has since developed progressively across Australia, both federally and at state and territory level.⁷ Within Australia's Federal government system, there are now various mechanisms established that place constraints on the natural inclination of governments and public servants to withhold information from the public. They include Ombudsmen, tribunals, FOI units and various forms of whistleblower protection legislation.

⁴ <http://www.ag.gov.au/agd/FOI/FreedomofInformationAct1982History.htm>. Accessed 24 October 2005.

⁵ *Sankey v Whitlam* (1978) 142 CLR 1.

⁶ *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

⁷ The States and Territories progressively introduced FOI legislation between 1982 and 2002 as follows: *Freedom of Information Act 1982 (Vic)*; *Freedom of Information Act 1989 (NSW)*; *Freedom of Information Act 1989 (ACT)*; *Freedom of Information Act 1991 (SA)*; *Freedom of Information Act 1991 (Tas)*; *Freedom of Information Act 1992 (WA)*; *Freedom of Information Act 1992 (Qld)* and *Information Act 2002 (NT)*. For a discussion of some of the issues see a Discussion Paper by the Victorian Ombudsman, *Review of the Freedom of Information Act* (2005).

The concept of 'open government' will always face some resistance within government. The heightened concern within government at the present time about security concerns illustrates this point. Nevertheless, there is now a firmly held consensus within the Australian parliament, the public service and the Australian community at large, that the FOI Act is a necessary and permanent feature of the constitutional framework of government. The FOI Act has not undermined responsible government, as some had earlier argued it would. It has, rather, become an integral part of Australia's democratic framework—which is not to say that it could not be made to work better.⁸

Freedom of Information Legislation

Scope of the FOI Act and the role of the Ombudsman

The overarching objective of the FOI Act was to replace three ingrained principles of government: (1) that government exercised a prerogative of deciding what information would be released to the public; (2) that a person seeking access to official documents bore the onus of explaining and justifying why access should be granted; and (3) that a decision by government on whether to grant public access to a document was discretionary and not guided by any objective criteria. As such, s 3 (1) of the FOI Act states its objective as being to 'extend as far as possible the right of the Australian community to access ... information in possession of the Government of the Commonwealth'.

In the first 22 years of the Act's operation, from December 1982 to June 2004, Commonwealth Government agencies received a total of more than 685,000 FOI requests. In most years following the early growth in the community's understanding and use of the legislation, the Australian government has received more than 30,000 FOI requests each year. In 2003-04, a total of 42,627 requests were received, an increase of 1,146 (2.8 per cent) compared with 2002-03.

The FOI Act expressly empowers the Ombudsman to investigate complaints about the actions of Australian Government agencies in response to FOI requests. The Act also requires agencies to inform applicants of their right to complain to the Ombudsman about FOI matters. The Ombudsman's role under the FOI Act reflects the more general role of the office in promoting transparency in government administration. This includes ensuring that agencies implement sound document management procedures, provide clear and accessible information, and are open and responsive to complaints about issues to do with access to information.

FOI complaints received by the Ombudsman

During the year 2004-05, my office received 275 complaints and finalised 289 complaint issues about the way that Australian Government agencies handled requests under the FOI Act. This was a 16% increase over the 236 complaints received in 2003-04.⁹ Even so, it should be borne in mind that this level of complaint corresponds to less than one per cent of the total FOI requests received by Government agencies. Another useful statistic that helps keep the level of complaints

⁸ Eg, see Greg Terrill, 'The Rise and Decline of FOI in Australia' in Andrew McDonald & Greg Terrill (eds), *Open Government: Freedom of Information and Privacy* (London: Macmillan Press, 1998).

⁹ By way of comparison, in 2003-04, there were 158 FOI applications lodged with the Administrative Appeals Tribunal—see Attorney-General's Department, Freedom of Information Act 1982, *Annual Report 2003-2004*:17.

in perspective is that, of the nearly 40,000 requests determined by agencies in 2003-04, only 2,360 (less than six per cent of the total) were entirely refused.¹⁰

Even now, after FOI has been in effect for 23 years, agencies do not always provide a smooth service to FOI applicants. My office has seen refusals on minor points, such as not accepting email requests (even though this can be a valid way to make application) and declining a request because it asked for 'information' and not 'documents'.

