

CHAPTER SIX

LEGISLATING IN THE PUBLIC INTEREST

6.1 In this chapter the Committee focuses upon the crux of its terms of reference - whether the practice of whistleblowing should be the subject of commonwealth legislation to enable the making of disclosures in the public interest and, if so, what form the legislation should take.

6.2 In determining this matter the Committee considered a general philosophical difficulty which was constantly referred to during the inquiry - namely, a loss of faith in 'the system' by whistleblowers and the necessity for cultural/attitudinal change in the approach to whistleblowers and whistleblowing.

Loss of faith in 'the system'

6.3 The Committee received a considerable body of evidence from whistleblowers indicating they had completely lost faith in, and were disillusioned with, 'the system'.

6.4 The term 'the system' was used in a general context to refer to the bureaucratic system, the investigatory and support agencies at federal and state levels and the westminster style political system providing the fabric of Australian society.

6.5 Whistleblowers emphasised that their total loss of faith in the 'system' was the result of the reaction to the whistleblower at a personal level combined with the organisational reaction to the wrongdoing reported by the whistleblower. The Whistleblowers Action Group summed up many whistleblower's experiences with and observations towards 'the system'.

"The system" rather than rigorously examining itself for wrong-doing to advance the public interest, moves to protect itself. If a whistleblower finds him/herself reporting on official misconduct at a very high level in the public sector, then he/she is effectively taking on the entire system:

the State. It becomes a David and Goliath battle where history shows more often than not, Goliath wins and David is seldom if ever heard of again.¹

WAG queried the value of legislating to protect whistleblowers if 'the system' would ultimately be entrusted with the responsibility of administering such legislation. This illustrates the deep-seated cynicism which whistleblowers have to 'the system'. WAG commented:

What is the good of any legislation in this area which supposedly encourages, legitimises and protects whistleblowers when confronting "the system" over misconduct or alleged misconduct, if those in "the system" who are required to administer such legislation fail to act impartially and honestly for fear of reprisal themselves, or of political consequences?²

6.6 The disillusionment which has been expressed by whistleblowers, has been likened to that encountered in the field of criminal law enforcement. People develop an enormous sense of injustice when complaints to law enforcement agencies are seemingly ignored or prosecutions are not proceeded with, purportedly due to insufficient evidence or lack of grounds. A sense of injustice and outrage is often felt at the outcome of normal court processes or judgements. Similarly, whistleblowers experience disappointment and disillusionment when allegations of wrongdoing are perceived as not being properly investigated and thus remaining unrectified and unpunished. A sense of bitterness towards and loss of faith with 'the system' is a common result.

Institutional reaction to whistleblowers' reports

6.7 The institutional reaction to allegations of wrongdoing occurs in two main ways. Firstly is the behavioural response directed towards the whistleblower on a

1 Whistleblowers Action Group, evidence p.1085.

2 *ibid.*, p.1085.

personal level, through harassment and victimisation. This has been discussed in Chapter 5.

6.8 The second element of the reaction involves the organisation's response to the actual reported wrongdoing and its subsequent investigation. Many whistleblowers who are dissatisfied with the process or result of the initial, usually internal, investigation of their complaint bring their complaint to the attention of an established investigating agency. A significant problem raised by whistleblowers was that the investigating agency never took account of the original evidence. Subsequent investigators simply returned to the outcome of the original investigation and not the process of that investigation. If that original investigation had been flawed, then all further reports, based upon the original, were likely to be defective.

6.9 The Privacy Commissioner suggested that this situation was strongly linked to resources. He noted that:

to some extent you are forced in high volume investigative environments to give a good deal of credence to the official reply you get from an agency...

You can go behind that reply but you have to then look at expending a large amount of resources to go behind the reply. There is a tremendous pressure on you as a complaints investigator in a relatively high volume, low cost complaints operation to make an assessment of the credibility of the reply in its own terms partly by maybe knowing the people who provided you with the reply or knowing that agency to some degree. Your capacity to really go behind the reply is a limited one.

