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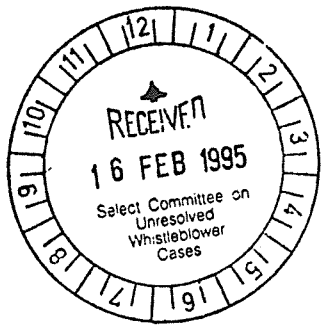

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Secretary
Senate Select Committee on Unresolved
Whistleblower Cases
Parliament House
CANBERRA ACT 2600

SUBMISSION

Thank you for your advice on the bases for protection of witnesses who provide information to Senate Committees, and for your advice on the ability of the Senate to summons State officials and their documents.

In deciding on the content of this submission I also had to consider the following:

* I have received advice from those in the system trying to assist me to obtain the independent investigation recommended by the Select Committee on Public Interest Whistleblowing that the present Select Committee is regarded by some in Queensland as a political stunt against the Qld Labor Government. This proposition was put before the Qld public by an editorial in the Courier Mail. The inference might be taken therefore that participation in the Selection Committee's inquiry might constitute engagement in political activities against the Qld Government. This inference if taken might be used to justify a political response, I have been advised

* While I hold positions as a member of the Army Reserve, as an executive member of a union and of Whistleblowers Action Group Qld, and as the Legislation Coordinator for Whistleblowers Australia, others may hold that I cannot avoid the fact that I am always a State Public Servant and that my Department has an instruction on how its staff can make their own submissions to Commonwealth Government Inquiries. This instruction states that staff in making their own submissions can only discuss material which is available to members of the public, amongst other requirements.

* I have no direct experience with the Criminal Justice Commission. I have received advice from diverse sources not to take my complaints to the CJC. The Select Committee's enquires might allow it to evaluate this advice I have been given. My experience in pursuing an investigation of my complaints has been with the Qld Public Sector Management Commission, including the Grievance Directorate and the Commissioners (Chairperson and Public Sector Equity Commissioner).

The experience of seeking a resolution of my complaints has given me an appreciation of the situation for whistleblowing and whistleblowers which I believe would be of value to the purposes of the Selection Committee. Within limits derived from factors described above, I believe this submission offers the Selection Committee knowledge of and insight into whistleblowing that will assist the Commonwealth Government to draft effective legislation for the protection of whistleblowing and whistleblowers.

ANTI-CORRUPTION/PRO-REFORM AUTHORITIES

The first insight I would offer the Selection Committee concerns the Committee's interest in Qld's CJC.

There will be value to the Committee in learning of the strengths and weaknesses of procedures as exemplified in particular case studies that occurred in Queensland.

The greater value however will be gained from the realisation that in Qld's CJC we may (or may not) have yet another example of a world wide phenomenon where Anti-Corruption cum Pro Reform Authorities, instead of defending witnesses and whistleblowers and pursuing the disclosures made by "integrity workers" of major corruption/waste, turn out to act in defence of the system against disclosures and to pursue the most minor breaches of rules/protocols/policies by whistleblowers.

If we have another example of this with Qld's CJC, then it is not a property alone of Qld or the Qld system, but a property of the dynamics of Anti-Corruption/Pro Reform Authorities well documented in other jurisdictions. It is thus a property that could become established in any such authority set up by the Commonwealth Legislation or in any existing authority to which Commonwealth Whistleblower Legislation directed whistleblowers and their disclosures.

The jurisdiction with longest experience in legislating for the protection of whistleblowers, the USA, has documented this property in its administration and has completed a second effort in legislative reform to overcome this major defect in specific whistleblower protection authorities. What the USA observed in this regard, and what was done to correct it must be instructive to Australian legislators. The study of Qld's CJC may (or may not) establish that the same defend-the-system syndrome that the USA identified can also arise in Australian jurisdictions, State or Commonwealth. Other authorities, in Queensland or in other States, that play a part in case studies that come before the Selection Committee, may or may not also demonstrate the defend-the-system syndrome.

The principal example to come out of the experience of the USA was the Merit Systems Protection Board (MSPB) a federal body not unlike the Australian federal body the Merit Protection and Review Agency (MPRA).

