"All that is needed for evil to prosper is for people of good will to do nothing"—Edmund Burke

The Whistle

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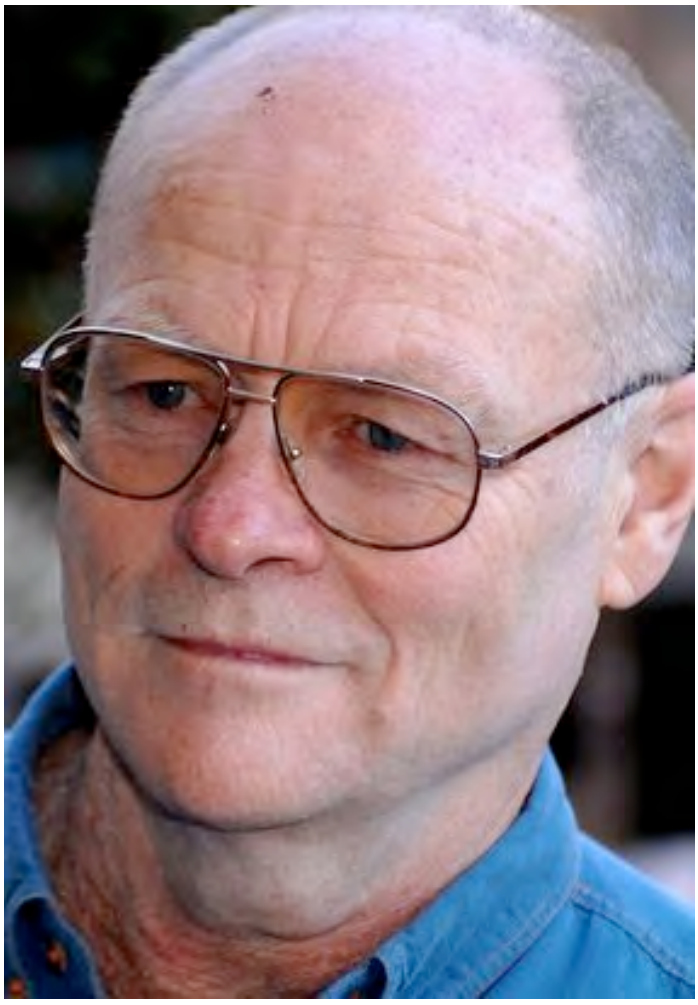
Newsletter of Whistleblowers Australia



Allan Kessing: read comments on his saga, pages 7–11 and 16

Media watch

Let's protect the brave ones who speak out

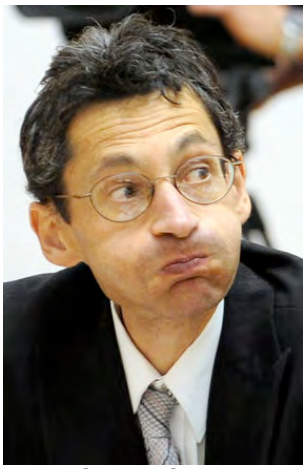
Godwin Grech's plight puts a new spin on "without fear or favour."

Kim Sawyer

The Age (Melbourne), 29 June 2009

THE case of Godwin Grech has important implications for public interest disclosures in Australia. It has brought into focus whether a possible whistleblower was indeed a whistleblower. It has turned a government with a commitment to public interest disclosures into a government pursuing public service leakers. And it has shown the politicisation of Senate committees.

When Grech testified before the Senate Economics Committee on June 19, many perceived him as an honest public servant, possibly struggling to blow the whistle on cronyism.



Godwin Grech

A week later, following allegations of a fraudulent email and serial leaking, the credibility of Grech and his whistleblowing was in doubt. For many, the good whistleblower had turned bad.

Whistleblowing advocates have struggled for years to establish its legitimacy. The public inevitably link the credibility of the whistleblowing to the credibility of the person speaking out, rather than the credibility of the information they disclose.

The most successful whistleblowers are those who expose a serious issue and are unequivocally vindicated. Sherron Watkins, the corporate vice-president who revealed accounting fraud at Enron, and Toni Hoffman, who disclosed life-threatening practices at the Bundaberg Hospital, are examples.

Most whistleblowers, however, are not unequivocally vindicated. They often struggle for years to shore up their credibility and, by implication, the credibility of their whistleblowing. The Grech case shows how quickly the situation for a possible whistleblower can invert. There is no room for error, and certainly no room for fraud.

There may be uncertainty about the evidence and motivation of Godwin Grech, but there is no uncertainty about one matter. Most public servants will now think twice before they appear before a Senate committee. Or at least they will think of Grech and many will assess the risk to their careers and hope that they will not be compelled to testify.

The risks are high. Are they worth it? Ironically some, if determined to disclose, may choose to do so anonymously. They may become the leakers that the government is determined to eliminate.

Senate inquiries have played an important role in our democratic process, acting as a counterbalance to the abuses of government and to the inefficiencies of the bureaucracy. They have addressed topics as diverse as gifted children, petrol sniffing, higher education, and indeed whistleblowing itself.

The two Senate inquiries into public interest whistleblowing of 1994 and 1995 are still the benchmarks for Australian whistleblowers. The 39 recommendations of the tabled reports are the recommendations that whistleblowers continue to reference.

The Senate inquiry is one of our most important political institutions. However, it is an institution at risk.

In the last years of the Howard government, the Labor opposition and minor parties were rightly concerned about the weakening of Senate inquiries.

Given recent events, they should have greater concerns.

The Senate committee hearing involving Godwin Grech raises important questions: whether Grech was influenced to appear; the veracity of his testimony; and whether the presence of a supervisor and the disagreement among senators interfered with his testimony.

We expect witnesses to be truthful, and we also expect them to be protected.

Witnesses to senate inquiries, like whistleblowers, are on their own.

They are given protections codified by parliamentary privilege, including protection against legal action, the right to object to questions, and protection against interference with evidence.

Witnesses may not be intimidated or induced in relation to their evidence. But the best protection for a witness is the truth.

Whistleblowers become accustomed to being targeted and Senate inquiries amplify the problem. In general, witnesses to Senate inquiries incur substantial risks, all for the public interest. In contrast, politicians use the inquiries as a blood sport.

In February this year, the Legal and Constitutional Affairs Committee of the House of Representatives, chaired by Mark Dreyfus, tabled a report that recommended legislation to protect public sector whistleblowers. The Federal Government is yet to act on these recommendations.

If the Government does decide to act, it should consider the possibility of aligning whistleblowing protection and the protection afforded witnesses to parliamentary inquiries.

Testifying to a Senate committee is often a form of whistleblowing and there should be similar protections and responsibilities.

Australians rely on honest public servants who commit to their service without fear or favour. The public unravelling of Godwin Grech at the Senate inquiry is a loss for all of us. When the political imbroglio disappears, politicians may reflect on the damage done to our institutions and, in particular, to the role of witnesses to parliamentary inquiries.

They may find that there are fewer witnesses to make the disclosures that our democracy requires. Perhaps then there will be an inquiry into Senate inquiries.

Dr Kim Sawyer is a member of Whistleblowers Australia.

US gives more protection to whistleblowers than Australia

Chris Merritt
The Australian, 2 October 2009

AFTER examining the proposed scheme to protect whistleblowers in the commonwealth public service, visiting US academic Robert Vaughn noticed a fundamental difference from the equivalent laws in the US. Unlike the scheme being considered by the Rudd government, whistleblowers in the US receive legal protection when they expose maladministration either to the media or to public sector agencies.

The Rudd government is considering a scheme that aims to have all instances of wrongdoing handled confidentially inside the public service. As a result, only limited legal protection is extended to whistleblowers who speak to the media about problems with public administration.

One of the reasons for the sweeping protection of whistleblowers in the US is the fact that the original US whistleblower law, the Civil Service Reform Act, was introduced after the abuses of power that came to light in the media during the Watergate scandal in the early '70s. After Watergate, the goal of US lawmakers was not merely to improve the bureaucracy's complaint-handling system, but to expose government abuses to scrutiny.

