G McMahon

WHISTLEBLOWER PROTECTION BODY: A STRATEGY FOR EFFECTIVE PROTECTION

by G McMahon, B.Com, M.Eng.Sc., B.Sc., M.Econ.St.

INTRODUCTION

Some individuals in society make decisions to put their personal integrity and the interests of the public above their own personal welfare. They make disclosures of wrongdoing by their employers, which wrongdoings are damaging to the public interest. These individuals of integrity, these whistleblowers, are acting to protect the welfare of the public before their own.

The public, in many jurisdictions in recent years, has decided that the personal welfare of these whistleblowing individuals should also be protected. The protection of the welfare of whistleblowers is now seen to be a public good. Where the public, through its government of the day, has taken up this cause, the public has also had to direct its government on a vital choice.

- Is the government to design a system for the protection of whistleblowers where the whistleblowers have to be their own protectors?

or

- Is the government to construct a system where the whistleblowers have a public body protector to enhance the whistleblowers own efforts to defend their lives.

PURPOSE

This paper looks at the general issues involved in providing whistleblowers with protections through an independent public body fashioned to maximize this public good.

DISCUSSION

The principal issues arising from discussions of independent whistleblower protection bodies are as follows

- Is such a body necessary?
- What roles and powers should it have?
- Why should it be independent?

Is a Whistleblower Protection Body (WPB) necessary?

This question is usually debated along the lines of the cost of the WPB versus the ineffectiveness of the protection system without the WPB.

There are two reasons why whistleblowers have found protections to be less effective when the system leaves it to the whistleblowers to protect themselves.

Firstly, the whistleblowers are not trained in or experienced with the procedures and pitfalls systematic to the myriad of agencies that may be able to assist them. Whistleblowers may be entitled to workers compensation, witness protection, counselling, medical and psychiatric treatment, legal aid, retraining and re-employment, social welfare payments and dispute resolution services and may need to make application for fair treatment before the Information Commissioner, industrial and/or public sector equity tribunals, Anti-discrimination and Human Rights Commissions, the Ombudsman, the police, any official misconduct tribunal, Industry and Professional Ethics Committees, Houses of Parliament and the Courts[2]. Into this fragmentary system of possibilities for redress and assistance has the whistleblower been thrown, often with bewildering speed and cruelty. The whistleblower protection avenue becomes just another fragment to the puzzle of bureaucracies daunting even to the trained professional.

The wounded state of being of the whistleblower is the second factor that renders the self-help approach to whistleblower protection ineffective. The Queensland Whistleblower Study is developing graphic descriptions of the "wounds" being suffered by whistleblowers through reprisals made against them:[3,4]

- loss of job or career opportunities
- blacklisted for other jobs
- disruptions to work
- disillusionment with career
- questioning of personal and professional integrity, without an opportunity to clear their names
- loss of self esteem

- sense of betrayal
- disruption to family
- emotional hardship
- physical and mental illness
- fear of further reprisals

People suffering these disadvantages are less likely to be effective in undertaking administrative actions on a self-help basis than when they have a **companion**, or **representative** or **adviser** or **advocate** or a **friend** to assist them.

What of the counter argument on the costs of a WPB?

The costs of maintaining a WPB in the Queensland State Government jurisdiction could be as much as $2.5 million[5]. This compares with the cost ($2.2 million) of establishing 3 more judges on the supreme court in Queensland, and the annual costs of conducting the CJC's enquiries ($2.0 million)[7]; or with the costs of running other parliamentary bodies like the Commonwealth Ombudsman ($6.6 million)[8]; it is equivalent to the estimated annual savings in drought relief subsidy rorts prevented by Dan Daley's whistleblowing in 1989[9], which savings are continuing to this day. The amount of $2.5 million is much less than the extra taxation collected as a result of Col Dillon's disclosures on police corruption to the Fitzgerald Enquiry, the value of disclosures on poor aircraft safety that prevent one air crash, the potential value that the foxtail palm industry had for Queensland's north, and the value of human misery prevented as a result of disclosures made by a whistleblower about the Basil Stafford Centre for people with intellectual disabilities.

What roles and powers should a WPB have?

There is a major division of ideas on the range of roles that should be the province of a WPB. While all prescriptions include purposes in support of whistleblowers, the principal distinction is whether or not the WPB has any mission with respect to the wrongdoing that was the subject of the public interest disclosure.

Within both sets of purposes, one directed in support of the whistleblower, the second with objectives towards correcting the wrongdoing, there exists a range of roles incorporated into the several WPB's established or proposed by different jurisdictions throughout Australia and the world.

Table 1 attempts to describe the spectrum of designs of WPB's. A further distinction has been made in Table 1 between the direct and active involvement of the WPB in particular roles versus an indirect though influential involvement in achieving results for whistleblowers through other agencies or through public education.

Table 1: Spectrum of Roles for WPB's.

DIRECT ROLES	INDIRECT FORMS
A. Advisory, re . Protections . Other support services and programs available . Investigatory bodies and tribunals applicable	1. Referrals to other agencies.
B. Supporting . Confidential counselling . Confidential channel for disclosures . Physical protection . Retraining . Re-employment . Safeguarding of documents . Legal aid . Injunctions . Full case management	2. Public education programs regarding . the ethic of openness . the community perceptions of whistleblowing
C. Investigatory with respect to reprisals . Investigations . Avenue of appeal from other tribunals . Initiate Formal Inquiries . Initiate prosecutions	3. Referrals to other agencies, and reporting performance of other agencies to Parliament.
D. Investigatory with respect to wrong-doings disclosed	4. Referrals to other agencies, and reporting allegations to Parliament.

Table 2 offers a categorisation of various WPB in place or proposed by various jurisdictions and bodies responding to the challenge of protecting whistleblowers.

Table 2: Categorisation of WPB's from various sources.

SOURCE OF WPB	CATEGORISATION *
Senator Chamarette's Whistleblower Protection Agency[10]	ABCD 1234
NZ Whistleblower Protection Authority[11]	ABCD 1234
Whistleblowers Action Group Qld, proposed Commission for the Protection of Whistleblowers[12]	ABC 1234
US Office of Special Counsel 1989[13]	ABC 1234
Ontario's Office of Special Counsel[14]	AB 1234
The Australian Senate's Public Interest Disclosure Agency[15]	AB 123
EARC (Qld) Whistleblower Counselling Unit[16]	A
United Kingdom[17]	No WPB employed
South Australia Whistleblower Protection Bill 1992	No WPB employed
New South Wales Whistleblower Protection Bill 1992	No WPB employed
Queensland's Whistleblower Protection Bill 1994	No WPB employed

* NOTE: A,B,C,D,1,2,3 and 4 refer to the roles of WPB's described in Table 1: note further that a "A" descriptor for example means that the WPB has one or more but not necessarily all of the roles described under category A on Table 1.

The systems for the protection of whistleblowers at the top of Table 2, it follows, are the most effective systems for this purpose, but they involve the most expenditure by government. Conversely the systems of protection at the bottom of Table 2 are the least effective systems, and also the least expensive for governments to implement.

The impact that cost considerations have on governments in deciding the level of support they will give to whistleblower protection is a significant impact. This is the case even with the accepted savings that whistleblowing can bring to public administration. The scheme of protection designed by WAG proposes a novel means for reducing this impact: in the WAG design, the WPB has the power to recover its costs, by levying government departments about whom substantiated complaints from whistleblowers arise - a kind of user pays approach.

Why should the WPB be independent?

There seems to be little disagreement amongst jurisdictions that have established or proposed WPB's that these WPB's should be independent.

Of the WPB's identified in Table 2, the EARC (Qld) proposal was the only one not to establish the WPB as an independent body. Even in this case, it was the first choice of EARC to make their Whistleblower Counselling Unit (WCU) an independent body[18], but they were under a political direction of "no new authorities". While designing the WCU to be part of the Criminal Justice Commission, EARC still recommended that the WCU be kept "entirely separate from the CJC's law enforcement units and that its work be confidential from those other units".

The experience of the USA is particularly instructive on this matter of independence of the WPB's. The US Office of Special Counsel was first established in 1979. Ten years of experience with the OSC demonstrated that the OSC had become a weapon that damaged

and frustrated whistleblowers. One of the principal changes made to the OSC in 1989 was to make it independent of the Merit Systems Protection Board. Without this independence in the first 10 years of its existence, the OSC suffered from a "miscued focus"; rather than protecting the employee, the OSC was perceived to be protecting the merit system[19]. The independence of the OSC from the MSPB was decided to shift the focus back onto protecting the employee.

WAG, in considering the independence issue, has put great value on this property in the WPB. Thus the Commission for Protection of Whistleblowers designed by WAG has not been given any direct role in the investigation of the wrongdoings disclosed by whistleblowers; the CPW is entirely focussed on protecting the whistleblower.

CONCLUSION

The existence and the characteristics of a Whistleblower Protection Authority, in any system for the protection of whistleblowers, is an indicator of the effectiveness of the system of protections and an indicator of the support of the government of the day for whistleblowing. WPB's should be fully independent, and they should provide advisory supporting and investigatory roles, both direct and indirect, for the benefit of the public interest.

Unfortunately, the proposed Queensland system for the protection of whistleblowers does not show any of these characteristics, and will thus be relatively ineffective. Revisions of the proposed legislation will be required, hopefully within a time frame much less than the 10 year learning curve experienced by the OSC in America.

NOTES

1. See for example "In the Public Interest", Report of the Senate Select Committee on Public Interest Whistleblowing, Parliament House Canberra. August 1994, p.101 and 235.

2. G. McMahon "An Independent Statutory Body for the Support and Protection of Whistleblowers". Whistleblowers Action Group Discussion Paper dated 13 September 1994.

3. W. De Maria "Unshielding the Shadow Culture" Queensland Whistleblower Study Results Release Paper One, University of Queensland, April 1994.

4. W. De Maria and C. Jan "Wounded Workers" Queensland Whistleblower Study Results Release Paper Two, University of Queensland, October 1994.

5. As per Note 2.

6. D. Solomon, article "Courts gain judges but face reform" Courier Mail, 11 November 1994.

7. Criminal Justice Commission Annual Report 1992/93 as reported in Courier Mail article "CJC legal bill tops $1.76m" by Michael McKinnon.

8. As per Note 1.

9. Electoral and Administrative Review Commission "Protection of Whistleblowers" Issues Paper No. 10, Queensland State Government, December 1990, p.34.

10. As per Note 1, p.232.

11. As per Note 1, p.26.

12. As per Note 2.

13. As per Note 9, p.25.

14. As per Note 9, p.30 and Appendix D.

15. As per Note 1, p.108.

16. G. Sorensen "Blowing the Whistle", Royal Institute of Public Administration Australia Seminar, Sydney 1992, p.22.

17. As per Note 1, p.18.

18. As per Note 11, p.22.

19 As per Note 1, p.16.

ABSTRACT

The Whistleblower Protection Body: A Strategy for Effective Protection
by G. McMahon, B.Com., M.Eng.Sc., B.sc., M.Econ.St.

The paper discusses the three major issues posed by proposals to protect whistleblowers with the assistance of a Whistleblower Protection Body.

Is such a body necessary?

What roles and powers should such a body have?

Should it be an independent body?

The discussion describes the decisions on these issues made in eleven jurisdictions from Australia and overseas. Arguments are presented linking the existence and the characteristics of such bodies to the effectiveness of whistleblower protection systems and to the level of support held by government for whistleblower protection.

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WHISTLE BLOWER PROTECTION LEGISLATION
NOTES FOR AN ADDRESS TO A CONFERENCE ON ADMINISTRATIVE LAW IN QUEENSLAND - A NEW BEGINNING
BY STEPHEN KEIM, BARRISTER, EXECUTIVE MEMBER OF THE QUEENSLAND COUNCIL FOR CIVIL LIBERTIES, HELD ON FRIDAY, 18TH MAY, 1990

THE FITZGERALD REPORT

The Fitzgerald Report turned the concept Whistle Blowers Legislation from a complete unknown to a household word. Mr. Fitzgerald said in his report:-

> "Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward unless they are confident that they will not be prejudiced. It is enormously frustrating and demoralising for conscientious and honest public servants to work in a department or instrumentality in which maladministration or misconduct is present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority. There may be no one that can be trusted with the information. There is an urgent need for legislation which prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities. Such measures have recently been made law in the United States of the America by the Whistle Blowers Protection Act 1989."

As well as the threat of retaliation, public servants in Queensland and Australia are faced by the fact that almost every act under which public servants carry out their duties carries within it its own small version of the Official Secrets Act. As an example, s. 144 of the Childrens' Services Act requires each officer to take

Special Counsel as personifying and/or orwellian big brother.

The authors refer to surveys which show an almost doubling between 1980 and 1983 from 19% to 37% of person who witnessed significant misconduct citing fear of reprisal as the reason for remaining silent. They also point to the fact since its creation, the OSC had turned down 99% of whistle blower cases without attempting disciplinary or corrective action. Other statistics showing inaction on behalf of the OSC are cited in the article.