The MSPB in 1979 was given responsibility for protecting whistleblowers in the USA. The tendencies of the MSPB to harm whistleblowers rather than protect them led to amendments of relevant legislation in 1989 (the Whistleblowers Protection Act WPA). The principal impact of the 1989 WPA on the MSPB was to separate from the MSPB its investigative and prosecutorial arm and to put these functions into an independent agency, named Office of Special Counsel (OSC), which carried out the investigative and prosecutorial functions and a role in litigating cases before the MSPB. This separation, this independence is a special property of the OSC - MSPB relationship, one not existing in Qld's CJC, or PSMC, or in the relationship between he Public Interest Disclosures Agency and the MPRA (or HREOC or Ombudsman) recommended by the Senate Select Committee on Public Interest Whistleblowing. In all these bodies, the investigative and prosecutorial arms of the administration activated in the defence of whistleblowers against reprisals remain part of the CJC or PSMC or MPRA.

The benefit to whistleblowers in the USA that has come with the 1989 WPA and the formation of the OSC is contained in the 1993 Annual Report of the OSC page 3 which reads in part

> "Although allegations of reprisals for whistleblowing are relatively few as compared to the number of federal civilian employees, the OSC regards ANY reprisal for whistleblowing as unacceptable. Accordingly, the OSC's priorities are:

* to treat allegations of reprisal for whistleblowing as its highest priority

* to review allegations of reprisal for whistleblowing intensively for any feasible remedial or preventative action, ...

* to use every opportunity to make a public record of the OSC's aggressive pursuit of corrective action (especially in whistleblower reprisal cases), both to encourage other whistleblowers, and to affirm the emphasis given to corrective actions by the OSC"

This quote demonstrates the absence of compromise and the strength of, the priority, the intensity and the aggression with which whistleblowers are protected in the USA. Will the CJC be able to demonstrate these advantages to your Selection Committee? Did the Commonwealth's MPRA demonstrate this commitment to the defence of whistleblowers to the Select Committee on Public Interest Whistleblowing?

In a jurisdiction such as the US, where whistleblowers obtain the level of support provided by the OSC, comparison can be made of whistleblowing reprisals versus other forms of discrimination. These comparisons can help to answer important questions raised in the whistleblower protection debate, questions that were no doubt raised prior to decisions taken on the CJC's approach to the protection of whistleblowers; for example

* Should we have yet another authority to protect the interests of yet another group suffering discrimination?

  INDICATOR: The OSC's Complaints Examining Unit examines all complaints received and refers those warranting further investigations to the Investigation Division. In 1993, for every EEO (race, colour, sex, national origin, religion, age, handicap) complaint found to warrant further investigation, there were 3.3 complaints of reprisals for whistleblowing warranting further investigation. These figures might indicate that the justification of a Whistleblowers Protection Body is greater than the justification for a Human Rights and Equal Opportunity Commission. Australia has a HREOC operating independently of the MPRA.

* Wont whistleblowing protection avenues just lead to an avalanche of complaints from people who know they are poor performers and are just trying to save their job?

  INDICATOR: In 1993, only 7% of complaints received based on EEO rights were found by the Complaints Examining Unit of the OSC to warrant further investigation. By comparison 22% of complaints of reprisals by whistleblowers were referred for field investigation. Whatever the validity of fears about false or constructed complaints, the figures from OSC might indicate that the propensity for these claims is less with whistleblowers than with EEO groups. Australia has a HREOC operating independently of the MPRA, a facility established despite fears of the false claims that might be made.

One role that was not given to the OSC in 1989, but was left with bodies such as the equivalents of the CJC, PSMC and MPRA was the investigation and prosecutorial functions with respect to the wrong doing disclosed by the whistleblower. OSC can investigate the reprisals against the whistleblower, but not the wrong-doings (corruption, waste, etc) against the system. Nevertheless, the OSC plays an important role in identification of wrong-doings and in influencing CJC - type authorities to carry out their responsibilities in investigating wrong-doings and prosecuting all offenders. The part played by the OSC includes:

* acting as a disclosure channel for employees and former employees to report wrongdoings

* requiring agency heads to investigate allegations if OSC determines that there is substantial likelihood that the information discloses wrong-doing

* documents that OSC are empowered to obtain and statements by witnesses that OSC are empowered to obtain in investigating reprisals are safeguarded thereby and can be made available to investigations by CJC type bodies or agencies where these are relevant

* reporting to both Houses of Congress and the President the outcomes of investigations into wrong-doings carried out by CJC-type bodies upon referral to them of information from the OSC.

The results achieved by OSC's involvement, albeit indirect, in the pursuit of the wrong-doings disclosed by whistleblowers are described in its annual report. In 1993, 66% of disclosures made to the OSC were judged to have sufficient basis to merit further action, and were referred to agencies for investigation or review. The reports from these agencies showed that 67% of cases contained allegations substantiated in whole or in part by agency investigations. The onus put on agencies to investigate allegations in this way serves to reduce the volume of matters proceeding to CJC-type bodies.