If you went behind every reply you received, you would run an enormously costly operation.³

6.10 The Privacy Commissioner indicated that it was not practical to further examine every reply received from an agency. Resources and practical considerations often demand a reliance upon the judgment of the staff who have usually been recruited due to familiarity with and experience in the field of investigation. These staff

3 Kevin O'Connor (Privacy Commissioner), evidence p.842.

must make a judgment that the reply that has been received is sensible and plausible in the circumstances. This is sometimes coupled with file inspections or discussions with relevant officers by the investigative staff.⁴

6.11 Vague allegations which the whistleblower is unable to substantiate can pose other difficulties for the investigating agency. When such allegations which have been made to the investigating agency are put to the organisation an emphatic negative reply is often the only response which can be provided in the circumstances. A response of this nature makes it virtually impossible for the investigative agency to pursue the allegations. This can be very frustrating, not only from an investigative point of view, but also from the whistleblower's perspective if the allegations are not further investigated.

Employment background of investigators

6.12 The fact that the investigating officers may have come from the same background or culture as the whistleblower has also been raised as a point of contention by whistleblowers. They suspect that these investigators may reflect that culture and not subject their disclosure to an adequate investigation. An example of this suspicion is the situation where former police officers who have been employed by or seconded to various law enforcement agencies might be involved in the investigation of complaints lodged by and/or against members of the police force, i.e. their former colleagues.⁵

6.13 The dilemma for an investigating agency is that it needs to have people with particular knowledge and expertise but who are, and are seen to be, independent. The agency has to make an assessment as to whether such people are beholden to their previous employment or culture. The Director, Corruption Prevention, ICAC, accepted that whistleblowers, concerned by their knowledge of who

4 *ibid.*, evidence p.843.

5 Kim Cook, evidence p.731.

might be investigating a matter, may feel isolated and refrain from reporting matters. However, he noted that:

generally speaking, [ICAC] has available to it a range of resources that would allow persons seeking an external review on an allegation of corruption to be confident that it would be investigated by people other than those with whom they are connected through a work environment.⁶

Delayed investigations

6.14 Many whistleblowers have indicated that long delays by investigative agencies are also a feature of their cases. The time taken through apparent inactivity is frustrating for the whistleblower. It can lead to deterioration in health and generally compounds their disillusionment and loss of faith in 'the system'.⁷

6.15 Based upon their personal experiences whistleblowers have described virtually all investigative/protection/law enforcement agencies operating in the Commonwealth and State spheres as having in effect become part of 'the system'. The agencies are perceived as biased against the whistleblower and unable or unwilling to provide satisfaction in response to the whistleblower's disclosure of wrongdoing.

6.16 This anti-system attitude of whistleblowers appears to operate at two levels. There is a general loss of faith in 'the system', overall. Secondly, by perceiving 'the system' as authoritative and corrupt they see the agencies established to assist people such as themselves as succumbing to and thus becoming a part of 'the system' which is regarded as corrupt.

6 Peter Gifford (ICAC), evidence p.749.

7 Keith Potter, evidence p.566. The problem of delayed resolution of cases was also acknowledged by Dr Jean Lennane, evidence p.708 and the Department of Defence, evidence p.1368.

Ethical individuals within organisations

6.17 Condemnation of organisations by whistleblowers was not universal. Some organisations have been regarded as helpful although this varied with the experience of individual whistleblowers. The reason why particular organisations were seen in a positive manner usually related to the individual officers with whom the whistleblower dealt. These officers were described as helpful and willing to take the trouble to examine all the facts of a particular case.⁸

6.18 For example, the Committee heard of one organisation being held in high esteem due to the "good fortune" of a case being heard by an officer "with a high standard of integrity, ability and courage". However, this esteem was tempered by the realisation that any case to be considered by that organisation could be heard by an officer who did not possess the same standard of integrity.⁹

6.19 Similarly, in a different organisation, the officers with whom the whistleblower had contact "appeared to be highly ethical men with a strong sense of integrity and independence". Again this was tempered by the comment that their effectiveness may be more a case of "having ethical individuals in the right place at the right time".¹⁰

6.20 This appears to indicate that whilst there may exist a 'bureaucratic' attitude, in its most pejorative sense, within many organisations, the fact that ethical and concerned individuals do exist within 'the system' and have provided assistance to whistleblowers, then 'the system' is not beyond redemption.

