The Ethicos Group

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The Honourable Alan Wilson KC

Public Interest Disclosure Act (Qld) Review 2023

Department of Justice and Attorney-General

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Submission by the Ethicos Group on Whistleblower Protection in Queensland 1982-2023

The Ethicos Group is a small specialist collaboration of former senior public officials and academics who have paid particular attention to issues of Public Integrity – and especially Whistleblower Protection law and policy – for more than two decades. We welcome the opportunity to make a submission to the Review of the Public Interest Disclosure Act 2010 (Qld).

In particular, the author's involvement in this subject stems from 1991, and the work of the Queensland Electoral and Administrative Review Commission, (EARC), as the principal Instructing Officer for the draft legislation which became the Queensland *Whistleblower Protection Act 1994*. This legislation was the first such in Australia – regarded as innovative at the time - and it provided the model which influenced the development similar laws in all Australian States and Territories and New Zealand, the UK (1998) and the UN Secretariat (2005), and eventually the EU Directive of 2021.

In making this Submission, we have considered the Review Terms of Reference closely, and an earlier Submission which we made to the federal Parliamentary Joint Committee on Whistleblower Protection in 2018, which treated similar issues.

We have also had the opportunity to consider closely the recent Submission to the review of the Queensland Act by Griffith University's Professor A J Brown and his colleagues.

At the outset, we are able to acknowledge our complete and unreserved support for both that Submission's recommendations and its reasoning generally.

Our complementary submission is therefore focused on additional matters of concern, and some egregious case examples which illustrate elements of Queensland's generally unsatisfactory history of dealings with Whistleblowers, with a view to identifying needed improvements.

1. Back to the fundamentals: Why should Whistleblowers be protected?

> "*As CEO, I treat whistleblowers as an asset - I see them as a free source of consultancy advice*" - (Anonymous Sydney Business leader cited by SMH, 2018)

This question is at the heart of the mostly confused thinking about 'Whistleblowing' which has characterised Australian discussion since it emerged as a serious policy issue for governments in the early 1980s. Whistleblowers are still apt to be regarded as both troublemakers and as public-spirited heroes, at the same time, and by the same community.

That said, it needs to be observed that the primary objective of Whistleblower Protection measures - properly understood - is not the protection of whistleblowers. '*Protection from retaliation'* is a crucial part of a strategy for encouraging disclosures of corrupt conduct or other 'wrongdoing': *it is not an end in itself.*

In my view, this argument holds equally well, in principle, in the context of private sector employment, and the professions, and it brings into sharp focus the proper function of the Whistleblower, and the *legitimate* interests of the employer. The 2019 amendments to the Corporations Act (Cth) in support of a limited form of protected disclosure supports this trend.

While the Hawke government rejected the notion of protecting public sector whistleblowers as early as 1982, by the end of the 1980s the emerging reality official corruption had seen the establishment of the Independent Commission Against Corruption (ICAC) in New South Wales, and the Criminal Justice Commission (CJC) in Queensland, each with a form of protection for people who made disclosures or gave evidence to those bodies enshrined in the establishing legislation.

It seemed self-evident in that context that genuine 'whistleblowers' ran a real risk of personal retaliation, and should be protected from harm and threats of harm from those whose interests were likely to be adversely affected. For many, it was implicit that such whistleblowers ought to be protected, if only as a matter of fairness, or because 'whistleblowing' – especially in the absence of financial or other reward – could be easily seen as an altruistic act in support of 'the 'public interest'.

In 2023 it is abundantly evident - based on our experience with cases - that the Queensland law is widely ignored or unknown, and that successive governments have failed to ensure the law was properly implemented.

Now, forty years on, the general perception that "whistleblowers suffer" has become the commonplace view as a result, and the extensive researches of Prof AJ Brown and our own experience suggest that, broadly speaking, this view reflects reality. This is to acknowledge that a significant number of genuine whistleblowers have been harmed, legislation notwithstanding, and have failed to obtain redress.

