

WATCHING BRIEF 18-6: PROTECTING WHISTLEBLOWERS

As Quakers we seek a world without war. We seek a sustainable and just community. We have a vision of an Australia that upholds human rights and builds peace internationally, with particular focus on our region. In our approach to government we will promote the importance of dialogue, of listening and of seeking that of God in every person. We aim to work for justice and to take away the occasion for war.

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The perils facing those who reveal information, on the basis that the public has the right to know, are highlighted by recent raids on journalists and prosecution of whistleblowers. This Brief gives the background, outlines the legal situation, and offers ideas on possible action.

What is a Whistleblower?

According to *Wikipedia*, it is “a person who exposes any kind of information or activity that is deemed illegal, unethical or not correct within an organization that is either private or public”.

Recent Cases in Australia

- Richard Boyle, who exposed abuse of power inside the Australian Tax Office, was charged with 66 offences, and faces a prison sentence of 161 years. He made allegations to the ATO in 2017 about instructions to staff to use aggressive debt collection methods. Following an investigation by ATO he was offered a payout on the basis of a gag order, but he declined. The charges include disclosure of confidential taxpayer information, and the use of listening devices.
- Paul Stevenson, a psychologist and trauma specialist, in 2016 revealed the extreme conditions facing detainees on Manus and Nauru, including self-harm, sexual and physical assaults, depression and violence. As result he was removed from his contract for working with detainees.
- David McBride – a former Defence Force lawyer – used internal processes to alert the Department of Defence to allegations of misconduct by Australian Special Forces in Afghanistan, but did not get a satisfactory response. He then gave the details to the ABC which used them in a documentary TV program. The ABC offices were raided by the

Federal Police (June 2019), and this provoked a strong reaction from media organisations around the world.

- Bernard Collaery – a Canberra lawyer - and a former ASIS officer known as Witness K have been charged for disclosing intelligence secrets. *The Guardian* reported on 28 June 2018 that the witness complained to the inspector general of security about the bugging of the Timor-Leste offices during oil and gas negotiations with Australia, and received approval to disclose this. The case is being held behind closed doors.
- Annika Smethurst – a reporter for *News Corp* – was subjected to a police raid at her Canberra home after reporting (June 2019) that a top secret memo showed the government was planning to empower the Australian Signals Directorate (ASD) to monitor Australian citizens for the first time.
- Ben Fordham (Radio 2GB) revealed that he had been notified by the Department of Home Affairs that he was subject to a similar investigation to identify the source of classified information he had reported.

Analysis and Comment

An article by Denis Muller (Melbourne University, in *The Conversation* 19 June 2019) identified four laws that need reforming:

- Part 5.6 of the Criminal Code that defines two categories of information that are secret – inherently harmful information, and information likely to harm Australia's interests. This covers public servants and journalists, and leaves it open to the government to define these terms.
- The 75 national security laws contain oppressive provisions and need to be reviewed, in particular to ensure they have a minimum standard of 'intention to harm national security'.
- Metadata laws require that internet service providers retain everyone's metadata for two years.
- Whistleblower laws (notably the Public Interest Disclosure Act 2013) do not adequately protect them.

Brian Martin (Vice-President of Whistleblowers Australia) wrote in *The Australian* on 15 July 2019 that:

- Whistleblowers are found in every occupation, and experience ostracism, petty harassment, damaging rumours, denunciations, bullying, referral to psychiatrists, punitive transfers, dismissal and black-listing.
- Current impediments to effective protection of whistleblowers include – defamation laws, secrecy and confidentiality provisions, national security and data retention laws.
- Whistleblowers need to talk with each other, collect information carefully, and use secure phones or face-to-face meetings when contacting journalists.

Rebecca Ananlan-Welsh (University of Queensland School of Law) wrote in *The Conversation* on 5 June 2018 that:

- The raids by police on the ABC and News Corp journalists showed the demise of source confidentiality and had a chilling effect on public journalism.
- The government created a 'journalist information warrant' to limit access to metadata of journalists; but this was to some extent counterbalanced by the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018. This expanded access and network warrants, and co-opted telecommunications agencies to assist in tracking information.
- Public interest journalism relies on secret material from government sources, and current laws penalize any current or former Commonwealth officer who leaks such information. In addition, communicating classified information can carry a possibility of criminal prosecution for a journalist.
- In the absence of a Bill or Charter of Rights in Australia, journalists are in a precarious position. The Alliance for Journalists is calling for a Media Freedom Act.

Christopher Knaus (*The Guardian*, 21 June 2019) reported that Attorney-General Christian Porter has announced his intention to strengthen whistleblower protection and overhaul public service culture to facilitate disclosures. The Executive Director of Transparency International, Serene Lillywhite, welcomed this move, saying "The court cases before us demonstrate that the protections we assume are in place, both for whistleblowers and journalists, are not strong enough in practice". She called for reform that would be along the lines of recent changes made for corporations" (see below).

New Rules for Corporates

The Corporations Act has been amended recently, and the following changes took effect on 1 July 2019:

- A broader range of misconduct can be reported than simply contravening the corporations law.
- A disclosure of a work-related grievance will only be protected if it relates to systemic issues, or involves detrimental conduct to the whistleblower.
- Reports can be made to senior officers of the organisation, the Australian Securities and Investment Commission (ASIC), or the Australian Prudential Regulation Authority (APRA).
- Public interest disclosures can be made to members of Parliament and journalists if the whistleblower has made a disclosure, believes no action has been taken within 90 days, and notifies the organisation of the intention to make a public disclosure.
- There are penalties for revealing the identity of the whistleblower.
- Compensation may be payable to the whistleblower.

Changes to the Taxation Administration Act (taking effect also on 1 July) enable disclosures to be made for misconduct regarding tax affairs.

Action

QPLC will monitor the Government's moves to enhance protection for whistleblowers and journalists. Other action that might be taken:

1. Let MPs and Senators in your State/Territory know of your concern to strengthen the protection of freedom of speech for whistleblowers and those who publish their concerns.
2. Join with other concerned citizens to support specific whistleblowers who are facing prosecution (e.g. by having a presence outside courts where cases are being held; letters to press; public statements).
3. Arrange public events to inform others about the threats to whistleblowers and journalists.

Canberra, July 2019