The authors suggest a number of ways in which the situation can be improved. They suggest that legal changes are only a starting point and draw an analogy with the civil rights struggle in the United States where broadly based action was needed over decades to turn abstract rights into reality. They reject the bureaucratic model of the Office of Special Counsel and suggest that what is needed is broad access to the courts to allow whistle blowers to defend their constitutional rights the same way that the public who benefits from their descent has such access to the Court. In the Australian context, one has to go beyond facilitating mere access to the Courts. In the absence of due process clauses and other constitutional guarantees, there is a need for a legislative creation of rights in the first place. Thirdly, the authors have advice for the would-be whistle blower. They suggest that whistle blowers do not have to be martyred profiles in courage. They can survive and even flourish both personally and professionally as

well as effectively challenge the misconduct against which they are objecting. Eight survival strategies are discussed by the authors and in very brief summary they are:-[7]

1. Before taking any irreversible steps, the employee should discuss the matter with his or her family on the decision that is about to be made;
2. The employee should try to work within the system twice, once informally and if that is not successful, once in writing;
3. The employee should be alert to and discreetly attempt to learn of a potential support base on the job;
4. The whistle blower should consciously be on best behaviour with the administrative and support staff who latter may retaliate;
5. The employee should keep a careful diary or log of all significant developments, from facts to warnings to insights and should be careful to keep out of such a diary, self-indulgent or sarcastic remarks;
6. The employee should identify and copy all necessary supporting records before drawing any suspicion to his or her objections;
7. The employee should research and identify sympathetic elected officials, journalists and relevant citizen activist organisations who can benefit from his or her descent as it is important to develop a support constituency as interests coincide with the whistle blower's career survival in order

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[7] Ibid p. 236-8

to avoid professionally fatal isolation; and

8. The employee should invest the funds to get a legal diagnosis from a competent lawyer, of the potential retaliation that could result, the odds for successful defence, and the price tag.

The dissatisfaction with the OSC was not restricted to academic commentators. Representative, Patricia Schroeder, a sponsor of the Bill vetoed by President Reagan, speaking in an interview published in the *ABA Journal of March, 1989, said that the existing Office of Special Council created in 1979, had lost sight of its mission and had consequently worked with agency management to harm employees. Miss Schroeder was ultimately successful. As mentioned earlier, the 1989 version of the 1988 proposal was signed into law on April, 10th last year. The new Act makes the OSC an independent agency, specifies that its mandate includes protecting whistle blowers, and gives the OSC the authority to issue a 45 day stay prohibiting an agency from demoting or firing a worker who has iled a complaint. The new law also modifies the existing burden of proof by requiring only that the whistle blower show that his or her whistle blowing was a contributing factor in his dismissal or harassment, rather than a significant or predominant factor.

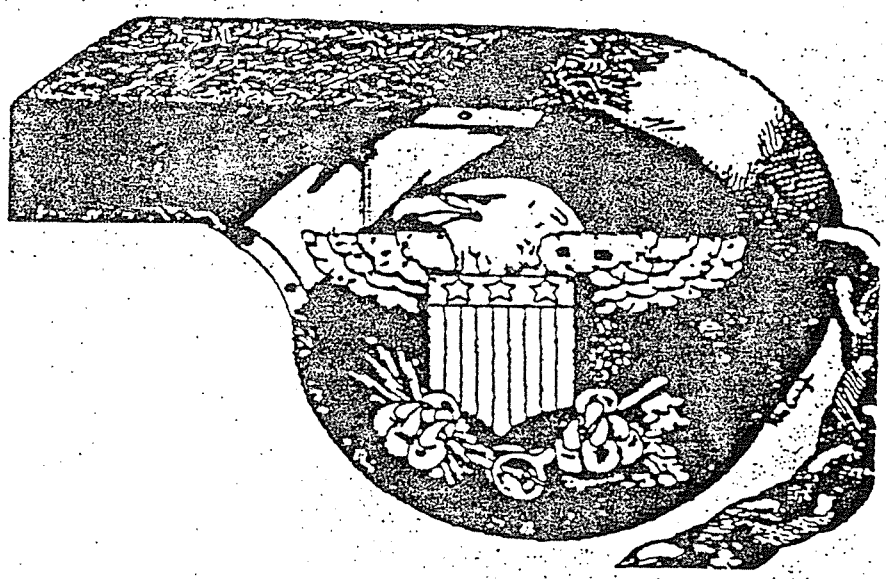
It is doubtful whether the 1989 amendments will correct all of the deficiencies of the US system. A system of administrative safeguards will always need to involve both bureaucratic watchdog

mechanisms and systems based on individual initiatives. The ombudsman is a bureaucratic solution. The Criminal Justice Commission is a bureaucratic solution. The prerogative writs and the more simplified procedures that will hopefully replace them provide remedies available through individual initiative. Freedom of information reforms tend to involve both a bureaucratic and an individual initiative process. If whistle blower protection legislation is to be introduced in Queensland, decisions will have to be made as to whether a bureaucratic watchdog, an individual initiative or a combination of the two is to be preferred. My preference is for a system which creates remedies involving both damages and injunctive relief. Access to such remedies should not be dependant upon going through some bureaucratic investigative process. The good of our future society is dependant upon whistle blowers. We must protect them where we can. We should reward those that we are already able to identify. We should protect those of the future where we can. We must struggle to create the ethic that retaliatory action of companies and agencies is as offensive as the misconduct which it seeks to hide.

Courage Without Martyrdom

A Survival Guide for Whistleblowers

STEWART, DEVINE & RISSE



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Special thanks to Julie Stewart for her work.

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October 1989

Re. , >ility, are to investigate and identify for possible criminal prosecution the source of "leaks" – usually anonymous whistleblowing disclosures.

On balance, IG's have a mixed track record at best of responding to whistleblowers. Even offices with statutory independence are staffed predominantly by employees from the "old days," when the IG was management's eyes and ears. That meant that if the agency chief wanted to get the facts and act against wrongdoing, the IG performed as a law enforcement agency. If the agency leader wanted to cover up a problem, the IG report assembled the case for the defense and acted as a hatchetman to do the dirty work of discrediting the whistleblower. Traditionally it has not been uncommon for an IG to investigate the whistleblower rather than his or her charges.

To some extent these traditions are changing. But whistleblowers are well-advised to seek expert advice or retain an attorney, even for coaching purposes, before going to an Inspector General. You should pin down how the IG will conduct the investigation before sharing your concerns and evidence. You should insist that all agreements, plans, and schedules be confirmed in writing, rather than handling matters informally or leaving anything to trust. As will be discussed in the next section, under some circumstances, it might be wise to approach the IG armed with the extra credibility of a substantial likelihood finding an order to investigate from the Office of the Special Counsel.

Office of Special Counsel

The Civil Service Reform Act of 1978 created a formal whistleblowing disclosure channel through the Office of the Special Counsel, which has a parallel duty separate from defending employees against repressive personnel practices. The Special Counsel screens whistleblowing disclosures and orders agency chiefs to investigate the challenges that have merit. When the OSC determines that there is a "substantial likelihood" the whistleblower's charges are accurate, a more intensive reform process is triggered. The agency head must investigate and reply within sixty days in a report whose contents are specified by statute, including the issues and evidence that were investigated, the methodology for the probe, a summary of the evidence obtained, findings of fact and law, and a summary of corrective action to solve any verified problems. After receiving the whistleblower's comments, the Special Counsel evaluates the report for completeness and reasonableness. Then the report is sent to the President and Congress, along with the employee's comments. The Special Counsel must maintain a copy of each report and comments in a public file.

The purpose of the OSC whistleblowing disclosure channel was "to encourage employees to give the government the first crack at cleaning its own house before igniting the glare of publicity to force correction." Indeed, if administered in good faith, the Reform Act mechanism offers strategic benefits for a whistleblower to be effective in his or her dissent. It represents an opportunity to gain the legally-binding judgment of an objective third party that the whistleblower's charges must be taken seriously. At a minimum, it could maximize the public whistleblower's credibility and help to reduce isolation. The OSC evaluation that there is a "substantial likelihood" the allegations are well-taken is the bureaucratic equivalent of a "Good Housekeeping Seal of Approval" for that particular dissent.

By comparison the OSC has handled its responsibilities to screen whistleblowing disclosures more objectively than its duties to investigate and act against job reprisals. On occasion, the combination of OSC support for the dissent and the knowledge of evaluations at the end of the process have helped to improve the quality of agency reports in response to whistleblowing disclosures. In both the nuclear power and safe food areas, the Nuclear Regulatory Commission, U.S. Department of Agriculture and the Department of Health and Human Services have confirmed the validity of employees' dissent and taken serious corrective action. A guideline for preparing OSC whistleblowing disclosures is enclosed as an appendix.

Unfortunately, as a general rule this option at best produces only cosmetic reform. Structurally, even with OSC support the agency targeted by the whistleblower's charges is investigating itself. Good faith responses have been the exception rather than the rule. Further, the OSC typically accepts as reasonable and complete whatever report the

agency sends back. As a result, more likely than not an OSC whistleblowing disclosure is merely an opportunity for the agency to cover up the evidence, perfect its defenses and then issue an official self-exoneration that soon will be approved by the Special Counsel – all before serious investigations by Congress, the media or other outside groups that would like to ferret out the truth. The basic structural flaw is analogous to hotlines but here the stakes are higher and the setback can be more severe. This means an OSC whistleblowing disclosure usually will be counterproductive unless it is part of a larger strategy involving other institutions. That was the case with all of the examples listed above.

In some instances the OSC channel has been treacherous. On numerous occasions the Special Counsel has ruled that the dissent was unreasonable but then sent it to the agency chief anyway without the employee's consent. These "informal referrals" have been a double whammy – advance warning to the agency of serious dissent, and an invitation to retaliate with impunity since the Special Counsel's ruling meant the dissent was too unreasonable to qualify as legally protected speech. The Whistleblower Protection Act of 1989 should make the OSC a safer channel for whistleblowing disclosures, by generally forbidding the Special Counsel from forwarding the employee's charges or revealing his or her identity without consent.

Congress

It would be nice to think that our elected officials only represent each one of us as individuals, but members of Congress are pulled by all types of constituent groups, including major industries in their state or district. For that reason, it is important to do some research before blowing the whistle to your local member of Congress. Some questions you might ask are: are there any contractors in your area of whistleblowing or large military bases in his or her district or state? Find out how the member feels about your particular agency or company before you discuss anything and ask about their methodology in a case load. Also investigate their past track record in battling the system with other whistleblowers and call those people to see if they were satisfied with the member of Congress's tenacity in fighting the system and protecting their right to blow the whistle. If the office does not have a strong record of supporting whistleblowers, you may think twice about trusting that member.

Some members of Congress simply pass complaints about the bureaucracy back to the agency to investigate itself. As discussed before, this action is rarely successful – the matter is often bucked down to the perpetrators of the fraud. To make matters worse, members of Congress may not be willing to protect your identity, even if you ask them to, because of the inexperience of the congressional staff in dealing with the bureaucracy or the individual member's courage to stand up to a large bureaucracy or company.

Whistleblowers often make the mistake of thinking that their best ally to expose the fraudulent activity is the authorizing committees in the Congress that give the bureaucracy its money. Although some congressional committees have a vigorous oversight staff, many of the members of the committees are captured by the same influences that pressure the individual member of Congress.

For example, the Pentagon procurement scandals in the 1980's have shown that cozy relationships exist between some members of congressional committees and contractors. The Armed Services Committees in the House and the Senate often have members appointed to them because of the large defense contractors or military installations in their state or district. If members of Congress do not have much military activity in their state or district when they are first appointed to the committee, Pentagon money gradually gravitates to their area because of their own efforts or because the Pentagon and the defense contractors are trying to win influence with the committee. In addition, in 1987, the Chairman of the House Armed Services Subcommittee on Procurement and Military Nuclear Systems received 80 percent of his yearly honoraria from speeches from defense contractors. His is not an isolated case: 6 of the other 18 members of his committee also received more than 50 percent of their yearly honoraria from defense contractors.

It also is important to remember that as an institution, Congress can be as unwilling to hear bad news as the Executive Branch. It is true that some of the major scandals of the 1980's have been exposed with the help of certain congressional committees, but once the

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Expectations of Whistleblowers When Matters Taken to Superiors

When we examined the whistleblowers expectations about the internal investigation of their allegations, we find that they did not entertain bizarre and unrealistic hopes. Rather they expected what they were entitled to expect, the taking of "corrective action" (46%) and a "proper investigation" (23%).

