CHAPTER NINE

PROTECTION OF WHISTLEBLOWERS AND THE SUBJECTS OF WHISTLEBLOWING

General observations

9.1 In devising a whistleblowers scheme for the reporting of wrongdoing, constant reference must be made to the objectives of the scheme. It must be accepted that the desired outcome of such a scheme is to correct maladministration and corrupt practices which may strike at the soundness of government and adversely affect the public interest. Therefore the scheme must be formulated in such a way as to recognise those ideals and rights which are the cornerstones of the system we are seeking to protect.

9.2 The freedom to report unethical or illegal work practices is a fundamental democratic right which the scheme will aim to protect. The evidence of whistleblowers to the Committee repeatedly confirmed that in practice, this right or freedom, has been diminished.

> It is an assumption that a person in a democracy can speak freely without fear or favour. Whistleblowers know this is a myth.[1]

9.3 The challenge for the Committee has been to devise a scheme which while ensuring the right of a person to report wrongdoing, also ensures that rights and freedoms are balanced. The Committee is aware that achieving the balance depends in practice on the protections which will be available under the scheme, not only to the whistleblowers, but to the subjects of whistleblowing.

9.4 The Committee strongly supports the protection of genuine whistleblowers from prosecution and, where appropriate, from disciplinary sanctions at the workplace. Furthermore, genuine whistleblowers should be protected from

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1 Whistleblowers Action Group, evidence p.1092.

intimidation and harassment in all its many guises. Where appropriate, protection should extend to those who, by association with the whistleblower, suffer repercussions either directly or indirectly from the act of whistleblowing. However, the Committee recognises the basic presumption of innocence, and seeks to ensure that allegations are investigated in such a way as to respect the fundamental rights of those accused of wrongdoing.

9.5 A number of whistleblowers expressed the view that, in cases of whistleblowing, those accused of wrongdoing should bear the onus or burden of proof. This would constitute a reversal of the principle that an accused is innocent until proven guilty. The Committee does not endorse this proposition and considers that any such endorsement may have serious and deleterious ramifications for the justice system.

Acts of wrongdoing and their disclosure

9.6 The legislation should describe which acts of wrongdoing are to be accepted as protected public interest disclosures and be the subject of investigation. The acts of wrongdoing to be included in the categories of information to be disclosed have differed between various proposals. The views of Professor Finn, EARC and the Gibbs and Elliott Committees were noted in Chapter 4.

9.7 In relation to the legislation that has been enacted, the Public Sector Management Act of the ACT provides for disclosures in the same terms as the Gibbs and Elliott recommendations, whereas the South Australian Whistleblowers Protection Act includes an illegal activity, an irregular and unauthorised use of public money, substantial mismanagement of public resources, conduct that causes a substantial risk to public health or safety, or to the environment and maladministration in or in relation to the performance of official functions. The Protected Disclosures Bill in NSW and the Public Interest Disclosure Bill in the ACT provide more detailed definitions of the conduct and behaviour regarded as corrupt or constituting maladministration or public wastage.

9.8 The difficulty in this area is to attempt a definition which does not sacrifice flexibility for certainty. The problem, as addressed by Matthew Goode, is that any attempt to cast a net which will adequately cover the range of possible misconduct of public interest in both public and private sectors necessarily contemplates a toleration of a deal of uncertainty. The use of the same words and phrases in bills and reports addressing whistleblowing demonstrates this point. Goode considers that:

> Because these words and phrases are essentially words of degree - that is, they were designed not to have a fixed meaning but to covey a spectrum or continuum of meaning within the parameters of the ordinary meaning of the words - they would be resistant to definition but would rather require description - using other words of similar meaning which would then be susceptible to criticism as being vague.[2]

He cites the New South Wales attempt to define 'maladministration' as an example of a definition which is "clearly descriptive and indicative - but not more certain".[3]

9.9 The question of degree is an important differentiating factor. This point was commented upon by the Gibbs Committee which noted that both Professor Finn and EARC do not use the word 'gross' in relation to their equivalents of the expressions 'gross mismanagement' and 'gross waste of funds'. The Gibbs Committee was of the opinion that unless "procedures are confined to allegations of gross mismanagement and gross waste of funds, they could well themselves result in waste of public moneys and time".[4]

9.10 The Committee believes that the legislative definition of "wrongdoing" should not include matters of a trivial or minor nature. However, any misdemeanour or act of wrongdoing of a trivial or minor nature should still warrant investigation, but

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2 Matthew Goode, A Guide to the South Australian Whistleblowers Protection Act 1993, Australian Institute of Administrative Law Newsletter No. 13 of 1993, p.16.

3 ibid., p.21.

