WHISTLEBLOWER CONSULTATION SUBMISSION

My name is Ferg Ferguson, I was formerly known as Stephen Ferguson.

I worked for the NT Department of Education (the Agency) full time for approximately six years in total between 2004 and 2012.

In late 2009, after contacting the Agency about a number of matters and receiving what I perceived to be an inadequate response I became a discloser as defined in the Northern Territory of Australia Public Interest Disclosure Act (the Act) with the Office of Public Interest Disclosures (OPID) while deliberately waiving my right to anonymity, reporting on what I believed was a public interest disclosure against several senior Agency employees:

18/11/2009

Dear Stephen,

The Commissioner has assessed the information you provided and determined it is a public interest disclosure and should be investigated.

We have served a notice on Gary Barnes indicating that we will be investigating the matter.  This was accompanied by a letter which identified you as the discloser and set out the gist of your allegations.  I have requested a meeting with Gary Barnes, Commissioner Robert Bradshaw, myself, Carol Penglase, Lee Rayner, and Hylton Hayes.  As we discussed, your identity as a complainant about similar matters is already well known, and informing DET personnel that you are in fact a discloser is unlikely to pose further risks, whereas it will make DET aware of your protected status and the need to only take well-considered action in response to your matter.

I am told that Mr Barnes is in Canberra and will not be back in the office until Monday.  He should, however, be able to access his email and his PA, Melissa Nixon, will make him aware of the matter.

I have requested that Shirley Nirrpurranydji not be told of the disclosure until after this meeting so that when she is told, it is in a controlled environment where we can fully explain her obligations and the nature of the process without misunderstandings.  This is both to minimise the risks of reprisals against you, and to ensure our investigation is conducted fairly to all persons concerned.

I have not mentioned that Scott Beaton has also contacted us.  As far as DET is currently aware, you are the only discloser.

Please feel free to email or ring me if you have any further information, questions, or concerns.

Regards,

Caroline Norrington

Sometime towards the end of 2012, after blowing the whistle and along with numerous other complaints of inaction I was labelled ‘unsuitable for further employment’ and was refused a new contract of employment. I took this as adverse action and initiated a Fair Work Commission (FWC) complaint to get my job back in early 2013, this complaint eventually settled out of court for a financial settlement. Subsequent documents released under Freedom of Information revealed the Government’s relief that the FWC case did not proceed.

Even though the OPID alerted me to the fact that there were legislative protections for being a whistleblower I did not feel protected at all. As any public servant will tell you, there are a myriad of ways to retaliate against someone in the Northern Territory Public Service that won’t connect that retaliation to the original deed, and especially when you have a compliant Chief Executive (Gary Barnes) and a Commissioner for Public Employment who is your personal friend (Craig Allen).

Dear Stephen,

The protection available under the *Public Interest Disclosure Act* is defined by sections 15 and 16.  In short, section 15 says:

‘A person commits an act of reprisal against another if the person causes, or threatens to cause, harm to another for a prohibited reason, that is because: (a) the other person or a third person: (i) has made … a public interest disclosure; … and (b) the person wants to obtain retribution for the disclosure, compliance or cooperation or, in the case of the intended disclosure, compliance or cooperation, to discourage it.’

Section 15 makes it a criminal offence to commit an act of reprisal.  Section 16 allows you to sue for compensation for an act of reprisal.

If you are thinking about pursuing a case against DET for compensation, then you need to see a lawyer to discuss the strengths and weaknesses of the case.

The difficult point for you in proving an act of reprisal had been committed against you is that you had difficulties with DET even before the events which form the basis of the disclosure (eg. Shirley’s behaviour towards Chris Wallace and yourself, in relation to extortion and threats to kill).  It is not enough to prove that DET is picking on you.  You have to prove that they are picking on you because you made a disclosure (and not because they don’t like you / are an outspoken union advocate / sent angry emails etc.)  I suspect, because of the amount of water under the bridge between you and DET, that you would have a hard time convincing a court that DET’s behaviour was a reprisal because of the disclosure.