"They were viewed as open government provisions," said Professor Vaughn who is based at American University in Washington. "Like Freedom of Information, they were also viewed as protecting the First Amendment rights of both public employees and citizens who would receive information that would be the foundation for the exercise of their First Amendment rights," he said.

"There is a strong open government underpinning — a human rights underpinning — that lies at the base of US whistleblower protection that I do not see called forth in the same way here." Despite the fact that the US whistleblower laws protect disclosures to the media, Professor Vaughn said most public employees in the US still preferred to have their concerns dealt with inside government agencies.

"We are looking over 20 years of experience with the federal whistleblower provisions and I think most people tend to go inside" government agencies with their concerns about maladministration. He said the strength of the Australian proposals on whistleblower reform was their method for dealing with complaints inside the public sector.

But the assumption behind US whistleblower laws "has always been that the opportunity for external disclosure is an incentive for public employers to develop internal mechanisms that employees find credible and usable", Professor Vaughn said. He said most public employees in the US who make disclosures to the media had already tried to have their concerns addressed internally. "They are not required to by the law, but that is the general practice," Professor Vaughn said.

Needed: new Wall Street whistle-blowing laws

We need to give financial incentives for people to blow the whistle on Wall Street. Why? Because the SEC isn't protecting us.

Bill Singer
Online, 18 September 2009

DURING the American Civil War, the Union Army needed to purchase a wide range of supplies for its troops. Unfortunately, many defense contractors saw the situation as an opportunity to engage in war profiteering. Contractors sold so much substandard equipment and tainted food to the military that the effort to wage effective war was being compromised. In 1863, in response to that threat, Congress passed the False Claims Act (31 U.S.C. § 3729–3733, also known as the "Lincoln Law").

The False Claims Act includes a *qui tam* provision that authorizes private citizens, called "Relators," to sue those defrauding the government and provides a financial incentive in the form of a percentage of any recovery. The term *qui tam* comes from the Latin phrase *qui tam pro domino rege quam pro sic ipso in hoc parte sequitur*.

This translates to "Who as well for the king as for himself sues in this matter." *Qui tam* provides a financial incentive for whistleblowers to come forward. False claims acts and *qui tam* provisions presently exist at federal and state levels.

Under the Federal False Claims Act, once notified of the Relator's lawsuit, the U.S. Department of Justice has the choice of intervening in the role of plaintiff. The act provides that the contemplated lawsuit remain sealed for at least 60 days during the Department of Justice's deliberation about whether to take over the prosecution of the claims. In cases where the government decides to intervene and a favorable award results, the Relator's share is not less than 15% but not more than 25% (based upon the extent of the Relator's contribution to the successful prosecution).

If the government does not intervene, the case may proceed with the Relator acting in the *qui tam* capacity of plaintiff. When the Relator shoulders the litigation burden and prevails, the share is not less than 25% but not more than 30%. Moreover, if the Relator was a whistleblower who was illegally retaliated against, the False Claims Act provides for additional remedies, including reinstatement of seniority, double back-pay with interest, reimbursement of litigation costs and reasonable attorneys' fees.

In many ways, the above approach suggests an excellent device to ensure the ongoing reform of Wall Street [the US financial sector]. Given the horrendous job that the Securities and Exchange Commission (SEC) and other regulators have done, more eyes and ears should be helpful — and particularly if those watchers and listeners are motivated by the lure of a bounty. As such, I propose that we implement an act modeled after the

False Claims Act replete with its *qui tam* provision to deputize millions of Americans to patrol the Wall Street beat.

The downside to my proposal is that it truly goes against the American grain. We have a deeply embedded distaste for so-called stool pigeons, snitches, rats, tattle tales — the list of unflattering names is quite lengthy. An unfortunate byproduct of this honor-among-thieves creed is that crime, often heinous, often goes unpunished because of a lack of witnesses or tips.

Moreover, in the US we have a thing about folks standing up, toeing the line and pointing the accusatory finger in the face of the alleged crook. The idea of someone hiding in the shadows and whispering names troubles us. We have enshrined in our Constitution and Bill of Rights the right to confront your accuser and to see the details of the information being used against you by your prosecutor. As a lawyer often employed in the role of a defense attorney, I appreciate and respect those protections.

Sadly, that is all too often the legacy of the Madoffs [referring to pyramid seller Harry Madoff] and their ilk. They provoke reactions that are not always balanced or palatable. Such criminals victimize their victims through their fraud but also victimize our society by forcing us to take measures to protect ourselves in the future — and those measures are frequently at the cost of our civil liberties and way of life. Which is why it was all the more critical for Wall Street's regulators to have done their job in the first place.

My call for drafting a federal law that would provide for *qui tam* incentives to Wall Street whistleblowers is not without the above-noted perils. I too have a dislike for folks who hide behind anonymity and report their colleagues and co-workers to the boss or the government. I too fear turning our society into one filled with informants in our homes and offices. Truly, there is something fundamentally offensive to our Constitution when our fellow citizens are acting as government spies against our own people.

Still — the cost of our failure to detect and timely prosecute the most recent spate of Wall Street fraud is measured in trillions of dollars of damage, devastation to the lives of millions of Americans, and an incalculable loss of national prestige and honor. Within bounds of propriety, tossing the profit incentive into the ring may motivate industry insiders and watchdogs to come forward with their concerns and allegations. The challenge is to do so without compromising our precious civil rights.

Bill Singer of BrokeAndBroker.com is a veteran regulatory lawyer, an outspoken critic of ineffective regulation, and a staunch advocate for the rights of smaller firms, individual registered persons, and defrauded investors.

Critics call on federal whistle-blowing watchdog to step down

Andrew Mayeda
Canwest News Service, 5 July 2009

OTTAWA, CANADA — Nearly two years since she was appointed by the Harper government, the head of a federal agency designed to protect whistleblowers is off to an underwhelming start, critics say.

As part of the accountability reforms put in place in the wake of the sponsorship scandal, the Conservatives beefed up legislation that gives public servants a confidential outlet for reporting wrongdoing, while protecting them from reprisals. In August 2007, Prime Minister Stephen Harper appointed Public Sector Integrity Commissioner Christiane Ouimet to enforce the new act.

However, Ouimet has yet to report a single case of public-sector wrongdoing to Parliament. Her office has not referred any cases to a new tribunal of senior judges that has the power to award as much as $10,000 in compensation to whistleblowers who have been punished for coming forward, as well as to discipline their bosses.

Of the 114 cases of alleged wrongdoing and the 42 complaints of reprisals reported to her office, Ouimet has taken on five formal investigations — none in the last fiscal year.

New Democrat MP Paul Dewar said the performance of the office has been disappointing, given the fact that the Conservatives rode to power largely on their promises to root out corruption in government.

"We had hoped when it was brought into force that the office would be … proactive, and it wouldn't be like the Maytag [washing machine] repairman and sit back and say, 'Well, everything seems to be fine,'" he said.

Some whistle-blowing advocates go even further, calling on Ouimet to step down less than two years into her seven-year term.

Christiane Ouimet

"It's not polite to call for an agent of Parliament to be removed, but it's very hard to see how Madame Ouimet can salvage her reputation," said David Hutton, executive director of Federal Accountability Initiative Reform, an organization that supports whistleblowers.

For the system to work, whistleblowers must trust the person to whom they report wrongdoing, and believe that action will be taken, said Hutton. "I think she has completely blown her credibility with those people."

As a former bureaucrat at the Public Works department, Allan Cutler blew the whistle on contracting irregularities in the now-infamous sponsorship program. Cutler, who ran as a Conservative candidate but was defeated in the 2006 election, now heads an organization that assists whistleblowers called Canadians for Accountability.

The small organization, which runs on volunteer staff, has heard more than 35 cases of wrongdoing in the public service, according to Cutler.

He believes that Ouimet, whose office spent $3.6 million last year and employs 20 full-time staff, should be more willing to "rock the boat" like other officers of Parliament, such as Auditor General Sheila Fraser and Parliamentary Budget Officer Kevin Page.

"It's not working," said Cutler. "It can work, if you have the right person at the head. There's got to be a desire to make it work."

