

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

IN THE PUBLIC INTEREST

REPORT OF THE SENATE SELECT COMMITTEE ON
PUBLIC INTEREST WHISTLEBLOWING

AUGUST 1994

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Parliament House
Canberra ACT 2600

TERMS OF REFERENCE

Terms of reference agreed to 2 September 1993:

- (1) That a select committee, to be known as the Select Committee on Public Interest Whistleblowing, be appointed to inquire into and report, on or before 31 August 1994, on the following matter:

Whether the practice of whistleblowing should be the subject of Commonwealth legislation to enable the making of such disclosures in the public interest and, if so, what form the legislation should take.

- (2) That in conducting its inquiry the committee should examine in particular:
 - (a) what persons and organisations, as subjects of whistleblowing, should be covered by the legislation;
 - (b) the nature of any protection that should be extended to whistleblowers and to the subjects of whistleblowing;
 - (c) whether a new agency should be created to receive and investigate disclosures and to investigate any discrimination suffered by whistleblowers as a result of those disclosures, or whether an existing Commonwealth agency should have that role;
 - (d) what powers any investigating body should have;
 - (e) the nature of any protection that should be extended to any investigating body and its members; and
 - (f) what remedies and penalties should be provided for whistleblowers and for the subjects of whistleblowing.

The terms of reference were amended on 22 February and 31 May 1994 to extend the reporting date.

Reference of a bill to the Committee, agreed to 27 October 1993.

That the Whistleblowers Protection Bill 1993, introduced into the Senate by Senator Chamarette on 5 October 1993, be referred to the Select Committee on Public Interest Whistleblowing for inquiry and report on the same day as the Select Committee is to report on the matter referred to it on 2 September 1993.

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LIST OF ABBREVIATIONS

AFP	Australian Federal Police
AMA	Australian Medical Association
ANF	Australian Nurses Federation
ANSTO	Australian Nuclear Science and Technology Organisation
APC	Australian Press Council
BASI	Bureau of Air Safety Investigations
CAA	Civil Aviation Authority
CJC	Criminal Justice Commission (Queensland)
DFAT	Department of Foreign Affairs and Trade
EARC (Queensland)	Electoral and Administrative Review Commission
Elliott Committee	House of Representatives Standing Committee on Banking, Finance and Public Administration
F&PA Committee	Senate Standing Committee on Finance and Public Administration
Gibbs Committee	Committee to Review Commonwealth Criminal Law
HREOC	Human Rights and Equal Opportunity Commission
ICAC	Independent Commission Against Corruption (NSW)
IIAA	Institute of Internal Auditors - Australia
MPRA	Merit Protection and Review Agency
MSPB	Merit Systems Protection Board (USA)
NCA	National Crime Authority
OSC	Office of Special Counsel (USA)
PEARC	Parliamentary Committee for Electoral and Administrative Review (Queensland)

PSC	Public Service Commission
QWS	Queensland Whistleblower Study
RANZCP	Royal Australian and New Zealand College of Psychiatrists
RBA	Reserve Bank of Australia
WAG	Whistleblowers Action Group (Queensland)

Reports

EARC Report	Report on Protection of Whistleblowers, Electoral and Administrative Review Commission, October 1991
Elliott Report	Focussing on Fraud, Report on the Inquiry into Fraud on the Commonwealth, House of Representatives Standing Committee on Banking, Finance and Public Administration, (Paul Elliott, MP - Chairman), November 1993
Finn Report	Official Information, Integrity in Government Project: Interim Report 1, Professor Paul Finn, ANU, 1991
F&PA DFAT Report	Report on the Management and Operations of the Department of Foreign Affairs and Trade, Senate Standing Committee on Finance and Public Administration, December 1993
F&PA Ombudsman Report	Review of the Office of the Commonwealth Ombudsman, Senate Standing Committee on Finance and Public Administration, December 1991
Gibbs Report	Review of Commonwealth Criminal Law - Final Report, (Sir Harry Gibbs - Chairman), December 1991
PEARC Report	Report on Whistleblowers Protection, Parliamentary Committee for Electoral and Administrative Review, Queensland, April 1992

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Definitions

In considering the subject of whistleblowing, the Committee has adopted as broad a definition as possible to include disclosures by people from within or outside the organisation in which the wrongdoing occurred and embracing a wide range of activities to constitute wrongdoing. (para 2.12)

Overview comments

The Committee acknowledges that whistleblowing is a legitimate form of action within a democracy and that there have been, there are, and there will continue to be occasions on which whistleblowing is the only available avenue for the concerned ethical citizen to expose wrongdoing in the public or private sector. (para 2.14)

The Committee believes that a fundamental shift in Australian values and ethics is necessary to overcome the stigma and trauma associated with whistleblowing. Notwithstanding the recommendations in this report, the Committee encourages organisations and institutions in both the public and private sectors, to reassess the value of reporting wrong-doing and welcomes any initiatives, programs or strategies aimed at addressing this culture-change. The Committee appreciates that, notwithstanding the implementation of any legislative initiatives recommended in this report, in order to effect a shift in traditional workplace values and ethics, legislation must be accompanied by national leadership and education programs specifically targeted at workplace ethics. (para 2.20)

International legislative activity

The Committee acknowledges that legislative action on whistleblower protection is occurring in a number of comparable international legislatures and believes that the

experience and future developments within these legislatures should be monitored with a view to benefiting from their experiences. (para 3.34)

Education to bring about cultural and attitudinal change

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. (para 6.35)

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. (6.50)

Public interest disclosure/whistleblower protection legislation

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. (para 6.66)

The Committee recognises the symbolic importance of any whistleblower protection legislation but is nevertheless concerned to ensure that symbolism and rhetoric are not regarded as a substitute for positive action. (para 6.65)

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. (para 6.66)

Public Interest Disclosures Agency and Board

The Committee recommends that:

Public Interest Disclosures Agency -

- . Legislation be enacted to establish an independent agency, to be known as the Public Interest Disclosures Agency (the Agency).
- . The role of the Agency should be to receive public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures, to provide a national education program and to make and oversee the implementation of recommendations relating to its role.
- . The Agency should consist of an administrative unit with the capacity to contract relevant experts as required, and an education unit.
- . The Agency should have the following accountability mechanisms:
 - a. Report annually to Parliament;
 - b. Present special reports to Parliament on any matters relating to its functions and operations which the Agency considers need Parliamentary support or action;
 - c. Maintain files, statistics and records of cases;
 - d. Provide evidence of client satisfaction through surveys, the results of which will form part of the annual report.

Public Interest Disclosures Board -

- . A Public Interest Disclosures Board should be created whose role would be to provide direction to and control over the Agency in the performance of its functions.
- . The Board should be supported by a small secretariat from within the Agency.
- . Appointments to the Board should aim at achieving gender equality and include nominees from the following organisations: Human Rights and Equal Opportunity Commission, Privacy Commission, Commonwealth Ombudsman's Office, Merit Protection and Review Agency, a recognised whistleblower support group, a Public Interest Advocacy Centre, an Ethics group, a Trade Union, and other national community organisations.

- Parliamentary involvement should be included by the appointment of a Senator and Member of the House of Representatives. The Member should be a government nominee and the Senator a non-government nominee or alternatively the Parliamentary members should include a government and non-government nominee.
- Members of the Board should be appointed for a period of three years, with eligibility for reappointment to a second term only. (para 7.47)

Legislative coverage - public and private sector

The Committee recommends that the Public Interest Disclosures Agency and the provisions of the supporting legislation be given the widest coverage constitutionally possible in both the public and private sector. (para 8.69)

In recognition of the constitutional limitations of the Commonwealth Parliament to enact a comprehensive scheme to cover whistleblowers throughout the private sector, the Committee encourages States and/or relevant industry groups to provide avenues for the reporting and investigation of wrongdoing, in those areas where the Commonwealth Parliament cannot constitutionally act. (para 8.70)

The Committee considers that, with mutual cooperation between the Commonwealth, the States and industry groups, whistleblower protection legislation can be a reform on a national level. (para 8.68)

Coverage of specific areas with public/private sector involvement

Education

The Committee recommends that legislation extend to academic institutions, where it can, and, regardless of legislative initiatives, the Committee encourages institutions to accept dissent as integral to the pursuit of knowledge. (para 8.83)

Health care and administration

The Committee recommends that, where constitutionally possible, the Commonwealth Parliament should legislate to provide whistleblower protection for disclosures made about the health care industry. The Committee acknowledges the public interest nature of the work of all sections of the health care industry and welcomes initiatives at/in work places within the industry to encourage and protect those who make disclosures in the public interest. (para 8.92)

Banking

The Committee recommends that, as in the education and health care spheres, the banking industry should be subject to whistleblowers protection legislation to the extent to which the Commonwealth Parliament is constitutionally able. The Committee further recommends that the Charter of the Reserve Bank of Australia be amended to empower the reserve bank to receive and investigate public interest disclosures relating to the banking industry. (para 8.104)

Policing

The Committee recommends that the Australian Federal Police be covered by the whistleblower protection legislation and, in noting the reporting inadequacies which exist in the State police forces, strongly urges reform in those areas. Given the seeming lack of success of police force reform to date, the Committee is of the view that additional action in the form of education initiatives and strategies needs to be directed at whistleblower protection in police forces together with the development of a policy to assist and encourage internal informers within all State police forces. (para 8.116)

Public Interest Disclosures

Acts of wrongdoing and their disclosure

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 the investigation of these public interest disclosures should not be precluded where the wrongdoing occurred before the commencement of the legislation or the disclosure within five years prior to the commencement of the legislation. (para 9.13)

Identity of whistleblower

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. (para 9.24)

Internal reporting systems

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. (9.31)

Screening process

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. (para 9.43)

Exemption from secrecy provisions

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. (para 9.52)

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. (para 9.53)

Protection of whistleblowers

Disclosure according to reporting procedures

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. (para 9.34)

Investigation of victimisation

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 oversee the MPRA's investigation of complaints and provide an avenue of appeal over MPRA actions. (para 9.62)

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. (para 9.68)

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. (para 9.68)

Protection of whistleblowers - remedies

The Committee recommends that whistleblower legislation make provision for a tort of victimisation. The Committee further recommends that, as far as is constitutionally able, the Human Rights and Equal Opportunity Commission through an extension of its powers be an alternative forum and course of action available to public and private sector whistleblowers to facilitate their obtaining compensation for victimisation. (para 11.13)

Use of psychiatry

The Committee recommends that the medical profession settle guidelines which expressly describe the ethical obligations of medical practitioners, especially psychiatrists, where patients are referred by employers. (para 9.77)

The Committee recommends that the use of psychiatry in relation to whistleblowers be comprehensively dealt with as part of the national education program. Such inclusion should be with a view to expanding community awareness and to developing employer sensitivity in relation to such matters. (para 9.77)

Protection for subjects of whistleblowing

The Committee recommends that the rights of the subjects of whistleblowing be protected in accordance with the principles of natural justice. In addition the investigations should be conducted privately in so far as the public interest is best served, and, where allegations are not substantiated after due and proper investigation, the details of the complaint should not be publicly released. (para 9.80)

The Committee recommends that where a person makes an allegation, knowing it to be false in a material particular, the making of such a false allegation should constitute an offence under the whistleblowing protection legislation. Where such an offence is proven, the person who made the allegation should be subject to a penalty being fine and/or community service orders. (para 9.83)

Counselling and advice

The Committee recommends that counselling services should be community-based, provided through a private/community group or ethics foundation with mixed government/corporate financial support, preferably based on the model of the St James Ethics Centre or Public Concern at Work in the UK. (para 9.99)

The Agency's function in relation to counselling should be to ensure that whistleblowers and those who are the subjects of whistleblowing have access to confidential counselling services. The Agency should maintain regular liaison with the counselling services to ensure that whistleblowers needs are being met. (para 9.99)

The Committee recommends the establishment of a toll free hotline to enable Australia-wide point of contact with the Public Interest Disclosures Agency. (para 9.104)

Legal aid and assistance

The Committee recommends that Legal Aid Commissions be informed that whistleblowers and actions arising from whistleblowing ought to be considered as one of the categories of actions for which legal aid may be granted, if the applicant is otherwise assessed as eligible. The Committee encourages community oriented legal services to provide legal assistance and advice to whistleblowers and associated persons. (para 9.112)

Reporting wrongdoing to the media

The Committee recommends that whistleblowers should have limited recourse to the media without being disentitled to protection under the legislation and endorses the Gibbs Committee recommendations in this regard. Whistleblowers should be protected where they make a disclosure of "wrongdoing" within the meaning of the legislation, to the media, where to do so is excusable in all the circumstances. In determining whether it is excusable in all the circumstances the factors to be taken account of should include the seriousness of the allegations, reasonable belief in their accuracy and reasonable belief that to make a disclosure along other channels might be futile or result in the whistleblower being victimised. (para 9.130)

