SELECT COMMITTEE ON

PUBLIC INTEREST WHISTLEBLOWING

Submission No:	110
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SENATE SELECTION COMMITTEE ON PUBLIC INTEREST WHISTLEBLOWING

SUBMISSION BY G M McMAHON

My name is Gregory Michael McMahon

My background relevant to this position includes:

* service as a national serviceman and army reservist (continuing)

* service as an officer in the Queensland State Public Service, in particular as an engineer in the Water Resources Commission (WRC) in 1988 and 1989 and thereafter in the Department of Primary Industries (DPI) when the former was merged into the latter shortly after the Labor Party formed the Government in Queensland.

* service as an office bearer in the Association of Professional Engineers, Australia, later named Association of Professional Engineers and Scientists, Australia (APESA), including duties as:

  - Vice President of APESA (Current)
  - the chair of the State Public Service Sub Committee of APESA (Current)
  - delegate to ACTUQ (Current)
  - representative of ACTUQ on the Defence Reserves Support Committee (DRSC) (previously Committee for Employer Support of Reserve Forces (CESRF)) (Current).

I wish to made submissions to you regarding:

* the coverage of the legislation [TOR(a)]

* the protection that should be afforded whistleblowers TOR(b) and those that are accused of disadvantaging whistleblowers

* the remedies that should be provided whistleblowers [TOR(f)] and the penalties that should be provided for those that disadvantage whistleblowers.

COVERAGE

With respect to your first term of reference, I recommend that your legislation give cover to State Government public servants who blow the whistle on actions by their departments to defraud the Commonwealth Government or misadminister Commonwealth funds or mislead the Commonwealth Government regarding programs being funded by the Commonwealth, or actions that are in breach of Commonwealth legislation.

I have attached a one page extract from Qld's EARC Issues Paper No 10 on Protection of Whistleblowers (p4) which describes the action of Mr Dan Daly of my Department in preventing "rorts" of Commonwealth subsidy funds to drought affected landholders.

I am suffering in my career for actions undertaken by me (in the same month as that when Mr Daly was transferred out of his job) to inform Commonwealth authorities of breaches by three Government Department of the Defence Re-establishment Act; these breaches acted to put at risk the viability of units of 1st Division to participate in the Army's largest military exercise since World War II.

Both these issues, financial management of Commonwealth Government funds, and the effectiveness of the Reservists contribution to and participation in Australia's defence, are of significant public interest, requiring disclosure and thus meriting the benefit of protection afforded by the proposed legislation.

THE DROUGHT "RORTS" ISSUE

The magnitude of the public interest shown by the community towards the fair and efficient administration of Commonwealth funds by State Governments is exemplified by the media attention and the Parliamentary enquiry conducted into the drought "rorts" issue in Queensland in 1989, and by the importance of current Commonwealth Assistance to Queensland farmers presently suffering under the worst drought experienced by Queensland this century.

To the extent that there is a vital public interest in the equitable and efficient administration of Commonwealth assistance to drought affected persons, to the extent that whistleblowing disclosures made a major contribution to improving the administration of Commonwealth Government assistance schemes for drought declared primary producers, to the extent that the whistleblower concerned suffered in his employment and career in ways that could not be justified by his Minister before a Parliamentary Committee, to the extent that such unjustified treatment was intimidatory to other public servants with knowledge of other actions by State Government departments that are prejudicial to the good administration of Commonwealth Government funding assistance to the State, it is submitted that Commonwealth legislation should be available to enable the making of such disclosures in the public interest, providing for protections and remedies for State Public Servants making such disclosures.

THE DEFENCE ISSUE

My own experience with whistleblowing concerns disclosures I made to the Commonwealth about practices by State Government departments to restrict the entitlements of State Public Servants for Special Leave to attend training activities in the Army Reserve.

Specifically, a number of State Government Departments in Queensland had unwritten rules or policies, it was claimed by Army Reservists, that staff should only be given 2 weeks Special Leave per year for Army Reserve training. These unwritten rules and policies constituted a reduction of the entitlements set out in Governor-in-Council determinations for Special Leave for Army Reserve activities (Copy is attached). In December 1988, the Water Resources Commission put their unwritten policy into a written instruction (Copy attached), which I disclosed to the Unions and to the Commonwealth Government.