6.21 The Committee acknowledges that for many people 'the system' does produce the results for which it is intended. The cases outlined in evidence to the

8 Dr Jean Lennane, evidence p.723.

9 Bill Toomer, evidence p.581.

10 Shirley Phillips, evidence p.654.

Committee need to be balanced against the many complaints received by various organisations which are investigated and satisfactorily resolved.¹¹ However, the disillusionment felt by many whistleblowers as expressed in their evidence is sufficiently widespread to warrant serious consideration and action. The Committee has focussed upon this aspect.

Cultural/Attitudinal change

6.22 The need for cultural and attitudinal change within society in general and organisations and individuals in particular, in relation to the treatment of whistleblowers and the investigation of their complaints, is imperative. 'The system' currently appears to be unsympathetic towards accepting and responding to reports of wrongdoing. An open, democratic society should not tolerate the behaviour and resultant effects against members of society which have been described in evidence given to the Committee. All people within 'the system' need to be educated to adopt the attitude and approach currently practised by the few. After all, an organisation is only as honest and effective as the integrity of the individuals which constitute that organisation.

Dobbing

6.23 An element of Australian culture which is significant in the treatment accorded whistleblowers is the concept of antipathy towards 'dobbing'. This concept governs the approach and reaction of many people towards whistleblowers. Those who dob are thought to have betrayed the canons of 'mateship'. Dr Simon Longstaff has suggested that "such views are anathema to the true ideal of mateship [which] was born out of the necessity of relying on one another in difficult circumstances ... A true mate would never place a friend in jeopardy simply for the sake of securing

11 See figures provided by Commonwealth Ombudsman, Submission: Attachment 2, evidence p.39; CJC, evidence pp. 1186, 1190; ICAC evidence p.752; Department of Defence, evidence, pp. 1351, 1364; MPRA casework statistics in Annual Report 1992-93, Appendix 1, p.130.

some selfish objective ... It is something of a pity that the ideal has been debased as society has grown in size and complexity".¹²

6.24 Nevertheless, the epithet 'dobber' remains a most damaging label when applied in Australian society - it automatically guarantees the effectiveness of the decree of social ostracism. When the dobbing label is applied to whistleblowing it serves to prevent widespread exposure of workplace wrongdoing. The cultural belief that dobbing is the greatest social sin, was described as "doing nothing less than serving to sustain a corrupt society".¹³

6.25 At a personal level the dobbing label ensures that work colleagues impose the ultimate penalties of ostracism, isolation and alienation. It was described to the Committee that to be shunned by all your friends, relatives and workmates is to become "the living dead".¹⁴

6.26 There needs to develop a greater understanding and acceptance within the community that whistleblowing is an action undertaken in the public interest. It needs to be seen in positive terms of benefiting not just the organisation involved but society generally. Legislation alone would not bring about the cultural and normative changes which are essential if the negativity associated with the dobbing label is to be removed from the socially necessary act of whistleblowing. An education program run in conjunction with legislation is required to bring about these changes.

6.27 The Committee believes that education programs and legislative action are crucial instruments for change. However, their likelihood of success would be enhanced through strong leadership and public statements of support at the political, senior management and union level. Endorsement at these levels would assist in providing an environment sympathetic to change.

12 Dr Simon Longstaff, St James Ethics Centre, Submission no. 118, p.14.

13 Cyrelle Jan (QWS), evidence p.1043.

14 *ibid.*

Educational requirements

6.28 Education is crucial to changing attitudes from negative reaction to positive acceptance of whistleblowing. The requirement for such education is widespread. In discussing education and change, one witness suggested that "only a sophisticated, massively funded public education campaign which targets every Australian workplace"¹⁵ was required.

6.29 The requirement for such a campaign was graphically illustrated by the results of an ICAC survey of NSW public sector employees' attitudes to reporting corruption. The survey involving over 1300 respondents reported that 74% agreed or strongly agreed that people who report corruption are likely to suffer for it and that 26% agreed or strongly agreed that there is no point in reporting corruption as nothing useful will be done about it. On a hopeful note only 4% agreed or strongly agreed that people who report corruption are just troublemakers.¹⁶

6.30 Organisations and the officials at all levels within them need to be educated about the efficiency of their operations, the possibilities for corruption and/or fraud in undertaking their operations and the need to maintain integrity in their organisations. They should be alert to the possibility of wrongdoing; they should be prepared to report it; their report should be accepted and properly investigated; appropriate remedial action should be taken; and they should not be victimised or harassed for reporting the wrongdoing.