Defamation laws

The Committee further recommends that whistleblowers who make disclosures through the media should not be given any special exemption from the laws of defamation. (para 9.130)

The Committee recommends that legislative changes be initiated to ensure the uniformity of defamation laws in all States and territories, in accordance with previous recommendations made by bodies such as the Law Reform Commission. Of particular concern to the Committee is the use of defamation law to suppress critical comment, including "stop writs" which prevent public consideration of matters of immediate concern. (para 9.135)

Investigating public interest disclosures: Powers and protection

The Committee recommends that any investigating body must be equipped with sufficient powers to enable it to competently and efficiently perform the investigations with which it is charged.(para 10.7)

The Committee recommends that the Ombudsman's office should be the primary organisation to which the Agency would refer whistleblowers complaints for investigation, but with enhanced legislative powers and functions. (para 10.12)

The Committee recommends that Commonwealth regulatory agencies, where applicable, be responsible for the investigation of public interest disclosures in the private sector. (para 10.34)

The Committee recommends that any organisation charged with the investigative function in relation to public interest disclosures should be conferred with powers to require production of documents and evidence, examine witnesses, and to report on and refer matters as relevant and appropriate. (para 10.16)

The Committee recommends that investigating agencies should have power to override secrecy provisions which serve to prevent information being disclosed which might assist the investigators in their task. The Committee has recommended that public sector whistleblowers be exempt from sanctions for contravening relevant secrecy or confidentiality provisions in all but a narrow category of cases. The Committee further recommends that the same exemption should also apply to witnesses who are called upon to give evidence relevant to an investigation of a public interest disclosure. (para 10.35)

The Committee recommends that the power of entry should be available to the Public Interest Disclosures Agency and the relevant investigating body in prescribed circumstances on application to a Judge of the Federal Court of Australia for a warrant. (para 10.27)

The Committee recommends that the Public Interest Disclosures Agency and the investigating bodies be empowered to utilise expertise as and where it is deemed necessary. Such expertise may be procured by secondment, transfer, contract or by whatever means are necessary to obtain expert services. (para 10.30)

The Committee recommends that the Public Interest Disclosures Agency and Board, their members and officers and the investigating agency and its officers should, in the least, be protected from:

1. Harassment, intimidation and obstruction in the performance of their duties; and
2. Civil action arising from the performance of their duties, in terms similar to that protection contained in Sections 33 (1) and 37 of the Ombudsman Act 1976. (para 10.44)

Rewards

The Committee recommends that a system of rewards for whistleblowing should not be included in the whistleblower protection scheme proposed in this report. (para 11.20)

Whistleblowers Protection Bill 1993

The Committee concludes that with the introduction and passage of whistleblower protection legislation in the form recommended in this report, further parliamentary consideration of the Whistleblowers Protection Bill 1993 should not be required. (para 12.35)

Further consideration of unresolved cases

The Committee recommends that the Queensland Government establish an independent investigation into these unresolved cases within its jurisdiction. (para 1.13)

Summary

The Committee's recommendations have been based around three areas it believes are crucial to the consideration of whistleblowing. Firstly, the need to change attitudes towards whistleblowers and the public interest benefits derived from whistleblowing within public and private sector organisations and the community generally. Secondly, the formulation or enhancement of internal reporting systems and procedures within organisations to specifically deal with whistleblowers and their disclosure of wrongdoing. Thirdly, the creation of an independent Public Interest Disclosures Agency and Board to undertake or oversee the investigation of disclosures of wrongdoing and the protection of whistleblowers and the subjects of whistleblowing.

In recommending the creation of a separate Public Interest Disclosures Agency and Board, the Committee is mindful of the desirability of containing set-up and operating costs. It has also taken heed of concerns about duplication of resources and overlap of responsibilities with other existing bodies such as the Ombudsman and the Merit Protection and Review Agency. The Committee is satisfied that an Agency and Board composed of part-time specialist members supported by a small secretariat and ancillary administration and education units, is preferable to a full-time Commissioner and large agency. The Agency is intended to provide a lean, efficient, credible and cost-effective method to handle public interest disclosures. In addition, the proposed external involvement of private sector ethics and community groups in the provision of counselling and support services to whistleblowers, should alleviate any concerns regarding conflict of the Agency's roles and contain operating expenses.

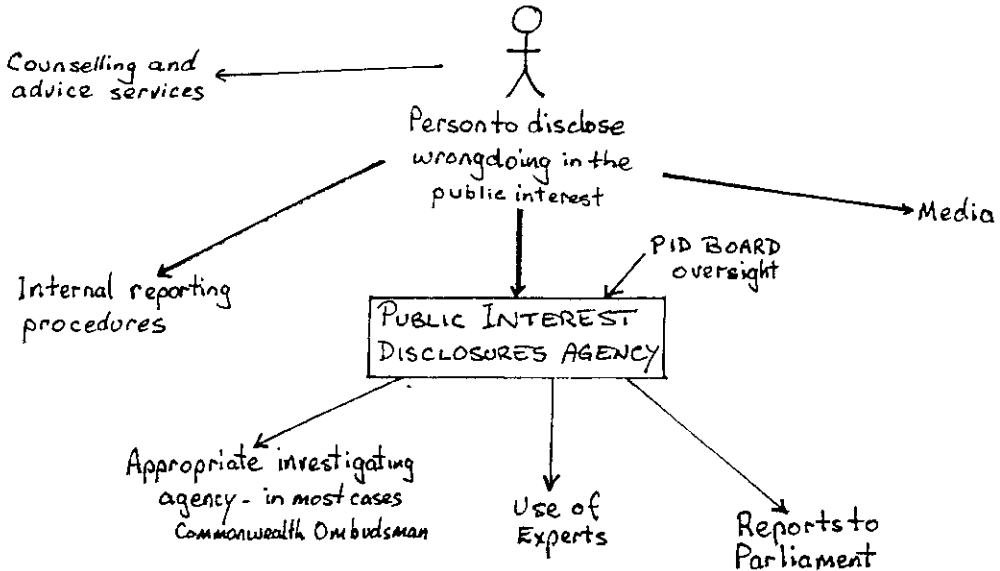
The Committee acknowledges that the effectiveness and benefits from whistleblowing legislation will only be realised if its provisions are viewed as being credible and workable by both potential whistleblowers and organisations who will be subject to it. As an adjunct to this objective, the Committee has endeavoured to propose the most appropriate and cost effective means to achieve greater accountability and responsiveness from government processes. The Committee believes that the creation of a separate Agency whose independence is emphasised through the

enactment of whistleblower legislation will have a twofold benefit. In the most tangible way it demonstrates a commitment to recognising the legitimacy of whistleblowing and in practical terms provides an 'open' system which facilitates the reform process in the public and private sectors by highlighting maladministration and exposing corruption in the public interest.

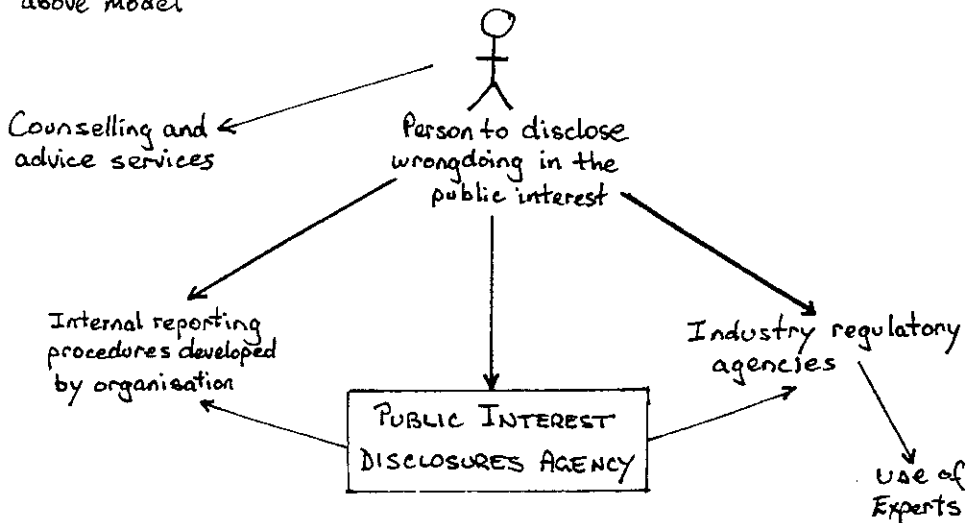
A simplified schematic representation showing the Committee's recommended options for making public interest disclosures and for protecting those making public interest disclosures is attached.

RECOMMENDED OPTIONS FOR MAKING PUBLIC INTEREST DISCLOSURES

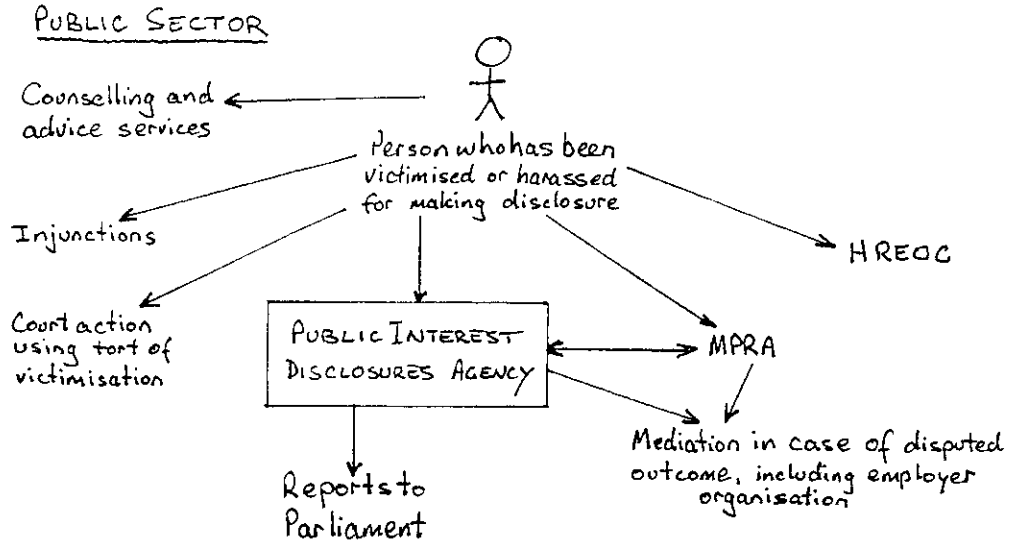
PUBLIC SECTOR



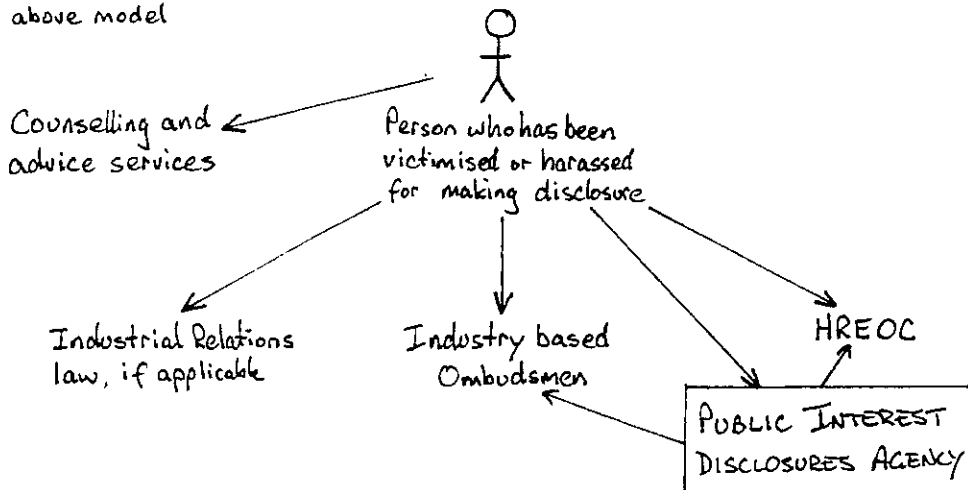
PRIVATE SECTOR or not covered within above model



RECOMMENDED OPTIONS FOR PROTECTING THOSE MAKING PUBLIC INTEREST DISCLOSURES



PRIVATE SECTOR or not covered within above model



CHAPTER ONE

INTRODUCTION

Establishment

1.1 The Senate Select Committee on Public Interest Whistleblowing was established by resolution of the Senate, on the motion of Senator Jocelyn Newman, on 2 September 1993. Senator Newman indicated to the Senate that she had been concerned at the number of people who described their experience of whistleblowing in the national interest, and whose careers and health had suffered as a result due to the apparent inadequacy of existing procedures in giving these people sufficient protection from harassment, intimidation or even sacking. However, it was not just these cases in the public sector, but also a case in the private sector - relating to problems affecting the viability of a Tasmanian bank and its subsequent removal of the whistleblower after his identity had been revealed - that led Senator Newman to move in the Senate for the establishment of the Select Committee.¹

1.2 On 27 October 1993, on the motion of Senator Newman as Chair of the Committee, the Senate referred to the Committee for inquiry and report the Whistleblowers Protection Bill 1993. This was a private senator's bill which had been introduced by Senator Chamarette on 5 October 1993.