4 Gibbs Report, p.346.

not under the auspices of whistleblower protection legislation. The Committee believes that initial assessment and referral could be undertaken by the 'clearing house' (described later in this chapter) and that the counselling facilities and advisory services provided under the legislation and outsourced by the Public Interest Disclosures Agency should be available to the makers of allegations which are of a trivial or minor nature.

9.11 The Committee also noted in Chapter 4 the variations in the views of Professor Finn, EARC and the Gibbs and Elliott Committees as to who should be able to make a disclosure. Given that the Committee has already indicated that the definition of whistleblower should not be limited by employment and that coverage should extend into the private, as well as public sector, the Committee agrees with the EARC proposal that 'any person' should be able to make a public interest disclosure.

9.12 The Committee has noted that section 4 of the South Australian Whistleblowers Protection Act provides for the investigation of wrongdoing which occurred before the commencement of the Act. Similarly, EARC recommended that no time limit be imposed in respect of the disclosures of wrongdoing which occurred in the past.[5] The Committee agrees that such retrospectivity should be included in legislation. Nevertheless, the Committee recognises that whistleblowers have encountered difficulties in the investigation of their disclosures and that prima facie evidence may exist to justify the reconsideration of these cases. Thus, although this report is directed to the future, the Committee believes that provision should be made for limited retrospectivity applying to disclosures made before the commencement of the legislation. To ensure that the wrongdoing which was disclosed remains in the public interest, the Committee considers five years to be an appropriate period for such retrospectivity.

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5 EARC Report, p.200.

9.13 The Committee recommends that the definition of whistleblowing should include the public interest disclosure of the following categories of wrongdoing and that 'any person' should be able to make such disclosures:

- illegality, infringement of the law, fraudulent or corrupt conduct;
- substantial misconduct, mismanagement or maladministration, gross or substantial waste of public funds or resources;
- endangering public health or safety, danger to the environment.

The Committee considers that investigation of these public interest disclosures should not be precluded where the wrongdoing occurred before the commencement of the legislation or the disclosure occurred within five years prior to the commencement of the legislation.

Identity of the whistleblower

9.14 . The issue of anonymity involves two situations which should be distinguished. The first is whether disclosures or information received anonymously should be investigated. The second is whether, after a disclosure has been made, the Agency ought to protect the identity of the maker of the disclosure.

9.15 Natural justice demands that an accused person is entitled to know the identity of those who have made the accusation. It is well recognised that in order for an accused person to adequately and properly prepare his or her defence, it is critical that he or she should be fully informed of all the facts of the accusation. One very relevant fact is the identity of the accuser. Without the benefit of that knowledge, an accused person may be severely and unjustly disadvantaged.

9.16 The Committee believes that in the majority of cases, the principles of natural justice require that a person accused of wrongdoing should be informed of the source of the accusation and the identity of his or her accuser.

9.17 Simultaneously, however, the Committee appreciates that it is this very same publication of identity which deters many whistleblowers from disclosing public interest information. One witness asserted "it is essential that the whistleblower is able to maintain his anonymity in order to avoid exposing himself to the possibility of discrimination by an employer".[6] The witness reflected on the concealment of his identity when reporting public interest information. He indicated that he needed to conceal his identity by assuming a false identity to enable his anonymous disclosures to be taken seriously, and to protect fellow employees not connected with the disclosure from possible reprisal action.

9.18 As a generalisation, not only has the issue of anonymity been a major concern to whistleblowers themselves, but also there seems to be a perception that whistleblowers usually make disclosures anonymously. Whether this perception reflects the true situation or not is debateable. Indeed, the Committee notes that some of the most well publicised cases of whistleblowing have not involved an anonymously made allegation. Such a perception may be the result of media coverage of the issue of whistleblowing. Nonetheless, the Department of Defence submitted that "traditional law enforcement circles" have maintained definitional differences between whistleblowers, complainants and informants. The set of definitions referred to by the Department attributed the issue of anonymity only to the whistleblower, being "an employee who comes forward with information and requests his identity to be kept secret".[7]

9.19 The Privacy Commissioner, whilst not detailing particular protections which should be given to whistleblowers asserted that "whistleblowers must feel confident that their complaints will be taken seriously and that they will be free of immediate or long-term reprisal".[8] In striving to achieve a middleground which will take account of both these goals, the Committee recognised the extreme

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6 Alwyn Johnson, evidence p.531.

7 Department of Defence, evidence p.1337.

8 Privacy Commissioner, evidence p.832.

consequences of either providing for the confidentiality of the identity of all whistleblowers, or not providing for confidentiality to be protected at all. Eric Horne summarised the different consequences of the two options:

> Blowing the whistle anonymously is one, but this lacks credibility. Another is to prepare to accept the termination of one's career and seek another. Finally, of course, one can look the other way.[9]

9.20 The Committee is of the view that the Agency should not receive disclosures which are made anonymously. There is less likelihood of frivolous and false allegations being made to the overall detriment of the objectives of the Agency, if those making the disclosures must do so by name.