The most important element to the public interest associated with service by Army Reservists in the Australian Army is that the Army's 1st Division in 1989 (and thereafter) was not operational without its Army Reservists; for example, one of the Divisions battalions was 49th Battalion, Royal Queensland Regiment, the Army Reserve's "Bush Rifles" unit, which assembled its members from all over rural Queensland once only per year for a period of continuous training of 4 weeks duration. Quoting from a paper delivered by Major D Lewis to CESRF meeting of 7 March 1989 on EXERCISE KANGAROO 89 to be held later that year:

EXERCISE KANGAROO 89
1ST DIVISION PARTICIPATION

General

1. *Exercise KANGAROO 89 (EX K89) will be the largest peace-time exercise to be conducted in Australia since WWII. The Exercise is designed to practice and test the ability of the Australian Defence Force (ADF) to conduct low-level military operations in the remote north of our country against an enemy force conducting raiding operations.*

2. *The ADF will deploy approximately 23,000 soldiers, sailors and airmen on the Exercise. The Army will provide more than 18,000 of this number, the majority of whom will be in the 1st Division (1 Div).*

3. *The Exercise will be conducted over a period of several months with the month of August 89 being the core period when the majority of the forces deployed will be required.*

4. *EX K89 will be in many respects a validation of integration of the Australian Regular Army (ARA) and the Army Reserves (ARES). Reservists will be involved at all levels. Individual reservists will work in regular units and headquarters. Reserve units and sub-units will work in regular brigades, and a reserve brigade will take its place as a manoeuvre element of 1 Div for the first time since WWII.*

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Importance of the Reserve

15. *Integration of ARA and ARES is fundamental to this country's Defence Force structure. Reservists now provide an essential part of 1 Div. They are employed as staff officers, mechanics, riflemen, storemen, armoured personnel carrier drivers, gunners, technicians and the list goes on. The Division's administrative system in particular, is heavily dependent upon ARES soldiers.*

16. *Without the full support of the ARES, EXK89 cannot succeed. If the Exercise was seen not to be a success, the question of the effectiveness of integration would undoubtedly be raised. It is for this reason that the full support of employers is imperative. ARES soldiers must be available to support their units and/or headquarters. Employers are called upon to assist by supporting employees' requests for leave to attend this most important milestone in the country's defence preparation; Exercise KANGAROO 89.*

The magnitude of the public interest in the issue of Army Reserve service stems from the public interest in the viability of Australia's defence forces; the following exemplify the concern of the Commonwealth Government over efforts within the Queensland Government to reduce the entitlements of Army Reservists in the Queensland Public Service:

* the lobbying done by the Army to reverse successfully during 1988 the decision by Qld Cabinet to reduce the pay of "1000 plus" officers while those officers were engaged in military training (see newspaper article attached). This lobbying included representations from the Minister of Defence and the Prime Minister's Office direct to the Premier of Queensland Mr Ahern. The Queensland Government's earlier decision to reduce Army Reserve entitlements was as a trade off in return for a 2% productivity pay rise during the Second Tier National Wage negotiations of 1988.

* the request by the Commander of the 1st Division for me to arrange for the Commissioner for Water Resources to meet with the Commander during EXERCISE OVERLORD 89, to discuss the Commissioner's December 1988 instruction on Army Reserve Leave. EX OVERLORD 89 was a training activity for the staff of Headquarterz 1st Division to prepare them for EX KANGAROO 89.

* the actions by the Chairman of the Committee for Employer Support of Reserve Forces to hand deliver a letter to the Minister for Water Resources complaining of the instruction by the Commissioner for Water Resources on Army Reserve Leave and threatening to go to the Premier if the instruction was not changed (copies of letters attached)

* correspondence initiated by the Commanding Officer 49th Battalion Royal Queensland Regiment to the Commissioner for Water Resources (copies of the letter and the Commissioner's reply are attached).

* The Office of the Chief of the General Staff is presently conducting studies into the effectiveness of the Defence Re-establishment Act and into Protective Legislation on Call Out because in part of my experience following my disclosures in early 1989.

To the extent that informal policies of certain departments regarding Special Leave were a breach of the Defence Re-establishment Act, to the extent that action by the Commissioner for Water Resources to formalise these policies in his department threatened a spread of such formalisations to other departments unhappy with the final decision by State Government in the previous year, to the extent that combinations of such actions would seriously impair the operational effectiveness of the Army's 1st Division and jeopardise the Commonwealth's investment in EXERCISE KANGAROO 89, and to the extent my disclosures mobilised a Commonwealth Government response sufficient to have the Commissioner's Instruction withdrawn, I submit that Commonwealth Legislation should enable the making of such disclosures in the public interest, providing for protection and remedies for any disadvantages or hardships that might be imposed on the whistleblower and his or her family because of those disclosures. I submit further that such legislation should be available for all cases where disclosures by State Public Servants bring to notice breaches of any Commonwealth legislation by State Government departments.

An unexpected result for me when I breached the culture of the organisation by "blowing the whistle" on a straightforward leave entitlement issue was that I became an automatic suspect for all leaks of information and perceived conspiracies against the organisation. An example relevant to Commonwealth Government was a draft report by the Commonwealth's Industries Commission criticising the economic analysis done by the Water Resources Commission of the Burdekin River Dam and Irrigation Scheme, the funding of which involved $130 million of Commonwealth funding (see the extract attached); the criticism led to an externally conducted investigation into the methods of economic evaluation used by Water Resources in supporting its various proposals for more dams. I was, in 1989, the Senior Planning Engineer in Water Resources Commission and managed the Policy and Economic Planning Group amongst other planning groups. I knew nothing of the report criticised by the Industries Commission and can not claim any credit for any disclosures that led to

the Industries Commission's findings. This instance however raised to my mind the possibilities that an individual can be disadvantaged in his or her employment for whistleblowing that he or she did not do. The coverage of any Commonwealth legislation on whistleblowing should allow for this possibility whether State Public Servants or Commonwealth Public Servants are the mistaken whistleblowers.