Conduct of the Inquiry

1.3 The inquiry was advertised in major newspapers on 23 October 1993. In addition to this advertisement the Committee wrote to a range of interested people and organisations inviting them to make a submission. A closing date for submissions was set at 17 December 1993. However, the public hearings held in early 1994 generated wider interest in the inquiry. It was therefore agreed that submissions

1 Senate Hansard, 25 September 1993, pp.900-902.

would be received throughout the course of the inquiry to ensure that all interested people were given an opportunity to put their views before the Committee.

1.4 The Committee received 125 submissions and 12 supplementary submissions, in addition to a number of written responses to evidence and submissions. A list of submissions and other written material received by the Committee and which it authorised to be published is at Appendix 1. These submissions and other material have been published in separate volumes.

1.5 The Committee held public hearings as follows:

Canberra - 29 November 1993

Canberra - 30 November 1993

Adelaide - 27 January 1994

Melbourne - 28 January 1994

Sydney - 7 March 1994

Brisbane - 8 March 1994

Canberra - 25 March 1994

A list of witnesses who gave evidence at these hearings is at Appendix 2.

1.6 The Senate agreed to extend the time for the presentation of the Committee's report on 22 February 1994, and on 31 May 1994 until 31 August 1994.

Consideration of individual cases

1.7 From the outset of the inquiry the Committee felt it was necessary to emphasise that its terms of reference required it to inquire into whether whistleblowing should be the subject of Commonwealth legislation. The Committee was not empowered to determine the rights or wrongs of individual cases which may be attracted by such an inquiry. The Committee's function was to look to the future in respect of whistleblowing legislation, not to become an avenue for whistleblowers to

raise their cases in the expectation that specific action could be taken. Accordingly, when advertising the inquiry the Committee included the following comments:

Whilst the Committee appreciates that there exists evidence which relates to personal and specific instances of whistleblowing the Committee will be confining its inquiry to the Terms of Reference. The Committee will not be investigating or pursuing specific cases. The Committee will consider such evidence only to the extent that it may assist the Committee in its inquiry.

1.8 Most people who provided submissions understood these limitations in respect to specific cases, using their case histories to illustrate comments directed towards the terms of reference. Many indicated that it was their strongest wish that action should be taken to ensure that in the future whistleblowers were not subjected to the suffering which had been inflicted upon them. The Committee was generous in its application of this procedure relating to specific cases and agreed to receive as evidence most of the written material that was forwarded. Nevertheless, a few correspondents had material returned with an indication that it did not address or was not relevant to the terms of reference.

1.9 The requirements of the Senate's Privileges Resolutions² relating to adverse reflections were relevant in determining which submissions the Committee would authorise for publication. Consequently, a number of submissions were published together with responses to adverse reflections, whilst others were published in part or with material expunged. A few submissions were not published at the request of their author and in some cases detailed supporting documentation was returned to the author.

1.10 In relation to the individual cases outlined in submissions which were received, the Committee considered them as anecdotal evidence of assistance in its inquiry. The Committee did not attempt to determine whether the case history as

2 Parliamentary Privilege Resolutions - 25 February 1988, Standing Orders and Other Orders of the Senate, June 1993, pp.91-93.

outlined was accurate in all respects. This was not the function of the Committee and therefore, subject to the requirements of the Privileges Resolutions, it was not regarded as necessary to have the opposing party (or in many cases parties) provide their interpretation of the events.

1.11 The case histories were important to the Committee as they described the experiences of whistleblowers and the effects upon them at a personal level. They conveyed the perceptions and attitudes of whistleblowers, in particular towards various organisations involved with their case. Whether these perceptions could be argued as justifiably held was not as relevant to the Committee as the fact that these perceptions are held, and held very strongly.

1.12 The Committee received requests during the inquiry to recommend action be taken on individual cases to reopen investigations or hold further judicial or parliamentary inquiries. As indicated, it was not the Committee's function to make judgements as to the merits or otherwise of particular cases. Indeed, many cases involved organisations not within the Commonwealth's jurisdiction. Nevertheless, the Committee was concerned at the evidence it received in many cases which indicated apparent injustices may have occurred.

1.13 The Committee is unable to allow this situation to pass without comment. The Committee is pleased to note that some jurisdictions have provided a mechanism by which particular cases can be reviewed. The establishment of the NSW Royal Commission into the Police Service will provide an opportunity for further examination of some cases brought before the Committee. The South Australian Whistleblowers Protection Act provides for the investigation of wrongdoing which occurred before the commencement of the legislation. The Committee believes that any disclosure of wrongdoing which occurred within five years prior to the commencement of legislation, should be included in legislation by other States as they move towards the enactment of complementary legislation. All these measures are intended to assist whistleblowers, as would the implementation of the recommendations in this report at the Commonwealth level. However, the Committee remains concerned at the number

of apparently unresolved whistleblower cases in Queensland³ and therefore **the Committee recommends that the Queensland Government establish an independent investigation into these unresolved cases within its jurisdiction.**

Reference to existing reports

1.14 The Committee acknowledges that a number of reports and papers published in recent years have addressed the subject of whistleblowing, although in varying detail. These are referred to in Chapter 4. The Committee particularly notes the work produced by other parliamentary committees and the Electoral and Administrative Review Commission (Qld) in its Report on Protection of Whistleblowers, together with the transcripts and papers from conferences arranged by the Criminal Justice Commission (Qld) and the Royal Institute of Public Administration Australia (NSW).

1.15 The Committee has in parts of this report referred to the consideration of issues which have been fully dealt with in these reports and papers, rather than reproducing that detail in this report. Much of the evidence received by the Committee corroborated many of the conclusions and recommendations reached by the authors of this existing material. The Hansard transcripts of the evidence received at public hearings together with the submissions that the Committee authorised for publication were tabled in the Senate with this report. Copies of submissions and evidence can be obtained through the Department of the Senate.

3 See in particular evidence given in Brisbane by members of the Whistleblowers Action Group, evidence pp.1072-1131 and by Kevin Lindeberg and Des O'Neill, evidence pp.1132-1144. See also Submission nos. 18 - Teri Lambert, 20 - Peter Jesser, 40 - Gordon Harris, 43 - Tom Hardin, 64 - Des O'Neill, 74 - Kevin Lindeberg, 108 - Robert Osmak, 110 - Greg McMahon and 123 - Bill Zinglemann.

CHAPTER TWO

OVERVIEW

Defining the terms 'whistleblower' and 'whistleblowing'

2.1 Use of the terms 'whistleblower' and 'whistleblowing' are commonly recognised overseas and have gained international acceptance in a legal context. The consumer activist Ralph Nader was one of the first advocates to give definition to the term whistleblowing as "an act of a man or a woman who believing in the public interest overrides the interest of the organisation he [sic] serves, and publicly blows the whistle if the organisation is involved in corrupt, illegal, fraudulent or harmful activity."¹

2.2 The Queensland Electoral and Administrative Review Commission (EARC) conducted comprehensive research and discussion of the concept of whistleblowing in the preparation of a report on the protection of Whistleblowers. In this report, EARC adopted a broad working definition of a whistleblower which had been developed in an earlier Issues Paper:

a whistleblower is a person who discloses wrongdoing to another person, whether within or outside the organisation in which the wrongdoing has occurred.²

The Committee prefers the more extensive definition given in evidence as follows:

the whistleblower is a concerned citizen, totally, or predominantly motivated by notions of public interest, who initiates of her or his own free will, an open disclosure about significant wrongdoing directly

1 Attorney-General's Department Submission, evidence p.110, quoting R. Nader, 'An Anatomy of Whistleblowing,' in *Whistleblowing: The Report of the Conference of Special Responsibility*, p.1.

2 Queensland Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers (EARC Report)*, October 1991, p.14. Similarly broad definitions were also proposed by the Health Insurance Commission, evidence p.1262 and Greenpeace Australia, evidence p.1291.

perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing.³

2.3 On the other hand EARC argued that it more was difficult to find an all encompassing definition of the activity of whistleblowing. EARC attributed this to the situation whereby:

the range of activities that can be comprehended by the term "whistleblowing" is potentially broad, to the point that ambiguity arises as to the precise scope or meaning of the term. The core concept, which exists in all definitions of the term, refers to the act of an employee who has disclosed details of (or "blown the whistle on") some wrongdoing by his or her employer.⁴

2.4 As EARC noted, by focusing on the action of an employee, many definitions narrow the scope of whistleblowing to an employment related activity. Whilst accepting that the most likely sphere of operation for a whistleblower protection scheme is in the employment context, EARC argues that there is no compelling reason why greater protection should be offered to persons who report wrongdoing by their employer than to a person who reports wrongdoing of any nature.⁵ The Queensland Whistleblower Study agreed. Although adopting a definition of whistleblowing which included only present or former employees of the organisation in which the reported wrongdoing occurred, QWS believed there was no reason why protection should not be broader. Many non-employee whistleblowers already suffer reprisals just as badly as employees.⁶

2.5 A comprehensive consideration of the meaning of whistleblowing was made by Mr J. Starke QC, in an article on the protection of public service

3 Dr William de Maria, quoted by Alwyn Johnson, evidence p.529.

4 EARC Report, pp.11-12.

5 *ibid.*, pp.13-14.

6 Queensland Whistleblower Study, evidence pp.1023 and 1035.

whistleblowers. Starke suggested that the following criteria are essential for any general definition:

- (a) a disclosure of information evidencing objectionable misconduct, not otherwise known or visible;
- (b) such disclosure is made in the reasonable belief that this information demonstrates that there had been such misconduct;
- (c) the person making the disclosure acts in good faith, without malice;
- (d) the disclosure is made in the public interest with a view to ensuring that the community has an effective civil service; and
- (e) the disclosure is not specifically prohibited by law, or considerations of national security or defence would not preclude it being made.⁷

2.6 Whistleblowing research led by Frederick Elliston concluded that an act of whistleblowing occurs when:

- 1. an individual performs an action or series of actions intended to make information public;
- 2. the information is made a matter of public record;
- 3. the information is about possible or actual, non-trivial wrongdoing in an organisation;
- 4. the individual who performs the action is a member or former member of the organisation.⁸

7 J.G. Starke QC, Submission no. 119, *The Protection of Public Service Whistleblowers: Parts I and II*, Australian Law Journal Offprint, pp.207-213.

8 Elliston, F., Keenan, J., Lockhart, P. and van Schaick, J., *Whistleblowing Research Methodological and Moral Issues*, Praeger, New York, 1985, p.15.

2.7 The Committee received suggestions that whistleblowing should be defined in terms of a complete process. It was suggested that whistleblowing should not only include the initial disclosure of information but also address the institutional response of victimisation and harassment.⁹

2.8 In addition to arguing that the application of protection for whistleblowers should not necessarily be confined on the basis of whether they are employees or not, EARC referred to circumstances in which independent contractors are witness to wrongdoing or where employees of one organisation may become aware of illegal conduct by another organisation. Ultimately, EARC comments that arrival at an all inclusive definition is an elusive task. Construction of a definition is subject to consideration of the range of information that may be disclosed by a whistleblower and "the scope of the protection that might be given to a whistleblower against retaliatory action."¹⁰

2.9 Whistleblowing has also been referred to as either an 'active' or 'passive' process. An 'active' whistleblower was described as a person who makes a conscious decision to make public information about waste, mismanagement or corruption by releasing material to an external authority or body such as the Parliament or media. An example of 'passive' whistleblowing may involve simply giving evidence to an investigator or commission of inquiry or court.¹¹ Similarly, refusal by an employee to carry out an employer's instruction because it is illegal without necessarily reporting the employer's conduct, could be viewed as passive whistleblowing.¹²

9 Len Wylde, evidence p.413.

10 EARC Report, p.12.

11 Bill Wodrow, Submission no. 111, p.2.

12 EARC Report, p.12.

2.10 The Committee received objections, as did EARC, regarding the use of the term "whistleblower" because of its potentially negative connotations.¹³ EARC reported that the term whistleblower had been criticised for its pejorative tone.¹⁴ One submission indicated that use of the term whistleblower inadvertently vilifies the honest officers who are motivated to disclose malpractice in the public service.¹⁵ The Department of Defence also noted the derogatory manner in which the term whistleblower is viewed in Australian society and argued that a more positive term should be used to describe those who disclose breaches of law and/or maladministration in government.¹⁶

2.11 The Committee adopted the same approach as EARC in acknowledging this criticism, but continued using the term because of its apparent acceptance and widespread use in literature and legislative initiatives both in Australia and internationally. The Committee is hopeful that with an increased understanding of the practice of whistleblowing and its benefits for the public interest, the term will become accepted for its positive qualities.