In fact, the Act was drafted with the purpose of making applications easy. The use of the word 'document' or the expression 'freedom of information' or 'FOI' is not required for a request to be valid. All that is required is that enough information is provided for an agency to identify the relevant documents. Those examples of poor agency responses do not necessarily indicate that there is a culture of obstructionism in government agencies. More than likely, the problems that come to the Ombudsman's office mostly indicate that some individuals within those agencies are not sufficiently familiar with the overall objectives of the FOI Act.

The majority of FOI-related complaints continue to be about delays in processing applications. In a number of cases, this is due to basic administrative error—such as the agency misplacing the FOI request, failing to interpret it as an FOI request, failing to forward it to the relevant area for processing, or forgetting to send the agency's decision (and the documents) to the applicant. In other cases, delays are due to unanticipated staff shortages or delays in consultation between the agency and the applicant to clarify a request. In such cases, the usual remedy is for the agency to apologise and expedite processing of the request.

In some cases we have also suggested that an agency refund the application fee and/or processing charge. In one particular case we investigated, the agency conceded that a wider problem existed, and implemented systemic remedial action, including training staff and upgrading its computer system. In another case, the complaint was about the agency deciding to refund processing charges paid in respect of the request, but then failing to pay back the money. In response to our inquiries, the agency implemented a new checklist procedure designed to ensure that no tasks remained outstanding before finalising FOI requests.

The Ombudsman's own motion into FOI

The Commonwealth Ombudsman is empowered to conduct an investigation, not only as a result of a specific complaint, but also on his or her own initiative. Investigations conducted under this authority are generally referred to as 'own motion' investigations. Last year, I instigated one such investigation into the quality of agency processing of requests made under the FOI Act, out of concern that members of the public were encountering unhelpful FOI responses from agencies.

The investigation will examine data from the 22 government agencies we selected to participate. That data includes agency FOI manuals and processing procedures, as well as a number of randomly selected FOI case files. We have also examined our own complaints database and various decisions of the earlier-mentioned Administrative Appeals Tribunal. Our main focus has been on assessing how well agencies were complying with the requirements of the Act, particularly in relation to timeliness and decision-making. Work continues in collating the received data, which will be included in a report that I intend publishing towards the end of this year.

¹⁰ *Ibid.* 5.

Our initial findings confirm that there are indeed discrepancies between agencies concerning the way they process FOI requests. There are also considerable variations between agencies in their overall ability to process FOI requests within the required 30-day period. At the two extremes, one agency achieved only a 31 per cent success rate, whilst another managed a success rate of 94 per cent. Discrepancies such as these might indicate that there could be a cultural resistance to FOI within some agencies. It might also indicate that agencies receiving a preponderance of 'personal information'-related FOI requests (about 90 percent of FOI requests are for personal information) are more easily able to process these within prescribed time frames than those agencies that primarily receive policy development or government decision-making requests.

Other issues that have become apparent through this project include:

- a lack of consistency in acknowledging requests in a timely fashion (within 14 days);
- delays in notifying charges;
- a variable quality in decision letters, particularly regarding the explanation of exemptions imposed; and
- unavailability of checklists in some agencies.

The future management of FOI in Australia

In Australia, there is a view that the FOI Act works well in facilitating public access to personal information, but not to policy-related information—particularly when that information is likely to be politically sensitive or is claimed to be 'Cabinet-in-Confidence'. There is general recognition that there is an uneven culture of support for FOI amongst government agencies, which may reflect their different responsibilities, the views of their respective Ministers, or the culture created under a particular Secretary. There is also some recognition that the coverage of the Act has not kept pace with the ever-increasing tendency of agencies to outsource many of their services to private enterprise. This has resulted in some record-holdings now escaping the coverage of the Act. There is also evidence that oversighting of FOI administration across some government agencies is too decentralised and that the cost of gaining access to documents can be prohibitively costly, arduous and slow.

In December 1995, the Australian Law Reform Commission and the Administrative Review Council issued a joint report based on a comprehensive review of the Commonwealth's FOI Act. One finding of the report was that 'many of the shortcomings in the current operation and effectiveness of the Act can be attributed to this lack of a constant, independent monitor of and advocate for FOI'.¹¹ The report promoted the idea that there needed to be an FOI oversight body that could play an active role in publicising the legislation's existence, monitor compliance with its provisions and initiate actions to remedy inhibitors to its effective operation. The report recommended that a statutory office of FOI Commissioner should be created, with responsibilities that would include:

- auditing agencies' FOI performances;
- preparing an annual report on FOI;
- collecting statistics on FOI requests and decisions;
- publicising the Act in the community;

¹¹ Australian Law Reform Commission/Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Discussion Paper 59, Australian Law Reform Commission, Canberra, 1995: para. 6.2.

