Whistleblower Protection and Disclosures to Members of the Queensland Legislative Assembly[*]

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Introduction

Whistleblower disclosures to individual members of the Queensland Parliament did not receive protection under the *Whistleblowers Protection Act (Qld) 1994* until 2007, when on 20 March the *Whistleblowers (Disclosure to Member of Parliament) Amendment Act 2007* was passed. Prior to this a Member of the Queensland Parliament was not an 'authorised entity' to whom a public interest disclosure could be made under the *Whistleblowers Protection Act 1994*.

The Queensland Public Hospitals Commission of Inquiry Report found that the process by which a public officer revealed information about the Queensland health system to a Member of the Queensland Legislative Assembly was not protected by the *Whistleblower Protection Act 1994* and recommended changes to the Act in order to address this perceived 'failure'.

The Inquiry's recommended changes to Queensland's *Whistleblowers Protection Act 1994* were subsequently supported by two Private Member's Bills (one lapsed and one failed) and recommendations of a Parliamentary Crime and Misconduct Committee report before the passing of the government's Whistleblowers (Disclosure to Member of Parliament) Amendment Bill 2006 resolved the issue.

[*] ANZACATT Parliamentary Law, Practice and Procedure 2006. This is an edited version of the full research report. Persons interested in further detail should contact the author directly.

[#] Queensland Parliament.

Australasian Parliamentary Review, Spring 2009, Vol. 24(2), 97–113.

Whistleblowing

The term 'whistleblowing' is thought to originate from the practice of English police blowing a whistle when they observe a crime in action. The application of the term to the reporting of public and private sector misconduct is believed to have only commenced in the 1980s.[1] The research definition of whistleblowing that was developed in the Queensland Whistleblower Study was:

> The whistleblower is a concerned citizen, totally and predominantly motivated by notions of public interest, who initiates of her or his own free will an open disclosure about significant wrongdoing in a particular occupational role to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing, and who suffers accordingly.[2]

The Queensland Ombudsman's Office states that, 'A person who makes a public interest disclosure is called a whistleblower. A public interest disclosure reveals unlawful, negligent or improper conduct affecting the public sector, or danger to public health or the environment.'[3]

The need to afford whistleblowers certain protections was legislated due to the history and likelihood of reprisals being suffered by those who had reported allegations of impropriety. Previously the law in Queensland and elsewhere in Australia made it an offence to disclose official secrets or information acquired by a public servant by virtue of their office.[4]

Queensland was the first Australian jurisdiction to introduce legislation to protect whistleblowers.[5] The *Whistleblower Protection Act (Qld) 1994* sought to balance a number of competing interests in regards to protecting both whistleblowers and those whom such allegations are made against. The Queensland Public Hospitals Commission of Inquiry Report stated that:

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[1] William De Maria, Deadly Disclosures, p. 24

[2] The Queensland Whistleblower Study was undertaken at the University of Queensland between 1993–95 under the direction of William De Maria. It was the first such study in Australia.

[3] Queensland Ombudsman website-http://www.ombudsman.qld.gov.au/cms/index.php?option=com_content&task=view&id=23&Itemid=21

[4] David Solomon, '*Whistleblowers, and governments, need more protection*', Democratic Audit of Australia — February 2006, p.2.

[5] The Queensland Public Hospitals Commission of Inquiry Report on page 467 incorrectly identifies Queensland's *Whistleblower Protection Act 1994* as being, 'the first of its kind in Australia'. Both the *Whistleblowers Protection Act (South Australia) 1993* and the *Protected Disclosures Act (New South Wales) 1994* preceded the *Whistleblower Protection Act (Qld) 1994.* The Inquiry Report may have been referring to Queensland's *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* which was Australia's first 'whistleblower protection Act'. The background of this 'Interim Protection' Act and the process leading to its passing will be outlined further in this paper.

> The *Whistleblowers Protection Act 1994* recognises and attempts to achieve a balance of competing interests such as:
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> > The public interest in the exposure, investigation and correction of illegal, improper or dangerous conduct;
> >
> > The interests of the whistleblower in being protected from retaliation or reprisal and in ensuring that appropriate action is taken regarding the disclosure;
> >
> > The interests of persons against whom false allegations are made, particularly the damage to reputations and the expense and stress of investigations;
> >
> > The interests in the organisation affected by the disclosure in ensuring its operations are not disrupted and also in preventing disruptive behavior in the workplace; and
> >
> > The need to ensure that whistleblower protection has appropriate safeguards to protect against abuse.[6]

Legislating the Protection of Whistleblowers in Queensland

The 1989 *Report of the Commission of Inquiry into the Possible Illegal Activities and Associated Police Misconduct* (Fitzgerald Inquiry Report) stated that there was an urgent need for legislation in Queensland which, 'prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities.'[7] Following these recommendations, Queensland became the first Australian jurisdiction and one of the first common law countries in the world to introduce whistleblower protection legislation, the Whistleblowers (Interim Protection) and Miscellaneous Amendments Bill which was introduced into the Queensland Parliament on 2 October 1990.