2.12 **In considering the subject of whistleblowing, the Committee has, adopted as broad a definition as possible to include disclosures by people from within or outside the organisation in which the wrongdoing occurred and embracing a wide range of activities to constitute wrongdoing.** These activities are considered in detail in Chapter 9. The Committee considers that by utilising a broad definition of whistleblower and what constitutes whistleblowing a degree of flexibility is retained. Nevertheless the Committee acknowledges the validity of EARC's comments that:

in the final analysis what is important is not the definition of the term, but the definition of the circumstances and conditions under which

13 The Committee was particularly disappointed to note the negative implications of the Macquarie Dictionary's definition of 'blow the whistle on' as "to betray, esp. to the authorities".

14 EARC report, p.11.

15 Malcolm MacKellar, Submission no. 12, p.5.

16 Department of Defence, evidence p.1337.

employees who disclose wrongdoing should be entitled to protection from retaliation.¹⁷

Overview comments

2.13 The concept of whistleblowing is a legitimate form of action within a democracy and is a valuable safeguard in protecting the public interest against fraudulent behaviour or wasteful practices. In practice, whistleblowing is not usually encouraged or welcomed when an individual feels morally compelled to make a public disclosure. As a consequence, whistleblowing is increasingly receiving attention as an important public issue in Australia, as reflected by its wide scale examination by academic, media, government and legislative bodies.

2.14 **The Committee acknowledges that whistleblowing is a legitimate form of action within a democracy and that there have been, there are, and there will continue to be occasions on which whistleblowing is the only available avenue for the concerned ethical citizen to expose wrongdoing in the public or private sector.**

2.15 A piecemeal approach to whistleblowing has tended to evolve in Australia. John McMillan, has described the Australian experience of whistleblower reform as "scandal or corruption" driven.¹⁸ Evidence of this is readily discernible through the number of inquiries and institutions that have been established to investigate fraud and corruption in the recent past. These include the Fitzgerald Inquiry (Qld), the Royal Commission on WA Inc, the establishment of the National Crime Authority, the Independent Commission Against Corruption (NSW), and the Criminal Justice Commission (Qld).

17 EARC Report, p.14.

18 John McMillan, evidence p.263.

2.16 Various forms of whistleblower type protection either already exist¹⁹ or are being developed. Specific whistleblower legislation has been enacted in South Australia and the Australian Capital Territory and has been or is being drafted in New South Wales and Queensland. The Committee supports the view that a concerted and co-ordinated approach to promoting and instituting whistleblowing as a legitimate means of exposing wrongdoing needs to be adopted.

2.17 The Committee believes that a co-ordinated approach to whistleblower legislation at federal and State levels will encourage and lead to more effective accountability within the public and private sectors. As stated in evidence to the Committee:

whistleblowers' legislation provides one way of monitoring [the] misuse and abuse of power. The monitoring occurs through individuals disclosing information they believe reveals illegal activities or maladministration. In so doing, individuals provide the opportunity for those responsible to rectify that illegality and maladministration, and the community benefits.²⁰

2.18 Many of the submissions and the evidence received by the Committee during the inquiry relate adverse personal experiences of individuals who had suffered victimisation and reprisal action for having the courage to expose wrong-doing. Members of the Committee were deeply moved by these personal experiences and the distress whistleblowing had caused these people. However, the Committee also recognises the harm that may be caused to the reputations of individuals and organisations who are subject to false or misleading public disclosures.

19 Such as the common law principle which may provide protection for employees against dismissal when making disclosures about criminal or civil wrong by an employer. See John McMillan, *Legal Protection of Whistleblowers*, in *Corruption and Reform: The Fitzgerald vision*, UQP, St Lucia 1990, p.208.

20 Equal Opportunity Commission (South Australia), evidence p.391. This view was supported in many other submissions.

2.19 To be effective a whistleblowing scheme must be cognisant of the combination of complex legal, administrative, behavioural and sociological factors that can potentially arise in any conflict between a whistleblower and his or her employer.²¹ Also, the Committee recognises that for such a scheme to be successful, it has to be reinforced by a multimedia awareness campaign targeting organisations and the community. This emphasis is needed to inculcate the notion of whistleblowing as a positive activity which benefits all society and recognises that victimisation of genuine whistleblowers is morally unacceptable.

2.20 The Committee believes that a fundamental shift in Australian values and ethics is necessary to overcome the stigma and trauma associated with whistleblowing. Notwithstanding the recommendations in this report, the Committee encourages organisations and institutions in both the public and private sectors, to reassess the value of reporting wrong-doing and welcomes any initiatives, programs or strategies aimed at addressing this culture-change. The Committee appreciates that, notwithstanding the implementation of any legislative initiatives recommended in this report, in order to effect a shift in traditional workplace values and ethics, legislation must be accompanied by national leadership and education programs specifically targeted at workplace ethics.

21 John McMillan, Legal Protection of Whistleblowers, p.209.

CHAPTER THREE

WHISTLEBLOWING: THE INTERNATIONAL EXPERIENCE

United States developments in Whistleblowing Legislation

3.1 The United States was one of the first countries to pass legislation to protect whistleblowers through the enactment of the Civil Service Reform Act 1978 (CSR Act). The aim of the CSR Act was to provide protection from reprisal action for federal employees who genuinely blow the whistle on fraud, waste and abuse. In 1989, further federal legislation was enacted to protect whistleblowers with the passage of the Whistleblower Protection Act 1989.

3.2 Whistleblower legislation has been introduced in at least thirteen States in the US to protect both public and private sector employees. Additionally, there are as many as thirty different laws protecting employees who expose breaches of the law in areas such as environment protection, occupational health and safety, transport and civil rights.¹

3.3 The US whistleblower protection scheme incorporates a reward system whereby whistleblowers may be financially rewarded for the reporting of wrongdoing. This practice acknowledges the ultimate saving to government which reflects the positive side of whistleblowing. This aspect of the US scheme is not one which the Committee considers should be retained in an Australian model. The subject of rewards for whistleblowers is discussed in Chapter 11.

3.4 The federal law for dealing with whistleblowing in the US has undergone refinement. The CSR Act created the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) to investigate and adjudicate allegations of prohibited personnel practices or other merit systems violations. Inadequacies of protection afforded to whistleblowers in the CSR Act were highlighted by the MSPB in 1984.

1 John McMillan "Legal Protection of Whistleblowers", *op.cit.*, p.207.

Statistics demonstrated that "no measurable progress had been made in overcoming federal employee resistance to reporting instances of fraud, waste and abuse. Indeed, the percentage of employees who did not report government wrongdoing due to fear of reprisal almost doubled between 1980 and 1983".² It was also found by Congress that a redefinition of the role of the OSC was required to change its focus from one of protecting the merit system to protecting the employee.

3.5 The miscued focus of the OSC had engendered employee distrust. The public's perceptions of the OSC was that it provided indifferent and in some cases adverse assistance to employees.³ Fault was also found with some of the restrictive judgements of the MSPB and federal court which frustrated the ability of whistleblowers to gain appropriate redress against reprisals.

3.6 Accordingly, the Whistleblower Protection Act 1989 (WP Act) was enacted. One of its aims was to strengthen protection mechanisms for employees making disclosures about wrong doing and to prevent reprisal action. The WP Act defined the term whistleblower as a present or former federal employee who makes a disclosure in the reasonable belief that information divulged evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. John McMillan summarised the three main objects of the WP Act as follows:

- . it ensures that allegations of illegality, mismanagement or wastage against federal agencies or officials are properly investigated;
- . it provides protection for the employees who make those allegations; and

2 L. Paige Whitaker, "Whistleblower Protections For Federal Employees", Congressional Research Service Report for Congress, 10 January 1990, p.2.

3 *ibid.*, p.3.

it ensures the punishment of any official who victimises another for making such an allegation.⁴

3.7 Protection may be invoked in four ways under the WP Act. The first option available is appeal to the MSPB regarding unfair treatment. Secondly, actions may be initiated by the OSC, or as a third option an individual right of action may be initiated.⁵ The last option involves negotiation between the relevant parties in accordance with internally set procedures.

3.8 The role of the MSPB is to hear and rule on appeals by employees concerning any 'prohibited personnel practice' as defined in the WP Act. The OSC is now independent of the MSPB. Its main objective remains protecting employees, former employees and applicants for employment from prohibited personnel practices. In this capacity, the OSC receives and investigates allegations or may initiate inquiries of its own accord into possible prohibited personnel practices.⁶

3.9 In compliance with its reporting responsibilities the MSPB released a report in October 1993 entitled, 'Whistleblowing in the Federal Government: An Update'. In contrast to its 1984 report, results of a survey of federal employees indicated that there was a greater willingness to report illegal or wasteful activities. Regrettably, a corresponding rise in the number of employees who experienced or were threatened with reprisal action was also noted, although there seemed to be a decline in the severity of retaliation. Overall, the survey data indicated that a reluctance to report still persisted. The report concluded that "the value to the organisation of sharing information about wasteful or illegal activities has not yet been fully accepted by all employees and managers. To further encourage employees to

4 John McMillan, "Legal Protection of Whistleblowers", op. cit., p.207.

5 Under the provisions of the Whistleblower Protection Act 1989, an employee, former employee, or applicant for employment has the independent right to seek review of whistleblower reprisal cases directly from the MSPB 60 days after the OSC closes an investigation or 120 days after filing a complaint with the OSC. L. Paige Whitaker, "Whistleblower Protections For Federal Employees", p.13.

6 *ibid.*, pp.7-13 provides a detailed description of the role of the OSC.

share such information in a constructive manner, agencies must create non-threatening climates in their organisations in which such a practice is valued and rewarded."⁷

3.10 In order to achieve the goals of a higher incidence of reporting and a steep decline in the incidence of retaliation, the MSPB report suggested the following measures need to be taken. Agencies should:

- . emphasise organisational change and improvements,
- . examine their programs for selecting supervisors and managers,
- . ensure that employees are properly informed about the sharing of information, and
- . actually solicit employees' views and give employees feedback concerning those views.⁸

These measures are equally applicable in the Australian context.

Whistleblowing in the United Kingdom

3.11 The United Kingdom has no equivalent to the formal complaint system established in the United States through specialised whistleblowing legislation. The situation in the UK regarding whistleblowing is described as "a combination of restrictive government guidelines and inadequate legal protection [which] conspire to silence any employee from revealing matters of public concern and leave the employer free to punish them".⁹

7 US Merit Systems Protection Board Report, "Whistleblowing in the Federal Government: An Update", October 1993, p.(iii).

8 *ibid.*, p.35.

9 J. Cooper and D. Greene "Whistleblowers", *Solicitors Journal*, 20 November 1992, p.1166.

3.12 The British Government appears to have been hesitant to broaden protection for legitimate whistleblowers. Recent examples of whistleblowing in the UK have centred on the Intelligence and Defence areas of the Civil Service. The circumstances regarding disclosure of information about the sinking of the Argentine cruiser "General Belgrano" during the Falklands War (known as the Clive Ponting case) and publication of Peter Wright's book "Spycatcher" about MI5 operations, are examples of sensitivity in this area.¹⁰ Following the Ponting case a new code of conduct was created for public servants. In particular, the new conduct code states that public servants facing 'a fundamental issue of conscience' should discuss it with their permanent secretary who will handle the matter. If the matter is consequently not resolved to the public servant's satisfaction the code requires that they carry out their instructions or resign. This code also stresses that the duty not to disclose information in accordance with the Official Secrets Act, is applicable to all currently serving or retired public servants.¹¹ The effect of secrecy provisions in Australian legislation is discussed in Chapters 8 and 9.

