REPORT ON
RECOMMENDATIONS ON WHISTLEBLOWING BY
THE COMMISSION OF GOVERNMENT (WA)

Whistleblowers have made significant contributions to the deliberations of the Commission on Government in Western Australia into public interest disclosures.

Submissions received and public hearings held late last year have been an additional opportunity for whistleblowers to persuade a jurisdiction towards modern legislative and administrative provisions for the protection of those who make public interest disclosures.

The Commission on Government received a written submission from the Whistleblowers Action Group (Qld), and the Legislation Coordinator for Whistleblowers Australia, Greg McMahon, was an invited witness before the public hearings. The Commission also drew on the writings of Bill de Maria and Cyrelle Jan from the Qld Whistleblowers Study at the University of Queensland, and of Jean Lennane and Stan Karpinski, namely, the Whistleblowers Australia Report on ICAC. Mention must also be made of the contributions of 16 West Australian whistleblowers given code names WB1 to WB16, and of named individuals who from their evidence obviously had first hand knowledge of the issues for whistleblowers.

The report by the Commission on its analysis of the information presented to the Commission (Report No 2 Part 1) was distributed early in 1996. The Report's recommendations to the West Australian Government are a recent measure of the impact whistleblowers are having on the latest government review of public interest disclosures.

The COG Report drew on the opinions of whistleblowers with respect to many issues including the following:

* Definition of Whistleblowers and Whistleblowing.
* Definition of Wrong doing.
* Anonymity in making public interest disclosures.
* Dead-end processing of complaints.
* Malicious Whistleblowing.
* Assisting Whistleblowers.
* Protecting Whistleblowers.
* Onus of Proof.
* Safe custody of documents.
* Availability of a remedy for reprisals.
* Anti-corruption bodies.

"Wounded Workers" (de Maria and Jan) was also persuasive, the COG empowering a whistleblower protection body to take action on behalf of whistleblowers that whistleblowers could take on their own behalf.

The bulk of evidence given by McMahon at the public hearing was on the protection of whistleblowers from reprisals. McMahon emphasised:

* the need for an appropriate standard of proof,

* putting the onus on proof on employers with respect to reasons given by employers for alleged reprisals or personal actions taken against whistleblowers,

* the need for safe custody of documentary evidence,

* the availability of a remedy for whistleblowers who sustain losses or hurt as a result of reprisal.

The COG accepted all arguments of this type put to them by McMahon:

- the public interest disclosure need only be a ground **of any significance** for a personal action against a whistleblowers, for that personal action to be an illegal reprisal for which compensation would be available. This was the causal test advocated by McMahon, who argued against the harder provisions in the recent Qld legislation which required the disclosure to be **the substantial reason** for the personal action before the personal action would become a reprisal.

- the Industrial Relations Commission would be given power, COG recommended, to order an employer to provide documents relevant to alleged reprisals.

- the Public Sector Employment Tribunal would be empowered to effect a transfer of a public sector whistleblower where the whistleblower was agreed. This would serve the purpose of removing whistleblowers from harassment and/or providing whistleblowers with the opportunity of continuing their careers.

The WAG (Qld) submission and McMahon in evidence at the public hearing argued the national whistleblower policy position that the body responsible for the protection of whistleblowers be separated from the anti-corruption body responsible for investigating wrongdoings disclosed by whistleblowers. The Report by Lennance and Karpinski explained to the COG the perceptions Whistleblowers have of one anti-corruption body (ICAC) and "Unshielding the Shadow Culture" listed perceptions by Qld Whistleblowers of another (CJC); these perceptions explain the need whistleblowers have for a separate whistleblowers protection body. COG, however, would not go this far. The Advice Unit would be included in the anti-corruption body, COG ultimately recommended; the Advice Unit would, however, be kept independent of the investigation unit and the receipt of complaints unit of the anti-corruption body. Roles would also be given to the Public Sector Employment Tribunal, the Legislative Council Standing Committee on Public Administration and the Commissioner for Public Sector Standards, and a veto placed on particular Government directives to the Director of Public Prosecutions, as a series of checks and balances to ensure whistleblowers are not simply used and then abused by witness hungry investigators. This was not, however, the result argued for by whistleblowers, and is the singularly most damaging (to whistleblowers) shortcoming in what the COG propose for the reform of the public sector in Western Australia.

In most areas of debate then, whistleblowers and experts on whistleblowing have had a positive impact on the recommendation of the COG regarding public interest disclosures. On the important policy plank for the establishment of a separate body responsible for whistleblower protection, including advisory and investigatory (of reprisals) functions, COG has not recommended as it should have; there is, however, in COG's report a visible acknowledgment of the legitimacy of the arguments whistleblowers have for this policy plank. Further opportunities for repeating this debate will, I am sure, move jurisdictions eventually to the whistleblower's view.

It happened in the USA, albeit after 10 years.

G McMahon
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