It provided protection for persons giving evidence and information to both the Electoral and Administrative Review Committee and the Criminal Justice Committee. While such coverage was not the intention of this 'Interim' Act, it is worth stating that disclosures to Members of the Queensland Parliament were not mentioned or protected by it.

A month after the 'Interim Protection' Act being passed, EARC published an Issues Paper on the 'Protection of Whistleblowers'. A compilation of 'Public Submissions' received by EARC was issued in April 1991 before the tabling of EARC's 'Report on Protection of Whistleblowers' in October 1991. This report recognised that there was a public interest in providing special protection for public officers who expose wrongdoing in the workplace and recommended the enactment of comprehensive whistleblowers protection legislation, a draft Bill for which was appended to the

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[6] Queensland Public Hospitals Commission of Inquiry Report, p.467. The report noted that these points were drawn from the Queensland Ombudsman's submissions to the Inquiry.

[7] Report of the Commission of Inquiry into the Possible Illegal Activities and Associated Police Misconduct, 1989, p. 134.

Report. This draft Bill did not contain any provisions for disclosures being made to Members of Parliament. Further, there was no mention or discussion of this possibility contained in the report.[8]

A review of EARC's Report on Protection of Whistleblowers was published by PCEAR in April 1992. The PCEAR report titled 'Whistleblowers Protection' also contained an appended draft Bill that mirrored EARC's proposal. Neither of these draft Bills included any mention of a Member of the Queensland Parliament being a 'Proper authority' to receive a public interest disclosure. While EARC supported that certain disclosures to the media be protected and PCEAR disagreed with this, it appears that neither group even considered that Members of Parliament could or should constitute a 'Proper authority' for disclosures. Following this 16 month period of whistleblower review and recommendations by EARC and PCEAR, a further two-and-a-half years passed before a more encompassing whistleblower protection Bill was introduced to supersede the 'Interim' Act.

The Whistleblowers Protection Bill 1994 was introduced into the Queensland Parliament by the then Premier, Hon. Wayne Goss on 19 October 1994. As with the draft Bills proposed in 1991 and 1992, the Goss government's 1994 Bill did not include allowances for disclosures to individual Members of Parliament. The Bill did however allow for public interest disclosures to be made to 'a committee of the Legislative Assembly' as Schedule 5 of the Bill defined a committee of the Legislative Assembly as a 'public sector entity' and therefore able to receive disclosures about matters of which they have a power to investigate. This allowance received one passing mention by the Premier in the Bill's second reading debate but the prospect of an extension of protection being granted for any Member of the Parliament to receive disclosures was not mentioned at all.

While the Opposition did support the Whistleblowers Protection Bill, their contributors to the second reading debate identified and highlighted several key criticisms that the Opposition had of it. The main criticism of the Bill raised by Opposition members during the debate centred on its reliance on government departments to properly investigate disclosures received about wrongdoing inside their own agencies. The Opposition argued for the creation of a central independent body to be able to receive such disclosures and monitor the resultant investigations. As well, there was support for whistleblower disclosures made to the media to be protected. Among these criticisms and suggested improvements to the Bill, the Opposition did not make any mention of any possible allowance for Members of Parliament to receive disclosures.

[8] Chapter Six of this EARC report is titled, 'Who Should Have Responsibility for Receiving and Investigating Public Interest Disclosures?' It dedicates analysis and examined public submission statements to this topic but again, there is not one mention of Members of Parliament being potential receivers of public interest disclosures.

The *Whistleblowers Protection Act 1994* was passed on 17 November. From December 1994 to December 2006, 57 amendments were made to the *Whistleblowers Protection Act 1994* by 22 different Acts. None of the 57 amendments in this 12 year period covered disclosures to Members of Parliament and this would not occur until 2007. The precursor to this reform can be traced back to statements made in the Queensland Legislative Assembly on 22 March 2005.

