Would We Need Whistleblowing, if we had Open Government?

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Would we need whistleblowers if we had open government? The short answer is YES. The long answer is yes, but not as much.

There are a number of reasons why the role of whistleblowers has become the focus of public debate in recent years. They include:

- The increasing concern about the diminishing openness of Government
- Government reluctance to comply with the spirit of Freedom of information legislation
- Its aversion to any form of independent scrutiny of its activities

It is not possible to consider the role of whistleblowers in isolation from these matters. They are not, and should not be seen to be, the normal process of informing the public. In many ways they should be the last resort.

Let me state my basic principle. Open Government depends on access to information. It is worth recalling why this is so. Let me read from material produced by TI in its Global Corruption Reports.

I am sure you all know that Australia is regarded by Transparency International (TI) as one of the least corrupt countries in the world. That is pleasing but we should not become complacent. Our lack of corruption is very dependant on the strength of our institutions and principles. Let me list some of them:

- Parliamentary democracy
- Separation of Powers
- Strong and independent judiciary
- Strong and independent Public Service
- Independent Auditor-General
- Independent DPP
- Police Force free of corruption
- Free Press

To the extent that any of these is weakened, to that extent are our protections weakened. It is perhaps unnecessary to remind this audience of the findings of the Fitzgerald Royal Commission in Queensland, the Wood Royal Commission in NSW and the WA Inc Royal Commission in Perth. They each show that we need to be ever vigilant.

I propose in this short presentation to cover two areas of concern. The first deals with what I call the freedom of information (FOI) problem. The second looks at Government aversion to independent scrutiny.

Freedom of Information

As a barrister I used to do a reasonable number of FOI cases. When first passed, FOI was thought to be the way of the future, the means by which Governments could be held accountable. Oppositions seized on it. Strangely, when they won an election and came into power their enthusiasm waned rapidly. A number of recent examples show how difficult has been the campaign to free up information and make it available to the public.

Just last month (June 30 2005) a former senior public servant, Andrew Podger, was farewelled from the service. He had previously been Secretary to the Department of Health and other Departments and was the Australian Public Service Commissioner for almost 3 years. His speech was reported in the Canberra Times and picked up by Michelle Grattan at least in the Age.

PS Hides Behind 'Secrecy' - Ex-Chief Lashes Out at Farewell

By Gia Metherell
Saturday, 2 July 2005

One of the nation's former top mandarins has accused some senior public servants of placing the Government's interests ahead of the public's and encouraging a culture of secrecy.

Former department secretary and public service commissioner Andrew Podger, who has been critical of the so-called "children overboard affair", also questioned the role of ministerial advisers.

He says some senior public servants are "too concerned to please" and serve "partisan" government interests by failing to keep proper notes, destroying diaries, and ratcheting-up security classifications of documents.

"There is widespread concern in government and the senior echelons of the [Public] Service that [Freedom of Information] has so widened access to information that counter-measures are needed," he said.

Mr Podger, who retired from the Australian Public Service last week, said the consequences were "fewer file notes, diaries destroyed regularly, documents given security classifications at higher levels than are strictly required and handled to minimise the chances of FOI access".

"Given concerns expressed by the auditor-general and others about record- keeping, most senior public servants recognise that these counter-measures must not hide the decision-making trail, but the trail that is left is often now just a skeleton without any sign of the flesh and blood of the real process, and even the skeleton is only visible to those with a need to know."

In a forthright - by public service standards - address at a farewell function on Thursday, he said there must be a "strong suspicion that partisan interests are often the main consideration, and public servants ... give more weight to the concerns of ministers than to the public interest ...

"The FOI Act explicitly requires that it be interpreted to further the object of extending, as far as possible, the right of the Australian community to access information held by the Government ... Is that really our approach?"

A former secretary of health, Mr Podger served as Australian Public Service commissioner from January 2002 to November 2004, before being replaced by Lynelle Briggs. He was then appointed to head the Prime Minister's health task force but was not appointed to another position after recently completing his report.

Mr Podger's farewell, at which a warm message from Prime Minister John Howard, was read, was attended by senior serving and former public servants, and by former cabinet minister Dame Margaret Guilfoyle.

The Secretary of the Department of the Prime Minister and Cabinet, Dr Peter Shergold, was unable to attend but was present at a farewell dinner of department heads for Mr Podger on Monday night. Jane Halton, who replaced Mr Podger as Health Secretary, was also unable to attend.

Mr Podger said it was a "perennial challenge" for public servants to balance being responsive to the government with being "apolitical, impartial and professional".

"I doubt there are many today, however, who would argue that the Public Service needs to shift the balance further towards responsiveness.

