WHISTLEBLOWING, TRANSPARENCY AND PRIVACY:

Aspects of the relationship between Victoria's Whistleblowers Protection Act and Information Privacy Act

an address by

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Let's assume the whistleblower feels unable to complain to the hierarchy of the organisation that employs him or her, and makes the disclosure to the Ombudsman, as may be done under the Whistleblowers Protection Act.

Is an organisation liable under the Information Privacy Act for an act of an employee who blows the whistle in a way that discloses personal information in breach of the Information Privacy Principles?

Probably not. In this special context of whistleblowing, the individual does not act for the organisation. Rather, the individual acts, in one sense, *against* the organisation, and in another sense, acts *despite* the organisation.

The Information Privacy Act is predicated on the assumption that employees ordinarily act on behalf of the organisation and the organisation is then responsible for those acts.

By the act of whistleblowing, the employee disconnects himself or herself from the organisation they are a part of. As Irena Blonder has observed:

> "The whistleblower steps outside the approved channels of communication to disclose information to an audience who normally would not be entitled to it."[1]

Whistleblowers probably do not act as an employee or agent of the organisation within the meaning of section 68 of the Information Privacy Act. A whistleblower is probably not, for Information Privacy Act purposes, acting on behalf of the organisation or within the scope of his or her authority.

But let us assume, for present purposes, that the employee's act of whistleblowing does implicate the organisation and bring the Information Privacy Act into play.

Even if the Information Privacy Act does apply to the organisation, section 6 of the Information Privacy Act preserves the relevant effects of the Whistleblowers Protection Act.

Section 6 means that if there is an inconsistency between the Information Privacy Act and the Whistleblowers Protection Act, the Whistleblowers Protection Act prevails, to the extent of the inconsistency.

[1] Irena Blonder 'Blowing the Whistle', in Margaret Coady and Sidney Bloch (eds) *Codes of Ethics and the Professions* (Melbourne University Press, 1996), p 167.

But again assume, again for present purposes, that the IPPs do apply.

How might we think through the application of these privacy protection standards – with their distinguished international pedigree – in this special context of whistleblowing?

Information

First, consider the information involved.

- Is it personal information? (section 3) That is, information or opinion, true or not, about an identifiable individual?
- Is it sensitive information? (IPP 10) Such as information about an individual's political opinions?
- In what ways is the information delicate? We will return later to this question, which is always important in privacy matters.

People

Second, consider the people involved. Remember that privacy is a condition of natural persons to which they have a right. Privacy is not a condition applicable to governments or corporations. Especially in the whistleblower context, privacy ought be carefully distinguished from secrecy and from confidentiality.

Holding this qualification in mind, we can nominate at least three types of individual whose privacy may be implicated:

- the whistleblower
- the alleged wrongdoer
- any third party whose personal information is involved.

Use and disclosure

Third, consider Parliament's guidance in the Information Privacy Principles to categories of use or disclosure of personal information that may outweigh privacy in particular circumstances. Privacy is not absolute. The Information Privacy Act's objects require balances to be struck between the public interest in privacy protection and the public interest in the free flow of information. In the whistleblowing context, both these public interests must be weighed carefully.

So, let's have a brief look at some types of uses or disclosures that Parliament expects to outweigh privacy in certain circumstances:

- consent (IPP 2.1(b))
- public safety (IPP 2.1(d)(ii)), a feature also of the definition of improper conduct in section 3 of Whistleblowers Protection Act
- reason to suspect that unlawful activity has been engaged in (IPP 2.1(e))
- authorised by law, specifically the Whistleblowers Protection Act, if the disclosure meets the standards of that Act, including that it:
  1. relates to a public body or public officer, as defined
  2. relates to improper conduct, as defined (section 5, Whistleblowers Protection Act)
  3. meets the "reasonable grounds" test
  4. is not false information knowingly provided (section 106, Whistleblowers Protection Act)
  5. is made to the right recipient (section 6, Whistleblowers Protection Act)

If the Ombudsman can properly be categorised as a "law enforcement agency" for the purposes of the Information Privacy Act and the Whistleblowers Protection Act, then use or disclosure may also occur:

- for the prevention, detection, investigation, prosecution or punishment of crimes (IPP 2.1(g)(i)),
- for the enforcement of laws relating to the confiscation of the proceeds of crime(IPP 2.1 (g)(ii)),
- for the protection of public revenue(IPP 2.1 (g)(iii)), and
- for the prevention, detection, investigation or remedying of seriously improper conduct (IPP 2.1 (g)(iv)).

Key players and privacy interests

Let’s take a closer look at the privacy interests of the people involved in a whistleblower case. Here we get the degrees of delicacy of personal information. Privacy and reputation are siblings, as the whistleblowing context makes plain.