- issuing guidelines on how to administer the Act;
- providing FOI training to agencies;
- providing information, advice and assistance in respect of FOI requests, and
- providing legislative policy advice on the FOI Act.

Although the Australian Government, to date, has not implemented this recommendation, the report's overall recommendations are seen by many as still providing the most useful template for maintaining the objectives of the FOI Act at the Federal level. I am inclined to agree that FOI needs more central direction and coordination.

One area of looming difficulty is the interaction between FOI and Privacy legislation. Both deal in a similar way with disclosure to a person of their own personal records, and the protection of personal information against inappropriate disclosure. But the theme of protecting information – of non-disclosure – is more strongly reflected in privacy legislation. At the Federal level in Australia we have an office of Privacy Commissioner, with a responsibility for the oversight and enforcement of the *Privacy Act 1988* and the power to carry out audits, investigate complaints, conduct 'own motion' investigations and to make determinations enforceable through the Federal Court. There is no such equivalent office with similar responsibilities for overseeing FOI matters, and for emphasising the importance of freedom of information. The complaint is often made nowadays that, through caution or design, government agencies are unnecessarily reluctant to disclose information, even to other agencies, for privacy reasons. There arguably needs to be a better balance between the often-conflicting demands of the privacy and freedom of information schemes.

For all of these reasons, I see my 'own motion' report as likely recommending that we revisit the idea of an FOI Commissioner. Moreover, because of the close involvement my office already has with FOI across all government agencies and the spread of our offices around Australia (we are located in every State and Territory), I can see particular resource advantages in the Commonwealth Ombudsman also assuming the responsibilities of an FOI Commissioner.

Whistleblower Protection Legislation

Legislative protection in Australia

Between 1993–2003, whistleblower protection legislation was widely introduced at the State and Territory level in Australia.¹² Today, each of the six Australian States, as well as the Australian Capital Territory, has enacted some form of whistleblower protection legislation. The two exceptions where there is no general legislation of that kind are in the Northern Territory and at the Federal (or national) level. Various titles have been used: *Public Interest Disclosure Act* (in three jurisdictions), *Whistleblowers Protection Act* (in another three) *Protected Disclosures Act* (in one other). There is diversity among the Australian laws, but features that are common (though not necessarily in all schemes) include the following:

- an obligation imposed on government agencies to investigate a disclosure or allegation by a person that there has been conduct occurring within the

¹² *Whistleblowers Protection Act 1993 (SA); Whistleblowers Protection Act 1994 (Qld); Public Interest Disclosure Act 1994 (ACT); Protected Disclosures Act 1994 (NSW); Whistleblowers Protection Act 2001 (Vic); Public Interest Disclosures Act 2002 (Tas); Public Interest Disclosure Act 2003 (WA)*. The State and Territory legislation is analysed well in an Issues Paper published by the NSW Ombudsman, *The Adequacy of the Protected Disclosures Act to Achieve its Objectives* (2004).

agency that amounts to a breach of the law, a disciplinary offence, gross wastage, or that poses an imminent threat to the health or safety of others;

- an obligation on agencies to protect those who make disclosures of that kind, for example, by preserving the confidentiality of the person's identity, relocating them to a safer position, and providing them with a progress report on the investigation of their allegation;
- statutory protection of a person who makes a disclosure against disciplinary and criminal action by reason of having made the disclosure;
- making it an offence for someone to take detrimental or reprisal action against a person who has made a disclosure;
- creating a right of action for civil damages to redress an unlawful reprisal; and
- creating a procedure for an injunction to restrain an unlawful reprisal.

In summary, all of the State and Territory schemes in Australia meet the three fundamental pre-requisites of whistleblower legislation:

- ensuring the protection of whistleblowers,
- ensuring their disclosures are properly dealt with, and
- facilitating the making of disclosures.