The cases of a number of genuine whistleblowers known to the author of this submission are unfortunately typical: the former CEO of Logan City Council, (Sharon Kelsey, vindicated recently by the guilty pleas of former Mayor Luke Smith), the senior nurse who exposed wrongdoing by 'Dr Death' (Nurse Hoffmann), the whistleblower who gave invited evidence at first hand to the Queensland CCC exposing the IBM Payroll scandal and triggering the consequent CCC Inquiry (name withheld) – all these and others show aspects of failure of crucial steps in implementation of the Act.

The Language of Whistleblowing

The original State and Territory legislation dealing with public sector Whistleblower Protection which was enacted in 1993-6 (Queensland, NSW, ACT, South Australia), and more recently the Commonwealth (2013), have adopted the 'Public Interest Disclosure' nomenclature. This is vague at best, and often needful of explanation. We believe it is now time for the original 'Whistleblower' language to be reinvigorated and legitimated by use.

This development reflects an older tradition which held that 'public office is a public trust', and as a result, that public officials have an inherent fiduciary duty to (*inter alia*) prevent and expose corrupt unlawful and 'wrong' conduct.

Implicit in this view is a countervailing duty on the State, as employer, to protect those officials who do their duty at risk to their personal interests. The current Royal Commission into the operation of the unlawful 'Robodebt' scheme is likely to reinforce this view in the community at large.

In the Australian context, 'Whistleblowing', properly understood, is the disclosure of defined *'wrongdoing'*. That being so, "*Why do organisations fail to protect their Whistleblowers*?" becomes more than a rhetorical question – as the CPA Australia's Chief Executive Alex Malley has correctly observed.

'*Wrongdoing' is usually defined as criminal or corrupt conduct, Misconduct, or other specified harms to 'the public interest'. Policy disputes, personal grievances, and 'complaints' are excluded from consideration. Generally, internal disclosure is prioritised, with public disclosure as a last resort, in recognition of the reality that 'mud sticks', and that innocent people and institutions may be damaged by mistaken or malicious allegations.*

Organisations and individuals who fail to protect a genuine Whistleblower in accordance with the relevant law may thus be seen to be supporting the wrongdoing concerned, or otherwise acting out of regard for illegitimate interests.

Depending on the circumstances, they may also commit a criminal offence, or become liable for other adverse consequences.'

2. 'Everything is connected to everything else': How should Whistleblowers be protected?

In principle, in the light of the above considerations, a Whistleblower Protection policy and procedures should be unnecessary in a well-managed organisation: '*If men were Angels, we should need no laws'* as the received ancient wisdom goes.

Alternatively, the law, the organisation's Code of conduct, 'Tone at the Top', skilled management, and the organisation's 'culture' should suffice to ensure that misconduct (etc) does not occur, or if it does, is disclosed and managed appropriately. As we know, the Real World does not work as a well-managed organisation, but it could be improved.

There is no question that there should be consequences for breaking the law.

But ultimately, rhetoric around ethics and public interest is hollow if it is not supported by deeds and well-crafted policy, well implemented.

Protection as a Last Resort: an Independent Authority

As to other forms of protection applicable to Whistleblowers, it is our submission that the competing interests involved in disclosing wrongdoing require an independent body to be the first recipient of external disclosures, a provider of confidential and indemnified advice, and a clearing-house for the initial investigation of cases preliminary to referral to an employer or a regulatory/enforcement agency, depending on the circumstances.

Given that (as is generally the case), a particular whistleblower may not be knowledgeable about all of the elements of a given matter, and may disclose only the part of the matter which is known to them, a given disclosure may be found upon inquiry to relate to other matters, which have been or could potentially be disclosed by others.

For this reason, we submit that an independent and expert 'clearing-house' function is required if related matters are to be identified and investigated. The follow-up of referred cases, protection of confidentiality, and the protection of the identity of whistleblowers should also be managed at this level.