- The whistleblower
  - identity
  - safety (of self and family)
  - employment prospects
  - reputation, perceptions about character (whether accurate or not), including:
    1. trustworthiness
    2. loyalty (“non team player”)
    3. propriety (“right channels’)
    4. dobber (“or public spirited”?)
    5. courage

- Alleged wrongdoer
  - identity
  - safety (of self and family)
  - employment prospects
  - liberty (where sanctions may include imprisonment)

- reputation, perceptions about character (whether accurate or not), including:
  1. trustworthiness
  2. loyalty ("non team player")
  3. corrupt ("bad apple")
  4. harm to colleagues (by bringing suspicion on all)
  5. dishonest

- Third parties (some innocent, some complicit)
  - as victims, disclosures by the whistleblower – or the wrongdoer – may be revelatory of private matters affecting third parties. Consider, for example, cases about serial sexual harassment.
  - as accomplices, privacy interests are similar to those of the alleged wrongdoer, listed above.

I note in passing the accomplices appear to lack the natural justice protections of the Whistleblowers Protection Act. Section 22(3) protects the identity of the person against whom disclosure is made, but apparently not any accomplices detected by subsequent investigations.

By isolating these privacy interests, I do not mean to imply they ought to outweigh the public interest in disclosure in every circumstance. Often, a whistleblower will lose privacy for larger purposes such as tackling corruption under due process of law. Often, privacy is among the rights that a wrongdoer rightly forfeits.

But I think it is clear that, if we are serious about protecting whistleblowers, we should give careful consideration to their privacy as we go about balancing the competing interests.

Data security

The Whistleblowers Protection Act and the Ombudsman's Guidelines (November 2001) appear to strengthen the intended effect of IPP 4, the privacy principle concerned with data security.

To comply with the whistleblower protection scheme in this respect is to comply with IPP 4. The Whistleblowers Protection Act and the Guidelines are consistent with the general rule in privacy that the more sensitive or delicate the information, the higher the level of data security required.

Anonymity

Similarly, the ability for individuals to blow the whistle anonymously is consistent with IPP 8, the privacy principles that gives individuals the option of not identifying themselves when dealing with organisations, if that is lawful and practicable.

Transparency

Requirements in the Whistleblowers Protection Act to make people aware of the protections, confidentiality and enforceability (section 68) are generally consistent with IPP 1 and IPP 5, the principles about the giving of notice and openness about information handling practices. One of the purposes of the Whistleblowers Protection Act is to help to make transparent any corrupt conduct, including improper handling of information.

Uses of transparency in privacy protection

Now a few remarks about the sometimes surprising associations between transparency and privacy protection (and here I draw on my recently published work).[2]

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[2] 'Uses of transparency – journalism and privacy' in *Privacy Law & Policy Reporter* Vol 10 No 2, June 2003.

Many people find it odd to think that privacy protection requires transparency. But it does. And you will find this notion embedded in some privacy laws. For example, section 5 of Victoria's Information Privacy Act.

I will not rehearse now the many ways in which personal information is collected by public and private sector organisations for a multiplicity of purposes, great and small. It is generally accepted that digital technologies have made vastly easier and cheaper the collection, matching, copying and dissemination of personal information. At the same time, different types of personal information are becoming available. Most potent of these is genetic information.

Against this contemporary background and foreseeable future, why is transparency so vital to privacy protection? For the oldest reason: because power over information means power itself. And because if privacy is to mean anything in this Information Age it must mean a measure of control – not total control – for the individual over his or her personal information. To check power and to preserve a measure of individual control, transparency is vital.

In privacy circles, this is a commonplace. Standard privacy principles include requirements for collection notices, openness about information practices, and access rights. But in journalism, the close connection between this aspect of privacy protection – transparency – and of journalism itself, if noticed, tends to be unremarked and undervalued.

Privacy commissioners commonly work to force information issues into the open, to make transparent certain practices that deal in personal information but which have been opaque, even hidden, from the subjects of that information. Privacy commissioners conduct audits. They strive for the implementation and publication of Privacy Impact Assessments, a sibling of Environmental Impact Statements. They urge the statutory exposition of the purposes and permitted uses of various data sets.

They press, for oversight, such as judicial warrants, for certain collections of information. In their work, privacy commissioners may at times be assisted by whistleblowers who have become troubled by the privacy-invasiveness of this or that practice in an organisation. Privacy commissioners make submissions to parliamentary committees, as specialists assisting generalists. In their annual reports, they publish. In media releases, they explain or they warn.

Surely all this is familiar to journalists, as it will be to those familiar with the work of Transparency International. Have I not just described, in broad terms at least, much of the nuts and bolts of transparency as accountability? Is this not precisely what journalists ought to do in their service of civil society and of the electorate in any democracy? They too scrutinise; they examine; they analyse; they warn; they disclose.

Journalism, properly understood, is a necessary part of the means by which power is held to account. But it is not sufficient. Also necessary are independent courts, and legislatures that work well. We need to disperse Executive power wisely, and to check it with various independent statutory watchdogs such as auditors-general, ombudsmen and, in their modest specialism, privacy commissioners.

I have naturally put the focus on transparency as a method to extract accountability from government. But the uses of transparency are legion. Journalism must apply it also to other sources of power. But what about journalism itself? Media so often seem to be immune from the transparency, and therefore the accountability, that they can so effectively require of others.

Among journalists, too, we need whistleblowers sometimes.

And journalists will also need to think about how to protect them.