

WHISTLEBLOWER PROTECTION BODY: A STRATEGY FOR EFFECTIVE PROTECTION

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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 cost¹ 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 Courts². 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 million⁵. 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 1989⁹, 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
<p><i>A. Advisory, re</i></p> <ul style="list-style-type: none"> . Protections . Other support services and programs available . Investigatory bodies and tribunals applicable 	<p>1. Referrals to other agencies.</p>
<p><i>B. Supporting</i></p> <ul style="list-style-type: none"> . Confidential counselling . Confidential channel for disclosures . Physical protection . Retraining . Re-employment . Safeguarding of documents . Legal aid . Injunctions . Full case management 	<p>2. Public education programs regarding</p> <ul style="list-style-type: none"> . the ethic of openness . the community perceptions of whistleblowing
<p><i>C. Investigatory</i></p> <p>with respect to reprisals</p> <ul style="list-style-type: none"> . Investigations . Avenue of appeal from other tribunals . Initiate Formal Inquiries . Initiate prosecutions 	<p>3. Referrals to other agencies, and reporting performance of other agencies to Parliament.</p>
<p><i>D. Investigatory</i></p> <p>with respect to wrong-doings disclosed</p>	<p>4. Referrals to other agencies, and reporting allegations to Parliament.</p>

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 body¹⁸, 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 system¹⁹. 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
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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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