9.21 The Committee does not believe that such a requirement reflects in any way upon the sincerity of whistleblowers who disclose information in the public interest. The requirement would also assist the clearing house function of the Agency in identifying those allegations which necessitate investigation. It will also assist in directing the Agency's resources to significant matters of public interest. The powers of the Agency must not be available to enable individuals to vent retaliation of sorts on other persons or organisations by anonymously making false allegations about them which precipitate an investigation. Any condition which precludes the waste of the Agency's resources in such a way will be a cost saving measure.

9.22 On the other hand, the Committee is of the view that there are those whistleblowers whose identity should be protected. The Agency should, therefore, have the power to determine whether the whistleblower remains identified or is made anonymous, before the disclosure is referred for investigation. The Committee believes that the Agency's use of such a power of protection would probably be the exception rather than the norm. The whistleblower should make an application to the Agency for concealment of identity. The Agency must be satisfied that in all the circumstances such concealment is necessary. Orders can be made on an interim

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9 Eric Horne, "Blowing the Police Whistle", IPA Review, Vol. 45 No. 4, 1992, p.23.

basis, and reviewable on the application of the subject of the whistleblowing, or at other times throughout the course of the investigation. Such orders having been made, the Agency may refer the disclosure to the investigating body without reference to the identity of the whistleblower.

9.23 The Agency, when deciding to grant an application for anonymity, should take into account, amongst other things, the following matters: the workplace situation of the whistleblower, material evidencing the whistleblowers fear of reprisal, the employment and promotional prospects of the whistleblower, and any matters relating to the personal health and well being of the whistleblower.

9.24 **The Committee recommends that the Public Interest Disclosures Agency not receive disclosures or complaints made anonymously. However, before referring the disclosure for investigation, the Agency should have the power to protect the identity of the maker of a disclosure on the application of that individual. The subject of a disclosure should have the right to apply for a reversal of any such order made or granted. The Agency may make orders having the force of law in respect of such applications.**

The reporting system and whistleblowers protection

9.25 The Committee appreciates that there are conflicting issues which must be reconciled by the reporting procedures of a whistleblowers scheme. Particularly pertinent to public sector whistleblowing, is the right of government to inform itself of matters within its domain. Government departments and agencies have the capacity to investigate allegations concerning their internal operations and it is appropriate that, where possible, they should be availed of the opportunity of correction and reform. As Professor Finn stated:

> Both individually and collectively, the agencies of government have the constitutional and administrative responsibility to protect and to promote the public interest. To this end each has the right and responsibility to

> inform itself of all and any matters relating to its own operations and to the conduct of its own officers in them.[10]

9.26 ICAC suggested that individual management responsibility would not be encouraged unless the same level of protection was provided for those who reported internally as for those who used an external agency. Without such provision, any whistleblower protection legislation "may convey the wrong message to managers and staff and perhaps encourage government agencies to shed responsibility for detecting, dealing with and preventing problems".[11]

9.27 John McMillan suggested that there should be a legislative obligation on each public sector agency to define a procedure by which an employee can make a whistleblowing allegation.[12] The Committee supports such an obligation which could be similar to the obligation to develop and implement fraud control plans. However, the Committee believes this obligation should be extended so that all public and private sector organisations would be required to formulate or examine and review internal reporting procedures relevant to the reporting of information alleging wrongdoing within the organisation. The Committee appreciates that internal reporting may not always be a feasible option for the whistleblower. However, there are many matters involving allegations which can be dealt with internally, and ultimately, should be dealt with internally. If internal reporting procedures can be, and are seen to be, reliable and "safe" for the whistleblower, then many benefits may flow.

9.28 First, the ability of government to investigate and correct work practices within its own organisations is a realistic expectation of the democratic processes of government. Self correction is and should be an attainable goal in a democratic system. The attainment of that goal may notionally reflect the degree of commitment by a society to democratic principles. In other words, the necessity for whistleblowers

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10 Finn Report, op. cit., p.47.

11 ICAC, evidence p.737.

12 John McMillan, evidence p.265.

to confide disclosures to a body independent of their government work place, infers that the freedom to raise matters of concern is not, in fact, tolerated by the relevant government agency. In the ideal situation, disclosures about illegal or unethical work practices should be received in a spirit of co-operation to improve the operations of the arms of government.

9.29 Secondly, investigation of wrongdoing within an organisation by the organisation may have practical advantages for both the whistleblower and the subject of whistleblowing. The matter might be resolved in a less contentious manner. The interests of all parties might be best served, in many cases, from a whistleblower being able to safely utilise internal reporting mechanisms. Non-adversarial and non confrontationalist procedures should be adopted and developed to encourage the practise of whistleblowing.