3.13 However legislation does exist to protect whistleblowers in limited situations. The Offshore Safety Protection Against Victimisation Act 1992, provides protection against dismissal action to offshore workers making public disclosures when acting as safety representatives. The Local Government and Housing Act 1989 requires all local authorities to appoint monitoring officers. The monitoring officer's responsibilities include reporting on "a proposal, decision or omission which has had, will have or is likely to have the effect of contravening any enactment or rule of law or any statutory code of practice. A second limb to the duty applies in respect of any maladministration or injustice".¹² Nonetheless, a survey on the use of monitoring

10 Ian Cunliffe "Heroes or Villains: Balancing the Risk", Directions in Government, vol. 6, June 1992, p.18.

11 *ibid.*

12 A. Harrison, "In office and in power", Solicitors Journal, 21 January 1994, p.46.

officers powers found that most officers had not exercised their responsibility by issuing a report, in the three years since this duty was created.¹³

3.14 Partly in response to European Community Directive 391/89 concerning the safety and health of workers, the British Government announced that whistleblowing legislation would be introduced during the 1992/93 parliamentary session.¹⁴ The aim of the legislation would be to provide protection to employees against victimisation and dismissal if they blew the whistle about health or safety issues at work. By early 1994, such legislation had not been introduced. A cross-party attempt to have the Government amend the Official Secrets Act to include a public interest defence for public officials revealing crime or fraud was defeated on 2 February 1989.¹⁵

3.15 In the courts, it has been held by Lord Denning that "the duty of confidentiality was overridden by the public interest in receiving information of misconduct and that the extent of the public interest should be wide extending to 'crime, frauds and misdeeds' and any misconduct that ought in the public interest, to be disclosed to others".¹⁶ However, operating under current legislation, British courts do not have the power to protect whistleblowers against victimisation, dismissal, blacklisting or even refusal of an employer to reinstate.¹⁷

3.16 Draft guidelines concerning whistleblowing, which encourage sympathetic and fair hearing of bona fide complaints, were issued by the National Health Service in October 1992. Their aim was to resolve complaints informally with immediate

13 ibid.

14 D. Brown and B. McKenna "Protecting 'whistleblowers' from victimisation", *Solicitors Journal*, 9 October 1992, p.994.

15 S. Goodwin and J. Jones, "Parliament and Politics: MPs' bid to safeguard 'the public interest' fails", *The Independent*, 3 February 1989, p.6.

16 D. Brown and B. McKenna, "Protecting 'whistleblowers' from victimisation", p.995.

17 J. Cooper and D. Greene, "Whistleblowers", p.1166.

supervisors according to internally drawn up procedures. If unsatisfied with the handling of the complaint, the whistleblower may refer the matter to higher management or a senior officer appointed to specially deal with such complaints. While referral to the Ombudsman is available in some instances, the guidelines stress the contractual obligation of confidentiality of employees and recommend that advice should be received from professional bodies before any disclosure is made.

3.17 In response to the limited protection available to genuine whistleblowers in the UK, some support groups and services have been established. For example, the Royal College of Nursing set up a whistleblowing service in 1991 and had received over 100 confidential allegations of maladministration or inadequate service to patients in its first twelve months of operation. The response of some hospitals has been to include 'gagging clauses' in work contracts which specifically prohibit disclosure of information to the press or 'authorised organisations'.¹⁸

3.18 Freedom To Care is an example of a whistleblower support group operating in the UK. It consists of a non-party political network of doctors, nurses, social workers, lawyers, academics, scientists and others working in the public services. The group supports employees who have been victimised for raising matters of public concern and lobbies for changes to the law, administrative procedures and the managerial culture to allow professionals the freedom to raise concerns without fear of reprisal.¹⁹

3.19 Public Concern At Work, launched on 14 October 1993 and operating as a legal charity, was established to help fulfil a perceived need in Britain. Its role is to encourage and enable employees to raise serious concerns at work, rather than turn a blind eye to a potential danger or feel compelled to blow the whistle outside. Public Concern At Work provides a range of consultancy, training and conciliation services for companies, public bodies, trade unions and professional associations.

18 Editorial 'For whom the whistle blows', *The Independent*, 28 April 1992, p.18.

19 'The Whistle,' *Freedom To Care Bulletin*, West Molesey, Surrey UK, November 1993, p.2.

It offers a free legal advice service and telephone helpline for people with serious work-related concerns. The strategy adopted by Public Concern at Work is to:

- . provide free advice and assistance to employees and others with serious concerns about public dangers and malpractice
- . encourage employers to set up procedures for employees to raise serious concerns
- . seek to ensure that employees can use those mechanisms without fear of victimisation and in the knowledge that their concerns will be addressed
- . publicise and reward good practice in the private, public and voluntary sectors
- . research into the opportunities people have for raising serious concerns and the risks they take when doing so
- . encourage people to play their part in preventing serious danger or harm to the public interest.

Public Concern At Work will not assist with any concern that is frivolous or vexatious and therefore normally needs to sight evidence supporting any claim before becoming involved.

3.20 Public Concern At Work was set up with financial assistance from charitable trusts and foundations. Its operating expenses are met in part by fees generated through consultancy and training services and research work. Other revenue is generated through subscriptions from individual and corporate supporters and charitable donations.

3.21 The initial report released by Public Concern At Work makes some interesting observations which corroborate the Australian experience as detailed to the Committee in submissions and evidence.

The clear message from our advice line is that the way in which a public concern is raised by an employee in the first place is critically important. Employees do not know whether they will have to prove the concern, how they should handle it, who they should raise it with, what they should expect to be done to address it and where their responsibility for the matter will end. And this is before they consider whether their own interests may be jeopardised if they speak up.²⁰

The report makes observations similar to those of the Committee when it states:

We were struck by the number of public spirited people who were prepared to put the interest of their employer or of others first, even when this might entail considerable personal risk.²¹

3.22 Public Concern At Work is producing a series of monographs 'Speaking Up by Sector' which publish research into accountability within organisations and into ethical and legal issues across the public, private and voluntary sectors. These publications aim to stimulate and inform debate so that individuals are better able to identify their own responsibilities and organisations are better able to fulfil their responsibilities. Titles in this series include fraud and corruption in local government, the police, the defence industry, abuse in residential care, malpractice in medical research and individuality and conformity in the workplace.

3.23 The service provided by Public Concern At Work has the support and recognition of the Bar Council.²² It is managed by a board of trustees and a director, who are advised by a Council comprising a diverse group of eminent citizens, professionals and academics. The Committee believes the general strategy of Public Concern at Work, together with the structure and funding of the services, provides a useful basis in which to adapt an Australian model for providing assistance

20 Public Concern At Work, 'The Advice Service: First Report,' Lincoln's Inn House, 42 Kingsway London, January 1994, p.4.

21 *ibid.*, p.4.

22 S. Ashworth, 'Law: Help for the Whistleblower' *Lloyd's List*, p.487.

and support for whistleblowers. Counselling and support services are further considered in Chapter 9.

The Canadian position

3.24 There is currently no widespread legislative cover to protect whistleblowers in Canada.²³ However, at a provincial level, isolated cover is available for disclosures about wrong doing in the areas of environment, health and safety. Legislation such as the Ontario Environmental Protection Act states that no employer may dismiss, discipline, penalise, coerce or intimidate an employee for complying with environmental legislation.²⁴ The Province of Ontario seems to be leading the way in public discussion of the issue of whistleblowing and in the introduction of legislative protection in Canada.

3.25 In 1986 the Ontario Law Reform Commission issued a report on Political Activity, Public Comment and Disclosure by Crown Employees. The report adopts the perspective that whistleblowing constitutes an exception to the common law duty of confidentiality as applied to public service employees. Three main issues are examined in the report:

- (a) Must the whistleblower have reasonable grounds for his/her belief that there had been misconduct?
- (b) Whether good faith must be proved, and
- (c) To what bodies or persons was it legitimate to blow the whistle?²⁵

23 L.J. Brooks, "Whistleblowers...Learn to love them", Canadian Business Review, Summer 1993, p.20.

24 L. Ramsay, "New attitude emerging on 'whistleblowers'", The Financial Post, 21 August 1993, p.s18.

25 "Canadian law reform report on 'whistleblowing' by public servants" Australian Law Journal, No.7, Vol.61, July 1987, p.321.

A general conclusion reached by the Commission was that "an attempt must be made to protect Crown employees who resort to whistleblowing where it is in the public interest to disclose the pertinent government information, whether confidential or non-confidential. At the same time, it is essential to ensure that over-zealous employees do not abuse what we consider to be an essentially extraordinary right to release such information".²⁶

3.26 Legislation providing whistleblower protection to civil servants was tabled in the Ontario legislature on 4 November 1993.²⁷ Under the proposed legislation civil servants will be able to lodge their allegation with a specially appointed counsel which is similar to the US federal whistleblower law. However, passing confidential information to the media or opposition parliamentarians would continue to be prohibited. This proposed legislation has not been fully debated as at July 1994.

3.27 The federally enacted Access to Information Act 1985 protects public servants when releasing information, if they act in good faith and with due authority. Unfortunately the protection provided under this Act is considered to be uncertain because its provisions are potentially ambiguous and contradictory.²⁸ This Act also authorises the Information Commissioner to disclose to the Attorney General, any information which can be substantiated by evidence, relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution.

3.28 Other measures proposed to facilitate whistleblowing include the suggestion of the national Auditor General that a fraud hotline be set up to allow public servants to anonymously report misuse of public funds.²⁹ In the private sector

26 *ibid.*, p.322.

27 L. Papp, "Civil Service 'whistleblowers' get protection", *Toronto Star*, 5 November 1993, p.A16.

28 I. Hansen, "Freedom of Expression, Whistleblowing and the Canadian Charters", *Canadian Parliamentary Review*, Spring 1990, p.31.

29 *ibid.*, p.30.

in Canada, an increasing number of large firms are appointing internal ombudspersons to investigate complaints and protect both the interests of the complainant and alleged wrongdoer alike. This push has been prompted by company directors being made directly liable for payment of fines for breaches of environment laws.³⁰

Recent legislative activity in New Zealand

3.29 In June 1994 a Whistleblowers Protection Bill was introduced as a private member's bill in the House of Representatives by the Opposition spokesperson on Justice.

3.30 The bill provides for the disclosure of public interest information which is defined as information relating to any conduct or activity in the public or private sector that concerns the unlawful, corrupt or unauthorised use of public funds or resources; is otherwise unlawful; or constitutes a significant risk or danger, or is injurious to public health or safety, the environment or the maintenance of the law and justice.

3.31 To be an appropriate disclosure the information must be disclosed to a Whistleblowers Protection Authority and can be made by any person who believes on reasonable grounds that the information is true or if not in a position to so do, believes that the information may be true and is of sufficient significance to justify its disclosure so that the truth may be investigated.

3.32 The bill provides for the protection of persons who have made disclosures to the Authority and for remedies for persons who encounter discrimination or harassment. The Whistleblowers Protection Authority is to be appointed as an officer of Parliament. The Authority's functions would include investigating any disclosure of public interest information made to it and providing

30 L.J. Brooks, 'Whistleblowers ... Learn to love them!', p.20-21.

advice, counselling and assistance to prospective or protected informants. The Authority would have the power to recommend remedial action as a result of its investigation and, if no action is taken after a reasonable time, it may report the matter to the Prime Minister and the House of Representatives.

3.33 Indications are that the New Zealand Government supports the concept of whistleblower protection in principle, although whether it would support this particular bill or introduce its own legislation is yet to be determined.

3.34 **The Committee acknowledges that legislative action on whistleblower protection is occurring in a number of comparable international legislatures and believes that the experience and future developments within these legislatures should be monitored with a view to benefiting from their experiences. (see paragraph 7.37)**

CHAPTER FOUR

AUSTRALIAN CONTEXT: FEDERAL, STATE AND TERRITORY ACTIVITY

4.1 There has been a growing awareness in Australia of the issues associated with whistleblowing. Academic and media attention, together with related interest groups, have contributed to raising the public profile of whistleblowers and the consequences of making public interest disclosures. Parliamentary and government reports have addressed the matter, whilst legislation has been passed in South Australia and the Australian Capital Territory and introduced or foreshadowed in other legislatures. There can be little doubt that whistleblower protection legislation is on the national agenda for reform. This chapter outlines recent Australian developments.

Recent parliamentary and government reports

Review of Commonwealth Criminal Law (The Gibbs Committee)

4.2 The Gibbs Committee was set up in February 1987 as part of a major review of Commonwealth Criminal Law. Its final report was released in December 1991.¹ Part of the report examines suggested legal reforms on the disclosure of official information and examines whistleblowing in relation to reforms to laws on official secrecy. The evaluation of secrecy laws with respect to the issue of whistleblowing was deemed necessary as "provisions which limit disclosure of official information may in themselves prevent the disclosure of information on wrongful activities in public administration, and thereby prevent such activities from being reported and dealt with".² Indeed, Professor Paul Finn has observed that there is no appropriate law

1 Review of Commonwealth Criminal Law - Final Report, Sir Harry Gibbs - Chairman (Gibbs report), December 1991, Parliamentary Paper No. 371 of 1991. See Chapter 32: Defence of Public Interest and Protection for 'Whistleblowers', pp.335-355.