6.31 There is a need to introduce and encourage management practices which ensure that staff who have suggestions relating to the running of their workplace are not regarded with suspicion as traitors but listened to in a constructive manner. Proper notice and consideration should be paid to their suggestions. It is through

15 *ibid.*, evidence p.1043.

16 Independent Commission Against Corruption, *Unravelling Corruption: A Public Sector Perspective*, Research Report No. 1 April 1994, pp.101-105.

such basic practices that trust and loyalty is generated within an organisation which is essential if it is to develop as an efficient and viable organisation.

6.32 There is a need for organisations to ensure that their focus becomes the correction of the reported wrongdoing rather than its denial and attack on the whistleblower. Public and private sector managers must deal with the causes of whistleblowing rather than the whistleblowers. They must become proactive rather than reactive in their procedures for handling whistleblowers.

6.33 This change of attitude, this goal, was described by Ian Temby QC at an EARC seminar:

What must be instilled is an attitude on the part of all of trust, openness, integrity and shared values. If that happens, then, when a problem arises, the natural response will be to take it up and have it resolved internally. Managers should make it their responsibility to render it unnecessary for staff to blow the whistle. That, you will understand, is a very different thing from repressing or discouraging that practice. A good sign of a healthy organisation is one which does not leak because nobody feels conflict between loyalty to workmates, on the one hand, and the obligations that flow from living in human society, on the other.¹⁷

6.34 Advocacy of the necessity for attitudinal change being brought about through education was not limited to whistleblowers and their support bodies. The CJC wrote that whistleblowing legislation alone was unlikely to establish the standards of public accountability and credibility that society deserves. It described two significant societal issues related to whistleblowing.

"[Firstly] an attitudinal change through a public education program that presents whistleblowing as part of responsibility and accountability in a system of honest and impartial public administration.

17 Ian Temby, QC, EARC-Seminar on Whistleblower Protection, 19 April 1991, Transcript of Proceedings, p.23.

In a climate of citizen distrust of government agencies, this is hardly an academic or philosophical issue.

There is a need for a public education program which reinforces the principle that there is a commitment by government to honesty and integrity in the public sector and that the disclosure of public sector corruption, fraud, theft, embezzlement, unlawful release of information, victimisation, lack of impartiality and harassment of staff or clients are important in the process in making government and its agencies more worthy of public trust.

[Secondly] due process procedures are necessary in public sector agencies to protect those whose concern for the public good motivates them to whistleblow.

Responsible whistleblowing should benefit both the organisation and the whistleblower.

Whistleblowers have the right to protection and support when they report significant suspect behaviour without having to destroy their careers in the process. It is critical to change the "*I win, you lose*" approach to whistleblowing in public sector organisations.

Creation and implementation of efficient whistleblower guidelines should invite staff to take the initiative and whistleblow in the "public good". The whistleblower guidelines should also require senior public sector administrators to listen to complaints of concerned employees, provide counselling on procedures and give indications of the possible outcomes of lodging complaints. Senior management should be required to respond directly to employee complaints ...".¹⁸

6.35 **The Committee recommends that a significant national education campaign directed at changing corporate and official attitudes towards whistleblowing at all levels within an organisation - both public and private, and within the community generally, should be undertaken as a matter of priority. The Committee further recommends that, in order to enhance the campaigns acceptance and likelihood of success, strong public statements of support should be given at the political, senior management and union level.**

Existing mechanisms for change

6.36 Whilst a broad, multifaceted education campaign is widely recognised as needed to bring about cultural and attitudinal change, moves towards improved accountability provide a basis from which such a campaign could develop.

Codes of ethics

6.37 Many public and private sector organisations have introduced codes of ethics or business conduct. Examples of such codes referred to in evidence included the AMA, RANZCP, Australian Press Council, American Association of University Professors, Coca Cola Amatil and Banking Practice.¹⁹ The Committee believes that all organisations and professions should be encouraged to adopt and apply similar codes of ethics. If these codes were given total management endorsement and were made binding upon employees through an educative campaign, they could lead to an enhanced ethic of public responsibility being displayed by organisations and the people working within them.