9.30 The internal reporting of wrongdoing may be a cost effective option and this is a matter which affects the public interest. Where matters can be reported and resolved internally, the public interest would in most instances, be best served by that option being utilised. In so saying, the Committee acknowledges the vast savings to taxpayers which are sometimes made as a result of a public interest disclosure. However, where that disclosure can be made internally with the expectation that wrongdoing, if it exists, will be corrected, then a further saving to the taxpayer will flow from not unduly encumbering the public interest disclosures agency with matters which should be directed to the relevant organisations internal reporting system. Obviously, there will be a category of matters which, whilst they could be resolved internally, the public interest would be better served by an independent assessment and recognition of the problem. There is always value in the substance of some complaints being brought to the attention of an independent agency or the media. There are lessons which may be learnt by other areas of both the public and private sectors about wrongdoing.

9.31 **The Committee recommends that all public and private sector organisations should formulate or, where appropriate, review and expand relevant internal reporting systems and procedures to specifically deal with whistleblowers and their reports of wrongdoing. The Committee considers that the internal reporting of wrongdoing should be actively promoted and encouraged within organisations when the requisite procedures are in place to deal effectively with such allegations.**

9.32 The Committee recognises that wrongdoing is frequently not reported internally for fear of reprisal, or because there are no adequate reporting mechanisms available or because whistleblowers are uncertain as to the spread of the wrongdoing. Alternatively, the circumstances of a particular case may dictate that the public interest will be best served by the matter being reported to an independent external agency. The Committee has, therefore, recommended in Chapter 7 the establishment of the Public Interest Disclosures Agency to receive reports of wrongdoing and be responsible for oversighting the investigation and resolution of such allegations.

9.33 The Committee believes that whistleblowers should be able to exercise some discretion in choosing the reporting option. However, the Committee envisages most whistleblowers reporting matters internally or to the Public Interest Disclosures Agency. In a very limited class of case, the Committee acknowledges that the public interest may be best served by whistleblowers disclosing the information to the media. Disclosure to the media in limited circumstances is discussed later in this chapter.

9.34 In order to enable the identification of those who can claim protection under the scheme, to facilitate the proper regulation of the matter and to protect the rights and interests of all those involved in the disclosure, **the Committee recommends that protection to whistleblowers should be conditional upon whistleblowers reporting wrongdoing in accordance with the procedures proposed in this report, namely relevant internal systems, to the Public Interest Disclosures Agency or to the media in limited circumstances.**

Screening processes

9.35 Many submissions referred to the need for a "screening" process to sift false and vexatious allegations from genuine public interest disclosures. The implementation of a screening process would have a dual protective function. It would protect innocent individuals and organisations from the trauma of an unnecessary investigation and it would protect the reputation of whistleblowers collectively. This latter protection would be a consequence of the distinction made between genuine whistleblower cases and spurious allegations designed to harm the reputation of others.

9.36 It was suggested to the Committee that as part of the screening process a "thorough, independent, impartial investigation be made of the background of whistleblowers, including the medical or psychiatric examination of the whistleblower.[13] The Committee does not accept this as promoting the interests of natural justice. The focus should not be on the whistleblower but on the allegation of wrongdoing. The civil liberties of persons making allegations must be protected, and the process of screening should not utilise measures which might dissuade genuine whistleblowers.

9.37 The Committee appreciates that there may be cases where the public interest disclosure of wrongdoing will be accurate, although the whistleblower may in fact relish the making of the disclosure and the exposure of the wrong-doer. The Committee agrees with the submission of Dr Lennane that "it is irrelevant to society whether the person blows the whistle for the best of motives, or out of malice. What matters is that the irregularities they complain of exist, are corrected, and seen to be corrected' ... The only valid issue is whether the complaint is substantially true".[14]

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13 Dr John Pope, evidence p.1210.

14 Dr Jean Lennane, evidence p.707. EARC agreed saying that "the public interest in the exposure and correction of illegal or improper conduct is just as well served by an allegation which proves on investigation to be accurate, but which was made purely out of spite, malice or revenge", EARC Report, p.147.

The screening process is not designed to preclude investigations of these types of matters.

9.38 The Committee suggests that the Agency should have a "clearing house" function. The "clearing house" should operate as the initial contact point with the Agency, in effect the Agency's "shop-front". The "clearing house" function would provide a screening process whereby whistleblowers reports can be registered and assessed to ensure they are genuine public interest disclosures. In exercising this function, the Agency would be expected to liaise with the whistleblower support groups and relevant organisations which would be providing initial advice and counselling to prospective whistleblowers.

