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A Submission to the Independent Review of the Public Interest Disclosure Act 2012

Introduction

The Public Interest Disclosure Act 2012 appears to contain all of the provisions expected of modern legislation. The Act has sound objectives; it seemingly offers adequate protection to those making disclosures. It provides for disclosure to journalists if there is a lack of investigation. However, one suspects (there is little publicly available data) that it has failed to meet its purpose.

Such failure is unsurprising because all anecdotal evidence shows that those making protected disclosures suffer adverse consequences for such action. In the Commonwealth sphere, those making unprotected disclosures face criminal prosecution. Thus the first challenge is to examine mechanisms that would promote the making of public interest disclosures.

There is a second challenge, one concerning the public's right to know. The Independent Review should thus consider legislated mechanisms that would publicise those public interest disclosures that have lead to investigations, whether or not those investigations have found disclosable conduct.

Importantly, publication of disclosures would help to provide an environment that supports those who are equivocal about making a public interest disclosure. Publication provides evidence to all that disclosing suspected maladministration is an allowable, expected and even a routine matter.

The Rationale for Public Interest Disclosures

The principal rationale to welcome and support protected disclosures is the potential such disclosures have for improving government operations, either in terms of productivity and reduced waste or in terms of meeting the requirements of law.

The need for protected disclosures grows in environments where the public service has been politicised or where the executive government resists the release of information that is detrimental to its political goals.

Perversely, where the public service is politicised and where the release of information is strictly regulated, the need for a successful public interest disclosure regime is enhanced at the same time as it is impeded.

The Need for Change

Anecdotal evidence suggests that despite the intentions of the ACT Legislature, and despite legislation that seemingly provides all the incentives for a successful public interest disclosure regime, it has failed to meet expectations.

As suggested above, this failure arises from the close bond that increasingly exists in modern Westminster-Whitehall governments between elected and appointed officials. It is exacerbated by the apparent resentment held by elected and appointed officials to increased scrutiny that governments must endure from the media and other scrutiny bodies, such as committees of the legislature.

This resentment is represented by refusals to answer questions and, unfortunately, by an increasing tendency for officials to lie.

The public service has not shown any overt enthusiasm for public interest disclosures. Instead of seeing such as an opportunity to improve performance, agencies too often see such disclosures at least as an embarrassment.

These two factors, politicisation and reluctance to inform, act to limit the incentive for whistle-blowers to make public interest disclosures.

Thus, the challenge facing the Independent Review is to devise a mechanism to encourage disclosures of matters that indicate failings and weaknesses and opportunities for improvement, not only to increase the productivity of government but also to ensure the accountability implied by the High Court judgement canvassed below.

Options for Change

One option is to reverse the notion that a disclosure must be protected.to one where disclosures are to be welcomed. For the reasons suggested earlier, this welcoming cannot be left to or expected of elected or appointed officials: they have too much self-interest at stake.

The only body that can help create an atmosphere where public disclosure is welcomed is the legislature. (And even the capacity of the legislature is limited.)

For example, the legislature can help improve the environment for disclosure by passing legislation that requires public sector agencies to facilitate the making of disclosures by its employees (whether anonymous or not) and by requiring that the agency report each year in an accessible manner the number of public interest disclosures made and the nature of the disclosures. (To allow some balance, the agency can at the time of publication be empowered to indicate its own views on the disclosure.)

This approach might be buttressed by a scheme along the lines of that operating in the federal government of the United Sates that provides for a mandatory

reward, such as a percentage of savings, for disclosures that allow increased productivity or reduced waste.

The strength of a legislated approach is the signal it gives to all in the public sector that public disclosures are expected, wanted and invited, rather than that they need to be protected.

The Need for Publishing Public Interest Disclosures

In Lange versus the Australian Broadcasting Corporation, 1997, HCA 25, the High Court unanimously held that

> those provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.

Although this view has not been adopted by subsequent Courts, this clear, concise and pre-eminent conclusion captures the need for an effective law that obliges the government to provide information needed to acquit its accountability to the public in order to allow informed voting. The view expressed by the High Court has import for public interest disclosures because the absence of such disclosures, and the absence of published disclosures, limit information available to the public that is relevant to their voting.

And there is increasing evidence that governments in Australia, long amongst the most secretive of the Westminster-Whitehall governments, are clamping down on the release of "sensitive" information. (There are many anecdotes of governments over classifying documents to prevent their release or of ignoring freedom of information legislation. These include the ACT governments.)

In addition to the above suggested annual reporting, agencies should be required to report in a timely manner details about public interest disclosures. At that stage, or a latter stage if the investigator believes immediate publication would interfere with the investigation, the essence of the disclosure should be made available to the public in an accessible manner. The results of the investigation should also be published.

Such a requirement would allow relevant oversight bodies, such as the Integrity Commission or the Auditor-General or even the media, to open an investigation of the matters raised in the disclosures.

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