Limitations in Commonwealth legislation

The Commonwealth has no specific whistleblower legislation, though the *Public Service Act 1999* does provide some protection for whistleblowers. Section 16 of that Act requires agency staff not to victimise or discriminate against a public servant when that person reports to an authorised person breaches, or alleged breaches, of the Australian Public Service Code of Conduct. Examples of breaches of the Code include public service employees failing to act with care and diligence during their employment, using Commonwealth resources improperly, or improperly using inside information or their status or authority for the purpose of gaining a benefit or advantage for themselves or others. The Public Service Regulations 1999 provide more of the detail, including an obligation for agency heads to establish procedures for dealing with whistleblowing allegations.

The Commonwealth legislation has limited coverage. Among those to whom it does not apply are public sector employees who are not employed under the Public Service Act (for example, employees of Australia Post), former Public Service Act staff, and government contractors. Nor does the Commonwealth scheme provide statutory protection for members of the public who make a whistleblowing disclosure about a government employee. In short, many of the features that are found in State and Territory whistleblower protection legislation are not found in the limited Commonwealth scheme.

There have been proposals for broad-ranging reform in the Commonwealth. An example is the report in 1994 of a Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest*.¹³ Studies of that kind have given rise to private member's bill, an example being the *Public Interest Disclosure Bill 2001* introduced by an Australian Democrat Senator, Andrew Murray in June 2001 (and reintroduced in 2004). The Bill was the subject of a report in September 2002 by the Senate's

¹³ See also Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited* (1995)

Finance and Public Legislation Committee, which drew attention to deficiencies in this Bill while supporting the need for separate and comprehensive Commonwealth legislation on whistleblowing.

The limitations of current Commonwealth whistleblowing legislation have prompted some agencies to look elsewhere for guidelines on whistleblower protection. For example, the Australian Defence Force, in establishing its 'Defence Whistleblower Scheme' uses a set of guidelines established by Standards Australia¹⁴—Australian Standard AS 8004-203, Whistleblower Protection Program for Entities—which largely draws on the provisions of *The Whistleblowers Protection Act 2001* (Vict).

'Whistling While They Work' Project

The limitations in Commonwealth whistleblowing legislation are now widely acknowledged within the Australian public sector. This, together with a desire to examine and make recommendations concerning best practices under the various whistleblower schemes currently in existence at the State and Territory level in Australia, has been the stimulus for a major collaborative national research project into whistleblowing. The project, known as, 'Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations', began earlier this year. It is a three-year, national, collaborative research program into the management and protection of whistleblowers in the Australian public sector. The project is being led by Griffith University in Queensland and involves five other universities and 14 industry partners from the Commonwealth, State and Territory public sectors. My office has become an industry partner and is contributing significant resources to the project, including the participation of senior staff on the project steering committee and a staff member to work part-time on the project over the whole of its three-year life span.

The project will build on previous Australian and international research to construct a more up-to-date, representative picture of how whistleblowing and related public interest disclosures are being and should be managed. It will:

- investigate and compare experiences with the varying public interest disclosure regimes that have been implemented across the Australian public sector,
- identify and promote current best practice in workplace responses to public interest whistleblowing, and
- develop better strategies for preventing, reducing and addressing reprisals and other whistleblowing-related conflicts.

The project's report, which is expected to appear towards the end of 2007, will undoubtedly contain recommendations that will help inform the debate on the adequacy, or otherwise, of the existing Commonwealth whistleblower legislation, as well as agency procedures for the handling of whistleblower allegations and the protection of whistleblowers once they have made those allegations.

The Ombudsman and whistleblowing – current procedures

In any year, my office receives a small number of complaints that amount to whistleblowing allegations. These complaints cover many kinds of agencies and may

¹⁴ Standards Australia is an independent company, which prepares and publishes most of the voluntary technical and commercial standards used in Australia.

be made by officials, contractors and members of the public. We can receive anonymous complaints, and complaints by people who do not wish the agency concerned to know who they are. We investigate these complaints in the usual way, although I do require that I be kept informed of all whistleblowing allegations that we receive. Occasionally I become personally involved in a case, for example, by writing to an agency head about a complaint and to seek an assurance that a staff member or contractor whistleblower will not be subject to retaliation. Alternatively, where I consider it may be necessary to protect the whistleblower or to confine the subject of an investigation, I may decide to decline to investigate the whistleblower's complaint and instead commence an 'own motion' investigation into the subject.