For various different reasons, we do not see these as functions of present Ombudsman offices, or ICAC/CCC bodies.

Evidence

We submit that the models provided by the various state legislation on whistleblower protection (especially Queensland, ACT, and NSW) provide sound models for dealing with evidence in support of a disclosure, and in support of dealing with an allegation of retaliation. Two general principles should apply.

Firstly, it is not to be required that a whistleblower will be expected to 'prove' the truth of a claim, or that retaliation - either against themselves or another person - has occurred. The present Royal Commission into the design and operation of the unlawful 'Robodebt' scheme should have settled the question of where it is reasonable to assert the onus of proof.

Secondly, a reversal of the onus of proof should, in our view, be applied to employers or organisation (or other retaliator) where prohibited retaliation or detriment is alleged to have occurred. The present Qld law is a good start as a basis for strengthening this approach.

Rewards and Incentives

The question of reward has been considered, with mixed outcomes at least for the public sector, since the first efforts almost 30 years ago to develop legislation to protect and encourage whistleblowers.

The time shift is significant: whereas in 1991 it was possible to take the view that public service employment was secure, absent proven Misconduct, and the senior officials would comply with the law, which would be sufficient for the law to be effective.

It was therefore generally considered unnecessary, 'distasteful', or even inappropriate, to offer potential whistleblowers the promise of a reward, financial or otherwise, for 'doing their duty'.It is regrettably evident, we suggest, that those comfortable assumptions can no longer be made.

An Australian legal expert, John Wilson of BAL Layers in Canberra, has commented:

"The most controversial element of the proposed reform will undoubtedly be that of financial rewards for whistleblowers. This must be distinguished from the possibility of damages where a whistleblower has been retaliated against and suffered loss, which is already compensable under the *Public Interest Disclosure Act*. In a scheme based on the American model, whistleblowers would be eligible to receive financial rewards where the information they disclose leads to a prosecution or penalty."

To some, such an approach seems repugnant. For instance, David Green QC, the head of Britain's Serious Fraud Office, has told the *Sydney Morning Herald*: "In this country and most of the Commonwealth, it is the citizens' duty [to blow the whistle]. To incentivise it seems slightly distasteful."

It is our submission that whether a policy approach is 'distasteful' may not be the best basis for its rejection: it is better to be pragmatic in answering the question 'But, is it likely to work?".

John Wilson's observations continued:

"However, the American system has proven highly effective in encouraging whistleblowers and directly led to a range of investigations, including one against BHP Billiton which saw a USD$25 million settlement paid by the mining giant. The Australian whistleblower who provided information in that case received USD$3.75 million. Thus a report by the International Bar Association argues that "the United States' experience is unequivocal. Whistleblower reward programs work, and work well." (*The Mandarin, 16 Jan 2017*)

'The American system' of rewards is a somewhat simplistic reference to a very complex set of legislative instruments, some of them developed to combat Civil War fraud by contractors, designed to encourage disclosure of prohibited practices or conduct. We are continually made aware of a large number of similar US cases, typically involving fraud against the public sector, the Health system, or the Securities industry, where multi-million dollar payments have been awarded to 'whistleblowers' under various schemes, as rewards or compensation for loss of employment.

In our view, the prospect of financial incentives – possibly linked to the value or seriousness of the offence disclosed (and without regard to whether a conviction was obtained) could - at the very least - function as a significant 'chilling effect' on those contemplating wrongdoing.

Legislated *ex gratia* payment for this purpose is desirable.

While some may object that such a scheme would be 'distasteful', or more seriously, open to abuse, we would respond that all regulatory schemes have been open to abuse since the emergence of Moses's Ten Commandments, and Hammurabi's Code of Business Ethics.

The policy task is to design a competent scheme which is resistant to abuse, and at the same time achieves its objectives. In the present case, we think it is worth a try.