	No. of cases*	%
Corrective action	62	45
Proper investigation	31	23
Other	14	10
Moral support	11	8
No action	9	7
Reprisals	5	4
Cover up	4	3

* Multiple choices permissible

Discussion

An interesting feature of this table is the low number (5) of whistleblowers who expected reprisals when they took the wrongdoing allegations to their superiors. This indicates two things. First this is a particularly brave sub-group because they disclosed knowing that reprisals would follow. Secondly, the low numbers indicate a widespread view among the sample that their public sector units would behave honourably. When we compare this to a previous table (Reprisals Taken by Superiors), which was an assessment after the whistleblowing occurred, we find that in 52 instances reprisals were taken against the whistleblowers by their superiors.

EXTERNAL RESPONSES

This section deals with the experiences of the sample when they took their allegations wrongdoing to external agencies.

External Agencies that Whistleblowers Disclosed to	Number of Disclosures
Anti-Discrimination Commission/Human Rights & Equal Opportunity Commission (AD/HREOC)	5
Auditor-General (Qld) (AG)	3
Cabinet Minister (Qld)	9
Criminal Justice Commission (CJC)	22
Electoral and Administrative Review Commission (EARC)	4
Member of Legislative Assembly (Qld) (includes Opposition spokespersons/shadow Ministers) (MLA)	11
Ombudsman (Parliamentary Commissioner for Administrative Investigations) (Ombud)	8
Police	2
Premier (of the day)	8
Public Sector Management Commission (PSMC)	13
Union	17
Other:	16
Commission of Inquiry	
Courts	
DEVETIR, Division of Workers Compensation/Workers Compensation Board	
DEVETIR, Division of Workplace Health and Safety	
Department of Housing, Local Government and Planning	
Federal Parliament, Committee, or Member of Federal Parliament	
Industrial Relations Commission (Qld or Commonwealth)	
Parliamentary Committee for Criminal Justice (PCJC)	
Parliamentary Committee for Electoral and Administrative Review (PEARC)	
Professional Associations	
Queensland Parliamentary Committee	

Responses from External Agencies About Disclosures	No (n=146)	%
Lack of Response		
Agency took no action	37	25
Negative Response		
Agency investigation did not proceed (alleged lack of jurisdiction)	16	11
Agency investigation did not proceed (lack of political will)	11	7
Agency investigation did not proceed ("no substantial wrongdoing")	2	1
Wrongdoing not substantiated (alleged lack of evidence)	6	4
Wrongdoing substantiated - corrective action not taken	6	4
Wrongdoing substantiated but covered up	3	2
Agency refused to give whistleblower protection	4	3
Whistleblower "neutralised"	4	3
Agency investigation or finding of wrongdoing frustrated	7	5
Referral		
Agency referred matter to prosecution authority	1	0.6
Agency referred matter to expert or specialist authority	10	7
Agency referred matter back to whistleblowers agency	11	8
Agency referred matter back to whistleblower	2	1
Agency took reprisals against whistleblower	1	0.6
Positive Response		
Agency offered whistleblower protection	1	0.6
Wrongdoing substantiated (corrective action taken, including support/protection of whistleblower)	11	8
Other agency response	13	9
Total	146	100
[Agency investigation current at interview date	13]	
[N/A	6]	

Discussion

The study recorded 146 responses by external agencies. This does not include matters current at interview time (13). When we scan these responses for unequivocally positive reactions, we find only twelve; "Wrongdoing substantiated and corrective action taken" (11), and "whistleblower offered protection" (1). This means that only 8% of the sample, when asked "what happened when you went external with the matter", reported a response that was positive, definitive, and led to 'corrective action' been taken.

Sixteen percent of agency action constituted referral to somewhere else. In the whistleblowers world "referral" is usually a synonym for passing the buck. In another publication I have referred to this as "dead end processing".[11] An example of this is found in case 233. The whistleblower said he had evidence of ... mismanagement which he believed could have resulted in "loss of life and unnecessary [public danger]".* After getting nowhere internally he contacted the Minister for ...* through the Minister's personal secretary. Ten minutes later a senior officer in the Queensland ...* called to tell the whistleblower that he was "finished". The whistleblower approached the Secretary of the Union who assisted in the preparation of a related submission to the Public Sector Management Commission (PSMC), but this had no effect. He then went to the PSMC to be told that it was "not their portfolio". He then went to the Public Sector Equity

* Sorry reader, those defamation laws again!

Commissioner to be told it was "not their area". He then went to the local member who told him that the Minister had "rapped on his [the member's] knuckles" and that member would not see him again. He then attempted to see the Director-General of ... Department of ...," to be told that the Director-General was "too busy" to see him. solicitor could not help, he said, because of the "unique legislation". He then approac the Chair of the Government Committee on ...* on several occasions. The Chair, the whistleblower said, was afraid for his own position and had been warned off by the Minister. He then approached the CJC who contacted the Minister in order to clear the way for the whistleblower to be interviewed for a position. The Minister refused the request.

Another example is offered in case 195. The whistleblower eventually went external with a series of alleged wrongdoings which included, "gross incompetence and mismanagement, loss and waste bordering on dishonesty, theft, inconsistencies in staff placements and promotions ... ordered to act against relevant laws". She approached the Auditor General who said that they would look into the matter. After a while she reapproached the Auditor General for a progress report and was told that regulations prevented them confirming with her the results of their findings. She then approached her union, they gave early assistance in defending disciplinary charges brought against her, but they took no further action. She then approached the CJC who told her that they were very busy, and that they had received many disclosures from people in her agency, and that most were found to be resisting agency reforms. Her local member was sympathetic but took no action. Finally, an Opposition MLA promised to act but didn't.

While the relevance of some of these contacts may be disputed, the picture as a whole is one of bureaucratic obstruction. The fields of action of external agencies are often so narrow that whistleblowers' call for assistance can be easily defeated. I also suspect that the "no jurisdiction" argument is frequently trotted out to respond to people deemed "trouble makers".

Another aspect of dead-end processing concerns the high evidentiary standards required by external agencies. This standard is often unable to be met by whistleblowers. They are put into a forensic David and Goliath contest with a hugh department, fully resourced for rebuttal. The whistleblower is often told that his or her case "lacks substance", or the official investigation "failed to prove ..." The sub-text of these messages is that the external agency was no match for the department intent on hiding evidence, intimidating witnesses and vilifying the whistleblower.

Case 160 illustrates this point. The whistleblower, a serving policemen, disclosed on a number of wrongdoings including; stealing, perjury, unlawful assaults, misappropriation of police property and racial and sexual harassment. The police officer approached the CJC. After some consideration the CJC referred part of the complaint back to the Police Department (hence exposing the whistleblower to more persecution). Generally the CJC felt that there was insufficient evidence to proceed. The whistleblower, needless to say, was critical of this process. He expected results, immediate action, and a more personal approach.

* Sorry reader, those defamation laws again!

Dead end processing also occurs when the external agency fails to muster the will to investigate or prosecute because the alleged perpetrator is powerful and well connected. Eleven of our sample claim this as the reason why their disclosures got nowhere. In case 166 the whistleblower was told by a very senior person in the ... Commission that he was aware that the Director-General of the Department of [...] was lying, but "they couldn't take him on". In case 194 a ... supervisor at a major correctional facility was reported by the whistleblower for failing to recognise the security concerns of ... staff and for racist behaviour directed at the Aboriginal ... The whistleblower approached the ..." Union with these allegations. They told her that they were aware of the ..." supervisor. The whistleblower said [the Union] "... did not appear to be very interested in the situation".

Attitude of External Agencies to Whistleblowers' Disclosures

	Police n=2	CJC n=22	EARC n=4	PSMC n=13	Ombud. n=10	MLA n=11
Very concerned	1	5	1	1	1	3
Fairly concerned	0	8	1	6	6	5
Fairly unconcerned	1	6	1	3	2	2
Very unconcerned	0	3	1	3	1	1

	Minister n=9	Premier n=8	ADC/ HREOC n=5	AG n=3	Union n=17	Other n=16
Very concerned	2	1	1	1	6	7
Fairly concerned	2	0	3	1	6	5
Fairly unconcerned	1	3	1	1	5	2
Very unconcerned	4	4	0	0	0	2

Effectiveness of External Agencies in Dealing with Disclosures

	Police n=2	CJC n=22	EARC n=4	PSMC n=13	Ombud. n=8	MLA n=11
Very effective	1	0	0	0	0	1
Fairly effective	0	4	1	0	1	1
Fairly ineffective	0	3	0	1	1	2
Very ineffective	1	15	3	12	6	7

	Minister n=9	Premier n=8	ADC/ HREOC n=4	AG n=3	Union n=16	Other n=15
Very effective	0	1	0	1	1	5
Fairly effective	1	0	1	1	2	1
Fairly ineffective	2	0	1	0	1	1
Very ineffective	6	7	2	1	10	9

Discussion

The two previous table tabulates the data on attitude and effectiveness of external agencies. The presentation of these two parameters (attitude and effectiveness) allows us to "measure" the reception the whistleblower got when he or the first presented his disclosure to the agency. It then allows us to "measure" the "result" of the whistleblower-agency contact from the whistleblowers' points of view. The juxtaposition of the parameters indicates that agencies are presenting themselves to whistleblowers in false ways, different to how they perform on the cases before them.

We can illustrate this by following through on the Public Sector Management Commission (the external agency that got the worst report from the sample). Thirteen whistleblowers in our sample took their disclosures to the PSMC. Just over 50% rated the "attitude" of the PSMC as concerned. However 92% of the sub-sample thought the PSMC was very ineffective in dealing with their issues. Admittedly the numbers here are small, but not so small to constitute an absolute defence by the PSMC. While the numbers are small, the trend across the sample is unequivocal - agencies promote their corporate images quite easily by expressing concern to the whistleblowers, but when it comes to doing something, and when that something involves money, time and will, agencies let the whistleblower down time and time again.

General Effectiveness of External Agencies in Dealing with Disclosures

	External Agencies	
	No. n=115	%
Effective	25	22
Ineffective	90	78

Discussion

This table amalgamates the evaluations for all external agencies approached by the sample. Seventy-eight percent of all approaches to these agencies were judged as ineffective.

Employer not to penalize person on account of service.

9.—(1.) An employer shall not penalize a person employed by him, or prejudice such a person in his employment, whether by reducing his salary or wages, dismissing him or in any other way, for the reason that that person is rendering service or liable to render service in a part of the Reserve Forces or of the Citizen Forces.

Penalty: Two hundred dollars.

(2.) In any proceedings for an offence against the last preceding sub-section, the burden is upon the employer to prove that the person proved to have been penalized or prejudiced in his employment was so penalized or prejudiced for some reason other than the reason alleged in the charge.

Leave to member during period of Defence service.

10. Where an employer of a member is required to allow annual or periodical holidays or leave to the member, the employer shall not, except at the request of the member, allow the holidays or leave at times comprised within any period of absence on Defence service of the member, but nothing in this section deprives a member of any right to any holidays or leave to which he would otherwise have been entitled.

Penalty: One hundred dollars.

Contract of employment not to terminate.

11.—(1.) Subject to this section, where—

(*a*) a member is employed under a contract of employment immediately before commencing a period of Defence service or immediately before a notice is served on him under the *National Service Act* 1951-1965 or the *Defence Act* 1903-1965 calling him up for Defence service; and

(*b*) in the case of a member who is employed under a contract of employment other than a contract of apprenticeship—has been so employed for not less than thirty days,

the contract shall not be, or be deemed to be, terminated by reason of the member's absence from work during his period of absence on Defence service, but the contract—

(*c*) is suspended from the commencement of the period of absence on Defence service; and

(*d*) unless earlier terminated, ceases to be suspended at the expiration of the period of absence on Defence service.

(2.) Nothing in the last preceding sub-section renders the employer under the contract of employment liable to pay the member for any time during his period of absence on Defence service.

(3.) Sub-section (1.) of this section does not prevent the termination of a contract of apprenticeship if the Minister consents.

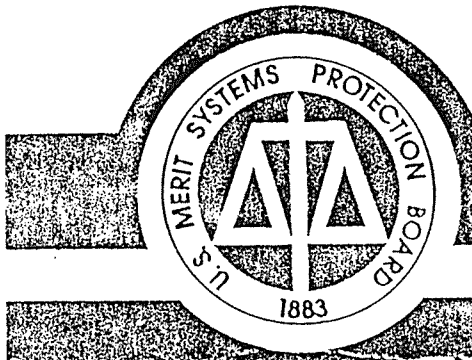
(4.) Sub-section (1.) of this section does not prevent the termination of a contract of employment if the member, having completed a period of Defence service, does not apply to resume work under the contract within a period of thirty days, or within such longer period (if any) as the Minister, having regard to the circumstances of the case, determines, after the completion of the period of Defence service.

(5.) A period during which a contract of apprenticeship is suspended under sub-section (1.) of this section shall, except as the Minister otherwise directs—

(*a*) in the case of Defence service rendered by a member in the Regular Army Supplement, being service under the *National Service Act* 1951-1965 or service as an officer in pursuance of an appointment referred to in sub-section (1.) or sub-section (2.) of section 28 of that Act—be deemed not to be a period of work under the contract for the purpose of determining the date on which the member is to be deemed to have completed the period of employment under the contract; and

(*b*) in any other case—be deemed to be such a period for that purpose.