9.39 The Committee is concerned to ensure that when the Agency, through its "clearing house", has determined that a matter does not properly come within the category of a public interest disclosure, the person raising the matter is not left 'stranded' within the bureaucracy without knowing where next to turn for assistance. This jurisdictional problem between agencies has been referred to by a number of whistleblowers. Consequently the Committee believes that the Agency should also have the related function of advising and assisting persons in respect of those matters which are not identified as public interest disclosures and to make formal referrals to the appropriate authority. This would ensure that these people are provided with assistance.

9.40 The Public Service Commission made the general observation that any whistleblower scheme will require checks and balances to ensure that it assists whistleblowers with 'genuine complaints', and discourages those who would use the scheme for their personal aims. The PSC referred to the motivational range of whistleblowers, noting that some can have an "obsessive intent to pursue their own interests".[15] Again, the Committee believes that where an allegation of wrongdoing

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15 Public Service Commission, evidence p.181. The Committee has noted that such obsession by whistleblowers can be associated with health aspects resulting from the institutional reaction to their case - see paras 5.40 - 5.42.

is made which would benefit the public interest, the actual motivation of the whistleblower is not relevant.

9.41 The PSC also noted that substantial allegations need to be distinguished from those which are vague, vexatious or based on hearsay.[16] The clearing house function of the Public Interest Disclosure Agency will be to identify those matters which are allegations of wrongdoing within the meaning of the legislation and therefore requiring investigation. Matters which are either of such a trivial nature so as not to come within the definition of "wrongdoing" or are concocted for the purpose of causing vexation to another would not be referred by the Agency for investigation under the legislation. However, it has to be recognised that sometimes the only evidence of substantial wrongdoing available in the first instance may be "vague" and "based on hearsay". The Committee is not prepared to discourage the investigation of such matters if the public interest content justifies it. Such matters might prove baseless or unsustainable. On the other hand, initial investigations might uncover the requisite amount of evidence to necessitate a full scale inquiry.

9.42 The Australian Federal Police referred to the need for a framework to protect whistleblowers which is "tempered with appropriate regard for the rights of persons exposed by whistleblowers and the rights of witnesses in matters reported by them".[17] The Law Institute of Victoria acknowledged the "importance of discouraging the making of spurious or false allegations motivated by malice on the part of disgruntled employees or former employees".[18] The Committee accepts that such matters will often be a matter of judgement for the Agency working within its legislative framework. To ensure uniformity the Committee encourages the development of a 'check list' to remind the clearing house officer of the subtle differences which may operate to either qualify a matter for, or disqualify a matter from, further investigation.

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16 ibid.

17 Australian Federal Police, evidence p.80.

18 Law Institute of Victoria, Submission no. 85, p.8.

9.43 **The Committee recommends that the functions of the Public Interest Disclosures Agency should include -**

- **To act as a "clearing house" for complaints and allegations so as to identify those matters which properly come within the category of public interest disclosures, and**
- **To advise and assist persons in respect of those matters which are not identified as public interest disclosures and to make formal referrals to the appropriate authority.**

Protections for whistleblowers - Reporting and Investigation

Exemption from sanctions for breach of secrecy provisions

9.44 Reporting wrongdoing in accordance with the procedures of the scheme, would qualify the whistleblower for the protections afforded by the proposed legislation. However, submissions made to the Committee mirrored the conclusion of the Gibbs Committee that in particular circumstances, public sector whistleblowers should be exempt from any sanction or disciplinary procedures for making a public interest disclosure which involved the unauthorised use of confidential information. In reviewing laws relating to official secrecy, the Gibbs Committee made particular recommendations concerning the issue of whistleblowing. As discussed in Chapter 8, the issue of secrecy and confidentiality provisions is appropriate to any discussion of public sector whistleblowing. The unauthorised disclosure of particular information may expose the public sector whistleblower to disciplinary sanctions and perhaps, prosecution for breach of a statutory duty.

9.45 The Committee has noted in paragraph 4.3 that the Gibbs Committee did not consider it necessary to make provision for a defence of public interest relating to equitable remedies, due to other recommendations it made relating to amendment of the Crimes Act and providing protection to whistleblowers.[19] The Committee

19 See Gibbs Report, p..335

considers, however, that the existing provisions of the Crimes Act should be amended to allow the disclosure of information in the public interest to be a defence against prosecution.

9.46 The Gibbs Committee outlined a public sector whistleblowing scheme, which would enable the unauthorised disclosure of certain information to certain specified bodies or persons regardless of any secrecy or other law.[20] However, the Gibbs Committee recommendation is quite specific in its application. Whether the whistleblower would be exempt from any disciplinary sanction for making the disclosure to any person (even to the media) would depend on the type of information disclosed.