I have attached a piece of writing on Whistleblower policy generally commissioned by The Utstein Group of international Aid agencies. I continue to hold the views expressed and the piece is still available from the U4 website library.

I would be happy to discuss any aspect of this Submission with the Review if desired.

For consideration.

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Director

The Ethicos Group

28 February 2023

www.U4.no
December 2008 - No. 24

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U4 BRIEF

Making whistleblower protection work: elements of an effective approach

Protection of whistleblowers – individuals who make a principled public interest disclosure of wrongdoing[1] – is now broadly accepted as an essential tool for strengthening accountability and reducing corruption in the public and private sectors.

This U4 Brief argues that aid organisations and all other public organisations should encourage staff report misconduct and corruption as part of their legal and professional duty. Protecting whistleblowers from retaliation or reprisal is a central strategy for achieving this objective. A positive management approach based on securing the organisation's best interests, rather than ethics alone, is the key to success.

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Recent developments in WBP policy and practice

Whistleblower protection (WPB) is undoubtedly an inherently complex policy and practice area. Nevertheless, evidence based on two decades of experience demonstrates that it is possible for an organisation to achieve substantial advantages from a well-designed and well-implemented scheme. The policy model for Whistleblower Protection adopted by the UN General Assembly in 2006 departed significantly from the problematic US tradition in this area. The adopted model is generally based on the UK P*ublic Interest Disclosure* law of 1998, and its antecedents, which have proved broadly effective.[2]

In more recent schemes of protection, retaliation against a protected disclosure of wrongdoing by a whistleblower is now seen as a form of misconduct based on conflict of interest. The control of such misconduct is already part of a manager's responsibility to his or her employer. This focus on the employment context of whistleblowing – rather than on the presumed mindset and motives of the discloser – is crucial to understanding that effective whistleblower protection requires that the focus must be *on the disclosure itself*, and not on the whistleblower. Provided that the *bona fide* discloser of defined wrongdoing believes, on reasonable grounds, that the disclosure is true, their motives are irrelevant.

> *"the focus must be on the disclosure itself, and not on the whistleblower"*

For any WBP scheme to succeed, the organisation must recognise the 'principled disclosure of wrongdoing' as an act of loyalty to the organisation and to the public interest, rather than as an act of personal disloyalty. 'Martyrdom' of a genuine whistleblower is usually fatal to any scheme's credibility, and to the credibility of the organisation that permits it to happen.

General objectives of modern WBP systems

The general policy model adopted by the UN General Assembly and several member countries is founded on a strategic and preventive approach, in which genuine disclosure of 'wrongdoing' is defined by statute as a duty or responsibility of employment. The phrase '*whistleblower protection provides a shield, not a sword*' captures this perspective.

This approach to whistleblowing is not to be confused with the fundamentally different system of '*qui tam*' private-capacity legal actions in the United States, which originated in Civil War procurement fraud. Under the US model, a successful 'whistleblower' litigant stands to gain a percentage of the fraud proceeds recovered through prosecution. The model is founded on the assumption that whistleblowing is not the business of the employer, but rather a private-capacity initiative motivated by individual moral conscience, to be treated as an exercise of Constitutionally-protected free speech. The notion of whistleblowing as it operates in the United States might be most aptly characterised by the phrase '*whistleblower protection provides a sword, not a shield*'.

In some jurisdictions, the terminology of 'whistleblowing' is also often employed to refer to an individual's exercise of 'principled dissent' in relation to government or organisational policy. Such activity has not been protected as whistleblowing in OECD countries or within the UN Secretariat, however. Policy disputes should be covered by a separate process that encourages internal discussion and analysis of an organisation's policy position or administrative practices.