(6.) Except as otherwise provided by this Part or, in the case of a contract of apprenticeship, as the Minister otherwise directs, a period during which a contract of employment is suspended under sub-section (1.) of this section shall be deemed not to be a period of employment under the contract.



Questions Answers About Whistleblower Appeals

May 1992

U.S. Merit Systems Protection Board
1120 Vermont Avenue, NW
Washington, DC 20419

7 *What are the burden of proof and degree of proof in whistleblower appeals?*

Under the Whistleblower Protection Act, the Board *must* order corrective action if you demonstrate that your whistleblowing was a contributing factor in the personnel action threatened, proposed, taken, or not taken against you. You have the burden of proving by a preponderance of the evidence that your whistleblowing was a contributing factor in the personnel action.

The Board will not order corrective action, however, if the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of your whistleblowing.

The Congress intended that these provisions would ease the whistleblower's burden of proving that an action was taken because of his or her whistleblowing, and, at the same time, would hold the agency to a higher standard in proving that it would have taken the action in the absence of the whistleblowing.

8 *If I file a whistleblower appeal with the Board after the Special Counsel has terminated an investigation of my complaint, will that termination influence the Board's decision?*

No. Under the Whistleblower Protection Act, when the Board considers your appeal, it may *not* take into account the Special Counsel's decision to terminate an investigation of your complaint. Moreover, if you file your appeal because 120 days have passed without your being notified that the Special Counsel will seek corrective action on your behalf, the Special Counsel may *not* proceed to seek corrective action without your permission. Furthermore, the Special Counsel may not intervene in your appeal before the Board without your permission.

A Report To Congress From The Office of Special Counsel

Fiscal Year 1989

Table 1
ALLEGATIONS CONTAINED IN COMPLAINTS RECEIVED DURING FY 1989 UNDER 5 U.S.C. §1214

Nature of Allegation	*Number of Complaints*[5]
Alleged abuse of merit staffing requirements or procedures, primarily the alleged granting of unauthorized preference or advantage, or solicitation or consideration of unauthorized recommendations, deception or obstruction of the right to compete, and attempts to secure withdrawal from competition [§§2302(b)(2), (4), (5) and (6)]	395
Alleged discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§2302(b)(1)(A)-(D)]	333
Alleged reprisal for whistleblowing [§2302(b)(8)]	245
Alleged reprisal for exercise of a right of appeal [§2302(b)(9)]	190
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity[6]	185
Alleged violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	126
Alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety [§1213(c) or §1213(g)][7]	112

[5] This category refers to the number of complaints which contained a particular allegation.

[6] Although these types of complaints may not, on their face, indicate the existence of any matter within the OSC's investigative jurisdiction, follow-up contact is made with the complainant to ascertain the exact nature of the complaint, and to determine whether there is any basis for further OSC action.

[7] These types of allegations are treated as whistleblower allegations which may be referred to the agency concerned under §1213(c) or §1213(g) for agency review. Nevertheless, if the allegation concerns an employment matter, the OSC carefully reviews it to determine whether the matter may be treated as an allegation of a prohibited personnel practice or other prohibited activity within its investigative jurisdiction. If so, the OSC investigates the matter.

A Report to Congress From The U.S. Office Of Special Counsel Fiscal Year 1992

Table 1

ALLEGATIONS CONTAINED IN MATTERS RECEIVED DURING FY 1992

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Reprisal for whistleblowing [§2302(b)(8)]	575
Discrimination on the basis of race, color, sex, national origin, religion, age, or handicapping condition [§2302(b)(1)(A)-(D)]	442
Attempts to secure withdrawal from competition [§2302(b)(5)]	20
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	376
Reprisal for exercise of a right of appeal [§2302(b)(9)]	476
Granting of unauthorized preference or advantage [§2302(b)(6)]	349
Allegations which did not cite or suggest any prohibited personnel practice or prohibited activity[3]	199
Disclosures of alleged violation of a law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety [§1213(c) or §1213(g)][4]	90
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	69
Discrimination on the basis of non-job related conduct [§2302(b)(10)]	68
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	87
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	75

[3] Although these types of allegations may not, on their face, indicate the existence of any matter within the OSC's investigative jurisdiction, follow-up contact is made with the individual to ascertain the exact nature of the allegation and to determine whether there is any basis for further OSC action.

[4] These types of matters are allegations of wrongdoing in government programs or operations received from employees through the OSC whistleblower disclosure channel which may be referred to the agency concerned under §1213(c) or §1213(g) for agency review. If the employee alleges that an adverse personal action occurred because of the disclosure, then the OSC carefully reviews it to determine whether the matter may be treated as an allegation of a prohibited personnel practice or other prohibited activity within its investigative jurisdiction. If so, the OSC investigates the matter.

Table 1 (continued)

ALLEGATIONS CONTAINED IN MATTERS RECEIVED DURING FY 1992

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Arbitrary or capricious withholding of information requested under the Freedom of Information Act [§1216(a)(3)]	29
Solicitation or consideration of unauthorized recommendations [§2302(b)2]	36
Deception or obstruction of the right to compete [§2302(b)(4)]	232
Discrimination on the basis of marital status or political affiliation [§2302(b)(1)(E)]	27
Other activities allegedly prohibited by civil service law, rule or regulation [§1216(a)(4)]	5
Coercion of political activity [§2302(b)(3)]	1
Total	3,156[5]

[5] Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters received.

Table 2

ALLEGATIONS CONTAINED IN MATTERS REFERRED FOR FIELD INVESTIGATION DURING FY 1992

NATURE OF ALLEGATION	NUMBER OF ALLEGATIONS
Reprisal for whistleblowing [§2302(b)(8)]	155
Reprisal for exercise of an appeal right [§2302(b)(9)]	97
Unauthorized preference or advantage granted to improve or injure the prospect of employment of any person [§2302(b)(6)]	35
Deception or obstruction of the right to compete for employment [§2302(b)(4)]	25
Discrimination on the basis of race, color, sex, national origin, religion, age, handicapping condition, or marital status [§2302(b)(1)(A)-(E)]	20
Violation of a law, rule or regulation implementing or concerning a merit system principle [§2302(b)(11)]	36
Violation of the Hatch Act by a state or local government employee [§1216(a)(2)]	28
Discrimination on the basis of conduct not related to job performance [§2302(b)(10)]	7
Appointment, promotion, or advocating the appointment or promotion of a relative [§2302(b)(7)]	16
Securement of withdrawal from competition [§2302(b)(5)]	4
Other activity prohibited by civil service law, rule or regulation [§1216(a)(4)]	4
Violation of the Hatch Act by a federal employee [§1216(a)(1)]	27
Violation of the Freedom of Information Act [§1216(a)(3)]	1
Solicitation or consideration of unauthorized recommendations [§2302(b)(2)]	4
Coercion of political activity [§2302(b)(3)]	1
Total	460[6]

[6] Each matter may contain more than one allegation. Thus, this total exceeds the total number of matters actually referred for field investigation (270).

Whistleblower Disclosures

In addition to its investigative and prosecutive missions, and pursuant to §1213(a), the OSC provides a safe channel through which federal employees may disclose information evidencing a violation of law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a specific and substantial danger to public health or safety.

Upon receipt of such information from a federal employee, the Special Counsel is required by §1213(c) to transmit the information to the head of the agency concerned if the Special Counsel determines that there is a substantial likelihood that the information discloses the kinds of wrongdoing described in the statute. The OSC will not divulge the identity of an employee who provided the information unless he or she consents. The agency head is then required to conduct an investigation and submit a report to the Special Counsel on the findings of the investigation. The Special Counsel sends the agency report with any comments provided by the employee who made the disclosure and any comments or recommendations by the Special Counsel to the President, the congressional committees having jurisdiction over the agency, and the Comptroller General.

The Special Counsel may determine, after review of information received from an employee, that there is not a substantial likelihood that the information discloses the type of wrongdoing described in §1213(a). In such cases, the Special Counsel may, under §1213(g), require the agency head to review the matter and inform the Special Counsel in writing of what action has been or is being taken thereon for transmittal to the employee.

The OSC is not authorized to investigate allegations of the kind described in §1213(a). Nevertheless, complainants often include information which may be covered by §1213(a) with their allegations of other prohibited activities within the OSC's investigative jurisdiction. The CEU identifies disclosures that may qualify for statutory referral to an agency in its initial review of complaints. The CEU refers any such disclosures to the Investigation Division's Disclosure Unit for further review and follow-up with the complainant as needed to confirm the facts and issues involved. After completion of its review, the OSC decides whether to (1) transmit the information developed to the agency concerned under §1213(c) or §1213(g); (2) refer the matter to the agency Inspector General or comparable office for any appropriate action; or (3) close the matter without further action.

During FY 1992, the OSC received and considered 136 matters for possible referral to the agency concerned under §1213(c) or §1213(g). In addition, 13 matters were carried over from FY 1991. During FY 1992, the OSC --

- referred five disclosures for investigation and a report under §1213(c);
- referred eight disclosures for a report of actions taken or to be taken thereon under §1213(g);

- referred 23 disclosures to the agency Inspector General;
- closed 93 matters due to lack of sufficient basis for further action; and
- carried the remaining matters over to FY 1993 for completion of review.

Results of Referrals

During FY 1992, the OSC received and closed ten reports from agencies to which statutory referrals previously had been made. OSC review of agency reports disclosed the following results from statutory referrals --

Section 1213(c) Referrals:

Allegation substantiated in whole or in part:	4
Allegation not substantiated:	2

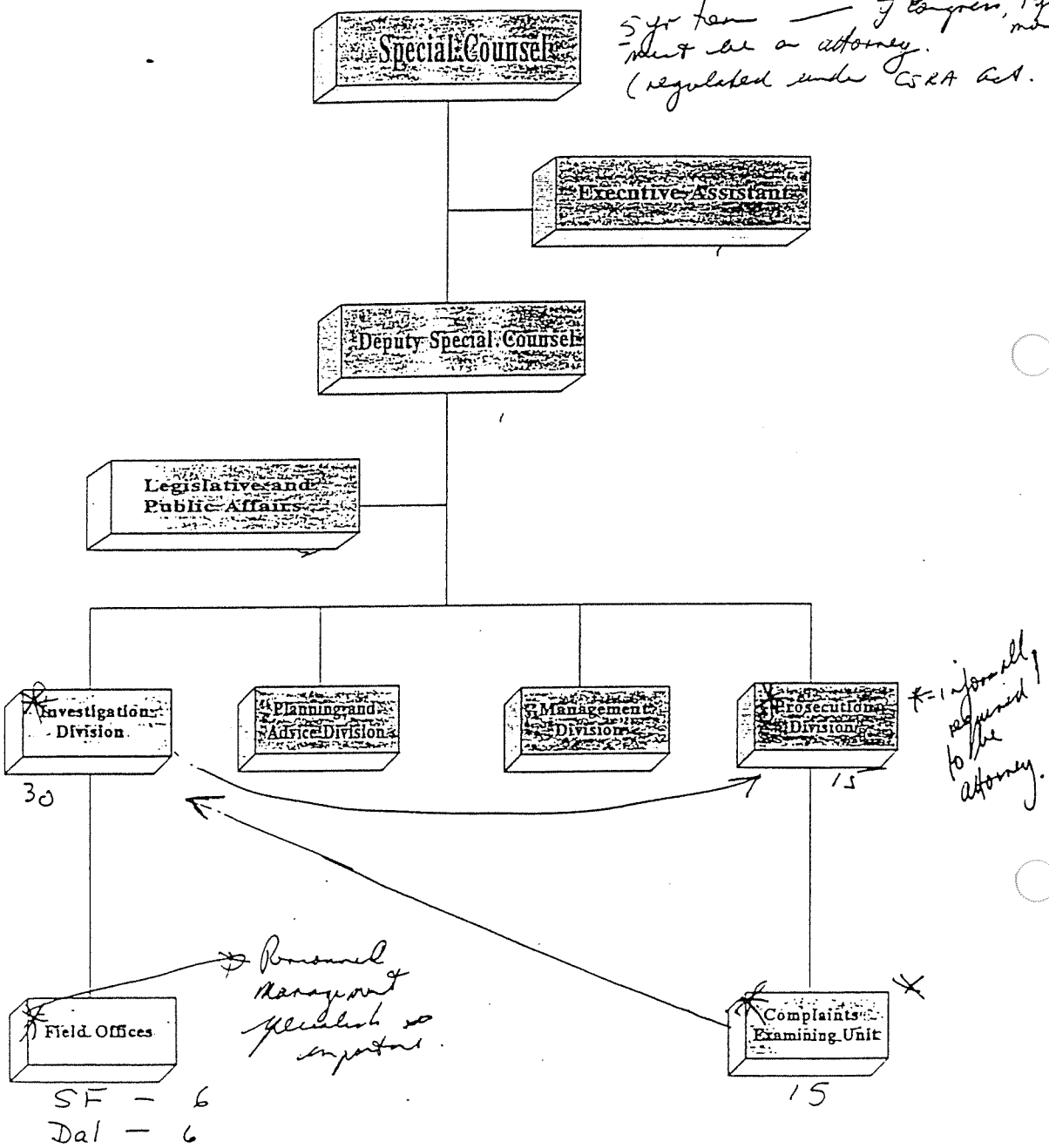
Section 1213(g) Referrals:

Allegation substantiated in whole or in part:	5
Allegation not substantiated:	1

In the nine cases in which allegations were substantiated, the agencies reported the following corrective actions, with more than one action in some cases:

Agency regulations or practices changed:	5
Disciplinary action taken:	1
Other:	3

Organization of the Office of Special Counsel



 overall total: c 100

THE ASSOCIATION OF PROFESSIONAL ENGINEERS AND SCIENTISTS, AUSTRALIA
Professional Engineers Branch, Queensland
Professional Scientists Branch, Queensland Office

APESA

Representing Professional Engineers and Scientists in Industrial Affairs

Reference

13 January 1995

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

Dear Mr Elton Humphery,

THE CASE OF MR GREG MCMAHON
ONE OF THE NINE UNRESOLVED WHISTLEBLOWER CASES IN QUEENSLAND

The Association of Professional Engineers, Scientists and Managers, Australia notes with appreciation the interest shown by the previous Senate Select Committee on Public Interest Whistleblowing in the case of one of our members, Mr Greg McMahon.

