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SUBMISSION

Crime and Misconduct and Other Legislation Amendment Bill 2014

10 April 2014

For over two decades since its formation in 1993, Whistleblowers Action Group (Queensland) Inc (WAG) has played a consistent public advocacy role in all aspects of the phenomenon commonly known as whistleblowing.

WAG is concerned about maximising safe ways and means by which a public interest disclosure (PID) can be made, with whom it is lodged, and what should be done by that proper authority, authorised person or machinery of public sector governance to provide whistleblowers with protection from reprisal.

In the past, WAG has contributed to the triennial reviews of the CJC/CMC and in the formulation of PID legislation which, in combination, was aimed at protecting whistleblowers from reprisals as well as trying to ensure that the Commission investigates PID's in an honest, timely, impartial and public interest manner.

WAG has a continuing concern over what is termed "regulatory capture". We would hope to elaborate on this at our oral presentation.

THE CONTINUING EXISTENCE OF THE COMMISSION

Notwithstanding the Callinan/Aroney Review, WAG's contribution to these consequential structural changes to the Commission, its Chair, Parliamentary Commissioner et al, as set out in the Bill, ought not to be interpreted as any stamp of approval by WAG for the Commission's continuing existence.

It is WAG's position that, before any such endorsement concerning the Commission's existence can be given, a full and open inquiry is held into the Commission's handling of notorious whistleblower cases, like the Heiner, Dillon and Leggate Affairs, and more recent matters such as Queensland University Affair and the Barber Disclosures. There are other cases which are presently of lower profile or unknown because the whistleblower lacks any confidence in the Commission, or may be so battered and demoralised over his/her treatment at the hands of the Commission that he/she has not raised his/her head since. The Commission has never experienced a 'public clearing house' review since its creation in 1989, save for the aborted 1997 Connolly/Ryan Judicial Review.

It is long overdue, and WAG believes that the accumulation of unresolved wrongdoing by the CMC/CJC/QCC over its term of existence, and by agencies kept from investigation by the CMC, threatens all of our institutions including the Parliament.

The prime reason why WAG suggests that the Heiner, Dillon and Leggate matters warrant public exposure is because of the crippling precedent that the Commission's improper handling of these and other cases created

for ‘whole of government’ regarding (a) the preservation of evidence, and (b) reprisal by means of constructive/punitive transfer.

These are key matters of concern for WAG.

NATIONAL WHISTLEBLOWER POLICY.

Whistleblower groups in Australia are agreed upon the policy for whistleblower protection attached, titled ‘The Sword and the Shield’. That policy document acknowledges the 'Sword' function of investigating corruption within government, and the 'Shield' function of protecting witnesses to that corruption, including the whistleblowers. The policy advocates that these functions be given to separate bodies, so that the vital Shield function is less vulnerable to being undermined, firstly, by the processes of regulatory capture directed at the Swordorganisation by the corrupted agencies, and, secondly, by the investigatory culture that uses up witnesses and whistleblowers, and then leaves witnesses to managing their own protection.

In the case of Queensland, both the Sword and the Shield functions were given to the CMC. It is submitted that the CMC process of referring to an agency whistleblowers who make disclosures to the CMC about that agency, is a clear demonstration of the capture of the CMC by the agencies of the Queensland Government. If the CMC is to have its functions distributed to new structures or to other agencies, WAGQ recommends that, for any would-be whistleblower to survive agency reprisals, and thus remain available as a witness for corruption-free governance, the CMC’s function for protecting whistleblowers be assigned to an independent **Whistleblowers Protection Authority** (WPA) to be established in Queensland.

The sole purpose of the WPA would be to protect the whistleblower from the inevitable backlash of reprisal. This protection role, at an appropriate juncture, would probably require the WPA to have the statutory authority to secure evidence. This would support the Public Interest Disclosure made, and maintain the public interest to have the matter investigated. Protecting the whistleblower would support the continuing employment of the whistleblower (and of his or her witnesses to the matters so disclosed).