6.38 The Attorney-General's Department submitted "it is essential that any whistleblowing regime that is established may recognise and operate compatibly with related [public sector] reform activities, such as the increased emphasis on ethical responsibilities in the public service".²⁰ In July 1993 the Management Advisory Board released a report entitled 'Building a Better Public Service' which spelt out key public service values. Included in these key values were the highest standards of probity, integrity and conduct and a strong commitment to accountability. The ethos of the Australian Public Service, based on these values, is reinforced by common high standards of conduct, behaviour and discipline. The Guidelines on Official Conduct,

19 AMA and RANZCP correspondence published as a response to Submission no. 29; Australian Press Council, evidence p.898; Dr Kim Sawyer, evidence pp.637 and 646; Dr Simon Longstaff, Submission No. 118, p.12; Australian Banking Industry Ombudsman, Annual Report 1992-93, pp.20-21.

20 Attorney-General Department, evidence p.113.

currently being revised by the Public Service Commission to include recent legislative and administrative reform, set out the standard of behaviour expected of Commonwealth public servants in terms of their official conduct.

6.39 As noted earlier in paragraphs 6.17 - 6.21 there are people of integrity within public sector organisations who have assisted whistleblowers by simply performing their duties in an honest and ethical manner. It is to be hoped that with the active support of management and encouragement provided through the promulgation of the revised Guidelines on Official Conduct throughout the public sector, there would be a reassessment of attitudes as more people gain an understanding of their ethical responsibilities as public officials.

Legislative duty to report

6.40 John McMillan has written that the negative reaction to the concept of 'dobbing-in' is gradually being broken down. He has suggested that the notion is not a 'cultural anathema' by noting that:

Government-sponsored schemes like "Operation Noah" and "Neighbourhood Watch", and government taxation and welfare agencies urge people to embrace the philosophy that reporting the illegal activities of others (even of friends and colleagues) is a form of behaviour that strengthens rather than undermines the public interest.²¹

6.41 Support for this view can be seen with the inclusion in legislation of ethics statements and provisions which create a positive duty to report wrongdoing. The Independent Commission Against Corruption Act in NSW imposes duties on certain officers to report incidents of suspected corruption. The recently enacted Public Sector Management Act in the Australian Capital Territory provides a statement of values and principles governing the administration of the public sector. These include general principles of public administration, general principles of management in employment matters and general obligations of public employees. This Act also

21 John McMillan, "Legal Protection of Whistleblowers", in *Corruption and Reform*, p.208.

provides a statutory obligation for public employees to report to an appropriate authority any corrupt or fraudulent conduct in the public sector that comes to his or her attention or any possible maladministration in the public sector that he or she has reason to suspect.

6.42 It has been suggested that whether or not one looks to a formal legal framework for establishing the grounds for reporting misconduct or rely on internal codes, there seems to be acceptance of the principle that serious cases of wrongdoing should be brought to the attention of those who can rectify the situation.²²

Fraud control policy in the Australian Public Service

6.43 Following the Review of Systems for Dealing with Fraud on the Commonwealth in 1987, the Government required all agencies to accept responsibility for developing and implementing programs to minimise fraud.²³ Fraud is the use of deceit to obtain money or other benefit from, or evading a liability to the Commonwealth. Fraud can range from serious criminal activities like abuse of influence, corruption, secret commissions and dishonest advantage to waste and mismanagement. Fraud can be perpetrated by persons outside government agencies or by members of the public service.

6.44 Fraud control is approached in three fundamental ways - prevention, detection and investigation. Central to the prevention and detection of fraud are agency Fraud Control Plans which assess the risk of fraud faced by particular programs and activities and set out strategies for dealing with fraud on a program basis and plans to minimise those risks.

22 Dr Simon Longstaff (St James Ethics Centre), Submission no. 118, p.13.

23 Review of Systems for Dealing with fraud on the Commonwealth, Parliamentary Paper No. 297 of 1987. The Attorney-General's Department, evidence, pp.113-115, draws particular attention to the reforms which have been implemented to prevent fraud on the Commonwealth.