The Association understands that the present Select Committee seeks to gain further insight into the provisions necessary for effective Whistleblower Legislation by a study of actual cases as yet unresolved in various jurisdictions in Australia. The Association presumes that the fact that these cases remain unresolved indicates the value they may have to the Selection Committee in identifying key issues for the protection of bona fide whistleblowers from reprisals because of their public interest disclosures.

This Association has a parallel interest in the protection of its representatives in the workplace, representatives who bring the attention of the Association to breaches of industrial awards or agreements or who otherwise represent this Association and its members.

In the case of Mr McMahon our separate interests may converge into one concern: that concern is that a public servant, rendering lawful service to the Crown in two separate capacities, one with the Queensland State Government and one with the Commonwealth, appears to us to have been disadvantaged in his employment with the first because of his lawful obligation to the second and because, as an elected representative of this Association, he reported the alleged breach of State and Commonwealth legislation to the proper State and Commonwealth authorities.

This Association has represented the interests of Mr McMahon since 1989 in his efforts to secure a proper investigation of his complaints. Those representations continue to this day. It is clearly understood that the Select Committee is not empowered to determine Mr McMahon's complaint. Selected correspondence however between the Association and Government authorities concerning efforts to secure such a determination are offered to the Select Committee for the demonstrations they provide of the difficulties faced by officers in Mr McMahon's predicament. Those letters are:

* APESA letter to PSMC dated 18 Aug 1992
* PSMC letter to APESA dated 14 Sep 1992
* APESA letter to PSMC dated 13 Oct 1992
* PSMC letter to APESA dated 1 May 1993

Please address correspondence to
447 Upper Edward Street, Brisbane Qld 4000 — Phone: (07) 832 1477 — Facsimile: (07) 832 3268

While these letters provide much material for an essay on the Queensland Government Public Sector Management Commission, they also provide illustrations of general issues relevant to proposals for Commonwealth Whistleblower Legislation.

A State Official disclosing breaches of Commonwealth Legislation by other State Officials.

In such a situation the Association would prefer an administrative environment wherein both the State Administration and the Commonwealth Administration had the interest and the power to act to redress this type of situation:

- The State Administration should be interested because the breach of law involves State officials.

- The Commonwealth Administration should be interested because the laws breached are Commonwealth laws.

The worst situation would be where:

- The State Administration washed its hands of the matter because the laws breached were Commonwealth laws.

- The Commonwealth Administration remained uninvolved in the matter because the officials involved were State Officials.

Half of this "worst situation" may exist already in Queensland: the APESA letter of 13 October 1992 included a request that documents be safely stored because they may contain information material to the breach of Commonwealth Legislation (page 2, third paragraph); the PSMC letter of 7 May 1993 refused the request partly because breaches of Commonwealth legislation are not within its jurisdiction (page 3 second last paragraph).

The Association recommends that the Commonwealth not complete this "worst situation" with respect to whistleblowers of the special category discussed, by excluding them from coverage by the protection of proposed Commonwealth Whistleblower legislation.

The Association recommends that Commonwealth legislation provide effective protections to State Officials who disclose breaches of Commonwealth legislation or fraudulent misuse of Commonwealth funds by other State Goverment officials.

Safe Storage of Evidence

This issue was raised by the Association with the PSMC because of destruction of documents by a Department in the early stage of Mr McMahons problems. On this issue the PSMC gave the other part of its reason for not agreeing to our aforementioned request: that it did not administer the State Archives Act.

Effective legislation, and the administrative policies supporting the enforcement of legislation, protecting public documents and/or evidence from destruction or loss, or from tampering, may be of assistance to whistleblowers in pursuing any rights given them by Whistleblower protection legislation. Such reforms however will not assist whistleblowers where vital documents or tape recordings or photographs are lost or destroyed.

We suggest that there are two provisions that the Select Committee might consider to improve the effectiveness of Commonwealth Whistleblower Protection legislation with respect to the safe storage of documents material to proving reprisals against whistleblowers.

1 Relevant powers, functions and expertise in administrative law should be given to a Whistleblower Protection Authority in order that this independent body could obtain and secure such documents in the interest of justice. Such a body should report to Parliament breaches of any Acts by Departments pertaining to the proper storage and handling of public documents relevant to investigations into reprisals against whistleblowers.

2 The burden of proof of any reprisals should be structured such that:

(a) the whistleblower has the burden of proving the disadvantages suffered, and

(b) the disadvantage being proved by the whistleblower, the burden of proving the motive for the alleged reprisals should be with the employer.

If with this reverse onus of proof with respect to motive, the employer is unable to produce documents or tapes or photographs known to exist, or that should exist if the employer followed proper procedures associated with the motive for the alleged reprisals argued by the employer, or if the employer is able only to produce tampered or altered or partial documentation, then the disadvantage resulting from this loss or diminution in evidence would fall upon the employer. The disadvantage then would be falling onto the party to the dispute that is responsible for safeguarding the documents.

Protection of Whistleblowers who are in the Senior Executive Service.

Both the Queensland Commission for Public Sector Equity and the Commonwealth Merit Protection and Review Agency can not allow appeals against appointment to promotions within their respective Senior Executive Service. With respect to the PSMC in Queensland, the determination that there be no appeals against SES appointments appears to be the dominant principle of that body. That principle is stronger than, it appears, the adherence of the PSMC to its major functions enunciated in its own Act relating to fair and equitable treatment of public sector employees and for application of equal employment principles in the management of and employment within the public sector. Beyond the provisions of the PSMC's Act excepting SES positions from its appeal provisions, the PSMC has extended the veto on appeals against SES appointments to effect a veto on investigations of a much wider range of administrative actions that could be used to inflict reprisals against whistleblowers:

- The standard on Fair Treatment issued within guidelines set out in regulations made pursuant to the PSMC's Act extends the appeal veto to "issues of a kind which could have been raised in an appeal" under another standard, even if that other standard says there is no right of appeal (PSMC letter 7 May 93 page 3 middle paragraph)

- The Commission can refuse to investigate what it considers amounts to "a form of appeal" or "de facto appointment appeal" (PSMC 14 Sept 92 page 1 second last paragraph and PSMC 7 May 93 page 1 fourth paragraph)

- The PSMC have a policy "that it will not investigate individual grievances except in the context of an appeal (PSMC 14 Sept 92 page 1 third last paragraph)

Most of the punishing reprisals that can be imposed on Whistleblowers can be linked to "issues of a kind ...." or "a form of appeal" or an "individual grievance" and would thus be caught by the wide net of embargos drawn by the PSMC from the narrow veto on specified appeals actually written in the PSMC's Act.

We suggest that the Select Committee needs to decide whether under Commonwealth Whistleblower protection legislation the veto on appeals of appointments to the SES that applies in the Australian Public Service is also to apply to whistleblowers blacklisted from such appointments or otherwise disadvantaged in SES selection processes.

This Association supports the recommendations of Tony Fitzgerald QC in his report on corruption within the Queensland Police Force. Appeal provisions need to be widened rather than limited with respect to appointments to senior positions. The Association recommends that any limitations on appeals are not allowed to limit investigations into discriminatory practices and reprisals against whistleblowers.

Avenues for an Investigation

Avenues available to Mr McMahon to have his complaints investigated are now limited essentially to the Courts. The reasons we hold this view are as follows:

(a) the principal events occurred before the dates of effect of the Queensland Anti-discrimination and Whistleblowers Protection legislation

(b) The Industrial Commission could deal with secondary matters, but the Industrial Relations Act has no provisions for obtaining damages or compensation for the loss in income and career advancement that Mr McMahon has suffered

(c) Legal, administrative and political advice provided regarding Mr McMahon's situation has recommended against Mr McMahon taking his complaints to the Queensland Criminal Justice Commission

(d) The PSMC continues to refuse the requests of this Association for granting Mr McMahon a Fair Treatment Appeal.

It is difficult to predict whether the attention given to Mr McMahon's situation by the recent and the present Senate Inquiries will assist those endeavouring to obtain a fair hearing of Mr McMahon's complaints or whether the Inquiries will cause the system to shut down on the various requests being made.

This Association believes Mr McMahon's only opportunity for a fair hearing is before the Courts, through an action taken under the Defence Re-establishment Act.

The substantive issue upon which Mr McMahon drew disadvantages onto his employment was Mr McMahon's obligations to render service to the Defence Force, which is an issue of primary concern of the Commonwealth and a matter of substantial public interest.

The Association believes that the Senate Select Commission would be serving the public interest with respect to the issues Mr McMahon's case raises if it recommended to appropriate Commonwealth Government authorities, certainly to the Office of the Attorney-General, that Mr McMahon be granted legal aid for taking his complaints before the Courts.

Yours faithfully,

K H Richards LL.B
Senior Industrial Officer

THE ASSOCIATION OF PROFESSIONAL ENGINEERS AND SCIENTISTS, AUSTRALIA
rofessional Engineers Branch, Queensland
Professional Scientists Branch, Queensland Office

APESA

Representing
Professional Engineers
and Scientists
in Industrial Affairs

Reference

18 August 1992

The Commissioner for Equity
Public Sector Management Commission
Executive Annex
George Street
BRISBANE 4001

Dear Dr Burton,

I refer to our meeting, Mr G McMahon also in attendance, at your office on 15 July 1992 and to our subsequent telephone conversation of 16 July 1992 concerning possible procedures for investigating complaints by Mr McMahon of discrimination in his employment.

Your suggestion of submitting an application for a fair treatment appeal, waiving the conciliation process and proceeding directly to the investigation stage has been considered. The Association and Mr McMahon would happily explore all possibilities for conciliation.

The Association would feel most at ease with a further attempt at conciliation of these matters if your office, prior to this process getting underway, could inform itself of the following:

(a) The opinion held of Mr McMahon's performance since 1 September 1991 in his new duties to which he was transferred after his formal grievance to the Director General of QDPI in April 1991. Mr McMahon's duties have been:

(1) Manager Market Reporting Service: Supervisor, Mr Roly Nieper, Executive Director Agribusiness Group (ph 239 3091)

(2) Manager Indonesian Desk and Manager International Agreements, Supervisor, Mr Grant Vinning, Manager Agtrade (ph 239 3266)

(3) Other duties in cooperation with Mr Brian Berge, Acting Manager Business Development (ph 239 3308)

(b) The names of the officers from the Water Resources Commission whose opinion of Mr McMahon were sought by Mr J Gilmour of the Department of Environment and Heritage when short listing applications for the position of Director of Environment Planning Branch (Ref No EN81/91) about January 1992. These opinions were related to Mr McMahon by Mr Gilmour in a selection feedback interview on 6 March 1992 (an excerpt from the record of this interview is attached). The continuation of the stereotyping of Mr McMahon, regarding his Union and Army Reserve activities, in promotion processes, even after the admonition of these practices by the Investigating Officer for Mr McMahon's grievance, is one of the major reasons for this matter being brought before the PSMC. Certainly the Association and Mr McMahon would not like to see the records and notes associated with this selection process misplaced or destroyed.

