Whistleblowers, and governments, need more protection

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Queenslanders in 2005 discovered that their public health system was chronically under-funded, poorly run and in some cases it provided dangerous and even deadly services for those who turned to its hospitals for attention. Two Commissions of Inquiry (the first shut because of the apprehended bias of its Commissioners) and a wide-ranging administrative inquiry were instituted after a whistleblower nurse, Ms Toni Hoffman, told her local MP about the disastrous surgical exploits of an overseas-trained doctor, Dr Jayant Patel, who had become infamously known to some of his colleagues as Dr Death.

The second Commissioner, retired Court of Appeal Justice Geoff Davies QC, published his final report at the end of November 2005. In the course of it, he said the people of Queensland owed a great deal to Ms Hoffman, 'whose decision to speak to her local Member of Parliament about her concerns regarding the activities of Dr Patel and the apparent threat he represented, led to his exposure and this Inquiry'.[1] He continued, 'Whether Ms Hoffman realised it or not, her disclosure to Mr Messenger MP was not protected by the Whistleblower Protection Act 1994. The fact that Ms Hoffman had to reveal her concerns to Mr Messenger MP, to have those concerns dealt with, and that the disclosure was not protected, reveals the failure of the current system of protecting whistleblowers.'[2]

In the aftermath of the report, most attention focussed on what was wrong with the health system, who was to blame (and to be punished) and how the system could be fixed. The issue of whistleblowing attracted little attention. But that system too had failed the test to

[1] *Queensland Pubic Hospitals Commission of Inquiry*, para. 6.486, p. 466
[2] ibid, para. 6.486, p. 467. The Commissioner does not deal with the issue of whether Ms Hoffman might have been protected in any way by parliamentary privilege, given that the information she provided may have been intended for use in the Queensland Parliament, and was so used. This is not a settled legal issue, though there is a judgment in the Queensland Supreme Court suggesting privilege is not attracted. See Harry Evans, *Odgers' Australian Senate Practice*, 2004, 11th edition, Canberra, pp. 45-6

which it had been put: Ms Hoffman's first complaints were made directly to Queensland Health, as the law required. But her complaints received scant attention. In his report, Commissioner Davies described and discussed the present system of whistleblower protection in Queensland and made recommendations for its reform and improvement. It appears from the Commissioner's report that this discussion and the proposals he put forward were based primarily on a submission to his inquiry by the Queensland Ombudsman. If adopted the Ombudsman would be given an important continuing role in the supervision and administration of the whistleblower protection regime in Queensland.

The legislation

Queensland was the first Australian jurisdiction to introduce legislation to protect whistleblowers. Following the report of the Fitzgerald Commission of Inquiry in 1989, and in response to its recommendations, the Parliament created the Electoral and Administrative Review Commission (EARC) and the Criminal Justice Commission (CJC). EARC was to inquire into the need for various legal, administrative and parliamentary reforms in Queensland and the CJC to supervise the reform of the Queensland Police Service and to have an ongoing role in monitoring complaints of official misconduct. In 1990 'interim' legislation was enacted to provide protection to whistleblowers giving information or evidence to both EARC and the CJC. In 1991 EARC produce a report on the need for permanent legislation covering whistleblowers who disclose wrongdoing in the public sector, and to a limited extent, elsewhere. Previously the law in Queensland and elsewhere in Australia made it an offence to disclose official secrets or information acquired by a public servant by virtue of their office, though there were various common law, and sometimes statutory, protections for public servants who revealed, for example, criminal conduct.[3] The EARC report summarised the countervailing interests that deserve appropriate recognition and protection in the design of a balanced system for encouraging and protecting whistleblowing that is in the public interest, in this way:

[3] See, Electoral and Administrative Review Commission, *Report on Protection of Whitleblowers*, October 1991, particularly chapter 3.

(a) The interests of the public in the exposure, investigation and correction of illegal or improper conduct, and dangers to public health and safety.
(b) The interests of the whistleblower are being protected from retaliation, and in seeing that proper action is taken on the whistleblowing disclosure.
(c) The interests of persons against whom allegations are made in good faith which turn out to be inaccurate, or, worse still, against whom false or misleading allegations are made. Most instances of whistleblowing will involve an allegation of personal impropriety, whether it be of conduct that is illegal, incompetent or negligent, against one or more persons. Such persons are liable to suffer not only damage to their personal and/or professional reputations, but also the stress of being subject to investigation.
(d) The interests of an organization affected by a whistleblowing disclosure in not having its operations unduly disrupted, causing unwarranted interference with its pursuit of its business or administrative goals.'[4]
These competing interests are recognised in the legislation in Queensland and elsewhere.[5]

What's in it for government?