Although there are no specific whistleblower provisions within the legislation administered by the Ombudsman, whistleblowers who act in good faith are entitled to the protection from civil action to those who complain to the Ombudsman, provided for in s 37 of the Ombudsman Act. While the Ombudsman Act goes some way to providing protection for whistleblowers, it is not a substitute for a more comprehensive scheme. One jurisdictional limitation of particular importance is that the Ombudsman does not have jurisdiction to investigate personnel or disciplinary action taken in relation to current employees of a government agency. Many whistleblowing complaints arise from the employment relationship.

The Ombudsman and whistleblowing – future prospects

In contrast to my belief that FOI would benefit from the more central direction and oversight that an FOI Commissioner could provide, I believe that whistleblowing lends itself to being primarily managed within the agency that is actually involved with the disclosures, with oversight by a range of 'compliance' agencies when appropriate.

This is for two reasons. First, whistleblowing sometimes relates more to human resource management than it does to administrative law. Cases commonly involve instances of people complaining about their non-promotion or treatment in the workplace. Secondly, many whistleblowing complaints focus on issues of internal management and resource allocation, and less upon the rule application or process issues that can be common in FOI complaints. One of the biggest challenges in FOI management is the development of a common set of procedures across government agencies, so there is more uniformity across government in how the public's right of access to government documents is implemented. Again, this contrasts with whistleblower issues, which are often focussed on problems or disputes arising in a particular agency, of a kind that require the attention and understanding of the senior management of that agency. Agency heads also have extensive employment and management powers that can be used to ensure that improper reprisals do not occur. It is premature to draw conclusions, but it may be that some of these issues and differences will be brought out in the findings of the 'Whistling While They Work Project'.

There is, on the other hand, a need for common principles and procedures across government in developing a culture that is attuned to whistleblower protection. Whistleblowers may also take the view that they will see greater protection and independence if they make a disclosure to a separate agency that can protect their identity, thus minimising the risk of reprisals. On occasions too the statutory powers and immunities to conduct an investigation that belong to an Ombudsman (and like offices), can be important in getting to the heart of a dispute marked by whistleblowing allegations.

Perhaps what may be needed is a two-tier system. At the primary level would be the heads of agencies, with the responsibility and the power to deal with most normal complaints. At a secondary level, to cover instances where there is a possibility of senior agency people being implicated in a complaint, or where the complainant is particularly concerned about reprisals or anonymity, there could be a small group of agencies with specific investigative and coercive powers that are authorised to receive whistleblowing complaints. Agencies that may have a role to play in this second tier include the Ombudsman, Auditor-General, Inspector-General of Intelligence and Security, and Public Service Commissioner and Merit Protection Commissioner.

The long-held view of my own office is that Ombudsman offices have a role to play in any whistleblower protection scheme. The Ombudsman's network of offices and access to staff with specialist skills as investigators can be useful in ensuring public confidence in any credible scheme for public interest disclosures. Moreover, the Ombudsman's office has experience with statutory powers to obtain information and has staff experienced in handling sensitive material with discretion.

Conclusion

The office of the Commonwealth Ombudsman of Australia has now been in existence for almost 30 years. During that period it has played, and continues to play, a prominent role in encouraging effective and efficient public administration. The office's primary role is to assess and investigate complaints about the administrative actions of Australian government departments and agencies. The expertise and insights gained from handling such complaints has enabled us to stimulate improvements across the breadth of government administration.

Public accountability is central to effective and efficient public administration: FOI and whistleblowing are two aspects of that accountability. FOI legislation has now been with us for almost 23 years and has become a widely used tool for enabling the public to achieve a greater transparency of government action. Whistleblowing legislation is a more recent tool of public accountability and one that has yet to be introduced at the Federal level in Australia.

My office is currently actively involved in both FOI and whistleblowing projects. With regard to the former, I will shortly be releasing an 'own motion' report which will highlight some of the problems evident in the processing of FOI requests by Australian government agencies. This report will likely recommend that my office play a more central role in the oversight of the FOI Act. As for whistleblowing, I would certainly agree that specific legislation now needs to be introduced at the Federal level in Australia. It is to be hoped that the 'Whistling While They Work Project', with which we are working, will provide sufficient impetus within Government circles to enable that to happen. In any new whistleblower legislation, I would expect to see the Commonwealth Ombudsman play, if not a central oversighting role, a significant supporting role.