

# **PUBLIC INTEREST DISCLOSURES BILL 2007**

## **Second Reading Speech**

### **Senator Andrew Murray**

The *Public Interest Disclosures Bill 2007* replaces the *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002*. It will encourage and facilitate the disclosure of information in the public interest, by protecting public officials and others who make disclosures, and for related purposes.

This Bill has three key objectives: First, to create a framework that facilitates the disclosure of information in the public interest. Second, to create a framework that ensures disclosures in the public interest are properly dealt with. Third, to provide practical protection (including relief from legal liability) for people who disclose information in the public interest.

The purpose of the Bill is to create an effective and transparent framework through which genuine public interest disclosures (commonly known as whistle blowing) are managed. In this way the legislation follows the life-cycle of a disclosure from initial reporting to appropriate people, through the life of the investigation and ultimately to the appropriate resolution of the issue.

It is important to note that the term ‘whistle blowing’ is not defined or used within this Bill. This is to emphasise that the focus should not be upon the person providing information (who may do so for a variety of reasons) but rather on the disclosure itself. This shift is designed to place primacy on addressing the issue raised rather than the person who raised it. This does not imply a lack of protection for those who raise the issue – quite the reverse.

With varying degrees of success, since the 1990s Australian governments at the State, Territory and Commonwealth level have sought to deal with the issue of public sector whistle blowing, and to deal with the way in which genuine public interest disclosures can be used to make public administration more effective and accountable to the Australian people. The Commonwealth public disclosure legislation has been particularly weak.

This Bill creates a new framework which learns from the drafting and implementation successes and shortcomings of previous legislative frameworks at the Commonwealth, State and Territory level. This process, while not being aligned with, is indebted to the authors of the issues paper ‘*Public Interest Disclosure Legislation in Australia: Towards the Next Generation*’ put together by Dr AJ Brown and the State, Territory and Commonwealth Ombudsman offices. My work with Sinead Clifford and my meetings with Dr Brown and others have been particularly useful.

The initial version of the paper delivered by Dr Brown and Professor McMillan at the ‘Vital Issues’ Seminar of the Commonwealth Parliamentary Library ‘*Do I Dare? Whistleblowing Laws in Australia*’ Australian Parliament House, Canberra, 16 August 2006, was the prompt for this Bill. The paper systematically worked through the existing legislative frameworks in Australia and proposes best practice standards. It

revealed that while there is much to be proud of within the existing framework no one piece of legislation is without its flaws.

The *Public Interest Disclosures Bill 2007* is intended to be a next generation piece of legislation that deals solely with the issue of whistle blowing within the public administrative arena. It provides an effective framework which emphasises a tailored risk management strategy which will not only provide the most effective protection for genuine disclosures but also demand a clear and well set out strategy for the handling of complaints within Commonwealth public agencies for the better resolution of administrative misconduct.

Public administration and public accountability can ever only be as good as the frameworks which support them. Openness, rigour and the need for constant revision is required within public bodies to ensure they live up to the vision for which they were created: serving the Australian people.

This is not always an easy job. Remaining accountable for the wide array of services provided by the government requires a powerful range of tools to ensure that the public service remains productive and efficient. Some of the tools employed are obvious – competitive entry standards, and competitive wages and conditions. Others are more complex – such as requiring employees to keep official secrets in the public interest or requiring security clearances for certain tasks to ensure that people are trustworthy.

However, between these two levels lies a critical third level, a level which works with the others to ensure that proper procedures are followed and that maladministration, of whatever type, is uncovered. This third level is dangerously underdeveloped in Australia. This underdevelopment is bad for public administration, bad for the Australian people and bad for public officials who are twice betrayed – first by the failures these officials see within the public service and second when they themselves are punished for reporting the problems they see.

Allan Robert Kessing was one such person. In March this year Mr Kessing was convicted under the *Commonwealth Crimes Act* of leaking Customs reports on drug offences and security breaches at Sydney Airport. Prior to the leak the reports had not been acted upon - one had been buried for two years and was never even seen by Ministers or senior bureaucrats. Following the leak the Australian Government appointed Sir John Wheeler to conduct a review on airport security operations which resulted in an exposure of serious problems, and an extra \$200m expenditure to improve aviation security. For exposing a real and immediate danger to Australians at large the system branded Allan Robert Kessing a criminal.

This highly perverse outcome occurred for two reasons – Australia does not have a proper disclosure framework in place, and the federal law states that keeping secrets is more important than the public interest.

Australia is currently missing the glue which holds together the different strands of the public service – the mechanism which not only protects people brave enough to come forward, but encourages them to come forward; the mechanism which recognises that the earlier problems are identified, the earlier solutions are found; the

mechanism that ensures that those who abuse the power given to them, or who are delinquent in their duty, are uncovered and dealt with. That mechanism is this Bill, a comprehensive framework that ensures that a robust process and appropriate support exists for public officials making public interest disclosures.

I and the Australian Democrats have long been committed to and concerned with the issue of whistleblower protection in Australia. In 2001 I introduced the *Public Interest Disclosure Bill 2001*. Following a report on that bill by the Senate Finance and Public Administration legislation Committee, in 2002 I introduced the *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002* to accommodate the recommendations of that Committee.

Now, five years later, building on experience with similar legislation elsewhere, I am urging the Parliament to again look long and hard at the issue of disclosures in the public interest and at this new and reformulated Bill.

The legislation speaks to the real needs of public sector workers. When we talk of 'implementing risk management strategies' we are really talking about ensuring that these peoples' worlds are not turned upside-down and that the responsibility for assisting them resides with senior people who not only have the ability to make a difference, but are required by law to act expeditiously, fairly, and in the public interest.