A Matter of Public Interest — Bundaberg Base Hospital

During Question Time on 22 March 2005, the then Opposition Shadow Minister for Health, Stuart Copeland, MP, asked the then Minister for Health, Gordon Nuttall, MP, a question on an internal Queensland Health investigation into allegations against the competence of a surgeon at Bundaberg Base Hospital. Soon after that morning's Question Time, the Member for Burnett, Rob Messenger, MP, made a five minute 'Matters of Public Interest' speech. This speech would alter and influence the course of Queensland politics for the following year.

The speech contained serious allegations against the clinical competence of a Dr Patel, an overseas trained surgeon working at the Bundaberg Base Hospital. It also questioned the integrity of an internal investigation into Dr Patel that had been undertaken by Queensland Health, and alleged that staff believed that they would be victimised if they made complaints about Patel. The Member for Burnett requested that hospital staff who wished to give evidence be afforded whistleblower status and therefore be protected from any vindictive administrative action.[9]

These allegations were investigated by the media and the resultant discoveries about Dr Patel's controversial medical history escalated the issue to encompass questions of the competence of the wider health system in Queensland. Further, the attempts to blow the whistle on Patel by Bundaberg nurse Toni Hoffman in 2004 had not eventuated in any meaningful response from Queensland Health. Instead, Hoffman claimed to have been victimised by her superiors for speaking out. In desperation at this situation, she approached a local Member of Parliament, Rob Messenger, MP and demanded that he address her concerns about Dr Patel and Queensland Health.[10]

Three inquiries into the Queensland health system were initiated in 2005, each of which highlighted shortcomings with Queensland's whistleblower protection regime. The Davies Inquiry in particular noted how the *Whistleblower Protection Act 1994* had not protected or covered Toni Hoffman. The Inquiry Report stated:

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[9] Queensland Legislative Assembly Hansard, 22 March 2005, p. 628

[10] Mr Messenger was not actually Toni Hoffman's local representative. He represented a neighbouring electorate to hers.

> Whether Ms Hoffman realised it or not, her disclosure to Mr Messenger MP was not protected by the Whistleblowers Protection Act 1994. The fact that Ms Hoffman had to reveal her concerns to Mr Messenger MP, to have those concerns dealt with, and that her disclosure was not protected, reveals the failure of the current system of protecting whistleblowers.
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> Under Part 4 Division 2 of the Whistleblowers Protection Act, in order to attract the protections of the Act public interest disclosures must be made to a public sector entity. A public sector entity is defined in Schedule 5, section 2 of the Act. That definition does not include disclosures to a member of the legislative assembly.[11]

The Davies Inquiry Report made a number of recommendations for reform of the *Whistleblowers Protection Act 1994*. Among these were the following that related specifically to the 'Expansion of bodies to whom a complaint may be made':

> I recommend a scale of persons or bodies to whom a complaint may be made. Effectively a whistleblower ought to be able to escalate his or her complaint in the event that there is no satisfactory action taken with respect to it. The scale should be as follows:
>
> (a) A whistleblower should first complain to the relevant department — or public sector entity under Schedule 5 of the Whistleblowers Protection Act — subject to the Ombudsman's monitoring role discussed above.[12] The Whistleblowers Protection Act must also provide strict time limits to investigate and resolve the disclosure. A time of 30 days would be appropriate.
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> (b) If the matter is not then resolved within the time, to the satisfaction of the Ombudsman, the whistleblower ought to be able to make a public interest disclosure to a member of Parliament. (It should not be restricted to a local member of Parliament, but should be any member of Parliament, for example an Opposition spokesperson on the relevant matter.)
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> (c) If disclosure to a member of Parliament does not result in resolution, to the satisfaction of the ombudsman, within a further 30 days, then the whistleblower should be entitled to make a further public interest disclosure to a member of the media.

The Forster Inquiry also recommended that whistleblowers be legally able to make a public interest disclosure to a Member of Parliament, but did not agree with Davies that disclosures to the media should also be protected. The Forster Inquiry stated that, 'During the review of the complaint systems and having regard to

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[11] The Queensland Public Hospitals Commission of Inquiry Report, p. 467.