Please address correspondence to
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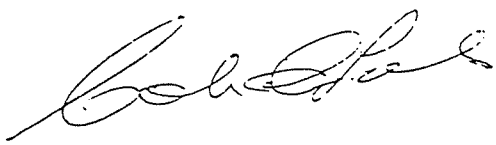
(c) The names of officers of Water Resources Commission affected by the practice in the Commission of shifting officers to less responsible positions when the CED evaluations of their original positions were higher than the officer's classification. These practices were described as a standard response by Water Resource Commission by their representative Mr Pegg at a meeting about the Eminent Professional Scheme held on 23 March 1992. The meeting was attended by four executive directors of QDPI, by Ms Anna Sefton of the PSMC and by Mr McMahon invited as APESA representative, amongst others. Mr Ray Pople of QDPI immediately explained to Mr Pegg the impropriety of the practice and the requirements of PSMC Standards. Other participants have confirmed their memory of this exchange Mr Pegg/Mr Pople to Mr McMahon; however the Association is concerned that further victimisation of Mr McMahon may occur if an investigation of this matter is traced back to Mr McMahon. Clearly the issue involves members other than Mr McMahon and should not therefore be part of the conciliation process.

The Association also requests the opportunity of an interview with Mr W Boughton as was requested as part of Mr McMahon's original grievance (see letter attached) but not agreed to by the Grievance Directorate.

The Association and Mr McMahon request that you hear any appeal should the conciliation process be unsuccessful.

Yours faithfully,



Colin Puls
Senior Industrial Officer

EXCERPT from
RECORD OF DISCUSSION between
MR J GILMOUR AND MR G MCMAHON
6 MARCH 1992

START OF EXCERPT

JG Initially your application was rated highly. I did the rating. There were four on the panel. Dennis Cook from Premiers being the expert. Dennis did not support your application. I phoned Water Resources people I knew and they also did not support your application. Do you want to know the reasons?

GM Yes please

JG We are looking for team work here, a team builder and the opinion was you would be divisive. There was also a problem of your availability. You spend a lot of time in study and in the army. Are you still in that?

GM Yes

JG Well the work here is intense and we need someone who can handle the work load. You do not have much planning experience either which is important to the job.

GM I am surprised that you didn't think I had planning experience. I was the Senior Planner at Water Resources.

Can I ask who your spoke to there?

JG That won't serve any purpose - they are all people whose opinion I respect and I meant by planning town planning.

GM I see. My experience with town planning was work with Arthur Muhl on the Wolffdene Dam back in 1980 odd. I also hold a Local Government Engineering Certificate where I passed examination in town planning. I probably did not emphasise this in my application.

END OF EXCERPT

PO Box 235
KENMORE QLD 4069
7 May 1991

Director
Grievances and Appeals
Public Sector Management Commission
Executive Building
100 George Street
BRISBANE 4000

Dear Ms Norton,

POST SELECTION FEEDBACK

I refer to various conversations during March 1991 involving yourself and myself and Mr Geoff Kenney of the Association of Professional Engineers, Australia, concerning my grievances with the Water Resources Commission. Also discussed were procedures for post selection feedback regarding considerations and decisions made by the selection panel for General Manager and Deputy General Manager positions within the Water Resources Commission.

I formally request post selection feedback from the PSMC representative on that Selection Panel, Dr W Boughton. I understand that Dr Boughton is unwilling to give this feedback by himself and wishes to do so in company with the chairman of the Selection Panel. My situation is that decisions concerning my employment, about which I have initiated grievance procedures, were decisions made by the Commissioner for Water Resources who was also chairman of that Selection Panel.

I understand from discussions with Ms G Honeywell of your office, who relayed to Dr Boughton my original request, that Dr Boughton saw his role as ensuring that correct procedures were followed by the panel, and that he would not be able to answer questions of a technical nature that might arise in our discussions. Whilst I am seeking feedback on the results of the selection panel's considerations, particularly with respect to the content of the report prepared by the panel, I was not intending to question Dr Boughton on matters of a technical nature but only on the procedural aspects. Rather than debate matters of a technical nature with Dr Boughton, it is my intention, having identified technical issues germane to the panel's report, to raise these as part of the grievance procedures already initiated, which clearly would then involve the chairman of the Selection Panel. I therefore formally request a reconsideration of the matter, and that Dr Boughton agree to the feedback session with me without any other person in attendance.

If, however, I am compelled to obtain the post selection feedback only with the chairman of the selection panel in attendance, I request that I be permitted to be accompanied at the post selection feedback discussion by Mr Geoff Kenney.

The assistance given to me in these matters by your office is much appreciated.

Yours faithfully

G M MCMAHON

PUBLIC SECTOR MANAGEMENT COMMISSION

EXECUTIVE ANNEXE 102 GEORGE STREET BRISBANE QUEENSLAND 4000
P.O. BOX 190 NORTH QUAY QUEENSLAND 4002 Facsimile: (07) 229 6017

DR CLARE SURTON
COMMISSIONER FOR PUBLIC SECTOR EQUITY

TELEPHONE (07) 234 5766

14 September 1992

Mr Colin Puls
Senior Industrial Officer
APESA
447 Upper Edward Street
BRISBANE Q 4000

Dear Mr Puls

I am writing in response to your letter of 18 August 1992, concerning complaints by Mr McMahon about discrimination in his employment on the basis of (i) what you refer to as "stereotyping" of Mr McMahon regarding his Union and Army Reserve activities, and (ii) Mr McMahon's involvement as an APESA representative in a challenge to certain CDPI staffing practices.

I note that the Association's preferred approach is a further attempt at conciliation with the Department, and that you suggest that my office investigate various background matters prior to such attempt.

I will respond to these matters separately.

In relation to the "stereotyping" claim, this Commission would be unable to pursue the approach you have proposed.

In particular I am concerned about any proposal that this Commission should "investigate" any aspect of a particular selection for an SES appointment, especially where the proposal was made by, or on behalf of, an unsuccessful applicant for the position concerned.

In general, and as I indicated to you when we met, it is the established policy of this Commission that it will not investigate individual grievances except in the context of a formal appeal, as provided by relevant legislation or a PSMC Standard.

Further, in my view the investigation proposed in this case would amount to, in effect, a form of appeal against the outcome of the selection process.

As you know, it is the Government's long-established policy that there should be no right of appeal against SES selections. Paragraph 1.2.4 of the Commission's Recruitment and Selection Standard accordingly provides only that the principles of the Standard apply to SES selections. No appeal process is available.

As an alternative to a right of appeal, the Commission is represented on all SES selection panels to ensure that the selection process is sound and that the principles set out in the Standard are observed.

I note that the "EXCERPT from RECORD OF DISCUSSION" attached to your letter does not indicate its source, but your letter refers to it as "the record of this interview". The excerpt has Mr Gilmour making reference to Mr Mcmahon's study and army activities, but not to his union activities.

I can make no comment on this matter, other than to observe that it is not clear to me that the exchange recorded in the excerpt is evidence of "stereotyping" in relation to Mr McMahon's union and army activities.

The question of whether Mr McMahon's availability to perform the duties of the SES position at issue was inappropriately considered by the selection panel is not for me (or anyone else) to determine, given the lack of an appeal right in such cases.

Likewise I cannot "investigate" what opinions others may have held of Mr McMahon's performance in the context of an SES selection, although such opinions may, in principle, be relevant to a Fair Treatment Appeal.

On the other hand, if the Association's concern is that the terms of settlement of Mr McMahon's original grievance are not being observed by the Department, it is open to you to raise that concern at an appropriately senior level in the Department initially, and ultimately with this Commission by way of a Fair Treatment Appeal if that approach is unsuccessful.

In the event of a Fair Treatment Appeal, the Commission would need to be satisfied that -

(a) the appeal is not about matters which are in relation to an SES selection for which Mr McMahon was unsuccessful;

(b) the appeal concerns only a claimed failure by the Department to abide by the terms of the settlement of the original grievance; and

(c) that the outcome sought by Mr McMahon is sufficiently specific as to be capable of being enforced, (eg a direction to the Department to abide by the terms of settlement of the grievance, rather than a direction that certain people should stop holding certain opinions about Mr McMahon).

In relation to the second matter, it is not clear to me what is being sought by subparagraph (c) of your letter. It appears that the Association's concern is that Mr McMahon may be "victimised" for acting as the Association's representative and challenging a particular staffing practice.

I am unable to comment on the acceptability or otherwise of the practice referred to without more comprehensive details of the circumstances and any actual staffing action taken by the Department.

Certainly the Commission would be seriously concerned to find that an officer had been victimised solely on the basis that they were carrying out the role of a bona fide representative or workplace delegate of a registered union. However, as you will no doubt recognise, it is often the case that much depends on the particular circumstances and the officer's actions or statements.

I would be happy to consider any further details of this aspect of your letter if you wish to provide them.

Let me re-iterate the point I made when we met; and have made again earlier in this letter: the Commission will not informally investigate matters such as you set out in your letter. But the senior staff in the Grievance Hearings Division are able to give advice in relation to the coverage and processes relating to Fair Treatment appeals. In anticipation of such a request, I have advised Mr Howard Whitton of your circumstances. He can be contacted on 224 6663.

Finally, you raise the issue of post-selection feedback from Dr Broughton. As is clear from this letter, the Grievance Directorate has no authority to intervene in SES selections. Although the selection was more than 15 months ago, I have referred your request for feedback to the Director, SES through the Chair of the Public Sector Management Commission. You can expect a response from Dr Coaldrake in the near future.

Yours faithfully

M Clare Burton

Dr Clare Burton

THE ASSOCIATION OF PROFESSIONAL ENGINEERS AND SCIENTISTS, AUSTRALIA
rofessional Engineers Branch, Queensland
Professional Scientists Branch, Queensland Office

APESA

Representing
Professional Engineers
and Scientists
in Industrial Affairs

Reference

13 October 1992

Commissioner for Public Sector Equity
Public Sector Management Commission
PO Box 100
NORTH QUAY 4002

Dr Clare Burton.

I refer to our letter of 18 August 1992 and your letter of response received by fax by this office on 28 September 1992.

There is no outcome sought by this Association or Mr McMahon that is in the nature of an SES appeal; there is no request nor thought of requiring removal from any appointment of persons benefiting indirectly from prejudicial treatment shown to be directed against Mr McMahon. Policies regarding appeals should not therefore be relevant to the investigation this Association asks you personally to conduct into a sequence of administrative actions prejudicial to Mr McMahon. Evidence of this prejudice is contained in actions forming part of selection procedures and processes, but this evidence is sought in the context of proving prejudice and not in the context of appealing the appointment of other officers.

In preparation of Mr McMahon's grievance regarding prejudicial treatment, the Association needs the "5 or 6" names of the Water Resources Commission officers who were asked by and gave to Mr Gilmour opinions about Mr McMahon when Mr Gilmour was shortlisting applicants for the position of Director Environment Planning Branch, Department of Environment and Heritage about January or February 1992. Mr Gilmour gave Mr McMahon the name of the Panel Member Mr Cook who made criticisms; the names of WRC Officers should also be made available to him through selection processes and feedback processes required by the PSMC Standard on Recruitment and Selections without putting the issue into the context of "an SES appeal" or an informal investigation.

Similarly your office is able to do other things helpful to Mr McMahon without limiting the possible courses of action open to you by putting matters into the context of an SES appeal or an informal investigation. Opinions of Mr McMahon's current performance could be sought as a simple follow-up of his Departmental grievance; this grievance was referred to the Grievance Directorate by the Investigating Officer on important matters, from which referral descriptions were given to Mr McMahon of follow-up checks that would be made as to how he was being treated.

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Again, the admissions made at the QDPI meeting of 23 March 92 could be followed up as a simple consequence of the fact that a PSMC officer, Ms Anna Sefton, was in attendance at the meeting during which descriptions of improper practices being used by one business unit were given, and where another officer brought it to the direction of the meeting that those practices were contrary to PSMC standards. Violation of PSMC Standards is something of natural interest to the PSMC. Mr McMahon should not have to come forward to have this issue investigated.

The PSMC also has the power under Section 4.9 of the PSMC Act to inform yourself of any matter judged appropriate, as you explained to me at our meeting of 15 July 1992.

Most important of the requests made in our letter of 18 August is that safe storage be assured for the next 3 years of the records of the PSMC, of the Department of Environment and Heritage and of the Selection Panel members concerning the procedures and processes used in the selection of the Director Environment Planning Branch. Disadvantaging Army Reservists in their employment because of their service in the Army Reserve is contrary to Commonwealth Legislation. The normal procedures of destroying records after one year should not allow destruction of records important to avenues of redress available to this Association and to Mr McMahon in other forums.

In this letter, though, the Association is trying to have in-service procedures, namely the Fair Treatment Appeal conciliation and investigation procedures, resolve this issue.

A draft of a statement of complaint is attached for comment by your Mr Howard Whitton as offered us in your Fax letter. The statement seeks review of the grievance first investigated by the Department. The statement also seeks, given that later actions of which Mr McMahon complains have come from the Office of the Director General, that these additional matters also be included in the Fair Treatment Appeal.

The investigating officer's report regarding Mr McMahon's grievance to his departmental head demonstrates the degree to which senior managers within QDPI have been given an opportunity to correct and adjust for the treatment Mr McMahon has received. Exactly the opposite has occurred. Mr McMahon was not "transferred" in QDPI after the grievance; he has been effectively demoted.