Ouimet defends her record, noting that she has spent considerable time and energy setting up the office while dealing with numerous complex cases.

She points to a case where a whistleblower reported that a colleague at a "busy federal mechanical facility" had engaged in potentially life-threatening actions. The commissioner spoke with a senior official at the organization, and the "situation" was addressed within 48 hours.

"If I may use a fire-station analogy, we don't wait till there's a huge fire," Ouimet said.

Nevertheless, she acknowledges that her office still needs to build confidence among the roughly 400,000 public servants covered by the act, and she says her office plans to invest more this year in "getting the word out."

"Certainly, at this time, we have a lot of people who come with private grievances, as opposed to [cases in the] public interest. So we need to invest more time explaining what our role is. It is confusing to citizens and to public servants."

Others say the government needs to make legislative changes to better protect whistleblowers. Joanna Gualtieri, a former Foreign Affairs employee who blew the whistle on excessive spending on overseas residences, has been battling the government in court for more than 11 years.

Joanna Gualtieri

Under the current law, the integrity commissioner can only cover up to $3,000 of a whistleblower's legal costs, she noted. "The way the office was established, it was just doomed to fail," said Gualtieri.

Ultimate risk taker

Elena Curti
The Tablet, 1 August 2009

PAUL MOORE warned his employers at the banking giant HBOS that he believed lending had got out of control. He claims he lost his job as a result. In going public with his story, he tells Elena Curti, he found the inspiration to be a whistleblower through his Catholic faith

It comes as no surprise that Paul Moore trained as a barrister. One can easily imagine him in wig and gown querying the most minute details of a witness's account during his cross-examination. He took the same forensic approach in his post in charge of risk at the financial services giant HBOS at the height of the credit boom: scrutinising documents, conducting structured interviews and observing meetings with an eagle eye. He may have done his job too well; when he discovered the bank was lending on a reckless scale he urged his masters to row back. Instead he was "summarily dismissed" in 2005.

Then there he was last February, before the Treasury Select Committee, setting out meticulous details of the bank's catastrophic lending. Overnight Moore became the "HBOS whistleblower" and for several days was in the eye of a media storm. Yet he says he felt perfectly calm, describing it as "a tremendous moment of grace." He was, he explains, impelled by his Catholic faith to set out what he had learned about the scale of the risks taken by HBOS and why much of the British banking industry imploded in spectacular fashion last autumn.

As Moore sets out his story, he spells out what needs to happen to prevent another economic crisis. In the same breath he quotes many of Christ's sayings about the corrupting effects of money. Days earlier he had delivered a lecture to the Christian Association of Business Executives and had agreed to take part in a conference being called by Archbishop Vincent Nichols on the themes raised by Pope Benedict's social encyclical, Caritas in veritate. He seems satisfied that he is at last putting his experience to good use.

Moore says he deliberated long and hard about what to do as he watched the banking crisis unfold. He had many conversations with a Catholic friend — a BBC journalist — about whether he should speak out and what his motivation would be if he did. Even at that stage he was concerned that he should not be motivated by revenge but by the public interest. He agreed to be interviewed for the BBC Radio 4 Money Box programme on 30 October 2008 — his fiftieth birthday. It was then he came up with the memorable phrase that trying to rein back HBOS had been "a bit like being a man in a rowing boat trying to slow down an oil tanker."

But he was desperate to find a way to tell the whole story and the opportunity presented itself when he learned that some of the banking executives involved in the credit crunch had been summoned to appear before the Treasury Select Committee. He relates that he had just finished reading about this and was sitting in his kitchen with a monk from Ampleforth Abbey when something dramatic happened.

"A voice came down from on high — I am quite serious about this — and it said: 'Now's the time to witness fully'. It was as straightforward as that. It was extraordinary," Moore chortles as he recalls the moment. He then contacted the clerk of the select committee and offered to testify. Although he didn't know it at the time, talking to the select committee would protect him from legal action by HBOS for breaching a gagging order because his evidence was covered by parliamentary privilege. Moore told the committee that the fundamental cause of the banking crisis was an inadequate separation and balance of powers between the executive directors on the one hand and the non-executive directors, who were supposed to be holding them in check, on the other.

"Governance and non-executive governance has been nothing less than veneer. There have been the great and the good in these non-executive positions but really they all come from the same clubs and businesses, and they are on cross boards, and there is not enough independence or challenge within the non-executive sector."

The chief casualty of Moore's testimony was the man who dismissed him from HBOS, Sir James Crosby, who had by this time moved on to

become deputy chairman of the City watchdog, the Financial Services Authority (FSA). Sir James stepped down from the FSA while strongly denying Moore's account.

Sir James was the former chief of the Halifax Building Society who brokered the deal to merge it with Bank of Scotland to create HBOS in 2001, becoming chief executive of the new bank. Moore admits finding it difficult at first to suppress a sense of "human glee and satisfaction" that his nemesis had been brought low, though he then felt sorry about it. He believes Sir James and other executives he worked with at HBOS were essentially good people who had lost their perspective when it came to business and making money. Did he, too?

"Oh yes, I only really re-found my faith in about the year 2000. I am just as bad as anybody else." But then he qualifies that, saying he never forgot about ethics and always had a reputation for telling the truth. He put this down to his education at the Benedictine public school, Ampleforth. The abbey has been a continuing influence on his life. He sent his children there and moved with his family to Ampleforth village when he took his first job at HBOS in 2002. The spirituality that exists in the Ampleforth valley is, he says, very strong and has been a great source of assistance in what he calls "the whole sorry saga."

Moore studied classics at university, trained as a barrister and began working in financial regulation in the mid-1980s. He was a partner at KPMG specialising in regulatory services between 1995 and 2002, and advised a number of FTSE 100 clients. His first job at HBOS was head of risk and compliance for the insurance and investment division. He was promoted to head of Group Regulatory Risk in 2003 when the regulator began to express concern about the level of risk being taking on by HBOS. Moore says he had a very strong reputation for rigour with the regulator and he set to with his customary zeal.

"It was perfectly clear things were out of control. There is a cultural indisposition for people to have their work checked. If you get into 'groupthink' and nobody can challenge an assumption or a paradigm, it can often go like the lemmings rapidly towards the cliff edge, and in fact that is what was going on in the banking world. Everybody was hurtling headlong towards the cliff edge and nobody was able to raise the challenge and anybody who did was removed."

Did he believe he was sacked for standing in the way of HBOS making money?

Paul Moore

"Yes. Without a shadow of a doubt. Objectively the inference is overwhelming that I was removed because I challenged the strategy for continued growth."

The chief conclusion Moore draws from his experience is that it is only possible to drive ethical behaviour into the business world by creating a tough regulatory environment. He believes the three key internal control functions — risk management, compliance, internal audit — should not report to the executive. They should report to a dedicated non-executive director who is accountable for oversight and assurance.

"That means if I hadn't been reporting to James Crosby and I had been reporting in to the non-executive director, I would have been able to do my job with protection. That, to me, is the single and simplest and most profound change that needs to be made."

It is for this reason that he is critical of the review by Sir David Walker into bank corporate governance commissioned by the Treasury. Walker, says Moore, has "fudged the issue" by suggesting the internal control functions report to both the executive and the non-executive.

"Anyone who has worked for an organisation that has dual reporting lines will know that they very, very rarely work. If the executive has power to remove you there is a conflict of interest."

Moore has looked at Pope Benedict's encyclical *Caritas in veritate* and says that, while he admires the principles it sets out, he's doubtful the world will listen. He has little faith in the efficacy of banks' social responsibility reports and ethics statements for the same reason.

He sees enforcement here too as key and launches into a list of measures he would introduce if he was in charge of the FSA. They include a company-wide ethics training programme for all financial sector companies; intensive training for the top three levels of management on ethical decision-making and a section added to any strategic decision-making document that says "ethical considerations taken into account." Terms such as risk management and compliance may not mean much to those of us outside the banking world but Moore says that essentially they are about excellence.

"They are about serving customers and serving society. They are fancy words for doing things really well," he said.