[12] An earlier proposal for reform under the heading of, 'Central oversight of public interest disclosures', stated, 'Firstly, I recommend that the Queensland Ombudsman be given an oversight role with respect to all public interest disclosures save those involving official misconduct. I recommend a system similar to that involving Official Misconduct where all public interest disclosures must be referred to the Ombudsman who may then either investigate the disclosure itself, or refer it back to the relevant department for investigation, subject to monitoring by the Ombudsman'. (p. 472)

Bundaberg issues generally it is clear that the *Whistleblowers Protection Act 1994* could be enhanced.'[13] These 'enhancements' recommended by Forster were:

> Whistleblowers should be able to lodge Public Interest Disclosures with Members of Parliament and have protection under the Act.
>
> The media should not be approved as one of the bodies to whom Whistleblowers can lodge Public Interest Disclosures and have protection under the Act.
>
> Any person not just a public officer should be afforded protection for disclosing danger to public health and safety.[14]

Amendments to the Whistleblowers Protection Act 1994

The above reforms and 'enhancements' recommended by the Davies and Forster Inquiries were not initially implemented by the government. As a result of this, the then Leader of the Opposition, Lawrence Springborg MP, introduced a private member's Bill into the Queensland Legislative Assembly on 7 June 2006. The *Whistleblowers Protection Amendment Bill 2006* sought to amend the *Whistleblowers Protection Act 1994* to implement the recommendations of the Davies Inquiry.

The *Whistleblowers Protection Amendment Bill 2006* mirrored the recommendations of the Davies Report. In particular, Clause 12 sought to insert Section 26A 'Member of Legislative Assembly or media representative is an appropriate entity in particular circumstances.' The Bill was not debated and lapsed with the dissolution of the Queensland Legislative Assembly on 15 August 2006 following the calling of a state election which was held on 9 September 2006. The Coalition carried the Bill's contents into the election in a policy titled, 'Whistleblower Protection', which stated that, 'In Government, the Coalition will seek (to) reintroduce legislation to protect whistleblowers'.[15]

Following the election and the return of the Beattie government, the issue of reforming the *Whistleblowers Protection Act 1994* continued. Two reports published in October 2006 each recommended reforms similar to those proposed the previous year by the Davies and Forster Inquiry reports. The first of these, the Parliamentary Crime and Misconduct Committee's (PCMC) 'Three Year Review of the Crime and Misconduct Commission', examined the Crime and Misconduct Commission's (CMC) role in respect of whistleblower protection and the adequacy

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[13] Peter Forster, *'Inquiry into the Queensland Health Systems Review – Final Report'*, September 2005, p. 193

[14] Forster, Recommendations 9.21

[15] Queensland Coalition, *'Whistleblower Protection'*, Policy 072 (Queensland election policy 2006).

of the current whistleblower protection scheme in Queensland.[16] Recommendation 24 of this report stated that:

> Whistleblowers should be able to escalate their complaint in the event that there is no satisfactory action taken by the relevant department within 30 days. If the matter is not resolved in that time to the satisfaction of the Ombudsman, the whistleblower should be able to make a public interest disclosure to a Member of Parliament: and
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> If disclosure to a Member of Parliament does not result in resolution, to the satisfaction of the Ombudsman, within a further 30 days, the whistleblower should be entitled to make a further public interest disclosure to the media.

The previous PCMC 'Three Year Review of the Crime and Misconduct Commission' report had also noted perceived limitations of the *Whistleblowers Protection Act 1994*, in particular, its lack of a centralised system for protecting whistleblowers.[17] This 2004 review of the CMC also recommended that the Government give consideration to a full review of the *Whistleblowers Protection Act 1994.* On 10 September 2004, the Government responded that:

> (T)he Government supports a review of the Act. However, the Government is not convinced that a full review of the Act (re-opening the Act's core principles and purpose to public consideration) is required. Instead, the Government will conduct a whole-of-Government review of the experience of public service agencies in relation to the operation of the Act and make any necessary amendments to the Act in light of the review.

This 'Review of the Whistleblowers Protection Act 1994' was undertaken by the Office of Public Service Commissioner (OPSC), an agency of the Department of Premier and Cabinet, which is charged with the administration of the *Whistleblowers Protection Act 1994.* The OPSC review commenced in October 2004 prior to the commencement of the three health inquiries mentioned above, but was then held in abeyance until their completion. This occurred in order for the OPSC review to take into consideration any whistleblower related recommendations of these health inquiries.

The OPSC review's 'Summary of Recommendations' stated, 'The *Whistleblowers Protection Act 1994* should be amended to allow public interest disclosures to be made to Members of Parliament, in line with the provisions outlined at section 5.2.1 of this report.'[18] This section was to become significant in influencing amendments to the *Whistleblowers Protection Act 1994* and is therefore reproduced below.