Clearly past processes used in administering Mr McMahon's complaint, and the outcomes these processes have achieved, have been unsatisfactory and counter-productive.

The Association is critical of decisions taken by the Director of Grievances that have added to the difficulties Mr McMahon now faces, including:

a. Refusal to obtain for Mr McMahon access to the PSMC representative on a selection panel at which he was asked prejudicial questions

b. Refusal to direct the Investigating Officer of Mr McMahon's grievance to investigate his complaints in greater depth and to apply the proper standards of proof to the facts as outlined in legislation and in the "Whistle Blowers" whitepaper.

The Association thus asks that you personally conduct the investigation if conciliation proves unsuccessful. The Association requests that an APESA representative be entitled to accompany Mr McMahon during any part of the conciliation or investigation process in which Mr McMahon is involved and to represent him at any stage if Mr McMahon should consider it desirable.

What Mr McMahon seeks in the way of redress does not affect others and can in no way be seen as any form of SES appeal. Proper consideration of the first complaint would largely remove the need to investigate most of the others. The initiatives of EEO and the recent anti-discrimination legislation should be deterrents from further actions against him if this complaint establishes the nature of the treatment he has received to date. Mr McMahon has established good working relations with his current peers, subordinates and superiors, despite some significant disadvantages (eg he is being paid more than his supervisor), and, (save the spoiling of these relations by this renewed grievance action) has confidence of others putting the WRC episode in proper perspective.

Yours faithfully,

Colin Puls
Senior Industrial Officer

PO Box 285
KENMORE QLD 4069

October 1992

Commissioner for Equity,
Public Sector Management Commission,
Executive Building
George Street
BRISBANE QLD 4000

Dear Dr Burton,

NOTIFICATION OF GRIEVANCE UNDER PUBLIC SERVICE MANAGEMENT AND EMPLOYMENT REGULATIONS 63.

I refer to the notification of grievance under Regulation 63 made to the Director General, Department of Primary Industries by letter dated 7 May 1991, and to the written report of the investigation of that grievance provided me by letter from the Director General dated 6 August 1991.

Undertakings given me during that investigation process, as well as the recommendations of the investigating officers report, have not been implemented. The practices of discrimination in my employment and slander of my professional attitudes have continued, preventing me from resuming my career and denying me fair consideration for promotion. Opportunities to minimise the disadvantages to me and my family have been let pass, and I now face the added prospect of dropping $8000 per year in salary below that salary level that prejudicial decisions have held me to since 13 April 1989.

I state my dissatisfaction with the investigating officers report and with these outcomes of my grievance and refer the original grievance and additional complaints to you for investigation and review, as discussed with you on 15 July 1992 by Mr C Puls of the Association of Professional Engineers and Scientists Australia. APESA letter of 18 August 1992, I understand, requests that the PSMC inform itself of certain matters relevant to my grievance, preserve certain records and provide access to a PSMC representative on a selection panel that is one subject to my grievance. The letter also indicates my openness to a further attempt at conciliation of this grievance; should conciliation be unsuccessful, however, I request that you, as the Commissioner for Equity, investigate my grievance in a thorough, fair and impartial matter, with regard to the appropriate standards of proof.

The substance of my grievance is that I have been prejudiced by decisions taken by the Water Resources Commissioner and other officers of the Water Resources Commission in relation to my duties and my position, and that these prejudicial decisions have been made on grounds which are not properly relevant to the appointment and selection process. In particular, I believe that important decisions in relation to my career have been made on the basis of unsubstantiated opinion that my performance has suffered from my commitment to service in the Army Reserve, and unsupported and unparticularised assertions as to my capabilities made in association with criticism of my Army Reserve Service. Other factors, associated with my appointment as a Trades and Labour Council representative and as APESA representative within the Water Resources Commission, factors not relevant to the

performance of my work, have also had a detrimental influence on management decisions about my career.

The decisions in respect of which I claim prejudicial treatment was shown are as follows:

- The decision in April 1989 to appoint another officer less qualified less experienced and junior to me to the position of Director Local Authorities Planning Division, without my application having been given fair consideration.

- The decision, announced in April 1989 and effected in June 1992, to remove from my management control a large part of my duties and all but four of the 22 staff for whose work I had been responsible by written contract signed only two months earlier (the changes caused the CED rating of my job to drop from 1034 to 664).

- On the introduction of the five pay point multi-banding of salaries for band 2 and band 3 officers, the decision to place me on the +2.5% performance point on a CED scale 35% below the CED rating of the job for which I had a contract.

- The requirement placed upon me to pay money for work done for the Department's Joint Coordination Committee.

- The decision to limit the time available to me for duties as Joint Union Chairperson to 5 hours a week, forcing me to use my own time, leave and flexitime to meet these departmental duties.

- The decision in August 1990 to remove the remainder of my staff (which was subsequently modified by the return of two of those staff) on the basis of the time (5hrs a week) I had to give to the Joint Coordination Committee, and the expenditure of my "creative energies" with the Army Reserve.

- Unwarranted and unsupported criticisms of my behaviour and my ethics as a union representative, to the detriment of my personal and professional reputation.

- Rejection of the nomination by my Union of me for the Facilitator Training Course (related to job redesign within QDPI).

- The decision taken in February 1991 not to restore me to the equivalent of my contract position (Manager, Strategic Studies also called Manager Planning Studies) when my contract position was substantially reconstituted.

- The decision taken to redesignate another officer into the residual position I held, based on a superficial change in the name of the position from Senior Engineer Overview Planning to Manager Overview Planning, and to transfer me to a position subordinate to a junior officer in a Division known to be about to be substantially down-sized by the PSMC Review.

- Improper consideration of my obligation to serve in the Army Reserve, and construction of improper considerations about time and effort expended on approved activities under Structural Efficiency and SARAS initiatives, by the selection panels for the following positions:

a. General Manager Client Advisory Services Division, and Deputy to the General Manager, Deputy General Manager Business Management Division, General Manager Water Resources Assessment Division, and Deputy to the General Manager, General Manager Water Management Divisions, and Deputy to the General Manager, and Director, Policy and Corporate Development Division within the Water Resources Commission advertised in December 1990

b. Director Environmental Planning within the Department of Environment and Heritage, advertised in November 1991

The cumulative effects of the previous disadvantages imposed on my career materialised in these selection situations, in that I came to them with a recent history of demotions in responsibility caused by prejudicial decisions, instead of good and relevant experience in senior management positions of higher responsibility levels that would have been held but for the above prejudicial decisions

- Improper criticisms of my work attitudes and professional abilities by senior Water Resources managers when acting as referees to my application for the position of Director Environmental Planning with the Department of Environment and Heritage; these improper criticisms were made within months of the investigating officer's report of my grievance, which report stated that such criticisms were improper

- Putting on my file written comments implying mispractice on my part with respect to moneys and failure to remove these comments from my file as was agreed during the departmental grievance procedure.

- Actions to separate me from work areas in which I have professional standing, limiting my claims for promotion to the Professional Executive Service.

- Refusal of the nomination of me, a nomination made by the Executive Director Agribusiness Group, to represent the Group on the PSMC Implementation Committee.

- Statements made by a WRC Officers alleging blacklisting of me by the PSMC from ever obtaining promotion to the SES.

- Failure of the QDPI to transfer me, following the investigation of my grievance, to a position equivalent in responsibility levels and pay to the position for which I have a contract; such a transfer was denied me in spite of a six months trial (improperly imposed on me) which I successfully completed, and in spite of many positions being available to accomplish this recommendation of the investigating officer's report

- Favouritism shown to other officers in appointments and promotions

I request that I be protected from any further changes to my work situation while these processes are proceeding other than as might be agreed to by myself.

To assist me to prepare fully my case I request:

a. The names of the "5 or 6" Water Resources Commission officers contacted by Mr J Gilmour and who gave Mr Gilmour opinions about me while Mr Gilmour was preparing the shortlist for the position of Director Environment Planning Branch, Dept of Environment and Heritage during January February 1992.

b. The advantage of a feedback meeting with Dr Boughton.

both matters as discussed in APESA letter 18 Aug 92.

I also request all PSMC records, departmental records and records of officers on the selection panel for the position Director Environmental Planning Branch be safely stored for three years from the date of gazettal of the appointment to this position. I request this to preserve for discussion material relevant to my complaints that would be available for investigations by your Office and/or for other enquires to which I remain entitled both administrative and legal.

The outcomes I am seeking DO NOT include displacement from their positions of appointed officers who benefited indirectly from prejudicial treatment shown to me.

The outcomes I do seek are:

a. a finding that I have been prejudiced in my employment for reasons involving my Army Reserve service and my trade union activity

b. Placement on a pay level with conditions that on the balance of probabilities I would have been on but for the prejudicial treatment I received, these backdated to the date I would have gained such pay and conditions.

c. Action to place me in a suitable position in the Public Service with responsibility levels meriting this pay and these conditions.

Yours sincerely,

G McMahon

PUBLIC SECTOR MANAGEMENT COMMISSION

EXECUTIVE ANNEXE 102 GEORGE STREET BRISBANE QUEENSLAND 4000
P.O. BOX 190 NORTH QUAY QUEENSLAND 4002 Facsimile: (07) 229 0017

DR PETER COALDRAKE
CHAIR OF THE COMMISSION

TELEPHONE (07) 224 5800

7 May 1993

Mr C Puls
Senior Industrial Officer
The Association of Professional Engineers
and Scientists, Australia
477 Upper Edward Street
Brisbane Qld 4000

Dear Mr Puls

I am writing in reponse to your Association's ongoing correspondence in relation to Mr McMahon's experience of the promotion process, in particular your letter of 13 October to Dr Burton in response to Dr Burton's letter to you dated 14 September 1992.

As you may be aware, Dr Burton is no longer with this Commission.

I regret the delay in replying. I am sure that you will understand that in the light of the issues addressed in Dr Burton's reply, the relative urgency of other matters, and difficulties in contacting a number of people from whom further information was required, it was difficult to deal with this matter sooner.

In terms of whether Mr McMahon's submissions are to be regarded as a de facto appointment appeal, and the extent of the powers of the Commissioner for Public Sector Equity to consider such an "appeal", I have nothing further to add to Dr Burton's letter to the Association of 14 September 1992.

In particular, your letter raises two issues, namely the use of comments from non-nominated referees by Mr Gilmour, and access to feedback from the PSMC representative on a selection panel.

In relation to the first matter, I am advised that Mr Gilmour has confirmed that in preparing his short-list for the position, he consulted on a confidential basis with several people whom he considered to be well-placed to comment on Mr McMahon's suitability for the position. Those consulted in this way were not nominated by Mr McMahon. It is not clear whether these people were formally consulted as "referees", but in this case the distinction is somewhat academic.

As you are aware, only the Principles set out in the Public Sector Management Standard for Recruitment and Selection are to apply to selections for the Senior Executive Service. There are no specific provisions in the Principles relating to referee comments.

I am advised that the the other members of the selection panel were unaware of Mr Gilmour's consultations, and were also unaware of his shortlisting decisions: each member of the panel reached their shortlisting decisions independently of the others.

In particular, the other panel members were unaware of any adverse views of Mr McMahon which may have been provided to Mr Gilmour.

It has not been established that any adverse comments about Mr McMahon's claims to the position were in fact made: Mr Gilmour refused to discuss the comments with Mr McMahon in the feedback process, because he considered those comments to have been obtained on an understanding of confidentiality.

While Mr Gilmour's approach in this instance may have fallen somewhat short of the high standard of openness encouraged by this Commission in relation to SES selections, I am satisfied that Mr Gilmour's seeking external input to his shortlisting decision was not necessarily a breach of the Standard's principles, and that in any case Mr McMahon was not treated unfairly overall. He was shortlisted out of further consideration, on the merits of his application, by each of the other members of the panel independently.

In relation to the issue of access to feedback from the PSMC representative on the panel, the Commission's policy has been that feedback should be provided by the panel chairperson, or by the whole panel in relevant circumstances.

The Commission will not support a demand for access to the PSMC nominee alone, on the basis that the recommenadation at issue is a matter for the panel as a whole. I understand that in this case Dr Boughton agreed to provide feedback to Mr McMahon in conjunction with the panel chairperson.

Your letter appears to seek a number of other outcomes, namely -

- information, in particular the names of certain officers, on the basis of which Mr McMahon seeks to demonstrate that he has been prejudiced by actions of the Department or individual officers;

- "follow-up action" on Mr McMahon's formal grievance, by means of obtaining opinions of Mr McMahon's current performance;

- "follow-up action" by the Commissioner, in relation to alleged admissions of improper staffing practices within QDPI;

- preservation of certain documents beyond the 12 month period specified in the PSMC Management Standard for Recruitment and Selection, in the interests of Mr McMahon's being enabled to pursue other avenues of redress, including by way of recourse to the provisions of Commonwealth legislation;

- access to the Fair Treatment Appeal process, for the purpose of resolving Mr McMahon's concerns by conciliation;

- comment on the text of a draft "statement of complaint" to the Commissioner for Public Sector Equity;

- an investigation of Mr McMahon's concerns, to be conducted personally by the Commissioner for Public Sector Equity, under the Fair Treatment Appeal procedure, if conciliation proves unsuccessful;

- representation by the Association during any conciliation or investigation in relation to Mr McMahon's grievance.