A further complication in understanding of the phenomenon of whistleblowing arises from the fact that most media accounts of whistleblowing, and many academic treatments, have tended to treat all whistleblowing as equivalent over time. Media accounts in particular tend to assume that the experience of whistleblowers in one jurisdiction or country can be directly compared to experience in a different cultural or legislative context, often at a different time. It should be self-evident that the severe retaliation suffered by a whistleblower in the United States, France, or the UK, perhaps years ago, does not of itself tell us anything of value today.

Other WBP policy issues

There is clear relevance for good policymaking in the model provided by the UK *Public Interest Disclosure* law, which provides that retaliation or reprisal against a whistleblower is a matter arising in the employment relationship, rather than as a criminal offence. The resolution of cases by a relevantly empowered Tribunal has clearly proved effective in the UK, in contrast to the few successful cases against alleged retaliation in jurisdictions where criminalisation applies.

Any scheme will also need to deal with situations where there is no protected disclosure as such. Protection may be required for an individual who has not made a protected disclosure of information, but is mistakenly suspected of having done so. Protection must also be provided for an individual who has been required (as part of his or her duties) either to report certain information via an internal administrative process, or to assist with an internal or external process such as an inquiry or audit. In each case, an attempt may be made to 'warn off' the individual from doing their duty conscientiously. Such threats should be treated as forms of retaliation.

> *"whistleblower protection provides a shield, not a sword"*

Any scheme will also need to pay close attention to preventing abuse by the makers of non-bona fide 'strategic' allegations, who seek to misuse the available protections for personal advantage, or to damage the reputations or interests of other individuals or organisations, or simply to cause mischief by way of revenge-taking against their (former) employer.

Under modern policy approaches, the whistleblower is *not* required or invited to provide evidence to 'prove' that their disclosure is true: vigilantes should not be endorsed in advance, and incriminating evidence should be obtained *only* by competent investigatory authorities. To require otherwise is to risk compromising an official investigation, and to involve the discloser inappropriately in the matter.

The whistleblower *may* be permitted to provide evidence where it is properly available to him/her in the ordinary

course of their work, but they must not be encouraged (nor indemnified) to act illegally or improperly in order to provide evidence. To do so may alert the subject of a disclosure to the fact that their conduct has come under suspicion and enable them to destroy evidence, or to interfere with potential witnesses, or otherwise to undermine an investigation or prosecution.

Careful distinctions also need to be drawn to identify and protect the following categories of person:

- disclosers who are genuine in their belief about a claim of wrongdoing, but prove to be ill-informed
- disclosers of claims which ultimately prove to be without foundation or which ultimately cannot be proved
- disclosers who are genuine in their belief but not necessarily motivated by 'public interest' considerations.

In such instances, the outcomes, evidence, and motives of the whistleblower should be of no significance provided that they can satisfy the 'good faith' test: 'an honest belief held on reasonable grounds' that their disclosure was true *at the time it was made*.

Disclosure to the public at large or to the media may be conditionally protected as a last resort, where the matter concerns a significant and urgent danger to public health and safety, or where the whistleblower has already made the same disclosure internally but has not seen an appropriate response, or where a crime is in process or appears about to be committed. Acceptance of financial or other personal reward for making such a disclosure is generally regarded as a disqualification from protection: this is appropriate, as reward issues tend to introduce fatal conflicts of interest.

Purported 'disclosure' of unsubstantiated rumour should not be protected: making a false public interest disclosure, knowing it to be false, is to be regarded as misconduct, and treated as a disciplinary offence. A 'strategic' disclosure about wrongdoing in which the whistleblower was personally involved, in order to seek to escape the consequences, should be protected *only in relation to any retaliation for making the disclosure*, not for the disclosed misconduct itself.

> ***"the outcomes, evidence, and motives of the whistleblower should be of no significance"***

The investigating authority must provide a reasonable level of reporting to the discloser, who should not be empowered to accept or reject the outcome of an investigation, but should be able to make the disclosure afresh to another appropriate authority.