> 5.2.1 Disclosure to Members of Parliament

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[16] Queensland Parliamentary Crime and Misconduct Committee, Report No 71, '*Three Year Review of the Crime and Misconduct Commission'*, October 2006.

[17] Queensland Parliamentary Crime and Misconduct Committee, Report No 64, '*Three Year Review of the Crime and Misconduct Commission'*, 10 September 2004, p. 96

[18] Office of Public Service Commissioner, 'Review of the Whistleblowers Protection Act 1994', p. iv

> Both the Health Systems Review and the Queensland Public Hospitals Commission of Inquiry recommended that the coverage of the WPA should be extended to allow protected disclosures to be made to Members of Parliament. Currently, New South Wales is the only jurisdiction that provides protection to a disclosure by a public official to a Member of Parliament. The protection is only available if the following conditions have been met:
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> The disclosure must have first been made to a relevant public authority, and
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> the authority has decided not to investigate the matter; or
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> the investigation has not been completed within six months of the original disclosure; or
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> following an investigation there is a recommendation not to take any further action; or
>
> the person making the disclosure has not been informed, within six months of making the disclosure, whether it will be investigated; and
>
> The public official making the disclosure must have reasonable grounds for believing that the matters that are the subject of the disclosure are substantially true; and
>
> The disclosure must be substantially true.
>
> The report of the Health Systems Review did not include any discussion about the circumstances under which a public interest disclosure might be escalated to a Member of Parliament. The recommendations in the report of the Queensland Public Hospitals Commission of Inquiry take a broadly similar line to the NSW legislation. The key issues in both cases are:
>
> a complaint that satisfies the provisions of the WPA for treatment as a public interest disclosure must have been made to an entity described in section 26 of the WPA in the first instance; and
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> the entity responsible for investigation of the disclosure must have:
>
> decided not to investigate the disclosure; or
>
> having completed an investigation, must have determined that no further action was required; or
>
> failed to complete an investigation to a reasonable standard or within a reasonable period of time.

Under both the New South Wales legislation and the Commission of Inquiry recommendation, a protected disclosure can only be made to a Member of Parliament if it has been first referred to an appropriate entity for investigation. As a result, escalation of a disclosure to a Member of Parliament is only possible where the information provided by the discloser is, at least prima facie, more compelling than that provided by the investigating agency. A disclosure to a Member of Parliament is only protected if it is found to be substantially true.

The Commission of Inquiry also recommended that a strict time limit of 30 days should apply to the investigation and resolution of disclosures under the WPA and that escalation of the matter could take place once that deadline had passed.

The investigation of PIDs is a sensitive and often complex undertaking. The experience of agencies indicates that a time limit of 30 days to resolve a matter of this type is unrealistic. By way of example, a recent investigation by a retired judge of a whistleblower disclosure, where all the relevant witnesses and information were readily accessible, took almost six months to complete.

The New South Wales legislation sets six months as the time limit after which a disclosure can be escalated to a Member of Parliament. The recently enacted Health Quality and Complaints Commission Act 2006 sets a time frame of 60 days with the possibility of a further extension of 30 days for the resolution of complaints. The Ombudsman has adopted a benchmark of three months for the resolution of complaints.

As the Bundaberg Hospital experience shows, however, it would sometimes be unacceptable to allow months to pass before a matter could be raised with a Member of Parliament and receive protection under the Act. The critical factors in determining how quickly matters should be escalated are the gravity of the matters at issue and the nature of the action taken by the entity to which the disclosure was initially made.

The Commission of Inquiry also recommended that the Ombudsman should be required to form the view that the investigation of a PID had been unsatisfactory before it could be referred, under the protection of the WPA, to a Member of Parliament.

Rather than set rigid, and potentially inappropriate, time frames after which a disclosure to a Member of Parliament may be permitted, a more effective and responsive approach, would be to amend the WPA to include Members of Parliament as an appropriate entity to receive a PID at any time; and to amend the WPA to include that where the matter has not been the subject of a previous disclosure, the Member of Parliament may refer the matter to an appropriate investigatory body.[19]

On the same date that the above OPSC review was tabled both the Government and the Opposition each presented separate Bills to the House seeking to reform the Whistleblower's Protection Act 1994. While the Government Bill adopted the recommendations of the OPSC review, the Opposition Bill adopted the recommendations of both the Davies Inquiry and the PCMC's 2006 review of the CMC. Each of these Bills are discussed below.