When we talk of protection from 'detrimental action' what we are really talking about is ensuring that if a person is bullied or intimidated or sacked because they reported wrongdoing then this has to be fully investigated, and that damages incurred can be recovered through meaningful legal and practical options.

This Bill is an opportunity to ensure that we provide that missing glue in public administration for the benefit of all Australians. Although the *Public Interest Disclosures Bill 2007* might be seen as a sophisticated piece of legislation, it is realistic, enforceable and sufficiently flexible to provide the Australian people with the tools they need to retain confidence and pride in their public officials.

As a framework it allows public officials to make disclosures in the knowledge that these disclosures will be investigated and that they will be protected from legal liability. The types of disclosures covered are defined under 'public interest information' and cover matters such as improper conduct, serious breaches of the APS Code of Conduct, actions which are contrary to the *Financial Management Act*, misuse of public resources, or actions or omissions which imperil the security of the Commonwealth. It expressly excludes issues of private grievance and disagreements over policy.

In essence this Bill allows public sector officials to expose important mistakes and oversights which may otherwise never see the light of day.

In order to encourage and integrate a regime of candid disclosure and protection this Bill creates a robust framework whereby public sector officials know these options are open to them and that they are fully supported by senior officials as a means to ensure that problems are raised and solutions are found.

This is seen in the Bill through the creation of model procedures to deal with disclosures, to be developed by the Commonwealth Ombudsman's office and to be implemented by Commonwealth agencies. It also includes a range of options to inform public sector officials about their obligations and rights, such as a hotline that an official can call to receive advice. Public sector officials will also have choices open to them as to who they can make disclosures to, including a designated person within their agency who will be able to assist them.

This Bill also creates options after other options have been exhausted, for disclosures to senators and members of the Commonwealth Parliament or alternatively to journalists. However a number of criteria, which reflect best practice in Australia and the United Kingdom, are set out to ensure that this latter option is only exercised at appropriate times and in appropriate circumstances.

A disclosure may be made to a senator or member if under all the circumstances it is reasonable for the official to do so and the disclosure has already been made to a proper authority but to the knowledge of the official has not been acted upon within 6 months; or the disclosure was acted upon by the proper authority but it was not adequate or appropriate; or the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the making of the disclosure.

A public official may make a public interest disclosure to a journalist if they do not make the disclosure for the purposes of personal gain, whether economic or otherwise; and under all the circumstances it is reasonable for the public official to make the disclosure; and the disclosure has already been made to the proper authority or to the senator or member but to the knowledge of the public official has not been made within 6 months; or the disclosure has already been made to the proper authority or to the senator or member but to the knowledge of the public official the response was not adequate or appropriate; or the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.

As soon as an official makes a disclosure, protective measures are implemented to support them. A risk assessment is conducted and integrated into each step of the process to minimise any impacts on the official making the disclosure. This is reinforced by the Bill's confidentiality protections which are extended for both the public official making the disclosure and any other person who may be accused of misconduct.

The Bill also ensures that there are official mechanisms for officials to remain informed during the investigation process. The public official must be given a progress report 3 months after they made the disclosure. They also have the right to request progress reports at any time. When a decision is made regarding the disclosure the official must be told what the outcome was and the reason for the outcome. If the investigation is discontinued for any reason the worker must be informed of the reason why and also informed that the Commonwealth Ombudsman was notified that the investigation was halted. The Ombudsman then has the power to investigate this decision.

This Bill has also created powerful protections for public sector workers who make disclosures. The first line of defence lies with the head of the agency who is directly empowered to take all reasonable steps to ensure that their employees are protected from detrimental action and must take action if any victimisation occurs. If any detrimental action is suffered it must be reported to the Ombudsman for investigation. The Ombudsman then must take all reasonable steps to ensure that action is taken to remedy the situation, including utilising the unique legal options created in this Bill.

The legal options set out in this Bill are uniquely tailored to public interest disclosures and have been developed as best practice from both the Australian and United Kingdom experience. These legal options can be exercised by either the individual affected or by the Ombudsman.

Civil legal action can be taken by anyone who is affected by detrimental action. This victimisation can be suffered by the person themselves or their friends, relatives and colleagues and may even include a person who is wrongly targeted as the person who made the disclosure. Reflecting best practice, the evidential burden has been shifted to the defendant who must demonstrate that the detrimental action was not taken because a public interest disclosure had been made.

Similarly the Bill contains an injunction clause which is designed to ensure that action can be taken as soon as possible to stop this victimisation and stop the damages accruing at the first possible point.

While this legislation rigorously defends public sector officials it is not a naïve Bill. It has been carefully crafted to ensure that unworthy causes cannot be pursued in the name of good public administration and that there are sufficient safeguards to weed out the inappropriate use of the complaints procedures. This is seen through the powers of proper authorities to stop investigating trivial or vexatious matters or matters which do not have a sufficient evidential basis. Similarly if any person provides false or misleading information they could face significant fines or a maximum gaol time of two years. A review mechanism has also integrated review mechanisms to ensure that after three years the framework will be re-analysed so that it too can be refined and reviewed.

I have taken the time to develop this piece of legislation to ensure that federal public sector whistle blowing in Australia does not remain the burden it currently is on officials with a conscience and a genuine issue that needs disclosure. The Bill seeks to ensure that from the outset the potential risks to the individual are considered and integrated into each step of the process, and to know that at each step of the way the individual has a number of different options available to them. It intends that at each step of the way officials have a number of support networks to utilise, whether that be within their own agency, the disclosure hotline, or even the Ombudsman or Public Service Commissioner.

This framework is designed to recognise that genuine public sector whistleblowers do us all a favour when they disclose these problems and for that they should receive our unmitigated support not a gaol sentence. This is an essential Bill. It should be passed, in the public interest, and for the greater good.