

Northern Territory Law Reform Committee

Report on

WHISTLEBLOWERS LEGISLATION

Report No. 26

December 2002

Recommendations

1. The Committee recommends that, if the Legislative Assembly of the Northern Territory sees fit to enact Whistleblower legislation, then the provisions of the Victorian and Tasmanian statutes be adopted as the general model for such legislation.

2. Nevertheless if such legislation is adopted the class of persons to be protected should not be in the category of “public officer” as in the Tasmanian legislation or “natural persons” as in the Victorian legislation but, rather in the category of “any person” as in the South Australian legislation.

WHISTLEBLOWERS PROTECTION LEGISLATION

In February 1994 the former Government released an “Issues Paper” for public comment on proposed Whistleblowers legislation. Action was deferred until some assessment could be made of the legislation in other States.

In fact, at the time of the Issues Paper only South Australia had enacted legislation. The South Australian “*Whistleblowers Protection Act of 1993*.”

As appears in the Issues Paper the Queensland Government and the NSW Government were both considering introducing legislation but had not then (February 1994) done so. Similarly a Bill had been tabled in the Senate in 1993 for discussion purposes.

By letter of 18 October 2002 the Attorney-General of the Northern Territory (the Hon Peter Toyne) requested the Northern Territory Law Reform Committee to inquire into the report on:

- (a) an analysis of the current interstate Whistleblower’s legislation and its effectiveness in revealing corruption or creating a more ethical working culture; and
- (b) recommendations for the most appropriate mode of legislation available for the Northern Territory to follow.

The following developments have taken place since the Issues Paper of 1994.

New South Wales – Protected Disclosure Act 1994
Australian Capital Territory – Public Interest Disclosure Act 1994
Queensland – Whistleblowers Protection Act 1994
Victoria – Whistleblowers Protection Act 2001
Tasmania – Public Interest Disclosures Act 2002
Western Australia – Public Interest Disclosure Bill 2002-11-27

It appears that no further action was taken in respect of the proposed Bill in the Senate.

For completeness it should be noted that the United States pioneered the legislation in 1863 with the *False Claims Act* and that the United Kingdom and New Zealand have enacted Whistleblowing legislation.

As to the effectiveness of the legislation (as inquired by the Attorney-General) it would be difficult for this Committee to make detailed inquiries interstate without

delaying the presentation of this Report. The original Issues Paper of 1994 apparently contemplated public comment but ultimately it seems this was not done. However, it is clear that since the original Issues Paper, and except for the Northern Territory, all States and the ACT now have the legislation (or, in the case of WA are about to have it) and one can only assume that this itself is an acknowledgement by the various Parliaments of the need for such legislation and the effectiveness of it. This seems underlined by the recent introduction of a Bill in WA and we refer particularly to the remarks of the Hon Jim McGinty MLA, Attorney-General in introducing the Bill in the Second Reading Speech of 20 March 2002.

The Committee considers that these matters may sufficiently answer the enquiry as to effectiveness but if further research is required the Committee will be very pleased to undertake it. Meanwhile, however, so as to avoid delay the Committee presents the Report.

The object of such legislation was succinctly stated by Hon Jim McGinty MLA, Attorney-General for Western Australia in introducing the Whistleblowers Protection Bill as “to ensure that people who have the courage to stand up and expose wrong doing are able to do so”.

See also s.7 of *the Queensland Whistleblowers Protection Act*, for greater detail.

“ 7. What is the general nature of the Act’s scheme?

- (1) This Act provides a scheme that, in the public interest, gives special protection to disclosures about unlawful, negligent or improper public sector conduct or danger to public health or safety or the environment.
- (2) Because the protection is very broad, the scheme has a number of balancing mechanisms intended to –
 - (a) focus the protection where it is needed; and
 - (b) make it easier to decide whether the special protection applies to a disclosure; and
 - (c) ensure appropriate consideration is also given to the interests of persons against whom disclosures are made; and
 - (d) encourage the making of disclosures in a way that helps to remedy the matter disclosed; and

- (e) prevent the scheme adversely affecting the independence of the judiciary and the commercial operations of GOC's or corporatised corporations.”

The legislation of the various States and ACT sets out in various ways the classes of persons who may seek protection under the Act, the sort of information which attracts the protection, (usually referred to as a “protected disclosure”), the persons to whom the disclosure can be made (“appropriate authority”), the nature of the protection given to the whistleblower in criminal and civil actions, the creation of a criminal offence where people attempt to take reprisals against the whistleblower and, as a balance, the making of false frivolous or vexatious statements by the purported whistleblower to be an offence.

As to the persons who may be protected the various Acts vary from “public officers” (Qld) to “natural persons” (Victoria).

We see no reason why the protection should not be as wide as possible and therefore extended to “any person” as in the South Australian Act; i.e. the application can be made by a natural person or a body whether incorporated or unincorporated, provided that, in the latter case, it has been given statutory recognition as a “person”.

In our overview of the legislation we can make very broadly the observations that-

- the South Australian Act, as the original Act, probably now lacks the details which later Acts have;
- the Queensland Act, though clearly setting forth its objects, is drafted in a way unusual in NT legislation;
- that the NSW Act applies to a more complex set of bodies with different rules which do not apply in the NT;
- that the ACT Act is modelled generally on the NSW Act; and
- the WA Bill relies on functionaries which NT does not have e.g. Anti-corruption Commissioner, and Commissioner for Public Sector Standards.

Generally the Victorian and Tasmanian Acts would be a better model for the NT for these reasons:

- (a) they provide a complete statutory scheme dealing with the processes for receiving processing and taking action, to disclosure;
- (b) it is noteworthy that, with the later Acts, the responsibility for dealing with applications falls more frequently on the Ombudsman (e.g. particularly Tasmania and Victoria), the observable trend being to locate the responsibility for overseeing the operation of the statutory scheme with one independent statutory entity; that entity having corresponding jurisdiction and expertise, particularly in the investigation process, and capable of developing guidelines and procedures for agencies;
- (c) the later Acts also specify the need for the establishment of good internal complaints mechanisms balancing the need for Agencies to handle such issues appropriately with external oversight and where appropriate independent investigation;
- (d) the Victorian Act appears to have absorbed most usefully the more relevant parts of the earlier legislation of other States;
- (e) if the NT adopted generally the scheme of the Victorian Act and generally the expressions used in the Victorian Act, then together with the Tasmanian Act which is in generally similar to the Victorian Act, the NT would have the advantage of a broadly similar body of law in three jurisdictions and the benefit of decisions of the Victorian and Tasmanian Courts toward interpretation of the statutory terms;
- (f) the Victorian and Tasmanian Acts also usefully cover all aspects of improper conduct, including corrupt conduct, and operate in an environment similar to that of the NT where there are no specialist bodies established to deal with particular types of conduct, such as corrupt conduct (i.e. The Crime and Misconduct Commission in Queensland, the Independent Commission Against Corruption and Police Integrity Commission in NSW and the Anti-Corruption Commission in WA).

We do, however, repeat that the NT Act should go beyond the confines of the Victorian and Tasmanian Acts in extending the right of application to “any persons”.

Annexure A - Issues Paper 1994;

Annexure B - Whistleblowers Protection Bill - Second Reading Speech of Hon Jim McGinty MLA, Attorney-General, 20 March 2002.

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President
Law Reform Committee of the
Northern Territory

ANNEXURE A

ANNEXURE B