2 Attorney-General's Department, evidence p.116. The Gibbs Committee's proposals are considered by the Department in its submission, evidence pp.116-123.

which prevents the use of official secrecy provisions being used to camouflage government or official wrongdoing.³

4.3 The Gibbs Committee recommended that the "catch-all" secrecy provisions in the Crimes Act 1914 (sections 70 and 79 (3)), should be replaced with provisions limiting penal sanction for the unauthorised disclosure of official information "to specific categories of information no more widely stated than is required for the effective functioning of Government".⁴ These categories are discussed further in Chapter 9. However, the Gibbs Committee also concluded that the defence of public interest, which relates to equitable remedies for breach of confidence, should not be provided for in relation to the provisions which it proposed should replace sections 70 and 79 (3) of the Crimes Act. The Gibbs Committee noted:

... having regard to the recommendations that follow for providing protection to whistleblowers, the Review Committee does not consider it necessary to make provision for a defence of public interest specifically in that form.⁵

4.4 In keeping with the US whistleblower legislation, the Gibbs Committee envisaged that only a limited section of information held by government departments, such as sensitive defence or foreign affairs material, would be protected from unauthorised disclosure by threat of criminal sanction. The Gibbs Committee concluded that in respect to all other areas of public information "complainants should be given appropriate protection, both as to criminal sanctions and disciplinary sanctions, in respect of the making of the complaint."⁶

3 Professor Paul Finn, *Official Information, Integrity in Government Project: Interim Report 1* (Finn Report), Australian National University, 1991, quoted in Attorney-General's submission, evidence p.117.

4 Gibbs Report, p.330.

5 *ibid.*, p.335.

6 *ibid.*, p.338.

4.5 The Gibbs Committee envisaged complaints being made in the first instance to a specially designated officer in the public body involved. Secondly, the Gibbs Committee recommended that the powers and functions of the Inspector-General of Intelligence and Security be widened for receipt and investigation of security and intelligence related complaints, while the Ombudsman was considered an appropriate authority to act as an independent agency for receiving other general complaints.

4.6 The Gibbs Committee agreed that persons making genuine complaints should not be subject to disciplinary procedures and should be protected from retaliatory action. The Merit Protection and Review Agency was considered to be an appropriate body to undertake this responsibility. However, no special protection against the laws of defamation (or "any other law of general application") was considered necessary.⁷

4.7 On the subject of legislative cover, the Gibbs Committee preferred the requirements set out in the United States federal law rather than the criteria suggested by EARC and Professor Finn.⁸ Accordingly, the Gibbs Committee felt that any whistleblower legislation should be confined to information evidencing:

- (a) an indictable offence against a law of the Commonwealth, State or Territory;
- (b) a gross mismanagement or gross waste of funds; or
- (c) a substantial and specific danger to public health or safety.

4.8 Although the Gibbs Committee largely concurs with the recommendations of the EARC report, there are some major differences. Unlike the Gibbs Committee, EARC makes no reference to unauthorised disclosure of information

7 *ibid.*, pp. 347-348.

8 The Gibbs Report, pp.340-347, discusses at length the proposals of Professor Finn and EARC compared to the provisions of the United States whistleblower legislation.

which attracts criminal sanction. The EARC recommendations are only concerned with categorising what type of public information disclosures should be authorised.⁹

4.9 While EARC includes provisions to cover the private sector, the Gibbs Committee was of the view that a sufficient case had not been made to include the private sector in any whistleblowing legislation. Also, EARC envisages the right to make a disclosure to any person, including the media, being limited to cases where information reveals a serious, specific, and immediate danger to the public. By contrast, the Gibbs Committee envisaged that "this right would extend to wider descriptions of information, provided that this information was outside the limited categories of information the unauthorised disclosure of which was proposed to be protected by criminal sanction".¹⁰ Whistleblowers would also have to demonstrate that they acted under the belief that the allegation was accurate and that the circumstances warranted such action. Finally, while the EARC Bill provides protection against liability for defamation, the Gibbs Committee argues against such protection.

Senate Standing Committee on Finance and Public Administration (the F&PA Committee) - Review of the Office of the Commonwealth Ombudsman

4.10 In its report on the review of the Commonwealth Ombudsman's Office,¹¹ the F&PA Committee found that the office of the Ombudsman on the whole provided an effective complaints handling service. However, although representing a small portion of the overall complaints referred, the most critical evidence submitted against the Ombudsman's Office was from whistleblowers making allegations of corruption and maladministration. Perceived failings were "that the Ombudsman's investigations

9 The Gibbs Report also observes that although Professor Finn states that certain agencies and their affairs should be exempt from inter-agency reporting, he did not propose different treatment between official information whose disclosure is liable to criminal sanction and other official information, page 342 refers.

10 Gibbs Report, p.351.

11 Senate Standing Committee on Finance and Public Administration, Review of the Office of the Commonwealth Ombudsman (F&PA Ombudsman Report), December 1991, Parliamentary Paper No. 519 of 1992. ³

were ineffectual, that there was no power to resolve any serious deficiencies which might have been detected or to protect complainants effectively and that members of the Ombudsman's staff were too close to the public servants they were sent to investigate."¹²

4.11 The F&PA Committee highlighted the qualitative difference between the bulk of the complaints received by the Ombudsman, which involved co-operative investigations of personal grievance complaints against Commonwealth agencies, to whistleblowing complaints. The latter category of complaints often involve complex financial or management issues, requiring in depth, adversarial examination. It was observed that in such instances, government agencies may not exhibit such a co-operative disposition towards investigations by the Ombudsman. Although the F&PA Committee found that the Ombudsman's powers were adequate to investigate whistleblowing allegations, it concluded that "the Ombudsman has often been unsuccessful in resolving major and complex complaints."¹³

4.12 The F&PA Committee also had the benefit of Professor Finn's research and supported Professor Finn's model for dealing with whistleblowing. This model¹⁴ recommends as a first step, that an employee or officer of a government agency should seek internal resolution of any non-compliance with legislative, governmental or administrative policy, maladministration or misconduct that they observe, by making a confidential report to the officer within the agency designated to hear such complaints. In its capacity as an independent external agency, the Ombudsman is nominated as a second avenue of referral for receiving and/or investigating as appropriate, confidential reports about wrongdoing from any person. Lastly, the Finn model provides for a public officer or employee or an officer or employee of a state owned enterprise to "go public" to a parliamentary committee with any matter that

12 *ibid.*, p.67.

13 *ibid.*, p.68.

14 Finn report, pp.5-7 and 47-64 and summarised by Professor Finn in evidence p.63.

could have been reported internally or to the Ombudsman as an independent agency, where the parliamentary committee has undertaken an inquiry into a related matter.

4.13 Professor Finn suggested that the Ombudsman should be the appropriate second tier independent external review agency. The F & PA Committee also concluded that the Ombudsman should be responsible at least for filtering whistleblowing complaints or redirecting them if appropriate to another agency. In some cases it would be necessary for the Ombudsman to undertake a full investigation into a whistleblowing allegation.¹⁵

4.14 To deal with whistleblowing allegations and to enable the Ombudsman to fulfil a role as an external review body as outlined above, the Committee recommended that the Ombudsman establish a specialist investigation unit within its Office. This new aspect of its operations would also be able to target areas for systemic reform, but its activities would remain separate from the bulk complaint work of the Ombudsman because of the different investigative approach required.

4.15 In response to this report the Government allocated additional funding to the Ombudsman in the 1992-93 budget. Part of these funds has enabled the establishment of a specialist unit with the capability to handle whistleblowing complaints. The brief of the unit includes investigation of complaints which raise "complex systemic or other administrative issues, allegations of serious malpractice, and cases involving large amounts of money."¹⁶ Additional funds were used to upgrade the Ombudsman's computer system incorporating a new complaints management system and to start a promotional campaign to increase community awareness of the role of the Ombudsman.

15 F & PA Ombudsman Report, p.69.

16 Commonwealth and Defence Force Ombudsman, Annual Report 1992-93, p.4.

Senate Standing Committee on Finance and Public Administration - Inquiry into the Management and Operations of the Department of Foreign Affairs and Trade (DFAT)

4.16 The inquiry into the management and operations of DFAT received considerable oral and written evidence from current and former serving members of DFAT. This evidence demonstrated "the need for a better process for dealing with whistleblowing-type complaints in the Australian Public Service."¹⁷ The F&PA Committee concluded that many of the specific allegations from whistleblowers which were investigated during their inquiry were found to be seriously inaccurate or clearly disproved. Further, any claims that could be substantiated were not considered serious enough to justify action against any individual.¹⁸

4.17 The Inquiry found that there were four major lessons to be considered from DFAT's whistleblowing experience:

- (a) there needs to be a conclusive result in the handling of a whistleblower complaint;
- (b) whistleblowers can be wrong and it is necessary to balance different interests in a whistleblowing case;
- (c) a proper process for dealing with whistleblowing is required; and
- (d) even whistleblowing which is misconceived or where specific claims are incorrect can expose flaws in management systems.¹⁹

4.18 In respect to the publicising of whistleblower complaints, the F&PA Committee felt that this could only be condoned as a measure of last resort. A

17 Senate Standing Committee on Finance and Public Administration, Report on the Management and Operations of the Department of Foreign Affairs and Trade (F&PA DFAT Report), December 1992, Parliamentary Paper No. 525 of 1992, p.52.

18 *ibid.*, p.41.

19 *ibid.*, pp.53-55.

whistleblower would only be justified in going public if he or she had a reasonable basis for the claim and there was no process of review to handle it. Accordingly, in the F&PA Committee's view, an effective, visibly honest system for dealing with genuine complaints was needed to protect both the interests of the whistleblower and the reputations of individuals and organisations implicated in any claim.

4.19 The involvement of an external agency in dealing with whistleblowing was seen by the F&PA Committee to be appropriate on two grounds; first, to alleviate suspicions a genuine whistleblower may have of internal review and secondly, to oversee that genuine faults exposed by whistleblowing were remedied by the organisation involved.

4.20 The F&PA Committee observed that inquiry into whistleblowing by the parliamentary committee system has the potential to elevate the status of a complaint beyond its merits. Such involvement was therefore best contained to a committee of review examining reports raised on whistleblowing by an external body empowered to oversee the handling of whistleblowing complaints.

4.21 The F&PA Committee argued that any system set up to deal with whistleblower complaints needs to maintain the balance of competing interests. Therefore, it was concluded that the provision to punish false complaints is an essential counterbalance to ensure individual privacy rights and official confidentiality are protected.

4.22 The F&PA Committee repeated its support from the report on the Ombudsman's office for the model proposed by Professor Finn for handling whistleblower complaints in which the Ombudsman has a central role as an independent, external agency. While this step would require an increase to that office's resources and minor amendment to its powers, the Committee felt it was more advantageous to build upon existing bodies than create new structures.²⁰

4.23 The only specific recommendation regarding whistleblowing made by the F&PA Committee was that no further investigation of allegations about DFAT made by whistleblowers mentioned in the report should occur, until they supplied substantive evidence to support their claims. While supporting this recommendation, the Government noted in its August 1993 response, that some investigative and review bodies have no discretion to refuse to investigate a complaint.

House of Representatives Standing Committee on Banking, Finance and Public Administration (the Elliott Committee) - Inquiry into Fraud on the Commonwealth

4.24 The terms of reference for the inquiry into fraud on the Commonwealth included the requirement to assess the "desirability of whistleblower legislation as a means of combating fraud." The Elliott Committee concluded that whistleblowing is a vital and lawful function to be encouraged if illegal and improper behaviour in the public sector is to be prevented. Accordingly, it was argued that the Commonwealth is obliged to encourage and protect genuine whistleblowers. The Elliott Committee also concluded that the three tiered model, outlined by Professor Finn and the Gibbs Committee and generally supported by the F&PA Committee, was the most effective way to proceed for handling whistleblowing complaints.²¹

4.25 The Elliott Committee recognised that maintaining confidentiality was paramount in the first two stages of dealing with any whistleblower allegations. The Elliott Committee also recommended that any whistleblower complaints be initially handled in-house. However, if it was found that this course of action was inappropriate, there was the option of making serious complaints to an independent external agency. If these two stages worked credibly and effectively there would be little need to go public, which would then be appropriate only as a measure of last resort.

21 House of Representatives Standing Committee on Banking, Finance and Public Administration, Focussing on Fraud - Report of the Inquiry into Fraud on the Commonwealth (Paul Elliott, MP Chairman), November 1993, Parliamentary Paper No. 235 of 1993, see Chapter 7 - Whistleblowing and Informants, pp.79-94.

4.26 The Elliott Committee also considered that there were significant advantages in building on existing institutions rather than creating a new agency. The Ombudsman was seen as the most appropriate agency to receive, investigate or redirect whistleblowers complaints. It was also argued that the Ombudsman should be responsible for administering a protection scheme for whistleblowers.

4.27 To ensure confidence and trust in the new system, it was recommended that a review be conducted after two years to ensure its operation was effective and efficient. As well as legislation, the encouragement of community and agency attitudinal change to whistleblowers and whistleblowing was considered important.