Moore has not had a permanent job since leaving HBOS and he confesses that he would love to take a role in a business absolutely committed to being run along ethical lines. In the meantime he is hoping to get some advisory work "to keep my head above water." He will also relay his views to the FSA and make a submission to the Walker consultation. He believes the economic crisis is "a divine shot across the bows" and that voices like his are now being heeded.

He is encouraged that other Christian business leaders such as Stephen Green of HSBC are making their views known and says he would love to be part of a Christian economic think tank, were one to be set up. Communication, he believes, is not something the Church is generally good at and it is up to lay people like himself to step up to the plate.

Aside from being active in his local church, he is a director of XT3.com, a social networking platform that was created for World Youth Day in Sydney last year.

Finding meaning in what happened to him at HBOS has been a lengthy process. His wife, also a devout Catholic, has been unflinching in her

support, as he explains: "When I was fired I went out into the street and I was crying, I felt so awful about the whole thing. It really did crush me for a long time. I was trying to do what was right and I was being treated shabbily. I phoned up my wife and she said, 'It's all part of God's plan.' I didn't understand that then, but I do now."

The News of The World didn't go far enough

Julian Assange
Wikileaks editorial, 11 July 2009

THIS week the British paper *The News of the World* was condemned by *The Guardian* for hiring private investigators. The investigators were alleged to have accessed messages left on the answering machines of thousands of the UK's social and political elite. The information was used (possibly unknowingly) by the paper to develop its stories.

The News of the World didn't go far enough.

Earlier this year, WikiLeaks released 86 telephone recordings of corrupt Peruvian politicians and businessmen. The revelations became the front page of every major paper in Peru and the journalists involved, such as Pablo O'Brian, became national heroes.

Europe has had its fair share of similar exposes. Italy's Prodi government was toppled by such revelations and, in December 2007, Silvio Berlusconi, who was then opposition leader, was himself exposed on a phone call leaked from an anti-corruption investigation. Further revelations from Berlusconi's circle were expected later this year, but by May the Italian Prime Minister had introduced "British style" legislation to prevent the Italian press from publishing them. Berlusconi justified the new law by saying that the privacy of Italian citizens was threatened by the press.

Now in Britain, we see similar sanctimonious hand-wringing over the "privacy rights" of the British elite. These individuals, through active scheming and quiet acceptance, have turned the UK into what Privacy International now bills as an "endemic surveillance society." Barely a month goes by without the government attempting to introduce another Orwellian state surveillance scheme. But now, like Berlusconi, these elites purport a sudden interest in protecting the privacy rights of the people, not by rolling back such schemes, but by gagging the press.

Despite this, *The Guardian,* in seeing an opportunity to attack a journalistic and class rival, has been doing its level best to castrate British journalism by tut-tutting in article after article about *The News*' alleged sourcing improprieties. A tabloid newspaper doing investigative journalism! Journalists skirting the law to expose the truth! The long-suffering of British billionaires — and Royalty! And did we mention that *The News* is owned by Rupert Murdoch? — so, um … you know, the enemy of my enemy and all that! *The Guardian*'s coverage is disproportionate. It is moral opportunism. It is an excuse to mention tabloid stories in a broadsheet. And it is dangerous. The result will be a publishing climate and probably legislation aimed at keeping the British public in the dark.

The right to freedom of speech is not short hand for the right to pontificate. We defend speech freedoms for their connection to a deeper underlying concept — the right to know. Without understanding the world around us we can not function. Without an informed public, democracy has no meaning and civilization is adrift. Through understanding the truth about ourselves and the world around us, we are able to advance and survive.

The News of the World should have released the tapes made by its private investigators. The elite exposed are the usual paymasters of such private intelligence firms. The democratic process should not be denied the same high quality information that businessmen, celebrities and oligarchs acquire on a daily basis.

The real scandal is not that some British papers used private investigators to find out what the public wants to know. It is that more did not. It is that *The News* was extorted out of a million pounds because the relevant British legislation does not have an accessible public interest defence for the disclosure of telephone recordings. Until it does, despite the risks, journalists who take their fourth-estate role seriously are obligated not to take the legislation seriously.

The actions of major newspapers are "voted on" every day by their readers. Whatever their faults, popular newspapers remain the most visible and the most democratically accountable institutions in the country. Their mandate to inform the public vastly exceeds that granted to the unelected and the rarely elected at Westminster, who are nonetheless quick to grant themselves a blanket exemption from all censorship.

Thomas Jefferson had it right when he stated, "If forced to choose between government without the press and the press without government, I would surely choose the latter."

Blowing the whistle

Protection for whistleblowers in Australia is patchy and inconsistent, writes **Norman Abjorensen**
Inside Story, 10 September 2009

THE DISGRACEFUL pursuit of the former customs official Allan Kessing over his revelation of serious security lapses at Sydney Airport highlights an official obsession with secrecy in Australia and a major deficiency in protection for whistleblowers acting in the public interest. Mr Kessing faces the possibility of further charges, having already been convicted under section 70 of the Commonwealth Crimes Act, for which he received a nine-month suspended prison sentence and was ordered to pay a $1000 good behaviour bond. The federal police are now considering whether to take further action after he admitted to leaking a report to a staffer of a federal Labor MP.

There is no doubt that Mr Kessing was acting in the wider public interest — and immediate action was taken to address issues subsequently revealed in newspaper articles based on the same report — and there is no suggestion that he acted for personal gain. Indeed, he now faces a significant debt as a result of his legal fees

Despite some perfunctory legislation, official Australia has always been

reluctant to acknowledge that the willingness of public officials to disclose wrongdoing within their organisations is an essential element in a robust democracy, as important as the work of an auditor-general or an ombudsman. Although nearly all Australian jurisdictions have introduced relevant legislation for the public sector since 1993, both the content of the laws and the practice of handling whistleblowing continue to be vexed issues. Laws to protect whistleblowers are patchy at best, and the Commonwealth remains by far the greatest laggard, despite promises by Labor to address the issue. The fact that the sweeping provisions of section 70 of the Crimes Act, under which Mr Kessing was prosecuted, still remain on the statute books is a monument to inaction.

Existing federal protection for whistleblowers is limited in effect and narrow in scope. Restrictions on Commonwealth public sector employees disclosing government information are contained in a range of acts and regulations, including the Crimes Act, the Criminal Code Act, the Public Service Act, the Privacy Act and the Freedom of Information Act.

The primary source of *protection* for whistleblowers is section 16 of the Public Service Act. This section notes that a person performing functions in or for an agency "must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct." (Section 16 of the Parliamentary Services Act provides the same protection for persons performing functions in or for a parliamentary department established under that Act.)

But a report tabled earlier this year by the House of Representatives Legal and Constitutional Affairs Committee indicates that only two-thirds of employees in the Australian government are protected by section 16 of the Public Service Act; employees of agencies falling within the Commonwealth Authorities and Companies Act 1998 are not covered, and nor are former public servants, contractors or consultants. The committee, chaired by Labor MP Mark Dreyfus, made a series of recommendations for reform but the government has yet to respond.

As things stand, there is little incentive for an official to blow the whistle, no matter how serious the matter at hand. A study in 2007, led by Griffith University, surveyed public servants in the Commonwealth and three states and found that 71 per cent of the almost 8000 respondents had observed at least one instance of wrongdoing or serious maladministration in the preceding two years. Of those who reported wrongdoing, 22 per cent replied that they had been the victim of reprisal from managers or co-workers.

THERE IS NO universally accepted definition of whistleblowing, but one that has gained broad acceptance emanated from a Senate committee inquiring into whistleblowing in 1994: "The disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons that may be able to effect action." The report came at a time when whistleblowing featured prominently on the political agenda, in the wake of such well-publicised corruption investigations as the explosive Fitzgerald Inquiry in Queensland. In 1991, a review of Commonwealth criminal law went so far as to accept the broad principle that in a democratic society "the public should have access to as much information as to the workings and activities of government and its servants as is compatible with the effective functioning of government."