9.47 The Gibbs Committee specified those types of information which would not attract the exemption. Briefly those categories include information relating to the intelligence and security services, defence and foreign relations, information which is obtained in confidence from other governments or international organisations, and information the disclosure of which results in the commission of an offence, facilitates an escape from custody, or impedes the apprehension or prosecution of suspected offenders.[21]

9.48 The Committee appreciates that the application of secrecy provisions to genuine whistleblowers may, in practice, deter the disclosure of public interest information. The relevance of such provisions to the whistleblowers situation cannot be underestimated.[22] The unqualified existence of secrecy provisions perpetuates the attitude of 'loyalty at any cost' within the public sector. Accordingly, the Committee believes that exempting whistleblowers from such provisions in certain circumstances

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20 Gibbs Report pp.353-4.

21 Gibbs Report, pp.330-331. Note: This does not entirely exhaust the list set out in the Gibbs Report.

22 Finn Report, p.44: "For most part the Australian legal story of government's management of official information has been the story of legislatively imposed restrictions on the use and disclosure of information by public officials and, particularly by public servants".

will result in a more balanced workplace attitude, which in turn will better complement the processes of government.

9.49 The Committee agrees that there exists a narrowly defined category of information, the unauthorised disclosure of which should still attract sanction. That category should be limited to the specific areas identified by the Gibbs Committee which are referred to above. However, special arrangements should be provided to cover the disclosure of information in this narrow category to ensure that public interest disclosures are not prevented. The Committee agrees with the Gibbs and Elliott Committees that, given the sensitive nature of the information in this category, in order for a whistleblower to be exempt from any relevant secrecy provisions, the disclosure should be made to the Inspector-General of Intelligence and Security. The provisions in the Inspector-General of Intelligence and Security Act 1986 which describe the functions of that office, should be amended to include this function, together with a clear authority to refer, with the Minister's approval, disclosures to the Public Interest Disclosures Agency, if, after due inquiry, it appears appropriate in all the circumstances to do so.

9.50 The Committee recognised that a problem could arise if a whistleblower was concerned in reporting a matter to the Director-General or believed that the report had not been dealt with satisfactorily. To whom could they then turn? The Committee suggests that in such, presumably very limited, cases a Federal Court Judge should be empowered to consider and make a determination on the matter.

9.51 The Committee is concerned to ensure that any such exemption from secrecy provisions does not in any way lower the standards of privacy of information currently enjoyed by the Australian community.

9.52 **The Committee recommends that those who make public interest disclosures should be exempt from sanctions and disciplinary action for breach of secrecy provisions, in all but a narrowly defined category of disclosures. Special arrangements should be provided to enable these narrowly defined disclosures to be**

made to the Inspector-General of Intelligence and Security or, in limited situations to a Federal Court Judge. The Inspector-General of Intelligence and Security Act should be amended accordingly.

9.53 **The Committee further recommends that the existing provisions of the Crimes Act should be amended to allow the disclosure of information in the public interest to be a defence against prosecution.**

Protection from harassment and intimidation

9.54 The Committee received overwhelming evidence of the appalling treatment whistleblowers invariably receive after making a public interest disclosure. At all the public hearings whistleblowers impressed upon the Committee the urgent need for legislative protection for these people. No matter the nature of the information disclosed, or the geographical or sector location of the workplace, the experiences recited by whistleblowers revealed an ominous but familiar pattern.

9.55 Whistleblowers consistently described to the Committee the trauma experienced during the period prior to the making of the disclosure. The decision to "blow the whistle" is one which few, if any, have made lightly. In fact the usual course of events seems to be that the whistleblower goes through a period of agonising about how to correct a particular situation. He or she casts about for assistance, and finding none is available or forthcoming, weighs up the risks to employment and personal well being of making a disclosure. Throughout the process the whistleblower is obsessed by the public interest involved, and the consequences of not making the disclosure. The process is analogous to the 'grieving process', the whistleblower's loss being the realisation of the vulnerability and inadequacies of the system; that corruption may continue whilst those who try to expose corruption may be crushed.

9.56 Certainty of the protections available to whistleblowers would obviate some of the concerns of the potential whistleblower. The Committee does not believe that any amount of legislative protection will ever completely protect a whistleblower

from all the subtle forms of negativity in the workplace. However, it may serve to entrench the legal rights of whistleblowers, and, to some degree, contribute to the attitudinal change required for whistleblowers to report wrongdoing without personal sacrifice. In order for legislation to alleviate the anxiety of whistleblowers during the pre-disclosure period, whistleblowers have to be aware of and understand, the legislation. As discussed above, there must be a national education campaign to ensure the distribution and dissemination of the relevant information.