But there is a fifth interest that is not specifically acknowledged in the EARC report that is of crucial and critical importance: this is the political interest of the relevant government. Governments in the past tried to prevent whistleblowing by public servants, making it improper and even illegal for them to disclose official information without proper authority. They threatened public servants who broke the code of silence with sanctions affecting their continued employment or promotion, as well as the threat of punishment through the criminal courts. But there are times when public sector employees are prepared to take the risk, whether for essentially political reasons – as in the (secret) leaking of information in 1975 about the Loans Affair to the Opposition Deputy Leader – or because of genuinely held concerns about public health and safety - as was the case in Queensland in 2005 when Ms Hoffman complained first to the Health Department and then to her MP about the surgical incompetence of Dr Patel. These exercises in whistleblowing can do enormous political damage to a government and may

[4] ibid, p. 223.
[5] See, *Queensland Pubic Hospitals Commission of Inquiry*, para. 6.487, p. 466 and footnote.

be (as was the case in 1975) irreparable. Leaking or disclosure of official information is now far easier – and more common – than ever before, and technological changes have not made it easier to trace those responsible. The Australian Federal Police are frequently asked to investigate leaks from the Commonwealth Public Service but rarely find a culprit.

The prospective political damage a government may suffer from the actions of a whistleblower, and the fact that whistleblowers can normally find a ready audience or means of communicating their concerns, provide additional reasons for governments to make laws about whistleblowing that actually encourage whistleblowers to use the official system. The laws should also be structured in such a way as to ensure the system works – it should provide for a proper investigation of problems and contain mechanisms to guarantee that those that are detected are corrected. The system didn't work in the Patel case because the Health Department was part of the problem. Its culture was such that Ms Hoffman was wasting her time raising her concerns with her superiors. Yet the Whistleblowers Protection Act 1994 makes it clear that the only body to which Ms Hoffman could have complained was Queensland Health.

Reforms

As Commissioner Davies concluded, the Act needs to be changed. He adopted the submissions of the Queensland Ombudsman in recommending:[6]

1. That the Ombudsman be given an oversight role with respect to all public interest disclosures other than those involving official misconduct. The Ombudsman may investigate the complaint or refer it back to the relevant department for investigation, subject to monitoring by the Ombudsman.
2. Anyone may make a public interest disclosure protected by the Act in cases involving danger to public health and safety, and negligent or improper management of public funds.

[6] ibid, paras 6.509-6.512, p. 472

3. There should be a scale of bodies to which complaints can be made. A complaint should first go to the relevant Department (subject to the role of the Ombudsman). If the disclosure is not resolved in 30 days, the matter can be disclosed to an MP. If the matter is still not resolved (to the satisfaction of the Ombudsman) after a further 30 days, the matter can be disclosed to the media.

In several respects this is an advance over the original EARC proposal. The relevant public sector entity – investigating a complaint about its own conduct or the conduct of one or more of its officers – will be forced to conduct a proper investigation, and do so very quickly. If it does not, it would risk intervention by the Ombudsman who would have power to take over the investigation, and, if not properly resolved, it could be made public. At present the reporting requirements that are supposed to ensure that whistleblower complaints are not ignored, are quite toothless. Who is to know if the Department has properly reported the matter in its next annual report, or whether it has dealt with the complaints in a proper way? The imposition of a time-scale, and the prospect that material provided by the whistleblower can be provided (while the whistleblower is still protected under the law against any recriminatory action) to the Opposition in Parliament or to the media, would be a further incentive for the public sector entity or department to act. Additionally there are several features of the original EARC model that were not legislated by the Goss Government that should now be reconsidered because they would greatly improve the whistleblower system. The first was EARC's proposal that whistleblowers were entitled to protection if they reported any conduct that constituted an offence under Queensland law. The second is that where a whistleblower comes across conduct that is a 'serious, specific and immediate danger to the health or safety of the public' disclosure may be made to any person, including the media. The Parliamentary Committee that reviewed EARC's report on whistleblowers objected to neither of these proposals.

It is in the interests of governments, as well as whistleblowers, that there be an effective system that allows people who become aware of serious problems within the public sector (in particular) to disclose them to an agency that will properly investigate them

and, if the complaints are shown to be justified, have them rectified. Keeping the problems secret, and unresolved, is likely to be counter-productive.

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