As a result of this peaking of public interest, a raft of public interest disclosure legislation was passed — South Australia in 1993; Queensland, the ACT and New South Wales in 1994; the Commonwealth 1999; Victoria 2001; Tasmania 2002; Western Australia 2003; and Northern Territory 2008. There is, however, significant inconsistency in the types of wrongdoing about which protected disclosures can be made under these various laws. In some circumstances the conduct about which a disclosure may be made appears to be too general and to extend beyond what we might regard as whistleblowing. In other cases — where, for example, only unlawful behaviour is covered, not maladministration — the conduct is too narrowly defined.

Only three states — South Australia, Queensland and Western Australia — have seen fit to detail the types of public sector wrongdoing covered, and they are also the only jurisdictions that provide remedies for potentially or actually aggrieved whistleblowers. Only one jurisdiction, New South Wales, extends protection in certain circumstances to officials who make public interest disclosures to a member of parliament or the media.

Australia's efforts in enacting effective legislation protecting public interest disclosure lag behind many comparable countries. In Canada, for example, the Public Servants Disclosure Protection Act lists the "wrongdoings" that may legitimately be revealed, makes illegal any reprisals against public servants who disclose or co-operate with investigators and establishes the office of the Public Sector Integrity Commissioner. In the United States, the Whistleblower Protection Act of 1989 — extended in 1994 to cover employees of some government corporations and employees in the Veterans Administration — prohibits from reprisals federal officials who blow the whistle on public sector misconduct and provides a means of redress, including financial compensation, for any loss suffered. Australia, it should be noted, also has an international obligation to protect whistleblowers, deriving from its signing of the United Nations Convention Against Corruption, which makes specific reference to protection for public interest disclosure.

The reluctance to enact stringent legislation to protect public interest disclosures coupled with inadequate and compromised laws relating to freedom of information and an absence of shield legislation for journalists all serve the cause of maintaining official secrecy and denying the public's right to know.

Norman Abjorensen, of the Crawford School of Economics and Government at the Australian National University, is co-author of *Australia: The State of Democracy*

My side of the story

Allan Kessing
Crickey.com, 14 September 2009

I JOINED Customs in 1990 and retired in 2005. My first three years were on the wharves then two at Sydney airport. In January 1997 I was approached to join a new intelligence section analysing sea and air cargo where I remained until returning to the airport in 2001.

In 2002 I was recruited by the Air Border Security unit because of my previous experience to analyse the large amount of material it had accumulated over the years that had never been brought together. It took me a couple of months just to read and try to collate and the picture that emerged was one of accumulated abuses of Customs regulations, theft, smuggling and systemic criminality. Long time failures had been set in concrete during the run-up to the Olympics and many new rorts and abuses had been accreted on since then.

As a result I was asked to write a risk analysis specific to one area: private security staff employed by the privatized airport corporation. This was completed and forwarded to the Customs airport manager in early 2003. It was met with shock and horror at the implications and rejected out of hand as impossible to implement for a number of commercial and operational reasons.

I was then directed to prepare an overall report on the workings of the airport that are beyond the public view, the so-called "sterile areas" which are restricted to employees issued with an Air Security Identification Card. I took a random cross section of persons holding these IDs and this report was completed in August 2003. Like its forerunner this was also rejected.

This caused considerable dissatisfaction, not to say anger, within the unit with talk of resigning or sending the reports to other senior officers, even plain envelopes to newspapers.

Shortly afterwards the unit was told that it was to be abolished and a rear guard action was fought without success. I was due to retire early in 2003 and had only stayed on to write the longer report because I felt committed to completing an important and worthwhile task.

I went on long service leave in March 2004 and in September the Air Border Security unit was abolished. Two members with years of specialized experience resigned and the other three were returned to general duties, a culpably incompetent waste of skills.

Allan Kessing

I returned just before Christmas, intending to retire as soon as the busy season was over in the New Year. Over the next couple of months, it was clear that my colleagues were still extremely dissatisfied at the suppression of the reports and it seemed that their only topic of conversation was how this could be rectified. I agreed to take it to my local MP, Anthony Albanese, but for whatever reason, nothing came of that.

I retired on 10 May 2005 to care for my mother who was in the final stages of acute myeloid leukaemia and in June *The Australian* published some details from the reports.

The government at first denied that there were any such reports on the first day, on the second that they were a minority view, the third day DPM [Deputy Prime Minister] John Anderson had announced his resignation and on day four Chris Ellison [Minister for Justice and Cutoms] assured the nation that "… there was no need for any concern as we have the safest airports in the world." Within a week [Prime Minister John] Howard announced that Sir John Wheeler had been commissioned to conduct a review "due to community concern."

Within weeks he endorsed the reports entirely, repeated the recommendations therein and added substantial criticisms. Howard promised that $200M would be allocated to implement this reform and the matter disappeared from public view. I was charged on 6 September with providing the information under the Crimes Act, s70 (ii).

I went to see Mr. Albanese a couple of weeks later to ask for some advice or assistance with the matter. He was sympathetic and seemed outraged by the government response. I pointed out that the previous information had been only to do with the airport and that there were equally serious deficiencies in cargo. I gave him a broad outline of problems, noting especially that the soon-to-be-implemented sea cargo automation clearance would fall over. (Which it did within 24 hours of going on line in October.)

He asked for more information and I said that I'd prepare a précis of things that needed attention. This was supplied a couple of days later and subsequently used in Senate estimates by Senator Ludwig in October.

Following this I was advised that a barrister had been found who would act pro bono for me and met with him in his chambers. He agreed to take on the case without charge and on the second meeting he introduced me to a solicitor whom he said he needed to assist.

I would be required to pay his costs and I agreed.

After four years, three barristers and over $70,000 wasted I am a convicted felon. As I have no further means to pursue legal options I felt that at last let the true story be told.

In the previous Parliamentary sitting Senator Xenophon formally asked for an estimate of the costs incurred by the Commonwealth in my prosecution and what action was taken following the Wheeler recommendations. To date he has received no response to the first and for the second a report on actions taken with a heading but entirely blacked out.

As to whether there have been any improvements resulting from the Wheeler recommendations, the recent events at Sydney domestic and the continuing rorts of the security training and vetting recently reported are not encouraging.

For secrecy's sake

Chris Merritt
The Australian
14 September 2009, p. 15

LAST week, after Allan Kessing revealed he had leaked a suppressed report to the Labor Party when the Howard government was in power, the former Customs official received an unexpected phone call.

Kessing knows the caller but is surprised by what he said: someone is preparing to blow the whistle on the Rudd government.

The call was triggered by news that Australian Federal Police are considering laying charges against Kessing for a second time over the leaking of a report on flawed security at Sydney airport.

Kessing has already been convicted of leaking that report to *The Australian* in 2005, a charge he continues to deny. Now the AFP has taken a renewed interest after he revealed that he did indeed leak the report, not to *The Australian,* but to the Sydney office of Labor frontbencher Anthony Albanese who is now Transport Minister.

Last week, the unnamed man on the phone line told Kessing that he had also been secretly leaking to Labor when the Howard government was in office.

The caller outlined what he had supplied, named the senator who received it, and then made a promise: if Kessing is prosecuted, the caller will follow his example and reveal what happened to highlight the need for reform.

That call was motivated by a growing perception that the treatment of whistleblowers under the Rudd government is at odds with what Labor did in opposition.

As a result of Kessing's disclosures, Labor in opposition received an array of information on maladministration. Airport security was just the beginning. He also warned that the automation of the system for dealing with sea cargo would fail as soon as it was activated. He was right on that, just as he was later found to be right about airport security.

All of Kessing's information — like the information supplied by the mystery caller — was handed to the Labor Party in breach of section 70 of the Commonwealth Crimes Act, which outlaws unauthorised disclosures of government information by public servants. There are no defences.

The prospect of a second prosecution of Kessing over the airport security leak has emerged just as the government is considering a report on whistleblower reform that Whistleblowers Australia has denounced as inadequate.

That report, which is before Special Minister of State Joe Ludwig, was drawn up by a committee of the House of Representatives chaired by Labor's Mark Dreyfus QC. It calls for only minor changes to section 70, the provision that helped convict Kessing.