6.45 Under the Guidelines for Officers dealing with Fraud on the Commonwealth, where fraud is suspected, an agency's own internal reporting and decision making processes should come into effect. Each agency should have a clear chain of command for receiving reports of possible fraud and for decisions on what should happen. This structure is a matter for each agency. In normal circumstances, staff members should report suspected fraud to their line manager. In circumstances where this may be difficult, e.g. involvement of the supervisor, the report should be made directly to the Departmental Investigations Unit, if one exists, or to a senior executive manager. Annual report guidelines make it obligatory for agencies to include reports on fraud cases and fraud prevention activity.²⁴

6.46 Fraud control plans have now been introduced within the Australian Public Service, although still at the development stage. An aspect of these plans is the encouragement of officers to 'dob-in' colleagues perpetrating fraud. It would only require a minor development in emphasis for the responsibilities and protections that fraud control plans provide for public sector employees to report and investigate suspected fraud to be extended to cover whistleblowers. In fact people reporting fraud arguably are already whistleblowers.

Other legislative and administrative initiatives

6.47 The introduction in recent years of antidiscrimination and other legislation which impacts significantly on social beliefs and behaviour has been particularly successful. These legislative initiatives, combined with awareness raising campaigns, have been widely accepted both within the workplace and society generally. They have been instrumental in producing behavioural and attitudinal change. People are considerably less likely to be discriminated against in employment due to gender, ethnic background or handicap than they were some years ago.

24 Fraud Control in Commonwealth Departments and Agencies: Best Practice Guide, Attorney-General's Department, November 1993. The Department of Defence provided an example of a fraud control plan in operation through the Defence Ethics and Fraud Awareness Campaign - see evidence pp.1337-1338, 1343-48.

6.48 The Public Service Commission has recently introduced guidelines for eliminating workplace harassment. Workplace harassment is described as a form of employment discrimination consisting of offensive, abusive, belittling or threatening behaviour directed at an individual worker or group of workers which may be a result of some real or perceived attribute or difference.²⁵

6.49 The guidelines do not specifically refer to whistleblowers within the public service. However, the type of behaviour being targeted is similar to that to which many whistleblowers have been subjected (see Chapter 5). The Committee believes that these guidelines should include reference to the harassment of whistleblowers.

6.50 The Committee believes that these developments, when combined with other moves towards improved public sector accountability such as enhanced powers for the Auditor-General, are creating an environment in which cultural, attitudinal and consequently behavioural change is not only occurring, but also becoming accepted as natural in a progressive society. **The Committee recommends that the proposed national education campaign should involve recent developments in ethics and accountability as a base from which to emphasise, in positive terms for the organisation and ultimately the public interest, the benefits of reporting wrongdoing, accepting such reports and taking appropriate investigative and corrective action.**

The need for legislation

6.51 It is suggested that with cultural/attitudinal change the role of whistleblowers would be increasingly accepted and appreciated. Their reports of wrongdoing would be honestly and efficiently investigated and they would no longer be subjected to victimisation and harassment. In this environment there would be no need for legislation to protect whistleblowers. However, it has also been suggested that to rely upon a change in culture to bring about a state of openness, trust, integrity

25 Eliminating Workplace Harassment: Guidelines, Public Service Commission, p.1.

and shared values is to believe in an ideal world. There would need to be a change in human nature as well.

6.52 Moving towards and aiming to achieve cultural change remains crucial to the acceptance and understanding of whistleblowing. It is recognised that even with education and awareness raising campaigns change will not occur overnight. There remains in the interim a need to address the situation as it currently exists, and that is through the enactment of whistleblower protection legislation. Legislation and education as vehicles for change must operate in tandem. A balance needs to be reached. As the CJC indicated:

The major problem, however, in relying solely on legislation is that the law, the parliaments which make it and the courts which administer it are primarily reactive institutions. Even if legislation is passed to protect whistleblowers there are a range of subtle pressures that can be exerted on whistleblowers by those in positions of power which would be difficult to successfully investigate but which could have serious consequences for the whistleblower. As in all fields of legislative endeavour, closing old loopholes simply prompts perverse ingenuity to find new ones.