The Public Interest Disclosures Agency proposed by the Senate Select Committee on Public Interest Whistleblowing is not the same as the US Office of Special Counsel. The examination of Qld's CJC by the Select Committee on Unresolved Whistleblower Cases may assist the Senate to assess the differences and the impacts that these differences may have on the effectiveness of whistleblower protection in the future in Australia.

* * *

The factors by which CJC-type bodies can lead administrative systems in the defence of the total system rather than in the protection of whistleblowers will not be overcome solely by the establishment of an OSC-type protection body. Of equal importance is the sophistication of the legislation that empowers the OSC-type body.

The sophistication of the legislation must be enough to counter the sophistication of the active and passive measures employed by agencies in defending the system against whistleblowers. Active measures include the normal reprisals against employment, but also include

* destruction or loss of documents

* taking documents to particular meetings (eg of security agencies or Cabinet) with submissions, thereby rendering the documents exempt from Freedom of Information processes

* determining complaints without providing the aggrieved person the opportunity to present evidence or argument, thereby forcing the aggrieved person to go to the next highest level of grievance investigation without reasons for rejection of evidence that was never allowed to be presented

* investigating by reference only to selected evidence or evidence on selected issues

Passive measures include the normal avoidance tactics of long time delays, claims that complaints were never received, documents have been misplaced, staff have been changed, higher priority cases are dominating work assignments, but also include a family of measures by which agencies and CJC type bodies "disarm" themselves of the abilities to defend whistleblowers using

* narrow interpretations of their powers

* wide interpretations of embargoes or restrictions on their operations

* in house unseen legal opinions questioning legal positions without resolving those legal questions

* in house policies, usually "long established", supporting the need for management prerogatives (not defined), and acknowledging the practical realities of running public service departments, including the need for staff to be politically sensitive.

Effective whistleblower legislation must enable the responsible authority, OSC-type or otherwise, to overcome both active and passive measures undertaken to defend the system against whistleblowers. Again the USA jurisdiction gives examples of legislation benefiting from 15 years of operation in defence of whistleblowers and a major legislative effort by both Houses of Congress to improve protections and remedies.

To demonstrate the sophistication now incorporated into USA legislation, let me refer to the WPA that formed the OSC (this was the legislation recommended for consideration by Tony Fitzgerald QC), but also to the Uniformed Services Employment and Re-Employment Rights Act of 1994. The latter Act, passed to the President for signature in September 1994 after a compromise agreement on provision was forged between the House of Representatives and the US Senate, is designed to protect the employment of Army Reservists in the USA. This legislation protects not only Reservists from employment disadvantages because of their absences on defence service (you should know this is the nature of my complaints against my agency head and the issue over which I made disclosures to State and Commonwealth authorities in Australia); the US legislation also protects persons, Reservists or otherwise, who blow the whistle on breaches of the employment protection provisions of the Uniform Services Employment and Re-employment Rights Act. The USA thus has reached a stage of development of whistleblower protections where these are being incorporated into individual Acts in addition to the WPA 1989 general provisions administered by the OSC.

Both the WPA (1989) and the USERRA (1994) show anticipation of the tactics the highest administrations in the USA may use against whistleblowers, and produce powers checks and flexibilities to defend whistleblowers; for example:

* USERRA makes provisions for where the governments "Office of Personnel Management had failed or REFUSED, or is about to fail or refuse, to comply with" the USERRA provisions on protection of employment - an insertion made by the US Senate into the House of Representatives Bill as part of the compromise agreement on protections for the employment of Reservists and whistleblowers on breaches of the USERRA

* USERRA makes provision for "the case of disobedience of the subpoena or contumacy" with respect to subpoenas issued by the investigating authority requiring the production of documents or the attendance and testimony of witnesses

* Under the WPA, the OSC is able to investigate the appointment and promotion of SES officers. In Queensland and in Australian public service administrations, there are no appeals allowed against appointments within the SES. This "no appeal" provision has been used to refuse investigations introducing criticisms of selection processes as evidence of reprisals and discrimination against whistleblowers and EEO categories of officers. The 1993 Annual Report of the OSC describes its success in securing for an SES whistleblower "a settlement agreement by which the employees last four performance appraisals were expunged and replaced with 'outstanding' ratings, the employee was given two retroactive SES promotions and the agency agreed to pay attorney fees"