Your Committee and the Parliament has recently come up against the characteristics and the tactics of the CMC that have long confronted whistleblowers. It is appreciated that the Committee and the Parliament are also interested in the Sword function of the CMC, namely, the function of effectively responding to any corruption that arises within the agencies of government. The Committee has before it the challenge of finding a way to ensuring that this Sword function is in fact carried out, a challenge not achieved with previous oversight of the CMC/CJC/QCC. How will this new Committee meet this challenge. What will the Committee try that is different, so as to avoid ending up with the same state of invalidity that the Parliament finds the CMC to be in today? How is any organisation, old or new, that is given this Sword role of justice watchdog, to be saved from the agency capture and agency corruption that has allegedly overtaken the functioning of the CMC?

LESSONS LEARNED

Destruction and Manufacture of Evidence. WAGQ proposes that the Heiner Affair, the Queensland Flood Commission of Inquiry [QFCI] and a recent unknown public safety case demonstrate the loss of function of the CMC in its anti-corruption (or Sword) role.

The Heiner Affair, about the 1990 destruction by the Goss Cabinet of documents requested for intended litigation, has only in 2013 been determined by a lawfully constituted Queensland Government Inquiry (the Carmody Inquiry) to constitute a *prima facie* criminal act. This period of 23 years to realise what retired judges, eminent barristers, High Court and Queensland Court of Appeal decisions, and Kevin Lindeberg have been telling the CMC/CJC/QCC during that total period, is due to the use of rogue or nonsense legal opinion

advocated by the CMC/CJC . The CMC continues to use this rogue legal nonsense to this day, in denying investigation of disclosures referred by the CMC by the QFCI. What has this corruption in the CMC brought to the current state of justice in Qld agencies today?

Firstly, agencies too are now using the rogue law to destroy evidence. In an unpublicised case where an agency has hundreds of people each year falling down its stairways, at least some of which are uneven in riser heights and non compliant with Australian Standards, the agency destroyed the blood evidence from a fall by one 60 year old woman. Her family wrote to the agency CEO and the police to protect from destruction the video of the clean-up, which the family sought to use so as to show where the lady's leg was sliced, but the agency also destroyed the video of the clean-up after these requests for protection and after an application for the video had been made under FOI. When the police began an investigation into the destruction of evidence sought for intended litigation, the lawyers for the agency allegedly told the police that nobody at the agency would agree to an interview, and the police withdrew from the investigation. The ability of an agency to organise or force its employees to deny giving evidence to police investigating an alleged crime, is information tending to show systemic corruption of a whole agency being applied to avoid responsibility for injuries caused by uneven riser heights in its public stairways. The CMC's rogue law – it is lawful to destroy the evidence before litigation is actually on foot – is now a tool to avoid insurance premiums, infrastructure costs and the costs of litigation.

Secondly, the use of rogue law on destruction of evidence now allegedly has been expanded to rogue law on the manufacture of evidence. When the QFCI referred to the CMC, allegations made during the Inquiry that evidence may have been manufactured by a water agency, the CMC appears to have developed a new nonsense legal opinion that protects that agency from investigation. This opinion appears to be that, if a public officer believes at the time of an event that they are doing the right thing, but after the event discover that they may have been doing the wrong thing, it is not a criminal offence for them, after the event, ***to manufacture for judicial proceedings*** their account of what they did during the event. And the work of water agencies poses very large risks to public safety.

The CMC, as an independent anti-corruption authority, appears to have become a captured and corrupted creature organisation bringing benefit in that alleged corruption to the agencies of bad government and poor governance. The future of any new structure or structures that are given this anti-corruption or Sword role will also have to survive the risks of regulatory capture to which the CMC/CJC/QCC so readily succumbed. WAGQ submits that the outstanding lesson to be learned from this 23 year history is that Queensland may still come to address this alleged corruption regarding destruction and manufacture of evidence within government and the CMC, despite the barriers to such action placed by the CMC. Queensland may still rescue its institutions from this corruption because the relevant whistleblower, through great suffering, still survives and continues to advocate for the CMC and the Goss Cabinet to be brought to account.

Whistleblower survival, it is submitted, has this significant potential to ensure that corruption is addressed, to ensure that watchdog bodies (Sword organisations) like the CMC do not turn a blind eye to *prima facie* criminal behaviour by Cabinets or by government agencies. Destroying the whistleblower is the first thing that corrupted agencies set out to do – this fact is another powerful indicator as to how significant the survival of the whistleblower is to the risk faced by corrupted agencies and captured CMC-type organisations, the risk that they will face ultimate prosecution if the leadership shown by the whistleblower is not crushed.