9.57 As discussed in Chapter 5, there are many overt and subtle forms of harassment which individuals and organisations use to retaliate against whistleblowers. The Committee formed the view that harassment and victimisation of whistleblowers may take many guises and forms and that it may range in severity from trivial forms of undesirable and unethical behaviour to serious threats upon the lives and wellbeing of whistleblowers and those closely associated with them. Protection from all these forms of behaviour is desperately needed. The Committee recognises that some of these matters may constitute breaches of the law and may be actionable in a court of law.

Public sector - The role of the MPRA

9.58 The Committee is of the view that the responsibilities of existing Commonwealth agencies could be widened to include the investigation of complaints of victimisation and harassment in the public sector. The Merit Protection and Review Agency currently has these responsibilities for public sector employment. However, the MPRA was strongly criticised for their handling of cases involving whistleblowers in evidence given to the Committee. Whistleblowers had no faith in the MPRA as an agency which could assist or protect them. The Committee itself was deeply concerned by the attitude and approach of the MPRA to whistleblowers and whistleblowing problems as demonstrated by the tenor of its evidence.

9.59 For any whistleblower protection scheme to operate effectively, it must have the confidence and support of whistleblowers. The MPRA currently does not

enjoy that confidence. The Committee considered at great length, and indeed still remains hesitant, in recommending that the MPRA should be the primary organisation responsible for investigating complaints of victimisation and harassment of public sector whistleblowers. However, in doing so, the Committee adds a number of qualifications. The proposals referred to in paragraphs 7.21 - 7.23 to overcome shortcomings in the MPRA's statutory powers relating to former Commonwealth employees and to make binding recommendations are regarded as positive steps and are supported by the Committee. In addition, the Committee is recommending that the oversighting of the investigation of complaints of harassment, ill-treatment or victimisation of public sector whistleblowers by the MPRA should be one of the functions of the Public Interest Disclosures Agency.

9.60 After a full and proper investigation, which should be continually monitored by the Agency, the MPRA should have the responsibility of determining complaints. The MPRA should be empowered to make appropriate recommendations regarding the victimised whistleblowers. The MPRA may make such orders for restitution and protection which should have the force of law. The making of orders by the MPRA should also be balanced by the capacity to seek court orders or injunctions. However, the Committee notes the Queensland Whistleblower Study comment that a reflection of human nature is that legislation and court action will not stop some people and agrees that "to the extent that injunctions can be useful, they should be reasonably obtainable".[23] In addition, the MPRA's powers should be strengthened to enable it to ensure the implementation of recommendations that it makes to employer organisations. The role of the Public Interest Disclosures Agency and the MPRA in providing remedies for cases of victimisation is discussed in paragraphs 11.5 - 11.8.

9.61 The Committee believes that the receipt and investigation of complaints of victimisation of whistleblowers is one of the vital functions of the proposed whistleblowers protection scheme. As has been indicated, it was only after much

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23 Queensland Whistleblower Study, evidence p.1028.

consideration that the Committee concluded that the function should be the responsibility of the MPRA. The Committee was ultimately of the view that the MPRA is an existing agency which can be used to fulfil such an important function and that it should be made to do so. The MPRA is strongly urged to reassess its attitude to whistleblowers and to adopt a more progressive and empathetic approach to the interpretation of its role. In evidence to the Committee and in its performance at a public hearing, the MPRA presented an overly-bureaucratic and unhelpful response to whistleblowers. The Committee believes that recommending a strengthening of the MPRA's powers specifically in relation to whistleblowers complaints will redefine the MPRA's role in this area and assist them to reassess their attitude and approach to whistleblowing.

9.62 **The Committee recommends that the MPRA be the primary organisation for investigating complaints of victimisation and harassment of public sector whistleblowers, but with enhanced powers to receive complaints specifically from whistleblowers and to make recommendations and orders for restitution. The Public Interest Disclosures Agency should oversight the MPRA's investigation of complaints and provide an avenue of appeal over MPRA actions.**

Private sector

9.63 The Committee recognises that private sector whistleblowers are as vulnerable (if not more so) as their public sector counterparts to victimisation and harassment. However, the Committee acknowledges that the constitutional limitations on the Commonwealth Parliament to legislate in this area prevent the enactment of a comprehensive scheme to protect private sector whistleblowers. Whilst acknowledging the constraints it has in making recommendations relating to protection for private sector whistleblowers who clearly fall beyond the Commonwealth's legislative powers, the Committee offers suggestions which could extend whistleblower protection throughout the private sector. The Committee is of the view that if the States, relevant industrial bodies and employer organisations join together in a co-operative spirit, the limitations can be all but overcome.