This concern is not limited to Canberra. On 21 June 2005 it was reported in the Age that the Victorian government had introduced regulations which prevented public servants from raising allegations to private investigation agencies which used to act as independent third parties. It was said in the article:

- Public servants wanting to expose alleged corruption in their departments have been shackled by changes to Victoria's whistleblower rules.
- Government regulations ban private companies from receiving such complaints.
- The change means public servants have fewer options to raise allegations outside the bureaucracy.
- While they can make complaints to the Ombudsman, or to their own employers, they are prevented from turning to private investigation firms, which used to act as independent third parties.
- Critics fear the change will deter people from exposing misconduct in department ranks.

> *"Forcing people to go to their own departments with information on corruption or misconduct really does make it difficult to be a whistleblower in this state," said the Opposition's scrutiny of government spokesman, Richard Dalla-Riva. "Why would the Bracks Labor Government want to control what is being said about its departments - what has it to hide?"*

The regulations were introduced by Attorney-General Rob Hulls in 2002, but came to light this year when Glenn Birrell, a former Victorian detective-sergeant who now runs a private firm specialising in whistleblower services, complained to the Government after finding that his business, Your-Call Pty Ltd, specialist in disclosure management services, could no longer receive complaints from public servants under state laws.

Mr Birrell said the move undermined the Ombudsman's own guidelines, and ought to be re-examined.

> *"If people genuinely want to raise concerns or blow the whistle in relation to corruption, they're more likely to do it outside of the organisation,"* he said.
>
> *"What concerns us is if the whistleblower now wants to come forward with a complaint, this regulation will void them of their opportunity to make a protected disclosure."*

But Mr Hulls said whistleblowers working in Government departments were covered by "robust legislation" and were encouraged to speak out.

> *"This legislation was never about lining the pockets of the private investigator industry . . . it is about assisting the public sector to own and address serious wrongdoing within its ranks," Mr Hulls said.*
>
> *"The whistleblower legislation is all about making public bodies accountable and transparent in their handling of serious misconduct or maladministration in the public sector."*

Under the state's whistleblower laws, private companies can still be contracted by the public sector to investigate whistleblower complaints - despite being banned from receiving them. The Ombudsman also has the power to oversee complaints, or take over an investigation from a public body if he is dissatisfied with its progress.

A spokesman for Ombudsman George Brouwer said a review of the Whistleblowers' Protection Act was under way, and concerns about the Government's regulations could be examined as part of that review.

Again the Productivity Commission in its recent Report, issued 7 July, is reported in the Financial Review as issuing a stern warning to politicians to be transparent about whether government-owned business's activities were commercially or politically driven.

Finally, no discussion of this topic can avoid reference to the highly significant decision of the Federal Court (Finn J) in Bennett v Human Rights and Equal Opportunity Commission (2003) 34 FCR 334. The judgment traces the history from colonial days of legislative attempts to shackle public servants' use of information.

Bennett was both a public servant employed by Australian Customs Service and the Federal President of the Customs Officers Association (COA). He made various media statements relating to the operation of Customs. The CEO of Customs directed him in either of his capacities not to make statements which involved disclosure of information about public business or of anything about which he had official knowledge. Bennett did not comply with the direction and was disciplined. He complained to the Human Rights Commission that the CEO had (i) infringed his right to freedom of expression under the International Covenant on Civil and Political rights (ICCPR) and (ii) discriminated against him on the basis of trade union activity and political opinion. The Human Rights Commission declined to deal with his complaint. Mr. Bennett sought review of this decision in the Federal Court.

This is a long and detailed judgment of some 35 pages concerned with the interpretation of Regulation 17(3) of the Public Service Regulations. The Regulation reads:

> *"17(3) An APS employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge."*

Justice Finn noted in his judgment that:

> *"Before considering the scope of Reg 7(13) it should be said that the coercive character of the public service secrecy regimes that were instituted in this country was exaggerated in most jurisdictions by the enactment of general criminal offences governing the disclosure of information which an official was obliged to keep secret.*

Section 70(1) of the *Crimes Act 1914* (Cth) remains emblematic of such offences. It provides:

> *"Disclosure of information by Commonwealth officers (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom is he authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of being a Commonwealth officer, and **which it is his duty not to disclose**, shall be guilty of an offence."*

Justice Finn held that the Regulation was invalid because it infringed the implied constitutional freedom of political communication and could not be read down to avoid that consequence. I refer to pages 355 and 366 of the judgment where he cites statements of Chief Justice Mason and Justice McHugh of the High Court:.