* The OSC identifies and is able to investigate and prosecute the more sophisticated forms of reprisals and discriminations, for example (from its 1993 Annual Report)

  - "deception or obstruction of the right to compete"
  - "attempts to secure withdrawal from competition"
  - "arbitrary or capricious withholding of information requested under the Freedom of Information Act"
  - "unauthorised preference or advantage granted to improve or injure the prospect of employment of any person"
  - "discrimination on the basis of conduct not related to job performance"
  - "reprisals for exercise of an appeal right"
  - "solicitation or consideration of unauthorised recommendations"

  The OSC in 1993 received 1458 allegations of these categories and referred 15% of these as warranting full investigation.

It is in all these ways that whistleblower protection in the USA has matured, through experience of combating not only the wrongdoers whose activities whistleblowers disclose, but also of breaking through the barriers that the system uses to defend itself against the repercussions that whistleblowers disclosures have on the public reputations of administrations and administrators. The Senate Select Committee's inquiries into the operations of the CJC may or may not be able to confirm the experience of other jurisdictions that sometimes or in some cases, anti-corruption and/or reform type bodies like the CJC get caught up into and even lead these "system defence" measures.

The Senate Select Committee on Public Interest Whistleblowing does not appear to have reached the same depth of understanding of this "defend the system" syndrome as is currently held by the US Senate. The Public Interest Disclosures Agency is not on OSC. The PIDA will not stand beside the whistleblower as an advocate before the MPRA, as does the OSC before the MSPB, before the Attorney General and before various District and Appeal Courts. Your Select Committee, in considering principle unresolved whistleblower cases, is requested to ask the question whether current outcomes would have been different if Queenslanders had an OSC, or if Queenslanders had a PIDA.

PROVIDING A FAIR CONTEST

The description provided above of the WPA and the USERRA in the USA demonstrate measures incorporated into legislation and into procedures to ensure that a whistleblowers efforts to defend himself or herself against reprisals is a fair contest. These measures include

* provisions of powers and procedures to secure the evidence of reprisals (documents and statements of witnesses)

* provisions of legal representation, supported by investigations by experienced investigators for whistleblowers before administrative Tribunals and before District Courts and Courts of Appeal

* categorisations of forms of improper practices against whistleblowers that include the more sophisticated forms of reprisals of which administrations have shown themselves to be capable

These measures are said to provide a fair contest in as much as they match or equate to the powers, resources, and categorisations of improper staff behaviour that have always been available to agencies and employers.

The provisions of USA legislation that make a major contribution to securing a fair contest concern the onus of proof (who carries the burden of proof) and the standard of proof associated which proving reprisals. The second major reform of the WPA (1989) (the first being the creation of the independent agency OSC) was to change the requirements placed on whistleblowers in proving reprisals; instead of whistleblowers having to show that their disclosures were a "substantial" cause of reprisals against them, as was the case in the USA before the WPA (1989) and as is now the case in Queensland, whistleblowers now have to prove that their disclosures were a "contributory" cause of the reprisals.

Whistleblower legislation in the State of Texas presumes that any disadvantages imposed against whistleblowers in the first 12 months after the disclosure(s) is (are) made are reprisals because of the disclosure, and the burden of proving otherwise lies with the employer.

Electoral and Administrative Reform Commission (EARC) Qld recommended that whistleblowers need only prove that their disclosures were a "cause of any significance", and that specific criteria for employers to meet in defending charges of reprisals be established in legislation - both recommendations by EARC were omitted from Qld's legislation.

The USERRA (1994) requires only that the whistleblower (or Reservist) show that the disclosure (or obligation to render service) was "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of" such disclosures (or obligations to serve).

There is also a precedent from existing Australian legislation for establishing a fair contest with respect to the onus and standard of proof. The Defence Re-establishment Act (DRA) (1965) provides for the protection of the civilian employment of national servicemen and Reservists. In proceedings under the DRA, the Reservists has to prove the disadvantage he or she has suffered in their civilian employment, but the burden of proof falls on the employer to prove that the disadvantage was imposed for reasons other than the obligation to render defence service.

It is recommended that the Select Committee assess the impact of the onus and standard of proof applied in the investigation of whistleblower cases in Queensland, so as to gauge if it is the unreasonable requirements place on whistleblowers that has rendered so many of these cases still unresolved. If the CJC advises of legal advice it received recommending against support of whistleblowers cases, questions as to the assumptions of the onus and standards of proof contained in those advices may prove instructive.