4.28 The Elliott Committee recommended that any current or former employee or contractor of the Commonwealth or any Commonwealth agency with evidence of indictable offences against a law of the Commonwealth, State or Territories, gross mismanagement or waste of funds or substantial and specific danger to public health or safety, may confidentially disclose that information as appropriate to the following people:

- (a) the officer in charge designated to receive such complaints;
- (b) the Inspector-General of Intelligence and Security; or
- (c) the Commonwealth and Defence Force Ombudsman in the case of other persons.

4.29 To implement a whistleblowing system, it was recommended that all government agencies should appoint an appropriate high level officer to receive, investigate and document whistleblower claims and implement and publicise internal procedures for whistleblowing. The Elliott Committee also recommended that whistleblowers should be protected against disciplinary action if a public disclosure is made in the reasonable belief that the claim was accurate and the whistleblowers actions in these circumstances could be viewed as reasonable. The Elliott Committee further argued that whistleblowers should be subject to defamation laws, while

discrimination or harassment of a whistleblower should be subject to disciplinary action. Similarly, false or misleading reports should be deemed a criminal and disciplinary offence.

4.30 The Elliott Committee proposed that implementation and enforcement of whistleblower provisions be the responsibility of the Commonwealth Ombudsmen. Consequently, their resources would need to be increased commensurately to allow for their increased responsibilities, including the provision of counselling to whistleblowers. Finally, it was determined that records should be kept by all agencies, to allow the effectiveness of whistleblowing provisions to be assessed.

4.31 The Government's response to the recommendations of the Report on the Inquiry into Fraud on the Commonwealth is expected to be presented to Parliament during the 1994 Spring sittings.

Summary

4.32 Professor Finn's three tiered model for dealing with whistleblowing is the preferred option of the Parliamentary Committees reporting on the Ombudsman, DFAT and Fraud on the Commonwealth. The Ombudsman, or in relation to specified matters some other designated agency, is nominated as an appropriate body to act as an independent external agency for receiving and/or investigating whistleblowing, if it is not feasible for a complaint to be dealt with internally.

4.33 The Gibbs report also supports internal reporting, wherever possible, as a first step for a whistleblower. It agrees too, that the Ombudsman or Auditor-General would be a suitable external agency to deal with public interest disclosures, except for information concerning sensitive intelligence or security matters. In these cases, the Inspector-General of Intelligence and Security is nominated as an appropriate authority. The Elliott Committee made the same recommendation.

4.34 The option of "going public" is limited in the Finn model to making a report to a parliamentary committee. However, if established reporting procedures are not utilised and the person 'goes public, protection would only be available if the person can show they had reasonable grounds to believe their claim was accurate and their action was reasonable in the circumstances. Alternatively, the Gibbs Committee concluded that a person had the ultimate right to "go public" to any person including the media, providing they reasonably believed the allegation was accurate and such action was reasonable in the circumstances. However, the right was limited to the disclosure of information not proposed to be protected by unauthorised criminal sanction.

4.35 There is considerable variation between the reports as to who can make a disclosure. Professor Finn limits it to "any officer or employee of an agency of government (including a State owned company)", the Gibbs Committee to "an employee or contractor of the Commonwealth or any Commonwealth agency", the Elliott Committee extends coverage to "a current or former employee or contractor of the Commonwealth, or any Commonwealth Agency", whilst EARC enables "any person" to make a disclosure.²²

4.36 The categories of information to be disclosed also varies, although three general areas are covered. Finn provides for "non-compliance with legislative, governmental or administrative policy", Gibbs and Elliott for "an indictable offence against a law of the Commonwealth, State or Territory" and EARC "conduct that constitutes an offence under an Act of Queensland". In the second area Finn includes maladministration "likely to pose an immediate threat to public health or safety", Gibbs, Elliott and EARC "substantial and specific danger to public health or safety" although EARC includes "to the environment". Thirdly, Finn provides for maladministration resulting in fraud or waste and misconduct of an agency official, Gibbs and Elliott "gross mismanagement or a gross waste of funds" whilst EARC includes official misconduct within the meaning of the Criminal Justice Act, misconduct punishable as

22 See Finn Report p.5, Gibbs Report p.353, Elliott Report p.90 and EARC Report p.225.

a disciplinary breach and conduct which constitutes negligent, incompetent or inefficient management resulting, or likely to result, directly or indirectly, in a substantial waste of public funds.²³

Legislative activity

South Australia - Whistleblowers Protection Act 1993

4.37 South Australia was the first State to pass a whistleblowers protection act, although Queensland had enacted interim protection provisions in 1990.

4.38 The Whistleblowers Protection Act 1993 (the SA Act) came into operation in South Australia on 20 September 1993. The legislation covers whistleblowing in both the public and private sector which aligns with provisions of a proposed bill drafted by the Electoral and Administrative Review Commission in Queensland (EARC bill). However, the committee which drafted the South Australian legislation felt it was appropriate to "discriminate between private and public sector in terms of matters in which the public interest in having the information revealed outweighs the private interest in having something not nice concealed".²⁴ This approach was also adopted by the Western Australian Royal Commission into the commercial activities of the Western Australian Government. The Commission commented that it was essential to allow disclosures about private sector dealings with government, where possible fraud or misleading of government could occur.²⁵

4.39 In determining to whom whistleblowers should make a disclosure, the drafting committee was mindful of the need not to make it too difficult to obtain protection under the legislation. If the criteria was too exclusive, a whistleblower might

23 ibid.

24 Matthew Goode, 'A Guide to the South Australian Whistleblowers Protection Act 1993', Australian Institute of Administrative Law Newsletter No.13, 1993, p.14.

25 ibid.

ignore the offered protection and risk personal retaliation. Accordingly, one of the aims of the legislation was to encourage whistleblowers to act judiciously and deal through a responsible authority that was the reasonable action to take in the circumstances.

4.40 Protection is provided in the legislation for those who make appropriate disclosures in the public interest. Section 4 of the SA Act defines public interest information as showing that a person or organisation is or has been involved in illegal activity, irregular and unauthorised use of public money, substantial mismanagement of public resources, conduct that causes a substantial risk to public health, safety or the environment; or maladministration involving negligence or impropriety in the conduct of their duties.

4.41 The description adopted in section 5(2) of the SA Act to define a whistleblower is similar to the one proposed in the EARC bill. The person making the disclosure must believe on reasonable grounds that the information being disclosed is true; or if the person is not in a position to form a belief on reasonable grounds about the truth of the information, believe on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated.

4.42 The SA Act requires a disclosure to be made to a person "to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure", referred to in the Act as an appropriate authority. Section 5(4) of the SA Act lists a range of appropriate authorities including Ministers, the Auditor-General, Ombudsman, Chief Justice, Public Employment Commissioner, Police Complaints Authority and a responsible officer of an instrumentality, agency, department, administrative unit or local government body whose sphere of responsibility the information relates.

4.43 The SA Act is intended to deter whistleblowing allegations being sensationalised inappropriately through the media. This ensures the "integrity of government and the justifiable need for a politically neutral and impartial public service

to keep some matters confidential while serving the government of the day.¹²⁶ The drafting committee was also mindful of implications for the private sector where inappropriate disclosure to the media risked the undermining of corporate values and important commercial and industrial confidentiality.

4.44 As the intention of the legislature was not to limit existing rights, the SA Act does not include any specific provision which makes access to the media conditional on acting through authorised channels. Section 5(1) of the Act provides protection from civil or criminal liability to a person making a disclosure, as long as such action can be proven to be reasonable and appropriate.

4.45 Under the SA Act, responsibility for safeguarding ethical whistleblowers from victimisation in their workplace, was conferred on the Equal Opportunity Commissioner whose jurisdiction already covered both private and public sector employment. Another feature of the SA Act is that a whistleblower who is victimised has the option of pursuing a civil remedy through a tort of victimisation.

4.46 Being the first specific piece of whistleblower legislation to operate in Australia, the SA Act naturally attracted comment in evidence to the Committee. John McMillan noted that few Australian models emphasise in-house handling of whistleblowing. In particular he comments:

The South Australian Act protects a person who complains to a "responsible officer" of an agency, but there is no obligation upon agencies to define a whistleblowing procedure, nor is there any presumption that internal procedures should be preferred to public channels.²⁷

26 *ibid.*, p.17.

27 John McMillan, evidence p.265.

4.47 McMillan also makes reference to the SA Act in discussing the various Australian State proposals for punishing whistleblowers who make false or misleading complaints. For instance he states:

Seemingly the South Australian Act does go too far, in a number of respects. The offence of false disclosure is extended to include complaints that are recklessly false. The offence will apply as well to every disclosure that comes within the scope of the Act, including disclosures made only to a more senior officer in an agency. Gone is the distinction between disciplinary regulation, applying to internal behaviour, and criminal regulation, applying to selected categories of public behaviour.²⁸

4.48 Another criticism concerns the accountability of the "institutional response" to a whistleblowing complaint. Len Wylde noted in his submission that:

The SA legislation provides for any victimisation of a whistleblower to be reported to the Equal Opportunity Commission, which has no direct authority to stop any institutional response, but only to conciliate. By the time this has been done, the damage to the whistleblower would have occurred and any action which could be taken would be far too late.²⁹

4.49 During the Adelaide hearing the Committee queried whether providing in the SA Act a range of appropriate authorities to whom a whistleblower can disclose information decreased the likelihood of receiving uniform, quality responses, because of different handling procedures and capacities of the appropriate authorities to deal with complaints. Matthew Goode, one of the drafters of the legislation, acknowledged that "a price of the scheme is that, because there is a variety of people to whom you can go, there may be some degree of unevenness in the investigation of the disclosure".³⁰ However, the intent of the legislation was to direct the disclosure to the person or agency most likely to have to deal with it. Mr Goode believed the risk of unevenness was minimised by the fact that specialist agencies who deal with

28 *ibid.*, p.7.

29 Len Wylde, evidence p.414.

30 Matthew Goode (SA Attorney-General's Department), evidence p.309.

specialist information have the techniques which best equips them to respond to the disclosed information.³¹

4.50 The Police Complaints Authority commented on the need for greater "mentor" counselling to reinforce legislation. This should be in the form of policies within agencies that "endorse and encourage people to come forward in an environment where they are informed of the types of protection they are entitled to ... some of the current legislation that has been proposed or is in force does not really go that far and it results in a reluctance in people to come forward, despite there being legislation proposed or in force."³²

4.51 In discussing assistance and protection for whistleblowers, the Police Complaints Authority highlighted that the SA Act basically required a complaint to be made about victimisation before an investigation was initiated. There was no provision in place for ongoing support from the start (i.e. from when the complaint is made and recognised as warranting investigation) to the conclusion of the matter. The Whistleblowers Protection Bill introduced by Senator Chamarette for example, at least provides for a person to be moved to another work environment, which would ensure an immediate form of protection.³³

4.52 A potential problem was also identified with the SA model when a complaint was referred from one agency to another more appropriate agency for investigation, as it was difficult to get an overview of progress being made. Depending on the nature of the complaint, it was conceivable that a person would have to deal with multiple agencies under the SA Act. Consequently, it was acknowledged that there would be merit in having one agency overseeing the whole process.³⁴

31 *ibid.*

32 Police Complaints Authority, evidence p.333.

33 *ibid.*, p.336-337.

34 National Crime Authority, evidence p.448.

4.53 This concern was commented upon in evidence:

The biggest worry, when you are looking at the state legislation in Queensland, New South Wales and South Australia, is that you have got no idea who you are going to end up dealing with - firstly, because someone makes the decision based on what department you work for and, secondly, the nature of your allegations.³⁵

4.54 At the time of preparing its report, the Committee believed it was premature to form a judgment on the impact of the South Australian Act. The Committee is aware that cases have been lodged under the provisions of the SA Act, although no determinations had been made in respect of them.

4.55 On 18 August 1994 the Attorney-General launched a campaign aimed at increasing awareness of the law and how it should be used. Public servants were reminded of the protections offered by the SA Act, training was to be provided for designated 'responsible officers' and a pamphlet explaining the Act was to be distributed throughout the public service. It was reported that the campaign would include local government and the private sector.³⁶

New South Wales - Whistleblowers protection bills 1992-94

4.56 Moves towards the enactment of whistleblower protection legislation in New South Wales commenced with the introduction of the Whistleblowers Protection Bill in 1992. The Royal Institute of Public Administration Australia (RIPAA) subsequently held a seminar to review the proposed legislation.³⁷ Debate from the seminar concluded that the bill had fundamental flaws in structure, substance and

35 Alwyn Johnson, evidence p.545.

36 AAP Report, 18 August 1994 and Adelaide Advertiser, 19 August 1994.

37 Royal Institute of Public Administration Australia, NSW Division, held a one day seminar on 1 September 1992, entitled 'Blowing the Whistle! Whistleblowers Protection Bill 1992 - Another Accountability Measure?'

drafting.³⁸ For instance, while the overall aims of exposing corruption, maladministration and substantial waste in the proposed bill were worthwhile, definitions were not provided to clarify their meaning.