Your letter to DET was very measured and I hope it serves you well.  I think it is a good decision to start separating your very personal reflections (as in the email below), from your public responses.  It is a healthy thing to put your thoughts and feelings down in writing, but not everyone is in a position to understand and appreciate where you are coming from.

Regards,

Caroline Norrington

The Act states the following:

Division 3

Protection from reprisal

15 Offence to commit act of reprisal

(1) A person commits an act of reprisal against another if the person causes, or threatens to cause, harm to another for a prohibited reason, that is because:

(a) the other person or a third person:

(i) has made or intends to make a public interest disclosure;

or (ii) has complied with, or intends to comply with, a requirement imposed by a person acting in an official capacity;

or (iii) has cooperated or intends to cooperate with a person acting in an official capacity;

and (b) the person wants to obtain retribution for the disclosure, compliance or cooperation or, in the case of intended disclosure, compliance or cooperation, to discourage it.

*Examples of cooperation Voluntarily answering questions, producing documents and providing information in any other form.*

Part 2 Disclosures of public interest information

Division 3

Protection from reprisal

(2) A person must not commit an act of reprisal against another. Fault elements:

The person:

(a) knows or believes a person has acted, or intends to act, as described in subsection

(1)(a);

and (b) intends to discourage, or obtain retribution for, that act or intended act. *Maximum penalty: 400 penalty units or imprisonment for 2 years.*

(3) It is a defence to a charge of an offence against subsection (2) for the defendant to prove that the prohibited reason was not a substantial reason for the conduct on which the charge is based.

(4) A prosecution for an offence against subsection (2) must be started within 2 years after the offence is alleged to have been committed.

The crux of the Whistleblower retaliation problem seems to be how to clearly define what is and what is not ‘reprisal’ for the purpose of the current Act.

It appears all too easy, from my own personal experience and others I know personally who were or have recently been whistleblowers against the Agency to manufacture or exaggerate some other low level employment issue into something much bigger, as a retaliation for whistleblowing then explaining that away as disciplinary action for something else. Or to keep harassing you, without offering any psychological support in breach of Work Health and Safety Laws, until you snap and then using that as THE EXCUSE for relieving you of your job. **Death by a thousand cuts, started after you blew the whistle on us. It’s easy to pick on one small thing then blow it out of proportion and discipline you for it.**

If a person is to be protected by the Act in its current form then someone in the Agency would have to write in a government email something like: Yes Mr Ferguson we are labelling you ‘unsuitable for further employment’ because we really didn’t like the fact that you wouldn’t accept our white washing of the incident so you went to the OPID and blew the whistle on our unlawful employment practices surrounding the principal (and all of our other officers who supported her for years and looked the other way while many others suffered) who threatened you. You don’t understand how useful an Aboriginal principal is to us who sings our praises and supports our policies to undermine Aboriginal language and culture and how much we have to let her do what she wants so we can use her as a poster girl for our on-going destruction of education out bush, therefore you must be punished for that.

Not even the Agency are *that* stupid.

Maybe need to add something like ‘the whistleblowing was a contributing factor to the alleged act of reprisal’ to lower the bar for the employee?

There are lots of cases on the Internet from around the world regarding ways to strengthen protection for whistleblowers. For example, this company in the USA was found to have retaliated against a whisteblower by simply creating a ‘hostile work environment’ after he blew the whistle:

**Halliburton, Inc. v. ARB**

Following the Fordham ruling, in Halliburton, the Fifth Circuit denied Halliburton’s appeal of an ARB ruling that it retaliated against a whistleblower in violation of SOX Section 806.  In this case, the whistleblower, the Director of Technical Accounting Research and Training, used Halliburton’s internal procedures to raise a complaint about the company’s allegedly questionable accounting practices.