Right now, the government has nothing to gain by allowing a fresh prosecution to galvanise support for reform that goes beyond what it has in mind.

The target date for its whistleblower reforms has slipped back since Ludwig took over from John Faulkner as Special Minister of State. In May, Faulkner said the government "will develop legislation later this year." Ludwig's office says there will now be a government response to the Dreyfus report this year. Legislation will come next year.

Progress on an associated change to laws shielding journalists' sources has also come to a halt since it, too, was criticised as inadequate. Those who want the government to go further include the media industry, the opposition and enough Senate crossbenchers to guarantee the government's bill will fail unless it is changed.

But while the government may have its own reasons for opposing a second prosecution, would it be justified in accepting Kessing's proposed request for a pardon?

Even before Kessing revealed he had leaked details of the airport-security report to Albanese's office, there was at least one problem with his conviction. Now there are two. On December 19 last year, when the NSW Court of Criminal Appeal turned down Kessing's attempt to overturn his conviction, judge Virginia Bell made it clear that one part of the trial judge's instructions to the jury was wrong. That error, she said, was not enough to undermine the "powerful circumstantial case in which the overwhelming inference" was that Kessing had provided *The Australian* with the leaked report.

Now that it is known that Albanese's office had a detailed briefing on the report almost two months before it appeared in *The Australian,* at least one part of that circumstantial case might not be so powerful.

Anthony Albanese

Bell, who is now a judge of the High Court, explained in her judgment that the trial judge gave the wrong answers to questions that had been asked by the jury.

"The jury's questions raised whether it was sufficient for the Crown to establish that the appellant had confirmed the accuracy of material that the journalists had obtained from another source. His honour directed the jury that it was. The direction was wrong," Bell wrote in her judgment.

"To confirm the accuracy of a document leaked by another to a journalist may be to communicate a fact, but in my opinion it is not to communicate the document."

The significance of Bell's decision is that unless the jury was satisfied beyond reasonable doubt that the document was communicated — and not merely confirmed — the Crown case failed.

This is where the second problem with the conviction arises. It concerns the inference that was drawn from the fact that a brief telephone call was made from a public call box near Kessing's mother's house to one of the reporters who wrote the article for *The Australian,* Martin Chulov.

This phone call was considered to be relevant because of the proximity of the call box to the house in Lilydale Street in the Sydney suburb of

Marrickville where Kessing had been nursing his dying mother.

What the court was not told was that the telephone box — which was demolished this year — was just around the corner from Albanese's electorate office.

The call box once sat between the two locations, a short walk from the house at 30 Lilydale St and from Albanese's electorate office at 334a Marrickville Rd.

Because Kessing did not give evidence in his own defence, the NSW District Court and the prosecutors were never told about the leak to Albanese's office.

Last week, when Kessing finally revealed his links with Albanese, there was a flurry of speculation that Labor might have been the real source for *The Australian*'s report.

Kessing finds such speculation "not just incomprehensible but bizarre." He told a press conference in Canberra last week that such an idea had never entered his head until it had been put to him at that press conference.

The location of the now-demolished call box does not prove that anyone from Albanese's office called Chulov. *The Australian* does not suggest anyone from Albanese's office made the call. But now that it is known that people nearby also knew about the leaked report, the weight given to this circumstantial evidence must change.

Even if Kessing was responsible for both leaks, the Transport Workers Union — which represents thousands of airport workers — believes he should not be prosecuted again. TWU national secretary Tony Sheldon says what Kessing did means he was "prepared to put the protection of our community first and foremost beyond a potential risk to himself." […]

So will Kessing be prosecuted? Commonwealth director of public prosecutions Chris Craigie declined to discuss the Kessing case.

"Obviously we never talk about operational matters or even potential operational matters; and I won't even tell you which one of those categories this fits into," Craigie says.

But he points to the extensive public interest provisions that must be considered by the DPP when selecting those cases that justify the expenditure of taxpayers' money on a prosecution.

Even if the AFP charges Kessing and presents a brief of evidence to the DPP, a prosecution would go ahead only after the DPP had considered all the public interest factors contained in clause 2.10 of the prosecution policy of the commonwealth.

Those factors include: whether the prosecution would bring the law into disrepute; whether the consequences of a conviction would be unduly harsh and oppressive; whether the offence is of considerable public concern; any mitigating circumstances; and the effect that a prosecution would have on community harmony and public confidence in the administration of justice.

If Kessing does escape prosecution, his disclosures have still raised doubts about one of the key aspects of reforms proposed by the Dreyfus report.

The logic underpinning this scheme is that there will simply be no need to provide legal protection for most public interest disclosures outside the bureaucracy because maladministration will be solved by an elaborate internal complaint-handling system.

But its recommendations — which would make federal politicians authorised recipients of public interest disclosures — were finalised before Labor failed to act on Kessing's information about airport security.

Dreyfus, who has a longstanding interest in open government, is aware there are lessons from the Kessing affair.

"Allan Kessing's case has wider significance," Dreyfus tells *The Australian.*

"In particular it shows the need to strengthen the role of integrity agencies, which will have systems to deal with public interest disclosures rather than solely relying on the media or members of parliament, which do not have those systems," he says.

On section 70, Dreyfus says the time has come to find a method of dealing with the flow of information about public administration that takes account of the reality of the information age.

"The appropriateness of provisions like section 70 needs to be re-examined in the context of an age of instant communications and many different means of communications," he says.

Provisions such as section 70 have their roots in 18th-century doctrines of cabinet government when the only form of recorded information was handwritten notes.

"This may not be appropriate for the 21st century," he says. "We just have to rethink the settings; we have to rethink, perhaps, better grading of information. Not all information needs to be kept secret.

"It raises the problem of over-classification of information, which we have seen in the intelligence area. This is a known problem in the Western world," Dreyfus says.

This approach has much in common with the view of independent senator Nick Xenophon, who has been working closely with Kessing.

"There seems to be an assumption that everything should be secret, and I think that is a dangerous assumption," Xenophon says.

"Shouldn't the assumption be that, generally speaking, the public has a right to know everything? And then if exceptions need to be made for national security or police operations reasons or whatever, let's have that debate. But don't assume the default position should be not to reveal anything to anyone.

"Taxpayers fund government and the bureaucracy. They ultimately own them. The bureaucrats don't serve the government, they serve the people and we seem to forget this.

"I believe whistleblower and shield laws are unconstitutional because they seek to limit the information a parliamentarian can receive. They stand in the way of parliamentarians doing their job. How can I as an elected representative of the people address a problem I am not aware of?" Xenophon asks.

Chris Merritt is *The Australian*'s legal affairs editor.

IN a report in *The Australian* yesterday, it was suggested that former Customs officer Allan Kessing, who has admitted leaking a report on airport security flaws to the Labor Party, was involved in a separate leak to the Labor Party that was brought to his attention last week by another whistleblower. Mr Kessing played no part in the separate leak. The error occurred during the production process.

Bureaucracy's criminal solutions: the Albert Lombardo story

Keith Potter

Albert Lombardo's company was located in the wrong place at the wrong time.

The company's use of heavy machinery and tall cranes to retrieve large blocks of lead from ongoing illegally dumped factory slag wastes at a nearby domestic tip was attracting unwanted attention. Victoria's Environment Protection Authority [EPA] was turning a blind eye to this serious offence, estimated to save the offenders approximately $10,000 per working day. Albert realised the highly toxic nature of the dumped material and reported this to the police and the EPA.

The Bulla Shire Council needed to acquire the company's site at minimal cost in order to complete a land exchange for which anticipated funds became unavailable. The Shire planned to upgrade the mostly vacant 40-acre subdivision in which the Lombardo company premises were located, from "reserved for general industry" to a high quality pleasant amenity industrial park.

The authorities forced permanent closure of the company's on-site operations, thereby obliging the cash strapped Albert to beg Vic Roads to voluntarily acquire the site at greatly reduced value for indefinitely deferred planned road works, and no compensation for the family's profitable business.