Whistleblowers, particularly those involved in reporting systemic corruption also need to be protected by concerned public support. This support can only be generated through cultural and institutional change.²⁶

6.53 The need to legislate for whistleblower protection and the certainty of effective procedures to receive and investigate complaints was strongly supported by many in evidence to the Committee.²⁷ For most witnesses it was not a question of whether legislation should be enacted, but rather it was the form which such legislation might take, the extent of protection to be provided and to whom should be vested these responsibilities which occupied their comments.

26 Criminal Justice Commission, evidence p.1162.

27 For example - Brian Burdekin (Human Rights Commissioner), evidence p.14; Phillipa Smith (Commonwealth Ombudsman), evidence p.40; Dr Simon Longstaff (St James Ethics Centre, Submission no. 118, p.9.

6.54 In particular, witnesses addressed issues such as how legislation should relate to the powers and functions of existing organisations such as ombudsmen or other State and federal agencies responsible for the investigation and monitoring of complaints of wrongdoing or abuses of human rights, whether the powers and responsibilities of existing organisations could be improved or enhanced and whether that would provide more effective coverage than the establishment of a new agency.

6.55 Witnesses from the public sector supported the need for legislation with the following comments exemplifying this attitude. The Commonwealth Ombudsman supported "the need for whistleblower protection legislation and a suitably constituted mechanism to receive and investigate complaints about alleged wrongdoing within Commonwealth agencies".²⁸ Similarly, the Public Service Commission believed "there will be benefits in a legislative scheme which will more clearly identify processes through which APS staff can report corruption and other forms of serious maladministration."²⁹ The Attorney-General's Department considered "that Commonwealth legislation should be enacted to enhance procedures and protections for whistleblowers".³⁰

6.56 Concerns over legislative necessity or direction were expressed by a number of organisations.

6.57 The Queensland Whistleblower Study, whilst submitting that whistleblowing "quite clearly should be the subject of Commonwealth legislation", suggested that the best method for providing effective and incorruptible protection for whistleblowers was an organisation based outside state apparatus, without any legislative framework at all.³¹ Whistleblowers would have the highest degree of confidence in an organisation that is run by whistleblowers for whistleblowers.

28 Commonwealth Ombudsman, evidence p.30.

29 Public Service Commission, evidence p.182.

30 Attorney-General's Department, evidence p.131.

31 Queensland Whistleblower Study, evidence p.1020 and Tony Keyes (QWS), evidence p.1047.

However, the QWS also acknowledged that legislation could be useful for legal protection and inducing cultural change.

6.58 The Department of Defence, whilst holding no firm view on whether legislation was required, wrote that "at a Commonwealth wide level, present mechanisms appear to be adequate to cope with investigating the concerns of whistleblowers both in terms of existing legislation, powers and administrative mechanisms to achieve the objective of ascertaining the facts and recommending changes and dealing with breaches of legislation".³²

6.59 The Institute of Internal Auditors - Australia (IIAA) provided a similar view. The IIAA suggested that legislation to protect whistleblowers was not required because the enhancement of internal procedures and controls would avoid the incidents of fraud and mismanagement which occurred in the 1980's. There are now administrative mechanisms in place with the capacity to deal with conditions lending themselves to whistleblowing and the effects thereof. The IIAA conceded that possibly these mechanisms are not being used sufficiently or effectively, in which case it may be prudent to encourage better understanding and use of existing mechanisms than to introduce 'wheels within wheels'.³³

6.60 Tony Keyes of the QWS noted that whistleblowers are questioning the ethics and corruption in a particular department with their individual case, and as a social phenomenon they are questioning the whole system under which we operate. He raised the problem with legislation in the form of a question - how does one create through legislation an organisation or process which escapes the stigma of becoming part of that establishment which is itself corrupt? He asked, therefore, if it was appropriate to have an emanation of the state which purports to look after people who are blowing the whistle on the state?³⁴

32 Department of Defence, evidence p.1339.

33 Institute of Internal Auditors - Australia, evidence p.865.

34 Tony Keyes (QWS), evidence p.1046.

6.61 This concern reflects the comments made earlier in this chapter referring to whistleblowers cynicism towards 'the system'. The Committee believes this concern can be successfully addressed by ensuring that legislation operates in tandem with an education campaign. The Committee's expectation, as hopeful as it may be, is that as an education campaign successfully brings about attitudinal change, the need for recourse to whistleblower protection legislation would diminish. As Keith Potter noted "effective protection legislation and machinery is not seen as a panacea but as one of many prerequisites to the rehabilitation of integrity in public administration".³⁵