In response to the complaint, the whistleblower’s direct supervisor informed him that he “was not a ‘team player’ and needed to work more closely with colleagues to resolve any concerns over accounting practices.”  Halliburton subsequently ordered a new study on the accounting practices and concluded that the practices were in fact proper.  When the whistleblower sought to speak with his supervisor regarding the accounting practices again, his supervisor refused to meet with him.  The whistleblower subsequently filed a confidential complaint with the Securities and Exchange Commission, but continued to engage Halliburton regarding his concerns.  His internal complaint, which showed his identity, eventually went to the board and Halliburton’s General Counsel.

The SEC contacted Halliburton’s General Counsel to inform Halliburton that it was investigating its allegedly improper accounting practices.  In response to the SEC’s statement, Halliburton’s General Counsel sent an email to the whistleblower’s boss and others asking them to preserve relevant documents because “the SEC has opened an inquiry into the allegations of” the whistleblower. After the email was subsequently forwarded to members of  the whistleblower’s work group , his colleagues began treating him differently and refused to associate with him.

Although the SEC decided that no enforcement action would be taken against Halliburton, the ARB determined that the disclosure of the whistleblower’s identity and the resulting hostile work environment **amounted to retaliation** in violation of Section 806.  The Fifth Circuit affirmed the ARB’s decision and held that the plain language of  SOX permits noneconomic damages, including emotional distress and reputational harm.

Therefore if after blowing the whistle your workplace becomes different in a negative way from before or you are suddenly the new focus of micro-management or apparently just noticed performance issues then these should be things that could constitute reprisals or retaliation, unless the employer can prove that they have documented evidence of the new problems from a previous time. And not just something manufactured now and pre-dated to suit their cause.

If the employer is unable to show a valid reason for any adverse employment action, not valid according to them but valid as defined by a competent, external jurisdiction, then they should be found guilty of reprisal action. This would serve as a great general deterrent to all other Agencies and promote further whistleblowing perhaps, which might hurt in the short term for Agencies but which has a long term goal of improving the delivery of services and minimising waste and corruption. The only people who wouldn’t want something like that are the ones who are benefiting from it.

A Northern Territory Government lawyer who shall remain nameless once told me, words to the effect of: “the Agency has just told me they treat everyone like shit (as they are treating you now) so they’re doing this (latest negative act) to you not because you’re a whistleblower (which they know) but because that’s just the way they roll and because this is not a tribunal to determine if they are the model employer, they can say and do what they like to you as long as you can’t prove it’s solely because you are a whistleblower.”

With a successful, cast iron get/keep out of jail card such as this, spread quickly around the NT Public Sector, what hope do whistleblowers have under the current legislative regime then?

**None, is the answer.**

Here are some ideas for employers, again from the USA, from this web site:

<https://www.dlapiper.com/en/us/insights/publications/2014/12/higher-burdens-sox-whistleblower-retaliation/>

**Establish policies and procedures.**The best defense to handling whistleblower claims of improper retaliation is to have policies and procedures relating to internal whistleblowing.  Procedures should establish timelines for handling internal complaints and set forth clear guidelines prohibiting all forms of retaliation.

* **Conduct separate investigations.**  In order to rebut a claim of whistleblower retaliation, employers must show that there was a valid reason for any adverse employment action.   Accordingly, companies should separate their investigation into whistleblowers claims (handled by legal or other appropriate department) from their employee performance evaluation (handled by HR).
* **Watch your tone.**The manner in which companies respond to whistleblower complaints is vital.  Using the appropriate tone and sending a proper response can be the difference between an internal complaint becoming an external whistleblower report.
* **Document, document, document.** Employers must establish their defense to whistleblower retaliation by clear and convincing evidence.  Properly documenting the response to the whistleblower’s complaint and the employment evaluation process is essential to the company’s defense.
* **Respect whistleblower secrecy.**  Companies should resist the impulse to identify an anonymous whistleblower.   Attempts to ferret out the whistleblower’s identity only support claims of retaliation and could lead to the creation of a hostile work environment or a violation of the company’s internal policies on whistleblower anonymity.  In some cases, like Halliburton, it may be obvious who the whistleblower is based on the facts of the case or the size of the company.  In these instances, companies should take steps to prevent further dissemination of the whistleblower’s identity and ensure that a hostile work environment does not develop.