A protected disclosure may be made to any appropriate authority in relevant circumstances: internal disclosure within the employee's own organisation as a first step is not necessarily required.

Disclosures by a private citizen of wrongdoing by an employee of the organisation, or by a contractor (such as abuse of staff or unlawful discrimination, breach of Health and Safety law, damage to contracting organisation's mission or reputation, breach of contract terms, fraud, or theft), should be protected as far as is feasible. A private sector contractor who is proven to have taken or threatened reprisals against such a discloser should be subject to administrative fines, contract cancellation, closer contract audit/supervision, debarment from future contracts, and/or prosecution.

Any scheme of protection will also need to recognise three further practical difficulties:

- anonymous disclosures should in principle be accepted by the receiving authority, at least for the purposes of preliminary assessment, especially in the early months of the scheme's introduction; the authority should have the discretion to decide whether or not to investigate a particular claim, based on the information provided by the anonymous discloser together with any other relevant information available or potentially available to investigators. Failure to adopt this pragmatic approach to anonymous disclosures renders the organisation a potential hostage to fortune, especially if a scandal emerges subsequently and evidence surfaces that the organisation had been informed by a whistleblower but had done nothing to investigate
- it is difficult in a complex organisational context to protect whistleblowers against 'subtle reprisal' by establishing policy. As in all areas of management involving the enforcement of standards, diligence and commitment on the part of middle and senior managers is critical to ensure that the organisation's policy is not undermined
- organisations should be subject to a reversal of the usual burden of proof in relation to claims of retaliation: it should be assumed that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified on management grounds unrelated to the fact or consequences of the disclosure.

Conclusion

Every act of whistleblowing takes place in a specific legal, organisational, and cultural context, which is likely to significantly colour the expectations of the discloser, the outcomes of a given disclosure, and the attitudes of anyone affected by it. For this reason, the experience of whistleblowers in the United States in the 1990s, or anywhere else, cannot be assumed to be directly relevant to the experience of whistleblowers in any other jurisdiction or organisation in 2008.

There appears to be no serious suggestion that employees who genuinely disclose corruption, fraud, theft, criminal conduct, abuse of office, serious threat to public health and safety, official misconduct, maladministration, or avoidable wastage of an organisation's resources should not be entitled effective protection from retaliation for so doing. On the contrary, organisations which fail to protect genuine whistleblowers, and permit, or take, reprisal action against them, increasingly face, at a minimum, severe public censure, and may furthermore risk legal action based on failure to provide a safe workplace. The task for organisations now is to make whistleblower protection work. ■

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Notes

Two decades of experience with relevant policy and practice issues involved in the statutory protection of whistleblowers in Australia has recently been the subject of a major national research project jointly funded by the Australian Research Council, five participating universities, and fourteen industry partners including important integrity bodies and public sector management agencies in all nine states and territories, and at the federal level.

For the first time, the review authoritatively points to a very large body of empirical data which show that the various laws have generally been well conceived in principle, and have broad acceptance. What is lacking, the research data demonstrates, is effective administrative and organisational support for whistleblowers and would-be whistleblowers, and more accessible mechanisms for protection. The report is discussed in Whistleblowing in the Australian Public Sector: Enhancing the theory and practice of internal witness management, at: http://epress.anu.edu.au/anzsog/whistleblowing/pdf/whole_book.pdf

Endnotes

[1] In the system adopted by the UN and operating in the UK and Australia, as discussed in this paper, 'wrongdoing' is not left to the whistleblower to decide: it is defined in law. Hence, only the disclosure of 'wrongdoing, as defined' is protected. Such a system ensures that whistleblowing is not about personal moral crusades or policy disputes, but rather about doing one's duty (by disclosing what the employer/ the state has defined) and being protected for doing so.

[2] See in particular the work of the UK Charity, Public Concern at Work, generally, at http://www.pcaw.co.uk

Photo by sharadhaksar at http://sharadhaksar.deviantart.com