Punitive Transfers and Terminations. The transfers/terminations suffered by [redacted], in the CMC when acting in its Shield role, of effective and credible protections of public officers who make disclosures in the public

interest. The CMC's poor performances in these three alleged reprisals also deserve the consideration of this Committee.

In Jim Leggate's case, the CMC/CJC gave evidence to the Connolly Ryan Inquiry that agencies had the power to transfer Jim Leggate to a desk in a corridor in another agency. This again was a rogue legal opinion. Agencies only have power to force transfers to positions at the same level as the position held, and must do so in good faith. Jim Leggate, however, was transferred to a lower level position – whether or not the desk was in a corridor, the forced transfer was outside the power of the agency.

In Col Dillon's case, after the Fitzgerald Inquiry, the so called reformed police force transferred Inspector Col Dillon to a position reporting to a public servant three levels lower in position and pay level than this hero police officer. A review of the QPS identified this mistreatment, describing it as ***anomalous in the extreme***. The review was headed by the first head of the CMC/CJC, Sir Max Bingham, and CMC/CJC staff served on the steering committee for that review. Nothing was done to cause the so called 'reformed' police service to withdraw the mistreatment. Eventually this so called 'reformed' police service transferred the Inspector to what is called a 'corridor gulag' – no job, no office, no desk, no care or responsibility. In the Dillon case, the CMC was turning a blind eye to correcting the mistreatment by the agency of the hero of the Fitzgerald Inquiry, enforcing its own rogue law that agencies can force such transfers to lower level positions.

Both Jim Leggate and Col Dillon resigned after they were affected by their alleged 'corridor' employment.

By the time the history of the CMC came to the most recent University of Queensland disclosures, where again the whistleblower was terminated, the CMC is allegedly doing more than turning a blind eye. The CMC has been caught out, allegedly, assisting the agency (University of Queensland) in dealing with the termination, including dealing with the media attention that the disclosures of favouritism and termination have brought.

For the purposes of this Committee, the most significant lesson to be learned is the priority given by corrupted agencies to getting rid of the whistleblower in their ranks – even with heroes. That is the indicator that an effective way for turning those agencies around is to ensure that the whistleblower survives in their employment.

Summary. The indicator that a government is serious about overcoming tendencies towards corruption and criminal acts within its agencies and watchdog authorities is the establishment of an independent Whistleblower Protection Authority. WAGQ submits that the Committee considers assigning the whistleblower protection function of the CMC to such a body.

RESEARCH

The CMC has turned this function, at least with respect to the understanding of wrongdoing in government, into propaganda.

[redacted]

Additionally, the research method used by the University removed the possibilities for registering the termination of whistleblowers by government agencies in that research. Termination and punitive transfers are the major detriments imposed by agencies on upright public officers. The University avoided the registration of such events by using a technique called cross-sectional analysis – the principal survey forming

the basis for the results of the research publicised by the CMC/CJC questioned only the public officers currently employed in agencies which volunteered to participate in the study.

[redacted]

The CMC then made the well publicised claim to the general public that the research showed that very few whistleblowers lost their jobs after they made their disclosures. [redacted] These claims by CMC steered research, about terminations in general and about particularly infamous examples of such terminations, are as legitimate and as credible as the claim made about the CMC/CJC investigation into the Heiner Affair, namely that the Lindeberg disclosures had been investigated to ***'the nth degree'***.

Whistleblowing is a life changing moment for the person concerned and their families. All WAG members have personally experienced this trauma. It supports our contention that WAG therefore speaks with considerable authority. WAGQ submits that the research function of the CMC/CJC with respect to whistleblowing be shared with the proposed Whistleblower Protection Authority.

WAG suggests that it is strongly open to conclude on its firsthand knowledge in this complex area of human behaviour, abuse of power and public administration, that the CMC knew that it was commissioning to the Griffith University a self-serving, self-congratulatory endorsement at public expense.