The EPA prohibited the company from using its lead-melting furnace, alleging that it emitted "excessive smoke." No smoke emission tests were conducted. The only smoke emissions were comparable to two diesel trucks. These were confined to the 20-minute "warm up" period of an operation that was conducted at approximately fortnightly intervals.

Meanwhile, the company had started to experiment with recycling of automotive batteries. Lead plates were sold overseas; the empty battery cases were sold in bulk to Sims Metals. The battery acid and wastewater from staff amenities (the area was not sewered) was stored in the company's specially constructed 10,000 litre underground concrete tank. The contents were periodically pumped out and disposed of by an EPA approved contractor. Profits were mainly directed to development of a novel and potentially highly profitable battery-case shredding machine.

The EPA alleged that the company was dumping its battery acid in the adjoining public drain and stopped all remaining operations via prohibition notices.

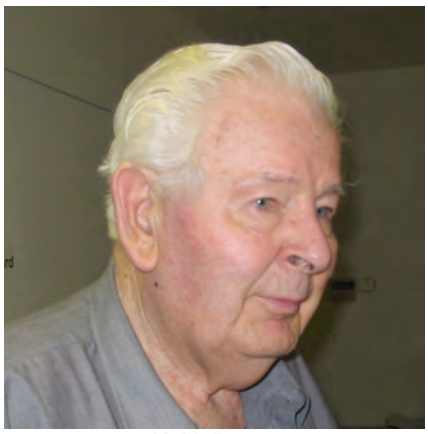
Approximately six months later the EPA took recourse to the Supreme Court alleging urgency to stop the company from polluting highway roadsides, waterways, and Port Phillip Bay with acid and heavy metals. Albert said the EPA's sworn evidence was false and misleading.

The court gave the company the option of cleaning up the alleged polluted drains or agreeing to permanently cease all on-site recycling operations. Albert intended to restrict operations to the purchase and shredding of empty battery cases. By that stage neither the company nor Albert could raise the $50,000 to $100,000 estimated just to commence formal challenge. Of financial necessity he opted to clean up the drains that he knew with certainty had not been polluted by any of the company's operations.

The EPA noted that Albert "had not learned his lesson" and laid 24 criminal charges against him and the company. His wife, co-owner, died on the spot upon learning of the charges. Albert said he would defend the charges himself in the Magistrates Court with the aid of an interpreter. The EPA did not pursue the charges, thereby evading the only opportunity for an affordable judicial hearing on the merits.

The EPA then ordered removal of all allegedly contaminated soil from the company's site. This cost the company $40,000. EPA staff later stated that they witnessed removal of 190 tons of soil. The EPA nevertheless retained the site on its register of contaminated sites, thereby reducing its value by an undisclosed sum when the Road Construction Authority belatedly agreed to purchase it for the indefinitely deferred major road works. No compensation was paid for the business because it was no longer functioning.

Despite strong representations by parliamentarians including the Shadow Attorney-General, cover-up continues to be tightly maintained by the government, authorities and regulators.



Keith Potter

Keith Potter is a life member of Whistleblowers Australia.

Whistleblower protection in New South Wales: moving backwards

Peter Bowden

The NSW government in March this year issued a discussion paper that resulted from a parliamentary inquiry into its whistleblower protection act. Whistleblowers Australia NSW has informed the NSW government that it is extremely concerned with this discussion paper. It is issuing this statement in the hope that it can stop what would be one of the more unethical acts that the government of NSW has yet perpetrated.

The parliamentary inquiry by the Committee of the Independent Commission against Corruption

(ICAC) is a sad indictment of the standards of government in NSW.

The recommendations in the discussion paper would, if adopted, place people who want to reveal wrongdoing in the public sector in NSW at even greater risk. It is hoped that political common sense at least will induce the committee to strengthen its recommendations.

The original NSW Act — the Protected Disclosures Act 1994 — has never been successful. It has many flaws, making it a simple matter to evade its provisions. There is no recorded case of any successful convictions under the act.

An inquiry in 2006 had suggested a number of reforms, but the NSW government ignored them. The report sat on various premiers' desks since 2006 before being superseded by a second inquiry. It was not the government's conscience, or a desire for honesty, that caused the second inquiry. It was to forestall the threat by the Legislative Council, where the government does not have a majority, to hold an inquiry into the rorts of which several NSW government ministers had been accused.

Different members of the parliamentary committee had responsibility for undertaking the second inquiry. The result has been to completely gut the positive recommendations of the 2006 inquiry. Sadly, the most recent recommendations have even further downgraded the original and largely ineffective 1994 Act.

Whistleblowers Australia has long argued that a protected disclosures unit was necessary to enforce compliance with the legislation. Such a unit has been adopted by the Commonwealth. The 2006 inquiry in NSW had also endorsed such a unit. It would be responsible for protecting people who want to bring public dishonesty into the open. The 2009 inquiry dismissed that proposal. They reverted to retaining the coordinating body of different public servants who have long administered the original ineffective legislation. Without an organisation charged with implementing whistleblower protection, nothing will happen.

Under the original 1994 act it was a criminal offence to intimidate or harass a whistleblower. This provision had the value that an employee threatened with retribution for revealing dishonesty could point out that those making the threats were committing a criminal offence. Whistleblowers Australia has several examples of using the act positively in this way. The 2009 discussion paper took out this clause from the original act. Sacking a whistleblower who reveals a wrong in government is now only a disciplinary matter.

Most whistleblower acts in Australia protect people who blow the whistle on damage to public health, safety and the environment. The 2006 provisions recommended that NSW fall in line with the rest of the country. The 2009 recommendations took them out.

NSW does not have a great reputation for integrity in government. That reputation seems destined to sink even further under the recommendations being considered by the current government

Peter Bowden

Peter Bowden is president of the NSW branch of Whistleblowers Australia.

BOOK COMMENTARY

Surviving as an outsider

Brian Martin

A book titled *Fitting in is overrated* is surely ideal for whistleblowers. The subtitle is even more promising: *The survival guide for anyone who has ever felt like an outsider*. Some are outsiders before they blow the whistle, and nearly all become outsiders afterwards.

The author, Leonard Felder, is a psychologist; his intended audience is just about anyone, including children who weren't part of the in-crowd at school, individuals who are not fully accepted by their relatives, and people with innovative ideas. Despite its wide ambit, Felder's book has some useful tips that can be used by whistleblowers.

Felder starts with an important point: most people want to fit in. If someone snubs you, why worry? There are plenty of others in the world. But even a single snub can be hurtful. I have some friends who are popular with nearly everyone they know but who are terribly hurt when someone appears to give them the brush-off. Wanting to be liked is very common. Felder counters with a simple yet crucial message: it's okay to be different.

So what do you do when someone is rude? Felder has a simple approach: say to yourself "I'm going to handle this with decency and integrity no matter what." In other words, don't stoop to the level of those who are being insulting or standoffish. This is surely good advice for anyone raising concerns at work. When co-workers start reacting nastily or give you the cold shoulder, there's a great temptation to react in kind, to reply to an insult with one of your own, or to avoid those who are avoiding you. Felder gives several examples of individuals who escaped this downwards spiral by reminding themselves of their commitment to decency and integrity.

As well as not worrying about being different, Felder recommends looking at possible benefits. Benefit #1 is "After experiencing the pain of being an outsider, you might come up with creative solutions that the insiders

don't see." This is a common experience of dissenters in all sorts of areas: rejection may be a blessing in disguise, forcing you to pursue an alternative path.

Benefit #2 is "An outsider perspective can be an important advantage in your business or career." Many whistleblowers would laugh at this — their outsider perspective is that of being spat out by the system, sometimes with a career entirely destroyed. But if you can survive the whistleblowing experience, you may be able to forge a new career in an area in which your insight and integrity are positives.

Benefit #3 is "Having a reputation as an outsider gives you the freedom to speak your truth and do what matters, whether it makes a lot of money or not." I think this is highly relevant to those who somehow survive in the system despite rocking the boat, perhaps because reprisals in early stages of their careers were not debilitating. If you establish a reputation as an insider who is willing to question orthodoxy, then sometimes — if you're careful and don't push too hard in the wrong places — you may be tolerated or even given some respect. Sure, you may not be promoted as rapidly as those who toe the line, but your ability to speak out and take action is a big compensation.