Of particular interest is the ‘watch your tone’ section above.

In late 2019, one year after I first contacted the OPID who then contacted the CE Gary Barnes to tell him about me and my complaint, Mr Barnes wrote to me on official Agency paper to remind me that *"It is also noteworthy that the issues you raise are being investigated currently in a variety of jurisdictions."*

If that’s not a blatant nod to future problems I don’t know what is. And from the man in charge of the whole Agency! Leading by example.

I forwarded this ominous letter from Mr Barnes to the OPID but they did nothing with it.

I immediately wrote back seeking clarification but never received a reply. Two years and multiple attacks on my psychological health later and I was out of a job, as Mr Barnes labelled me ‘unsuitable for further employment’. Not long after he got a promotion to the Chief Minister’s Office. the principal about who I had complained was back at work in the Agency and the regional director who assisted her got a promotion from NE Arnhem Land to Darwin.

**But hey, I was protected under the legislation, right?**

09/12/2010

Melissa Nixon <Melissa.Nixon@nt.gov.au> Gary Barnes’ PA

Dear Melissa,

Due to the confusion in the inference of Mr Barnes' last statement which reads:

*"It is also noteworthy that the issues you raise are being investigated currently in a variety of jurisdictions."*  
I would like Mr Barnes to fully explain to me exactly what he means by this.  
  
Also, I would like to know from Mr Barnes exactly what 'penalty' from DET, Shirley *"I'm Aboriginal, they can't touch me"* Nirrpuranydji incurred due to her behaviour, amongst other things, regarding her threats to *"kill me, send her family to burn down my house and hang me from the trees",* since no one has told me yet and she has been back at work since term three.

And what 'penalty', Assistant Principal at the time, Lindall Watson incurred, for again, amongst other things, encouraging those threats, while adding*,* in front of two separate witnesses (not including Shirley), *"Don't worry, I'll help you get rid of him"*?  
  
Thanks.

Stephen Ferguson

I also received this from the head of Human Resources at the time Carol Penglase:

*Dear Mr Ferguson*

*I am responding to your email to Gary Barnes of 10 December 2010.*

*In regard to the comment ‘It is noteworthy that the issues you raise are being investigated currently in a variety of jurisdictions’, it is our understanding that you have raised the same issues with the Office of the Commissioner for Public Employment, The Anti-Discrimination Commission and the Public Interest Disclosure Commission.*

If the Whistleblower Protection legislation has included reporting to the OPID as a ‘contributing factor’ then Carol Penglase and Gary Barnes would have and should have been charged under the reprisal section of the Act. Or at least been worried about stating it.

Both Ms Penglase and Mr Barnes’ replies show me that they were not at all scared of openly mentioning in official government writing that part of the ‘noteworthy’ observation was a complaint to the OPID. Clearly the Act as it was then had no bearing on them whatsoever.

The onus of proof should fall on the employer to show that what they are doing is in no way whatsoever connected to anything related to the OPID, not on the employee to prove their allegations were solely because of their whistleblowing. Otherwise, the status quo does not change, more whistleblowers will be retaliated against as I believe I was and in the long run there will be less whistleblowers in general which means less checks and balances for government officers.

In my opinion and from my own personal perspective I would like to see the following introduced in the NT and the whole of Australia actually:

1. A clear, publicly available, publicly enforced whistleblower policy for all NT Government Agencies.

2. An independent contact person inside the Agency who is trained to deal only with whistleblowing complaints and who can help to monitor any alleged reprisal action.

3. Adding to no. 2, if necessary the allegation of reprisal then gets passed to a competent jurisdiction for proper external investigation with the appropriate consequences if found guilty.

4. Meaningful consequences which are enforced, take the responsibility for this away from the OCPE.

5. A reward ceremony (if the whistleblower wants to attend of course) for whistleblowing/ers to assist in changing the idea that whistleblowing is wrong.