On 31 October 2006 the Leader of the Opposition introduced the *Whistleblowers Protection Amendment Bill 2006* which sought to allow, under certain circumstances, persons to make a public interest disclosure to a Member of the

[19] Office of Public Service Commissioner, 'Review of the Whistleblowers Protection Act 1994', pp. 14–16

Legislative Assembly, or a member of the media. The Bill required that the person first make the disclosure to a public sector entity or to the Ombudsman. If the Ombudsman has not advised the person within 30 days that the subject matter of the disclosure has been resolved satisfactorily, then the person may make the disclosure to a Member of the Legislative Assembly. If, after a further period of 30 days, the Ombudsman has not advised of a satisfactory resolution, the person may make the disclosure to the media. The relevant clause is reproduced below:

Also on 31 October 2006, the Premier introduced the government's Bill in response: *Whistleblowers (Disclosure to Member of Parliament) Amendment Bill 2006*. The Bill also sought to ensure that a Member of the Legislative Assembly could be an entity to which a public interest disclosure could be made. The Member could then refer that disclosure to another appropriate entity. The Bill did not allow for representatives of the media to be classed as an appropriate entity for which disclosures would be protected. The Bill contained less restriction than the Opposition's in so far as a disclosure to a member is concerned.

The Premier stated in his speech:

> The bill … places no restrictions on when a public interest disclosure can be made to a member of the Legislative Assembly. … One of the overriding principles of the act is to ensure that the confidentiality of the person making the disclosure is preserved. This assists in creating an environment where whistleblowers will come forward and they will be protected from reprisals.
>
> Equally importantly, people against whom allegations are made must not have their reputations unjustly harmed by the airing of unsubstantiated claims. …
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> To ensure that balance is maintained, I propose that standing orders be established to guide members in how to deal with public interest disclosures. To assist members in ascertaining whether a matter is a public interest disclosure, they will have access to specialist advice from the Crime and Misconduct Commission, the Ombudsman or the Office of the Public Service Commissioner.
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> … the bill gives members the discretion to consider complaints, including those purported to be public interest disclosures, and determine a reasonable course of action.
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> When a complaint is received that a member believes to fall within the scope of the act, the member may refer the matter to an appropriate entity to have the matter investigated. Members of parliament are not to have any authority to investigate the matter.
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> This is to ensure that a proper investigation is carried out by the relevant authority. …

The important provisions of the Bill are reproduced as follows:

> 26 When public sector entity or member of Legislative Assembly is an appropriate entity
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> (1A) A member of the Legislative Assembly is an appropriate entity to receive any public interest disclosure.

(2) However, subsection (1)c) or (1A) does not permit a public sector entity or member of the Legislative Assembly to receive a public interest disclosure if, apart from this section, the public sector entity or member would not be able to receive the disclosure because of division 4, 5 or 6.

28A Disclosure received by member of Legislative Assembly may be referred

(1) If a member of the Legislative Assembly receives a disclosure, the member may refer the disclosure to another appropriate entity that is a public sector entity which the member considers has power to investigate or remedy the conduct the subject of the disclosure.

(2) For the purposes of this Act, the member has no role in investigating the disclosure.

(3) In this section—

disclosure means a public interest disclosure or purported public interest disclosure.

28B Legislative Assembly may still deal with disclosure

(1) This Act does not limit the powers, rights and immunities of the Legislative Assembly and its members and committees in relation to a disclosure received by a member.

(2) In this section—

committee means a committee of the Legislative Assembly, whether or not a statutory committee.

disclosure means a public interest disclosure or purported public interest disclosure.

member means a member of the Legislative Assembly.

rights includes privileges.

While the Opposition Bill failed at the second reading on 7 February 2007, the Government Bill was passed by the House on 8 March 2007. Following this, the Leader of the House moved on 14 March 2007 that complementary amendments to the Legislative Assembly of Queensland's, *'Standing Rules and Orders of the Legislative Assembly'* be adopted.[20] This new Standing Order and Schedule are below:

233A – Protection of whistleblowers

(1) Members should exercise care to avoid saying anything inside the House about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures ('whistleblowers'), which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.

[20] The amendments to Standing Orders commenced on proclamation of the Act, which occurred on 1 May 2007.

(2) Schedule 5 contains guidelines for members about when and how public interest disclosures should be revealed in a parliamentary proceeding.

SCHEDULE 5 – GUIDELINES FOR THE PROTECTION OF WHISTLEBLOWERS

(1) These guidelines apply when there is a public interest disclosure to a member pursuant to the Whistleblower Protection Act 1994.

(2) These guidelines seek to provide guidance to a member who receives and acts upon a public interest disclosure about whether a member should or should not reveal the disclosure in a parliamentary proceeding.