The majority of these matters have been addressed already. I will comment on the remaining issues in general terms, as follows:

The request for information, in particular the names of certain officers, on the basis of which Mr McMahon seeks to demonstrate that he has been prejudiced, in my view amounts to no more than an endeavour to re-open the original selection process and decision. For the reasons already provided, I am not prepared to consider this request further.

The request for "follow-up action" on Mr McMahon's formal grievance, by means of obtaining opinions of Mr McMahon's current performance, and for access to the Fair Treatment Appeal process, for the purpose of resolving Mr McMahon's concerns by conciliation, likewise endeavour to re-open the original selection process and decision.

As Dr Burton has already indicated, in this instance a Fair Treatment Appeal would probably be rejected by the Commissioner for Public Sector Equity, on the basis identified by Dr Burton and confirmed by recent legal advice to the Commission in another case. To judge by the draft notice of appeal attached to your letter, it is likely that such an appeal would be regarded as excluded by section 2.2 of the Public Sector Management Standard for Fair Treatment of Employees, which prohibits an appeal which is held to be "in relation to...issues of a kind which could have been raised in an appeal pursuant to another Standard, regardless of whether the employee has a right of appeal under that other Standard or not".

The request for "follow-up action" by the Commissioner, in relation to alleged admissions of improper staffing practices within QDPI, is also refused on the basis that s.4.9 of the Public Sector Management Commission Act only empowers the Commissioner to to inform herself or himself on any matter relevant to a relevant appeal. Section 4.9 does not create a general power of investigation in relation to such matters.

The application of the provisions of the Archives Act, are matters which are outside the powers of this Commission.

Similarly, alleged breaches of Commonwealth legislation are not within the jurisdiction of this Commission.

The request that an officer of this Commission and a Delegate of the Commissioner Public Sector Equity provide comments to the Association on the text of a draft "statement of complaint" to the Commissioner for Public Sector Equity is, in my view, highly inappropriate. It would be clearly anomalous for this Commission to assist an officer to continue to pursue claims which have been considered and rejected in principle by the Commission.

The request for an investigation of Mr McMahon's concerns, to be conducted personally by the Commissioner for Public Sector Equity under the Fair Treatment Appeal procedure, if conciliation "proves unsuccessful", is similarly rejected for the reasons already given.

Finally, your letter says that the Association is critical of two decisions by the Director, Grievance Hearings Division which it is claimed have added to Mr McMahon's difficulties.

The fact is that the Director has made no such decisions. You may wish to note that the Investigating Officer in charge of Mr McMahon's grievance discussed aspects of the grievance with an officer of the Grievance Division. The grievance was not "referred" to the Grievance Division, as claimed in your letter, and was not the subject of any determination or decision.

The Commission's position is that Mr McMahon has not been refused access to to the PSMC representative on the selection panel concerned.

In relation to the second matter, this Commission has no power to direct an agency's investigation of a grievance, for self-evident reasons.

I trust that these comments and advice clarify Mr McMahon's situation, and that the Association now has a better understanding of this Commission's position on the matters raised by Mr McMahon.

Yours sincerely

PETER COALDRAKE

APESMA

THE ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS, AUSTRALIA
QUEENSLAND BRANCH

FACSIMILE TRANSMISSION

DATE: 16 October, 1995 FAX NO: 06 277 5899

TO: Senator Shane Murphy - Attention Jackie

FROM: Hal Richards

SUBJECT: G McMahon - Whistle Blowers Issues

NUMBER OF PAGES TO BE TRANSMITTED INCLUDING THIS PAGE: 6
OUR FAX NUMBER IS (07) 3832 3268

MESSAGE:

I have been contacted by Mr John Thompson, the General Secretary of the ACTU Qld Branch in relation to the above matter.

You expressed an interest in:

(1) This Associations request to the ACTUQ for assistance in relation to our member's legal problem, and

(2) the resulting letter, drafted by myself, sent by the General Secretary to the Attorney General Mr Lavarch seeking an ex relatione involvement of the Commonwealth.

This latter matter is still being persued and information sought by the Attorney General is being prepared by Mr McMahon's solicitors. The two letters referred to now follow for your information.

On behalf of our member we thank you for your interest

K H Richards
Senior Industrial Officer

NOTE: IF ANY PART OF THIS TRANSMISSION IS INDECIPHERABLE OR NOT RECEIVED PLEASE TELEPHONE (07) 832 1477.

Please address correspondence to
447 Upper Edward Street, Brisbane Q. 4000 - Phone. (07) 3832 1477 - Facsimile: (07)3 832 3268

THE ASSOCIATION OF PROFESSIONAL ENGINEERS AND SCIENTISTS, AUSTRALIA
Professional Engineers Branch, Queensland
Professional Scientists Branch, Queensland Office

APESA

Representing Professional Engineers and Scientists In Industrial Affairs

Reference

HL:L-GMCMAHON

20 March, 1995

Mr D Petie
General Secretary
ACTUQ
TLC Building
16 Peel Street
SOUTH BRISBANE 4101

Dear Dawson,

RE: GREG MCMAHON

You are, we know, very familiar with the nature of the treatment given to Mr McMahon by both the Department of Primary Industries and the PSMC. We are particularly concerned that one of the accusations which has disadvantaged Mr McMahon relates to the activities he has carried out as a delegate of this union.

Further, you are aware of the nature of the legal case he proposes against the DPI. Legal opinion is that there is a strong case to be pursued here.

All avenues of appeal at an administrative level have now been exhausted. There is no alternative now but to pursue to matter in the civil courts.

It is significant that the Senate Committee on Whistleblowers has taken an interest in Mr McMahon's case, the essence of which is that he has suffered a severe disadvantage in his employment as a result of blowing the whistle.

The alternative action in the civil courts relies on the testing of the Defence (Reestablishment) Act. This will raise serious issues of public importance (eg: protection of Army Reservists at a time when Australia's defence strategy is dependent upon the Reserve).

To pursue this action which has been, todate, exhaustively researched by Mr McMahon and his solicitors and counsel would be financially ruinous to Mr McMahon even if costs were ultimately awarded to him. A preliminary estimate of costs would run to at least $100,000.00. Further, it is highly probable that certain issues would almost inevitably be taken to the High Court.

Please address correspondence to
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Because of the issues of public policy raised and the public importance of the issues (both defence, workers rights to proper procedures and the issues of whistleblowing) this Union earnestly seeks to have this matter taken over by the Attorney General at the relation of Mr McMahon.

Therefore, we seek the support of the ACTUQ in making an approach to the Attorney General for either legal aid or more significantly that the matter be taken over at an ex rel basis by the Attorney General.

We look forward to your reply and support in this exercise.

Yours faithfully,

HR

Hal Richards
Senior Industrial Officer

ACTU
Australian Council of Trade Unions — Queensland Branch

Address all correspondence to:
The General Secretary,
Level 5,
T. & L.C. Building,
16 Peel Street,
South Brisbane, 4101.
Telephone: (07) 846 2468
Fax: (07) 844 4865

15th June, 1995

Hon Michael Lavarch
Attorney-General
GPO Box 1408
BRISBANE 4001

Dear Mr Lavarch,

REQUEST FOR ACTION AT LAW TO BE TAKEN OVER BY THE ATTORNEY GENERAL ON AN EX RELATIONE BASIS

The Queensland Branch of the ACTU wishes to acquaint you with an action at law unique in Australian legal history which the Council believes merits a decision by your Office to take over the case on an ex relatione basis.

The action involves the first test of the Commonwealth's 30 year old legislation, the Defence Re-establishment Act 1965. Part II of this Act contains the Government's provisions to protect members of the Reserve Forces from disadvantages in their civilian employment imposed on them because of their obligation for defence service.

The proposed action in law arises from the actions by a Reservist and honorary union official in the Queensland State Public Service, Mr G. McMahon, to meet his defence service obligations and his duties as a union representative in the workplace. One such action was to notify State and Commonwealth authorities of breaches in State and Commonwealth laws and industrial agreements by particular State Government agencies concerning the leave provisions being applied to Reservists in these agencies.

These actions arose following:

* *Decisions by the Commonwealth Government to amend the Defence Act to enable Reservists to be "called-out" in situations short of war service for periods from 3 months to 12 months (previously the obligation was for 2 weeks to 4 weeks). The second reading speech was dated 18 March 1987.*

* *Decisions by Qld Cabinet to reduce the entitlements of its Reservists employees as part of the Second Tier National Wage Case negotiations in 1988.*

* *Successful lobbying by unions (with Mr McMahon's involvement), by the Defence Forces and by Federal politicians (including telephone conversations from the Prime Minister to the Premier) to have the Qld Cabinet reverse its decision.*

* *Decisions by individual State Government agencies to continue informal restrictions on leave entitlements of Reservists despite agreements secured from the Premier and spelt out in a State Governor - in - Council determination.*

Mr McMahon has received QC opinion that he has prospects of success in the proposed action at law. He faces difficulties however in that:

* *The Defence Re-Establishment Act has unintended defects and uncertainties in its provisions, particularly as those provisions apply to public sector employees.*

* *Those provisions have never been tested in the courts in the 30 years the Act has been in force, and so there is no direct precedent to judge the outcome of decisions from the Court arising out of any interpretation of the Act, its unintended defects and its uncertainties.*

* *His action if successful may constitute a precedent for Commonwealth authority over any legislation of any State Government concerning release of Reservists for defence service, and thus would attract the interest of all State Governments.*

As a result of this unique set of difficulties, Mr McMahon's action at law is likely to cost in excess of $50,000.00 or even $100,000.00, through its susceptibility to:

* *Interlocutory action by the State of Queensland on points of law in the resolution of uncertainties with the untested legislation.*

* *Referral to higher courts for application of the Acts Interpretation Act concerning the unintended defects in the Defence Re-establishment Act.*

* *Referral to the High Court on application by an Attorney General of any one of the State Governments, if the action was seen to involve issues of State versus Commonwealth rights under the Constitution.*

Clearly, Mr McMahon's proposed legal action raises novel questions of law on matters of significant importance to public policy issues concerning the use of the Commonwealth's defence powers. This importance derives from the dependence of current Australian Defence Strategy on its Reserve forces and the fact that 40% of the members of the Reserve forces are public sector employees. The novel legal issues include:

* *Determining the scope of the protection given to public sector employees by the provisions of the Defence Re-establishment Act.*

* *Ascertaining the respective rights of Commonwealth and State Governments for legislating and\or regulating the employment of State Public servants who are also members of the Reserve forces.*

* *Establishing what actions by employers constitute disadvantage to public sector employee in their employment under the Defence Re-establishment Act.*

It should be noted that Mr McMahon has exhausted all avenues available to him in pursuing an investigation of his complaints within the State Government. His own efforts to secure relief within his department were defeated when departmental officers breached the recommendations of a departmental investigation. The Queensland Public Sector Management Commission has refused separate efforts by Mr McMahon's union and by this Council to secure a fair treatment appeal.

The attached letter from Mr McMahon's solicitors summarises his legal position.

This Council is supportive of Mr McMahon because the matters he represented to State and Commonwealth authorities were also the substance of industrial agreements finalised under national wage fixing procedures after personal communications between Mr. Hawke and Mr. Ahern. Bureaucratic and political factors appear to have overtaken what should have been a straightforward industrial matter easily resolved by reference to specific regulations recently confirmed.

It is on the public record that the Commonwealth Government was aware of the defects in the Defence Re-establishment Act in 1986 and 1987 when the "call-out" amendments to the Defence Act were being drafted. Initiatives taken at that time to investigate these defects and to recommend improved legislation are still being pursued. The ACTU has recently responded to requests to provide its views on necessary legislative amendments to the Honourable Arch Bevis MP, the Parliamentary Secretary to the Minister for Defence. These amendments will not be enacted before the statutory time limits on action affecting Mr McMahon are exceeded.

Your office, through powers under the Judiciary Act 1904 (which makes specific reference to assisting members of the defence forces) to act for a member of the Defence Forces, is in a unique position to assist Mr McMahon to obtain a hearing using the legislation currently existing to test the specific matters Mr McMahon has raised. We believe all the circumstances of his case merit the strongest support of your Office in taking these complaints before the Courts.

We request that that support be provided to Mr McMahon and to the Reservists and the union members he represents.

Yours Sincerely,

John Thompson
General Secretary,
A.C.T.U. Queensland.

cc. *Hon. Arch Bevis - Parliamentary Secretary to Minister for Defence.*