6. An active media campaign to encourage and support more whistleblowing.

After writing this last night I stumbled across this article this morning, which I have copied and pasted below, which might help: <http://www.mondaq.com/unitedstates/x/212790/Whistleblowing/Top+10+Ways+To+Minimize+Whistleblower+Risks>

Here are the TOP 10 STEPS public and private employers should consider taking to minimize the risk of whistleblower retaliation claims and build defenses where litigation is unavoidable. These steps are based on lessons learned through litigating whistleblower cases to verdict and counseling employers to minimize the risk of litigation. One important theme underlying these steps is the need to treat good-faith whistleblowers as assets.

### 1. Conduct focus groups & surveys

Develop an understanding of your workforce's beliefs about whistleblowing and attendant retaliation risks through focus groups and surveys. Design questions that will expose whether employees are apt to bypass internal compliance channels (or not complain at all) and why. Focus groups should be diverse in terms of age, length of service, race, responsibility and education.

### 2. Create and widely disseminate whistleblower protection policies with multiple avenues for reporting

Create and modernize policies on which employees can rely. In addition to codes of conduct, promulgate simple and straightforward whistle-blower protection policies. Include them in employee handbooks and make them available through multiple other channels. Ensure that they provide multiple reporting channels.

### 3. Conduct whistleblower-specific training for managers

A substantial volume of whistleblower complaints are made directly to managers, and managers' responses tend to vary and create risks. Managers need whistleblower-specific training on a regular basis to ensure that they respond appropriately to complaints.

### 4. Break down corporate silos so that HR, legal (employment counsel in particular) and compliance work together

As highlighted in our recent [post](http://www.mondaq.com/redirection.asp?article_id=212790&company_id=7032&redirectaddress=http%3A//www.whistleblower-defense.com/2012/11/29/a-clear-illustration-of-how-hr-employment-law-best-practices-intersect-with-compliance) on the DOJ/SEC guidance regarding the Foreign Corrupt Practices Act, whistleblower claims often implicate employment retaliation issues, performance management, discipline, investigations and critical compliance issues. HR corporate labor and employment (legal) and compliance functions should work hand-in-glove to ensure a fully informed, comprehensive approach is taken with respect to all aspects of the whistleblower response process.

### 5. Promptly appoint a liaison to the whistleblower

Many whistleblowers head straight to the government or an attorney when they feel isolated or ostracized for complaining. Combat this risk by swiftly appointing a corporate representative to serve as a liaison to the whistleblower.

### 6. Promptly conduct a thorough investigation, and report back to the extent practicable

Promptitude is critical to a successful investigation, so employers should develop rapid response systems that require investigations to be conducted shortly after a complaint is lodged. Whistleblowers should be advised that certain information must remain confidential, but that the company will provide the results of the investigation to the extent practicable.

### 7. Oversee the evaluations of whistleblowers who remain employed, with an emphasis on objective metrics

To ensure whistleblowers are not subject to retribution, an HR professional and/or a supervisor – ideally, one who is unaware of the whistleblower's report – should review whistleblowers' performance evaluations by using objective metrics to the greatest extent possible.

### 8. Reward good-faith whistleblowers

Consider rewarding whistleblowers either monetarily or otherwise for the benefit the complaint conferred upon the company. A letter of commendation from an executive to the whistleblower's personnel file is a good start. So is a bonus, and/or other recognition.

### 9. Report-out on responses to complaints

Show employees you are committed to protecting whistleblowers and that you take their complaints seriously. Consider providing generalized (anonymous) examples through an internal blog, newsletter or intranet posting. Consider describing the general nature of the complaint, some basics regarding the investigation, the speed with which the matter was resolved, the benefit the complaint conferred on the company and, if applicable, the benefit the whistleblower received for reporting.

### 10. Hold an annual "Ethics & Compliance Day"

Dedicate one day each year to focusing on the need for transparency, accountability and ethical and lawful conduct. Invite outside speakers with expertise in corporate ethics, deliver training on the code of conduct, whistleblower protection and anti-retaliation policies, and hold sessions with employees focused on your core values

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