9.64 The Committee recognises that the recent amendments to the Industrial Relations Act 1988 relating to unfair dismissals may, arguably, improve the position of some private sector whistleblowers. In some cases, the amendments will improve access to compensation, although the compensation available may not be of a level meaningful to whistleblowers. Certainly, the recent case of *Byrne and Anor* v *Australian Airlines Limited* (Full Court of the Federal Court, unreported, 7 February 1994) has introduced a further element of uncertainty as regards the position of private sector whistleblowers. That case has overturned the position which previously existed under *Gregory* v *Phillip Morris Limited* (1988) 80 ALR 455. The latter case was authority for the proposition that the award proscription against unfair dismissal was implied into every employees contract of employment. The decision of *Byrne and Anor* v *Australian Airlines Limited* has overruled that case; no such term should be implied into the contract of employment in the absence of an express term. This decision is pending appeal.

9.65 The Committee considers that the appointment of industry Ombudsmen, as has occurred in the banking, telecommunications and insurance industries, could be used to provide protection for private sector whistleblowers. For example the Banking Industry Ombudsman was established to assist in the resolution of disputes between banks and their non-incorporated clients. The Ombudsman's functions as provided in the terms of reference do not include reporting on legislative breaches, unlike the UK equivalent who has such powers.[24] These terms of reference would need to be broadened to empower the Ombudsman to provide protection for banking industry whistleblowers.

9.66 The Committee believes that the trend to appoint industry Ombudsmen presents a unique opportunity for individual industries to make appropriate arrangements for the protection of whistleblowers, which ultimately would benefit the industries themselves.

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24 Australian Banking Industry Ombudsman, evidence p.668.

9.67 The Committee also considers that with enhanced powers the Human Rights and Equal Opportunity Commission could play a role in the protection of private sector whistleblowers.

9.68 **The Committee recommends that legislation to protect whistleblowers should extend as far as constitutionally possible to cover the private sector. Where this is not possible, the Committee encourages the appointment of industry ombudsmen and recommends that the terms of reference of such Ombudsmen be so framed as to enable those officers to receive and investigate complaints of victimisation and harassment of private sector whistleblowers.**

The function of the Public Interest Disclosures Agency should be, in the matter of victimisation of public sector whistleblowers, to oversee the investigation of complaints of harassment, ill-treatment or victimisation of whistleblowers, such complaints being received and investigated by the MPRA or the Human Rights and Equal Opportunity Commission, as the case may be. The Agency's function in the protection of private sector whistleblowers should be to refer complaints to the relevant industry Ombudsmen or HREOC and to monitor progress with the resolution of those complaints.

Psychiatry

9.69 A matter of concern to the Committee is the alleged use of psychiatry by employers and organisations to intimidate and punish whistleblowers. Requiring a person to unnecessarily undergo psychiatric examination and assessment is likely to have substantial deleterious effects upon that individuals wellbeing. The alleged practice of referring whistleblowers, simply because they are whistleblowers, for such assessment is deplored by the Committee.

9.70 Dr Jean Lennane, National President of Whistleblowers Australia, and herself a practicing psychiatrist who has published on this subject,[25] was one who drew the Committee's attention to the abuse of psychiatry.[26] Dr Lennane recommended that the practice of employers forcing whistleblowers to consult with a psychiatrist for the purpose of harassing and discrediting them should be addressed by whistleblower protection legislation. Such legislation should define the type of employment practices from which whistleblowers should be protected.[27] Dr Lennane's suggestion is that the abuse of psychiatry to discredit whistleblowers should be a "prohibited personnel practice".[28]

9.71 Dr Lennane provided the Committee with a copy of Referrals at the Instigation or Insistence of the Patient's Employer: Guidelines for Psychiatrists (the Guidelines).[29] The Guidelines were issued under the auspices of the New South Wales Branch of the Australian Medical Association (the 'AMA'). The Guidelines have been composed to assist practitioners in distinguishing between referrals which are for the purpose of genuinely benefiting an employee, and referrals at the behest of the employer calculated to intimidate an employee for the employers interest. Clearly, professional ethics should preclude psychiatrists - and other medical practitioners - from participating in the latter type of situation. The Committee considers that the formulation of such Guidelines should be a matter for the relevant professional bodies. The Committee agrees with the direction and intent of such guidelines, whilst it makes no judgement as to their soundness.

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25 Dr Jean Lennane, "Whistleblowing": a health issue', British Medical Journal, 11 September 1993, Vol. 307, Pages 667-670.

26 See also Bill Wodrow, evidence p.1378; Network for Christian Values, Submission no. 1, pp.2-3.

27 The Whistleblowers Protection Bill 1993 introduced by Senator Chamarette refers to such practices as 'prohibited personnel practices'.

28 Dr Jean Lennane, evidence p.707.

29 The guidelines are reproduced in evidence p.710.