The criticism in the Industries Commission report also serves to link the discrimination and disadvantages in employment suffered by whistleblowers with the public interest. The discrimination can act to take the skills knowledge and abilities of a whistleblower out of operation, so that they are not applied to problems and projects faced by the organisation. It the instance of economic analysis within the Water Resources Commission, I had qualifications and experience in this area, and had studied evaluation techniques in use in all states of Australia and overseas. In 1991 I presented a paper on Australian Practices in the Evaluation of Floodplain Management Schemes to an international conference. A reference I received from Professor Jensen (copy attached), the economist who headed the review into methods of economic evaluation of dam projects used by the Water Resources, talks of my

> "quite superior performance and ability in economics and the perception of economic problems".

Discrimination was distancing me from my contracted duties and my career much to my personal hardship and upset, but it was also denying to the organisation my skills and knowledge and abilities in areas in which I had expertise and in which the organisation was getting it wrong.

I would also have contributed to the integrity of such analyses. Considering some of the amounts of funding involved, the discrimination that was ostracising me from practice of my craft was diminishing the effectiveness of the organisation and was thus not in the public interest.

A further issue I would put to you on coverage is that members of the Defence Force be included in the coverage of the Act. Related to matters I observed in the Service Post-Vietnam is the question of protection for military members who pursued matters within the military system and were thus identifiable and thereafter disadvantaged when they or their families made representations to Senators who asked pertinent questions in the House. More generally, I ask you to consider including in the definition of Whistleblower actions by Public Servants providing information to members of Parliament.

NATURE OF PROTECTIONS

Protections to whistleblowers should extend to any disadvantages in their employment such as (and these should all be listed in the legislation):

* Retrenchment or termination
* Demotions
* Forced redeployment or transfers
* Being made redundant and employed in lower level areas
* Preventions from practice in career or trade
* Loss of staff or responsibilities

* Loss of promotions or reductions in prospects for promotion through other disadvantages

* Discriminatory reporting on abilities knowledge and skills of the whistleblower either internally or to external organisations.

* Breach of contracts

* Intimidation of the whistleblower to accept disadvantages in his or her employment

* Intimidation of third parties to impose or threaten to impose hardship or disadvantages on the whistleblower in his or her employment

The whistleblower should only have to prove, in any legal action that:

* one or more of the above disadvantages in his or her employment has occurred, and

* that discrimination following the act of whistleblowing was a contributory cause to the disadvantage.

The amount of damages should reflect the degree to which other causes were behind the disadvantages proven.

The defendant organisation should be required to prove these other causes and to prove that the organisation acted in good faith.

A special intimidation clause should be included in the legislation allowing the whistleblower to accede to pressures placed upon the whistleblower, his or her colleagues or family, or to adopt tactics of self-preservation without the loss of any rights under the whistleblower legislation of before the law on contractual issues or torts.

REMEDIES

Damages, for actual losses and for expected future losses, both in remuneration and in loss of enjoyment of a chosen career, and also for ill-effects experienced by family members, should be available through the legislation.

Legal aid should be available for amounts of legal expenses in excess of $5,000, where the whistleblower can establish a prima facie case to some Commonwealth agency or investigative body. Legal expenses in whistleblowing cases should be tax deductible.

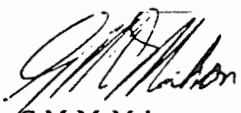
A prima facie case sufficient to attract legal aid should be established not only by written admissions by the perpetrators of discrimination, but also by a pattern of circumstantial evidence of matters which in combination have the concurrence of time character direction and result as naturally to lead to the inference that the separate acts were the outcome of an intention to discriminate or disadvantage.

The criteria for what constitutes a prima facie case sufficient to attract legal aid should allow for the concept of a "directing mind". While many defendants may contribute to or action discrimination in the workplace towards the whistleblower, perhaps for personal or unknown reasons, the determination of a prima facie case should have regard to the attitudes beliefs and objectives of the one defendant identified as the directing mind.

The legal aid should be a charge made against the budget of the organisation against whom a prima facie case has been established.

I do not favour penalties imposed on individuals because of new offences created by new whistleblower legislation.

Orders should, however, be available for requiring administrations to proceed with disciplinary or administrative procedures before tribunals, or with referrals to the police where relevant evidence collected as part of a hearing or investigation has been found to merit this approach under current regulations and laws.



G M McMahon

2 March 1994