THE WHISTLEBLOWER PROTECTION BODY

The authorised securing of evidence by a WPA is to ensure that a "constructive/punitive transfer" and enforced termination of employment reprisal strategy is not embarked on by those in positions of authority above the whistleblower after the disclosure is made. With any process already in train, the role of the WPA would be to ensure that the process thereafter includes measures to ensure that the process is not turned to a reprisal against the whistleblower. The act of blowing the whistle does not always happen within the events of one day. There can also occur a preliminary period during which a build-up of tension inside a department over the matter disclosed may occur.

For example, a refusal by the principal officer to comply with the mandatory reporting obligations under sections 38 and 39 of the *Crime and Misconduct Act 2001* may have caused the subordinate to act out of exasperation over delays. Or, as in Jim Leggate's case, an expectation that mine inspectors would not report breaches by mining companies of the environmental requirements of their mining leases, can be seen to be loading up the mining inspectors for ultimate responsibility when the massive pollution events occur.

Furthermore, the presence of WPA ought to have a 'watchdog' effect over the conduct of the Commission itself or its replacement, by ensuring that the Sword body secures all the relevant evidence pertinent to the PID so that any wrongdoing is available to a thorough investigation.

More perspective on the Whistleblower Protection organisation is offered in the attached national policy document, 'The Sword and the Shield'.

BIPARTISANSHIP

WAG **does not support** any move away from the bipartisan appointment of the Chair of the Commission. Indeed, WAG supports the process being opened up even further, so as to have clear stakeholders, along with PCMC members, on the selection panel. In addition, given the potentially charged political environment in which the Chair operates, recent membership of any political party ought to be a disqualifying factor. Perhaps a gap in party political membership of 6 years might be prescribed as some reasonable attempt at and/or perception of impartiality.

WAG also supports the interpretation of section 295(3) of the *Crime and Misconduct Act 2001* placed on it by some of this nation's most eminent jurists and others in the June 2010 Public Statement of Concern on the Heiner Affair provided to (then) Premier Anna Bligh and Opposition Leader, Mr Langbroek.

APPOINTMENT AND DISMISSAL OF THE PCMC

[redacted]

REVIEWING THE COMMISSION PERIOD EXTENDED

WAG does not agree with extending the triennial review of the Commission by the Parliamentary Committee to every half decade (i.e. 5 years). These reviews offer the public and stakeholders like WAG a valuable opportunity to present submissions and appear before the Committee, to speak to various recommendations as may become obvious and urgent items of change due to a failure within the Commission.

It is always critically important for the community at large to feel a sense of ownership through its confidence in the functioning of the Commission, and WAG believes that the current timeframe of 3 years ought to be retained under section 292(f).

ENHANCING THE ROLE OF THE PARLIAMENTARY COMMISSIONER

WAGQ supports the changes pursuant to Clause 74. Notwithstanding the expectation that the Parliamentary Commissioner will be a barrister of considerable experience in the area of criminal justice law, and enjoy bipartisan support, WAG supports the legislative change of a complainant being able to approach him/her directly with a grievance concerning how the Commission handled a complaint. It would be WAGQ's recommendation that any selection be conducted in public by the Parliamentary Committee members along with nominees from stakeholder group, which, for example, could be persons nominated from WAGQ as well as the Bar Association.

WAGQ supports and understands the change that the protection of parliamentary privilege shall not be attached to such a work. However, WAGQ recommends that it should attract the privilege similar to that found in the *Commissions of Inquiry Act 1950,* and not leave a complainant open to an action in defamation. It would also seem to logically follow that being devoid of the protection of Parliament (i.e. Article 9 of 1689 Bill of Rights UK) any such report must be justiciable. In the interests of justice being done and being seen to be done, this would not be a bad thing.

It would therefore seem that complainants would need to understand (and be warned) that providing deliberate false and misleading evidence to the Parliamentary Commissioner in this new course to justice, could lead to a charge of perjury, actionable in a court of law.

CRIMINALISING COMPLAINTS

WAGQ supports the position taken by the Queensland Bar Association. WAGQ believes that any move in this regard would be counter-productive, too heavy handed, and therefore does not support any move to criminalise complaints.

Thanking you for the opportunity to make this submission.

GREG McMAHON

Secretary

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Yours faithfully

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GREG MCMAHON

Greg McMahon

Secretary