(3) Compliance with these guidelines is not mandatory, and a breach of these guidelines is not a breach of privilege or a contempt, but members are called upon to adhere to these guidelines so as to ensure public interest disclosures are properly investigated, that those making disclosures are protected and that no person's reputation is unnecessarily damaged before the investigation of the allegations has been finalised.

(4) In general, members should exercise care to avoid saying anything inside the House about a public interest disclosure to a member which:

(a) could lead to the unnecessary identification of persons who have made public interest disclosures (unless such persons have consented to the disclosure of their identity);

(b) could cause unnecessary damage to any person's reputation before allegations have been appropriately investigated; and

(c) may jeopardise the investigation of a public interest disclosure by the appropriate entities.

(5) If a public interest disclosure is received by any member of the Legislative Assembly and the member refers that disclosure to an appropriate entity to investigate the disclosure in accordance with s.28A of the Whistleblower Protection Act 1994, members should avoid disclosing the substance of the disclosure or the referral in any public parliamentary proceedings, unless:

(d) after inquiry with an appropriate entity in accordance with s.32 of the Whistleblower Protection Act 1994, a member is not satisfied that the matter is being investigated or otherwise resolved; or

(e) the disclosure has referred to an appropriate entity, but a member has a reasonable belief that further disclosure in a parliamentary proceeding is justified to prevent harm to any person; or

(f) the disclosure has been referred to an appropriate entity, but a member decides to also bring the disclosure to the attention of a committee of the House that has responsibility for the area about which the matter relates.

(6) In these guidelines 'appropriate entity' and 'public interest disclosure' have the same meaning as in the Whistleblower Protection Act 1994.

The Motion to adopt the above amendments to Standing Orders was opposed by the Opposition but passed on Division by 52 votes to 29. In opposing the Motion, the Opposition spokesperson, Mark McArdle, MP stated:

> The opposition will be opposing this motion for the very simple reason that this is clearly an attempt to gag debate in this parliament and gag members of parliament who have an obligation and a right to bring to this chamber issues that affect Queenslanders and the good governance of this state. It is nothing more than that.[21]

An hour after the above Motion regarding Standing Orders was passed, the then Premier, Hon Peter Beattie, MP made the following Ministerial Statement to the House:

> I am concerned about the comments made by those opposite today about the regulations in relation to whistleblowers. The guidelines. … The bill contained several key reforms — and it has been through the House so it has been debated — and one of those reforms was to amend the Whistleblowers Protection Act 1994 to ensure that a member of the Legislative Assembly can be an entity to which a public interest disclosure can be made. … We are empowering members of parliament. The guidelines circulated on this amendment to standing orders similarly seek to provide guidance to a member who receives and acts upon a public interest disclosure about whether a member should or should not reveal a disclosure in a parliamentary procedure.
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> This morning, the opposition members clearly did not understand what the case was. Members of this House have a lot of scope to raise issues of public importance and nothing in the guidelines circulated would now prevent it. Nothing changes that position. However, at the end of the day, that power comes with responsibility. Opposition members are now worried about whistleblowers and, frankly, they should be concerned about how this process will go. We are too, which is why we are protecting them. It makes sense that if a disclosure has been referred to an appropriate authority a member should refrain from commenting about the issue until the authority has determined whether an investigation is warranted. Otherwise any unsubstantiated claim could be made and the reputation of individuals unfairly or unnecessarily tarnished. I remind members of this House of what happened in Western Australia when Penny Easton was named by a Labor member of parliament and, because they were unfounded allegations, subsequently committed suicide.
>
> That was my side of politics. This is about being responsible about how these things are done. It is not about trashing people's reputations. Opposition members should look at what the guidelines say. Paragraph (2) says, 'These guidelines seek to provide guidance'. Paragraph (3) says, 'Compliance with these guidelines is not mandatory'. … What we are trying to do is to set up some processes where these matters are properly and fully investigated by bodies like the CMC or other organisations. This does not take away any power that currently exists for any member. What we are trying to do is actually give some guidance to people about appropriate behaviour, to get the balance. …

Can I finalise my points on this by referring members to paragraph (5), which basically says that a member can raise things here if they are not satisfied. It says —

[21] Queensland Legislative Assembly Hansard, 14 March 2007, p. 979

> Members should avoid disclosing the substance of the disclosure or the referral in any public parliamentary proceedings, unless —
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> After inquiry with an appropriate entity in accordance with s.32 ... a member is not satisfied that the matter is being investigated or otherwise resolved ...