6.62 Whistleblowers Australia referred to the legislation which has been enacted or proposed by several States (see Chapter 4) and wrote that none of this legislation bears:

any consistency in approach or procedure - other than to place the power in the hands of those from whom the whistleblower needs protection. This inconsistency limits the effectiveness/cohesion of any independent body attempting to support whistleblowers in more than one state or Australia wide. Invariably, this protects the institution at the expense of the whistleblower. It ensures government control of dissent.³⁶

6.63 The Committee considers that formalising the links between the Commonwealth and States through regular meetings of Ministers and officials responsible for administering whistleblower legislation could assist in overcoming jurisdictional difficulties. These meetings could address any perceived inconsistency in approach and procedure, as well as providing a process for formal referral of cases between jurisdictions to the appropriate jurisdiction. It is hoped that such meetings would encourage States without complementary legislation to enact the same and assist in bringing greater uniformity toward legislation and its operation within each State, Territory and the Commonwealth.

35 Keith Potter, evidence p.558.

36 Whistleblowers Australia, evidence pp.700-701.

6.64 Richard G. Fox addressed the issue of protecting the whistleblower. His conclusions summarise many of the views expressed to the Committee and reflect directions which the Committee believe need to be followed. Fox has suggested that by enacting whistleblower legislation as evidence of a commitment to the containment of corrupt and incompetent administration, the legislature is seeking to arrest the debilitation of morale which inevitably occurs when government itself appears to have placed insuperable obstacles to the ability of truth and honesty to prevail.³⁷ Fox continues:

the essential nature of the new protective legislation [is that] its value is largely symbolic. It is as much to do with ethics, education and morale as with law. Its worth is less in its immediate efficacy in exposing wrongdoing than its ability to bring about a shift in attitude from the notion of the whistleblower or informer as a person betraying a secret to one revealing a truth. In the long haul the solution cannot be one that involves tagging an employee as a whistleblower and then trying to protect the person thus singled out. The emphasis has to be on creating a climate in which agencies possess the managerial willingness and internal capacity to investigate themselves in an open and direct manner to ensure that they conform to their own publicly stated ethical and professional standards. External authorities will still be called upon to investigate disputed matters and to provide the necessary further checks, but the need to go public to expose misconduct will be reduced by a greater commitment to open government. Indeed the attitudes and skills of the internal dissenters could be harnessed to improve the agency's own performance. That openness will be advanced by the incorporation of whistleblowing obligations in the ethical codes of the professional associations whose members are in government service and in the codes of practice for all public sector employees.³⁸

6.65 The symbolic importance of legislation has also been referred to by John McMillan. He has suggested that a foundation principle of a whistleblower protection scheme is to protect the right of a person to blow the whistle. This protection given to a whistleblower would have both a practical and a symbolic dimension. McMillan proposes that:

37 Richard G. Fox, *Protecting the Whistleblower*, op. cit., p.161.

38 *ibid*, pp.162-163.

The practical protection is against the consequences that frequently befall the dissenting employee - discipline, dismissal, prosecution, victimisation, or harassment. The symbolic protection will accrue to employees generally, if legislation is enacted to enshrine the right of people to confront their employer without recrimination.³⁹

The Committee recognises this symbolic importance in any whistleblower protection legislation. Nevertheless, the Committee is concerned to ensure that symbolism and rhetoric are not regarded as a substitute for positive action.

6.66 The Committee believes that at the present time legislation is essential to protect whistleblowers and ensure that their reports are properly received and investigated. **Accordingly, the Committee recommends that the practice of whistleblowing should be the subject of Commonwealth legislation to facilitate the making of disclosures in the public interest and to ensure protection for those who choose so to do.**

The Committee further recommends that regular meetings should be held between **Commonwealth and State Ministers (Ministerial Council)** and organisations responsible for administering whistleblower protection or equivalent legislation.

39 John McMillan, evidence pp.263-4.