Overall, the Select Committee would benefit, I believe, in an assessment of the absence-of-a-fair-contest on the failure to resolve so many whistleblowers cases in Australia, and whether the contest was rendered unfair because of the destruction of evidence, the heavy burden of proof, the absence of legal resources, a combination of these factors, or other barriers.

HEALING

The concept of "healing" is understood with respect to administration. The CJC, for example have part time officers who move into administrative units after they have been investigated for corruption, waste, etc, and have had corrective actions ordered, to assist those administrative units to comply with those orders and/or cover any temporary short falls in skills or capacity caused by those corrective actions.

Whistleblowers and their careers and reputations are also deserving of a healing process. Should the Senate Select Committee find right in the actions taken by or find truth in the allegations made by whistleblower cases of principal interest to the Select Committee, the Committee might ask itself how are the situations now held by these vindicated whistleblowers to be healed.

The US jurisdiction again gives a lead.

The OSC is able to be both pro-active and reactive in effecting a healing process for vindicated whistleblowers.

OSC's pro-active abilities stem from its power to stay administrative practices being made against whistleblowers until the OSC's investigations are completed. OSC gives its highest priority to the investigation of reprisals against whistleblowers. The wounds to whistleblowers and their families caused by inordinate delays in investigations while the whistleblower is on no pay or reduced duties are minimised through powers and procedures available to the OSC.

The strength of OSC's reactive strategies stem from the flexibilities its powers give the OSC in generating remedies and solutions to the wounds inflicted on whistleblower. These include:

* facilitating settlement agreements, the components of which can include:
  - revision of performance appraisals
  - awarding of promotions retroactively (including SES)
  - payment of attorney fees
  - payment of cash performance awards
  - withdrawal of memoranda

- resumption of former duties
- arrangements for an arbitrator acceptable to the employee to resolve further disputes
- removal of the employee responsible for the harassment (including through voluntary retirement)
- expungment of termination, allowing the employee to resign with back pay and a satisfactory reference for future positions
- through the USERRA (1994) provision, arrange for a position of like seniority status and pay at another agency (for federal public servants)

* conduct prosecutions before the MSPB of individuals identified by OSC investigations as likely to have initiated improper practices against a whistleblower as a reprisal to the latters disclosures of wrongdoing.

An indication of future measures that may further improve the effectiveness of whistleblower protections provided by the OSC may lie in the powers OSC now have with respect to officials engaged in prescribed political activities. OSC can apply, in the case of state and local government officials found to have violated the Hatch Act, to the MSPB for an order withholding federal funds from agencies failing to remove or acting to reemploy such officials.

INVOLVEMENT OF VOLUNTEERS

The USERRA (1994) allows for the involvement of volunteer organisations in the implementation of employment protection measures. The involvement of representatives of whistleblower organisations on the Public Interest Disclosures Board proposed by the Senate Select Committee on Public Interest Whistleblowing is a most welcomed proposal.

THE UNRESOLVED WHISTLEBLOWING CASE REGARDING G MCMAHON

Disclosures that I made involved breaches of the Defence Act and the Defence Re-establishment Act.

Allegations that I have made about reprisals would if proven, constitute breaches of the Defence Re-establishment Act.

Both matters are of legitimate interest to Commonwealth authorities and the Federal Parliament as the Defence Act and the Defence Re-establishment Act are statutes of the Federal Parliament.

On legal opinion the only practical avenue I have with which to have my allegations investigated is through the Courts under the above Acts. I have savings and would be able to commit a proportion of my salary (while I held a job) to meeting the expenses of legal proceedings. I do not however have the resources of the Queensland Government agency against whom the action would be taken.

I need a commitment from the Commonwealth to cover the legal expenses I am not able to meet. The Commonwealth Office empowered to provide such assistance is the Attorney-General.

I request from the Senate Select Committee on Unresolved Whistleblower Cases a finding that:

a. All reasonable efforts have been made by myself, my union and the Senate to have my case resolved and the Senate to have my case resolved through the Queensland

State Government

b. The allegations I have made and the principles of Commonwealth versus State administrative policy that the allegations bring to notice are of substantive public interest and of direct responsibility of the Commonwealth Parliament under its defence powers

c. That therefore the Commonwealth Attorney General provide legal aid and assistance to me in taking my allegations of discrimination against me in my employment to the courts.

I ask to be provided with copies of any submissions made, favourable to or adverse to my case, that discuss my case in total or in part.

G M McMahon