In other words, they recommend members send it to the CMC and if they are not happy — that is a pretty broad one — then it can be raised. The guidelines continue —

> ... the disclosure has referred to an appropriate entity, but a member has a reasonable belief that further disclosure in a parliamentary proceeding is justified to prevent harm to any person.

These are very broad guidelines. Point F talks about the same sort of opportunity to raise things. … These guidelines are just that; they are guidelines. They are designed to protect people's private reputations while there is an appropriate full investigation. But they do not take away the rights of any member to raise any matter in this House if they believe it is in the public interest.[22]

The Motion attracted a number of critical media reports which claimed that its purpose was actually to prevent members revealing whistleblower disclosures to the parliament.[23] In response to this and the above concerns of the Opposition, the Speaker of the Legislative Assembly made the following statement to the House on 17 April 2007.

> Standing Order 233A
>
> … Freedom of speech and debate in the Legislative Assembly and its committees and the privilege, including the right of members to raise and air matters in the House, remain absolutely unaffected by the Whistleblowers (Disclosure to Member of Parliament) Bill by standing order 233A, schedule 5 or the guidelines contained in the schedule. The guidelines have been passed by the House only to provide guidance to members as to the circumstances in which a matter should be raised in the House. The standing order is, however, cautionary only and neither the standing order nor guidelines in schedule 5 provide any mandatory prohibition and do not provide a basis for me as Speaker to prevent a matter from being raised or debated. The guidelines themselves state that they are not mandatory. I or one of my deputy speakers may take it upon themselves to remind members of the guidelines to ensure that the member has considered the guidelines, but there is no ability — and I repeat no ability — to use the guidelines to prevent the member from continuing in their disclosures. Of course, the new standing order and guidelines do not affect other pre-existing rules.

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[22] Queensland Legislative Assembly Hansard, 14 March 2007, pp. 991–2

[23] See the following: Sue Lappeman, *'Dictator' Pete gags the house*, Gold Coast Bulletin, 15 March 2007, p. 1; *'MPs blow the whistle on disclosure'*, The Courier-Mail, 20 March 2007, p. 4; *Editorial: Another nail in the name of secrecy'*, The Courier-Mail, 29 March 2007, p. 32; and Mike O'Connor, *'No tell tales allowed'*, The Courier-Mail, 2 April 2007, p. 19

Since the proclamation of the Whistleblowers (Disclosure to Member of Parliament) Amendment Bill 2006 and the adoption of the complementary amendments to Standing Orders on 1 May 2007, there has only been one instance where the new provisions of Section 26 (1A) and 28A have been utilised. In a 'Matters of Public Interest' statement to the House on 16 October 2007, Mr Messenger, MP stated that he had received a whistleblower disclosure regarding allegations about the establishment of a new police computer system. Mr Messenger stated that he had referred the matter, including an alleged reprisal against the whistleblower, to the CMC.[24] In response to a government point of order during Mr Messenger's statement, the Deputy Speaker, stated, 'we are making inquiries in relation to standing orders and issues to do with whistleblowers which the member may have breached. I will allow the member to continue at the moment while we make further inquiries.'[25] Mr Messenger was allowed to conclude his statement and there was no subsequent statement by the Deputy Speaker regarding his 'inquiries'. Standing Order 233A and its Schedule 5 therefore remain to be invoked in the Queensland Parliament.

Conclusion

In 1990 Queensland became the first Australian jurisdiction to enact whistleblower protection legislation. This 'Interim' legislation was replaced by a more encompassing model in 1994. In 2007, following highlighted deficiencies in Queensland's *Whistleblower Protection Act 1994*, amendments were passed to allow whistleblowers to make protected disclosures to a greater scope of persons. In doing so, Queensland became the second state, after New South Wales, to afford protection to whistleblower disclosures made to Members of Parliament. However, the requirements under the New South Wales Act are more onerous and restrictive than those prescribed under Queensland's *Whistleblower Protection Act 1994* and its complementary Standing Order guidelines. As of 1 May 2007, 'A member of the Legislative Assembly is an appropriate entity to receive any public interest disclosure'.[26] This provision is unique among Australian jurisdictions. With only one known example of such a disclosure being made since this became legal, it remains too early to assess the workability of the new regime. ▲

[24] Queensland Legislative Assembly Hansard, 16 October 2007, p. 3545

[25] ibid

[26] Section 26 (1A) *Whistleblower Protection Act 1994*

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