82. The regulation is a relic of an era of government in which the practice of politics and of public administration differed markedly from our own. Its ancestors in their historical setting could probably be characterised reasonably as "command and control" mechanisms considered appropriate to the circumstances prevailing in the infant colonies of this country: see eg *Civil Service Royal Commission Report*, paras 4 and 31, VPP (1858-59), vol 3 no 19. Circumstances have changed: see *Lange* at 565. Whatever may have been regarded as acceptable a century and a half ago, the vices of excessive secrecy in the conduct of government, its effect on the quality of public debate and, ultimately, on the practice of democracy itself, have more recently been both

exposed and addressed in this country and on some number of fronts. These concerns, as I will indicate below, are by no means uniquely Australian.

83. The *Report of the Royal Commission on Australian Government Administration* (1976) (The Coombs Report) in discussing public access to information in the hands of government agencies acknowledged (at para 10.7.20):

> *"While there is no simple solution to the problems of determining what can properly be withheld, the general sentiment and expectations of the community have been changing consistently in the direction of requiring more openness and access to information gathered and held in its administration."*

84. The progressive advent of Freedom of Information legislation has provided the principal governmental accommodation of the `changing community sentiment' discerned in the Coombs Report. That sentiment is equally reflected in judicial responses to claims made to protect "government secrets" from disclosure in legal proceedings: see eg *Sankey v Whitlam* (1978) 142 CLR 1; in arbitrations: see eg *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 31-32; or to the media: *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

85. In the *John Fairfax* case Sir Anthony Mason observed of the equitable jurisdiction to protect information in the hands of government from public disclosure in the media (at 52):

> *"It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.* (Mason J.)
>
> *Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."*

86. The public interest in open government in this country (which the Coombs Report heralded) has been a central refrain in a number of prominent official reports resulting from inquiries into official misconduct particularly at State level: see eg *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, para 3.5.7ff, p 358 (1989) (The Fitzgerald Report); *Report of the Royal Commission into the Commercial Activities of Government and Other Matters*, Ch 2 (1992) (The WA Inc Report). As the latter report makes plain, open government is not synonymous with the enactment of Freedom of Information legislation: ibid, para 2.3.1ff.

87. The same theme of informing the public has been reiterated in other contexts. In *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, for example, McHugh J in commenting upon the defence of qualified privilege in defamation proceedings observed (at 264-265):

> *"In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community? Information concerning the exercise of those functions and powers is of vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that the general public has a legitimate interest in*

receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally. If this legitimate interest of the public is to be properly served, it must also follow that on occasions persons with special knowledge concerning the exercise of public functions or powers or the performance by public representatives or officials of their duties will have a corresponding duty or interest to communicate information concerning such functions, powers and performances to members of the general public." (McHugh J.)

88. Distinctly, and partly as a result of the inquiries into official misconduct referred to above, criticism has been levelled at some of this country's more extravagant official secrecy regimes. The 1992 *Report of the Royal Commission into the Commercial Activities of Government and Other Matters*, for example, characterised the secrecy obligations imposed on public officials in Western Australia as encouraging "the practice of information paternalism. They are quite opposed to any reasonable concept of open government": para 2.3.2. That Report illustrated its objection by reference to the obligations imposed on that State's public servants which (public comment apart) were similar to that of Reg 7(13).

89. Again the Review of Commonwealth Criminal Law in its *Final Report*, when recommending a significant liberalisation of the *Crimes Act* 1*914* (Cth) offences dealing with official secrecy accepted the principle that::

"in a modern 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 that Government."

By way of postscript the government introduced a new regulation designed to overcome the flaws in Reg 7(13) identified by the Federal Court. On 16 June 2005 the new regulation was disallowed by the Senate. This seemed to be a desperate attempt to pretend openness without any real change.

Aversion to Independent scrutiny

Coupled with the reluctance to provide information about its activities Governments of all political colour are immensely reluctant to allow any independent scrutiny of their activities. No wonder the rise of the whistleblower has seemed to accelerate in recent times. Quite frequently, and not surprisingly, events occur which attract public attention and in respect of which there is a genuine public interest to know what has happened and what is to be done about it. Let me give a few examples:

- Immigration Department
- Children Overboard
- Woodside and Lightfoot
- Victorian Police Integrity Commission

In relation to the first three there was a determination not to allow any independent public scrutiny vested with appropriate powers to discover the truth. In relation to the fourth there has been a stubborn refusal by the Victorian Government to set up an independent Police Integrity Commission.

It is not surprising that leaks occur in these circumstances. Typical Government response is to ask the AFP to investigate, not the matters the subject of the leaks, but the leaks themselves. In Hansard of 16 June 2005 at page 28 it is noted that close to 120 separate references to the Federal Police have been made on what it calls unauthorized disclosures.

To sum up, the words of Justice McHugh and former Chief Justice Mason should be listened to with great care. The public can trust Governments only if they are worthy of trust. They are not so worthy if they refuse to take their electors into their confidence and if they refuse to accept and apply the principles of open Government. Until that happens we will continue to need whistleblowers. I would like to think that the need will reduce as more information is made available.