Another chapter is about the biggest mistakes outsiders make. The first is having a chip on your shoulder. One example: "Maybe it's someone in your social circle who can't let go of a frustrating incident that happened long ago, because it still clouds his vision and causes him to launch into tirades about bad drivers, slow clerks …" Whistleblowers have much more reason to have chips on their shoulders than someone annoyed by bad drivers, but the same principle applies — you need to rise above rages and internal turmoil triggered by those around you, even though they may be corrupt and uncaring. To counter the urge to behave badly, Felder suggests first imagining what you would do if you were permitted to do anything (throw your worst tantrum!) and then imagining what you would do if you were strong, calm and centred. It sounds too easy and doesn't always work, but the key idea is worthwhile: stop and think about the consequences of your own attitudes and actions. Felder has similar exercises for the other types of mistakes outsiders make.

Fitting in is overrated follows a formula: list key points, illustrate each one with illuminating stories about individuals, and finally offer exercises to help overcome the problem. Felder has chapters dealing with work, cliques, families, being a mentor, and turning your own circle into the one people want to be in.

For whistleblowers, the chapter on work is probably most relevant. Felder lists four skills useful to outsiders at the workplace. Skill #1 is "see each unpleasant interaction not as a personal failing, but as a workout for getting wiser." If you're suffering reprisals, this skill would certainly be valuable. But how hard it is to develop! Some bullies develop the opposite skill, learning how to humiliate and demoralise their targets, in some cases making the target feel responsible. Felder's approach is worthwhile in encouraging you to step back from the nastiness and hurt of an encounter, instead adopting a learning perspective. Rather than suffering in the moment, psychologically you try to become removed, examining events for clues on responding more effectively. It's very hard to do but the skill can be developed.

Felder gives examples in which workers have turned around the attitude of bosses and co-workers. He advises breathing smoothly, being strong using an approach he calls "quick refocusing," and not being intimidated. These techniques can be supplemented by skill #2, "know your comeback lines."

Finally, with skill #3, we come to the challenge for whistleblowers: "know what to do if you are faced with something unethical, illegal, or dangerous." Felder's recommendations are designed for survival. They involve carefully planning to move to a new job in an ethical environment, at the same time documenting the dubious activities at your current job. He also has suggestions about financial planning. Felder's recommendations, though brief, are entirely compatible with the usual advice given to whistleblowers. There is little new for whistleblowers on this point, but *Fitting in is overrated* is not aimed at them specifically, but rather at a much wider audience.

For whistleblowers, there is much wise advice in this book, especially for dealing with your own emotions through practical techniques. It may not be easy to survive as an outsider, but if you're going to persist then developing a few additional skills is most sensible.

Leonard Felder

Leonard Felder, *Fitting in is overrated: the survival guide for anyone who has ever felt like an outsider* (New York: Sterling, 2009).

Brian Martin is editor of *The Whistle.*

Whistleblowers Australia 2009 conference and AGM

The 2009 National Conference and annual general meeting of WBA will be held on the weekend of December 5 and 6 at Aquinas College, University of Adelaide.
Aquinas College is located at 1 Palmer Place, on the corner of Palmer Place and Montefiore Hill North, Adelaide (see map on website), a 15–20 minute walk from the CBD, or a 5 minute bus ride from the CBD. It is within 25 minutes from Adelaide Airport. The conference venue can be viewed at http://www.adelaide.edu.au/Aquinas/ml-contact.html where there is also a link to a map showing the location of Aquinas College.

Accommodation at Aquinas College
Bed & breakfast: $50 per night

Conference costs
Saturday (conference), $45
Sunday (AGM, workshops), $35
Both days, $80
Conference dinner, $30

The conference dinner will be a three-course meal with a vegetarian option. Lunch as well as morning and afternoon tea will be provided to attendees at the Saturday conference and the Sunday AGM.

Members should advise Shelley Pezy, conference co-convenor, no later than Friday November 20 of their accommodation requirements, at
Phone: 08 8303 5563
Email: archerpezy@adam.com.au
Postal address: Molecular & Biomedical Science, University of Adelaide, Adelaide SA 5005

Payment options

1. Cash paid on the day. Be sure to tell Shelley you're coming.

2. Cheque or money order paid to Whistleblowers Australia and posted to Feliks Perera, Treasurer, Unit 1, 5 Wayne Avenue, Marcoola Qld 4564.

3. PayPal

4. Direct deposit

For information about options 3 and 4, contact Feliks Perera (feliksperera@yahoo.com or phone 07 5448 8218) or Shelley (details bottom left on this page).


Aquinas College

Public transport in Adelaide
See http://www.adelaidemetro.com.au/

Draft programme

Saturday 5 December
8.45am, Registration
9.15, Welcome, Peter Bennett, WBA President
9.30, Janet Giles, SA Unions
10.15, Questions and discussion
10.45, Morning tea
11.15, Hon David Winderlich – South Australian Whistleblowing legislation
12.00, Questions and discussion
12.30, Lunch
1.30, Panel including Janet Giles, David Winderlich and two others
2.30, A whistleblower's experience of blowing the whistle
3.00, Afternoon tea
3.30, Workshops
4.30, Report back from workshops
5.00, Close
6.30, Conference dinner, Aquinas College
8.30, WBA party/social event,

Sunday 6 December
9.00am, Annual General Meeting
10.30, Morning tea
11.00, Discussion: specific goals and how WBA is going to achieve them; resolution of issues
12.30, Lunch
1.30, Workshops
4.00, Finish

Whistleblowers Australia contacts

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New South Wales
"Caring & sharing" meetings We listen to your story, provide feedback and possibly guidance for your next few steps. Held 7.00pm on the 2nd and 4th Tuesday nights of each month, Presbyterian Church (Crypt), 7-A Campbell Street, Balmain 2041.
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WBA 2009 conference and AGM

See information on page 15.

Politicians from both sides hate whistleblowers

The disclosure that the Labor Party turned away whistleblower Allan Kessing and refused to act on his information about security flaws at Sydney airport is not surprising.

When Kessing provided then opposition MP and now federal Transport Minister Anthony Albanese with access to a secret report, he created some difficulty. To encourage whistleblowers in opposition creates a problem when the transition is made to government. The sad fact is that politicians of all persuasions hate whistleblowers because they all have skeletons in their cupboards. In opposition, they pay lip service to disclosure, but in power they do their best to suppress it. The Kessing case is a classic example.

When Labor was in opposition and the Liberals were copping flak over Sydney airport's customs debacle, Labor politicians displayed some overt sympathy for Kessing's case. However, as we can now see they failed to act even when given the information prior to its public disclosure. Furthermore, they have done absolutely nothing effective in relation to his case since they got into power.

It should be noted that in Kessing's case, the Howard government didn't have the guts to go after the journalist concerned in the disclosure (which led to $200 million of reforms at Sydney airport), but prosecuted Kessing, who was presumably a softer touch. This is straight out of the Mao Zedung management philosophy of "execute one, educate a thousand."

The current whistleblower legislation, state and federal, is ineffective and provides little practical protection to public servants or journalists. A government serious about good governance would facilitate whistleblowing and give some statutory protection to both the whistleblower and the channels through which information is publicised.

However, no such reform is ever likely from a government intent on protecting its own backside from whistleblowers.

• Greg Angelo, letter, *The Australian,* 8 September 2009, p. 13

Whistleblowers Australia membership

Membership of WBA involves an annual fee of $25, payable to Whistleblowers Australia, renewable each June. Membership includes an annual subscription to *The Whistle*, and members receive discounts to seminars, invitations to briefings/ discussion groups, plus input into policy and submissions.

To subscribe to *The Whistle* but not join WBA, the annual subscription fee is $25.

The activities of Whistleblowers Australia depend entirely on voluntary work by members and supporters. We value your ideas, time, expertise and involvement. Whistleblowers Australia is funded almost entirely from membership fees, donations and bequests.

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