4.57 The Whistleblowers Protection Bill did not provide cover for the private sector. This limitation was questioned by many participants at the RIPAA seminar on the grounds that it has dangerous implications for maintaining accountability due to the increasing drive of government to privatise public functions and where "public law remedies from large areas of activity which traditionally are regarded as 'public'," are removed.³⁹ Accordingly, the desirability of cover for private sector employees engaged in part-time membership of government bodies and government consultants and contractors performing public duties in accordance with contractual arrangements, was considered an area worthy of inclusion in any legislative provisions. Although any private citizen may complain to the investigative authorities referred to in the bill, they would not be protected.

4.58 A second bill, the Whistleblowers Protection Bill (No 2) 1992, was introduced, and referred to a legislation committee in November 1992. The committee reported in June 1993 making 16 major recommendations.⁴⁰ The scope of these recommendations was considerable. It was recommended that investigating authorities appoint specialist staff to provide advice to whistleblowers and be responsible for assisting public authorities to establish proper internal procedures to handle disclosures. Protection for last resort disclosures to the media was not supported, while penalty provisions for wilfully false or misleading disclosures were recommended. Annual reporting obligations for investigating authorities was considered important as was the need to amend the definition of "public official" to

38 John Goldring, "Blowing the whistle", *Alternative Law Journal*, Vol.17, No.6, December 1992, pp.298-300. This article summarises the debate and conclusions of the RIPAA seminar. For a full record see Transcript of Proceedings published by RIPAA.

39 *ibid.*, p.299.

40 Report of the Legislation Committee on the Whistleblowers Protection Bill (No. 2) 1992, Parliament of New South Wales, June 1993.

include persons contracting directly or indirectly with the Government. It was also recommended that the legislation include a defence for a person taking possible detrimental action against a whistleblower, if there was just and reasonable grounds to justify such behaviour.

4.59 After consideration of the legislation committee's report and other representations made on the matter, the NSW government introduced the Protected Disclosures Bill 1994 on 21 April 1994. This bill replaced the Whistleblowers Protection Bill (No. 2). It provides for public interest disclosures to the ICAC, Ombudsman, Auditor-General and senior officers of public and investigating authorities in accordance with internal procedures established for the handling of whistleblowing complaints. Protection under this bill is provided if a disclosure is made voluntarily and in accordance with an internal code of conduct established by a public body to handle complaints. It would be an offence under the bill to wilfully mislead or make false statements.

4.60 The bill nominates the ICAC as the responsible body for disclosures about corrupt conduct, the Ombudsman for disclosures concerning maladministration and the Auditor-General for serious and substantial waste of public money. Further provision is made for public disclosures involving these investigating bodies. The ICAC is responsible for handling any public disclosures of maladministration by the Ombudsman, while the Ombudsman is empowered to investigate disclosures involving the ICAC and the Auditor-General. Investigating authorities may refer examination of a disclosure to a more suitable body and must advise the whistleblower what action has been taken or is proposed to be taken. The report should be made within 6 months of a complaint being made. Disclosures may be made by current or former public officials.

4.61 Under the bill protection to whistleblowers is only available if disclosures are genuine. Authorised investigating bodies may decline to investigate or discontinue action on any disclosure deemed to be frivolous or vexatious. Disclosures involving

policy decisions of Cabinet or a Minister and allegations made to avoid dismissal or disciplinary action are not protected under the provisions of the bill.

4.62 It is an offence in the bill to intimidate, harass or take disciplinary action against persons making public disclosures. Protection against liability to any action, claim or demand is provided to whistleblowers as is protection from any duty of secrecy or obligation of confidentiality under an Act. Investigating authorities are obliged to maintain the confidentiality of whistleblowers unless consent is given or the principles of natural justice dictate that identifying information be provided to a person whom the disclosure concerns.

Queensland - EARC draft Whistleblowers Protection Bill 1992

4.63 Arising from the Fitzgerald Report into illegal activities and police misconduct, the impetus for establishing a legal framework for whistleblower protection in Queensland and subsequently most other Australian States, began in earnest. A Fitzgerald recommendation led to the establishment of the Electoral and Administrative Review Commission (EARC) which, amongst other things, was to prepare "legislation for protecting any person making public statements bona fide about misconduct, inefficiency or other problems within public instrumentalities, and providing penalties against knowingly making false public statements."⁴¹

4.64 The Parliamentary Committee for Electoral and Administrative Review (PEARC Report), tabled a report on "Whistleblowers' Protection - Interim Measures" in June 1990. This report recommended strengthening of protection to persons providing information to EARC and to the Criminal Justice Commission (CJC). Accordingly, PEARC's recommendations were enacted in the Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990 (the "Interim Protection Act").

⁴¹ Report of a Commission of Inquiry Pursuant to Orders in Council (Fitzgerald Report), 29 June 1989, page 370, quoted in Chairman's Foreword, Parliamentary Committee for Electoral and Administrative Review (Qld) report on Whistleblowers Protection (PEARC Report), April 1992.

4.65 This Interim Protection Act made it an offence to victimise a person who had assisted or given evidence to EARC or the CJC in the discharge of their objects, functions and responsibilities. In addition, EARC and the CJC were empowered to seek injunctions from the Supreme Court to restrain persons who engage or are proposing to engage in conduct that would breach the victimisation provisions of the respective Acts.

4.66 However, this Committee was advised in evidence and submissions that:

in the 3 years the Interim Scheme has been in place, there have been no prosecutions for the offence [of victimisation] created by the Criminal Justice Act 1990 (QLD) s.6.6.1 [which is derived from provisions of the interim protection Act]. On the other hand, victimisation of CJC whistleblowers has been a prominent feature of QWS's findings.⁴²

A witness commented that "one would be living in a fool's paradise to make the observation that [during these 3 years] there has been no victimisation of persons who have blown the whistle".⁴³

4.67 During the same period only one interim injunction was obtained under the provisions of the Interim Protection Act. However, when the CJC applied for a permanent injunction, the Court rejected the application on two grounds. The Judge ruled that the respondents had a right to be heard in open court and that, in the particular case, the whistleblower provisions of the Criminal Justice Act would, in effect, be invalid when it came to protecting the position of a person who was employed under a Federal Award. The CJC has appealed these rulings. It considers they are wrong in law and seriously undermine the CJC's ability to protect whistleblowers in Queensland.⁴⁴

42 Queensland Whistleblower Study, evidence p.1028.

43 Tony Keyes (QWS), evidence p.1052.

44 Criminal Justice Commission, supplementary submission no. 106A, attached Report re: The Whitsunday Shire Council Matter.

4.68 The attitude of whistleblowers was summed up by the Queensland Whistleblowers Action Group who commented that from their perspective current legislation including the Criminal Justice Act 1989, the Police Service Administration Act 1990, and the Public Service Management and Employment Act and Regulations 1988, still leaves whistleblowers vulnerable to reprisal action ... "it is more window dressing than substance when put to the test."⁴⁵

4.69 In accordance with the Fitzgerald recommendation EARC prepared an Issues Paper on Protection of Whistleblowers, which canvassed a wide range of views to determine what scope and form whistleblower legislation should follow. Exhaustive examination of what would constitute appropriate coverage, investigation and protection provisions was undertaken. This research culminated in the comprehensive Report on Protection of Whistleblowers released by EARC in October 1991, complete with a draft Whistleblowers Protection Bill (EARC bill).

4.70 The coverage of different types of whistleblowing under the EARC bill is extensive. Protection is proposed for public interest disclosures about:

- (a) conduct which breaches an Act of Queensland;
- (b) a substantial and specific danger to the health or safety of the public or environment;
- (c) official misconduct as defined in the Criminal Justice Act 1989;
- (d) misconduct by a public official punishable as a disciplinary breach; and
- (e) negligent, incompetent or inefficient management within the public sector involving a substantial waste of public funds.

4.71 Coverage of public interest disclosures made to the media is also proposed if there is a serious, specific and imminent danger to the health or safety of

45 Whistleblowers Action Group, evidence p.1085.

the public. Additionally, the EARC bill offers protection to any employees who refuse to commit an offence in the course of their employment or who make a disclosure while giving evidence to a court, tribunal or Commission of Inquiry.

4.72 EARC proposed that the best means for handling most public interest disclosures would be through internal procedures established by government agencies. Disclosures could be made either internally, or through a designated external authority. The CJC was nominated to be the responsible body for producing a model of procedures which could be adopted and varied as appropriate by public bodies. It was considered inappropriate to apply the same obligation to the private sector.

4.73 In terms of processing public interest disclosures, EARC envisaged that all public sector bodies would be designated bodies for receiving complaints, and the CJC would be the proper authority to receive disclosures from any person that no other public authority can appropriately handle. EARC also suggested that a disclosure be made to the CJC if an appropriate authority had failed to take action. Public authorities would be given discretion to refer disclosures to a more appropriate authority for action. This provision would enable efficient and responsive handling of the disclosure and ensure that the most appropriate authority deals with the complaint. All designated bodies would have the discretion to refrain from proceeding with the investigation of a disclosure if it was found to be trivial, frivolous or vexatious.

4.74 To be eligible for protection under the EARC bill, the whistleblower must honestly believe that the disclosure is reasonable and that it falls within the nominated categories of disclosure proposed in the bill. Public authorities would be obliged to protect whistleblowers from reprisal action. Also, genuine disclosures would not be liable to any claim, demand or action including criminal sanction for breach of secrecy rules or civil action for defamation or breach of confidence. The CJC acknowledged in its submission that the interim protective measures in the Criminal Justice Act need to be more comprehensive:

The Commission ... agrees that the extensive protection proposed by EARC (criminal offence of victimisation, injunction available at the suit of the whistleblower, civil action for compensation for victimisation) should be included in any whistleblower protection scheme.⁴⁶

4.75 The EARC bill proposes the establishment of a whistleblowers counselling unit within the CJC to provide counselling and assistance on a wide range of matters. Any disclosure made to the whistleblowers counselling unit would be provided with full protection regardless of the circumstances.

4.76 The CJC has established a Whistleblowers Support Program to provide counselling, crisis intervention and welfare referral to people who report official misconduct to the CJC. Other major functions of the Program include training CJC staff who deal with whistleblowers and witnesses thereby providing them with greater insight into the problems that whistleblowers encounter and providing liaison, consultancy and policy advice to other agencies involved in whistleblowers support. Significantly, the Program manager can act with considerable professional autonomy and the Program has been separated from other CJC activities so that it can operate with a high degree of confidentiality.⁴⁷

4.77 EARC recommended that, as well as having recourse to existing grievance appeal procedures, financial compensation for lost earnings should be awarded to any whistleblower suffering from unlawful reprisal action.

4.78 To counterbalance the proposed whistleblower protection measures, the EARC bill proposes that it be a disciplinary and criminal offence to knowingly make a false or misleading public interest disclosure. The same sanctions apply to employees taking unlawful reprisal action against a person making a public interest disclosure.

46 Criminal Justice Commission, evidence p.1169.

47 Criminal Justice Commission, evidence pp.1167-68 and CJC supplementary submission no. 106A, attached report re. the CJC's Whistleblowers Support Program.

4.79 The EARC report has been reviewed by PEARC, which reported in April 1992 that it was satisfied that EARC's recommendations were appropriate and would provide protection to persons making public interest disclosures in Queensland. PEARC endorsed EARC's recommendations and the provisions of the draft bill,⁴⁸ although it commented upon a number of matters including the whistleblowers counselling unit, absolute privilege, extension to the private sector and disclosures to the media. It is anticipated that legislation based upon the EARC report and draft bill will be introduced by the Queensland Government later this year.

Australian Capital Territory - Legislative status on Whistleblowing

4.80 The Public Sector Management Act 1994 (the PSM Act) was passed in the ACT Legislative Assembly on 22 June 1994. Division XII of the Act deals specifically with whistleblowing by government employees and contractors. The ACT Opposition has also introduced a Public Interest Disclosure Bill 1994 (the PID bill), which proposes cover for anyone who wishes to make a disclosure. The PID bill outlines procedures for making and handling public interest disclosures. In contrast, the PSM Act does not detail any such procedures for dealing with disclosures. However, subordinate legislation and the Public Sector Management Standards are intended to incorporate such provisions.

4.81 The Select Committee on the Establishment of an ACT Public Service (the Select Committee) reviewed the two different sets of proposals regarding whistleblowing. The whistleblowing section of the Public Sector Management Bill, now law, provided fundamental coverage to public servants. However, the Select Committee felt that wider coverage as proposed in the Public Interest Disclosure Bill was both desirable and possible.⁴⁹ The PID bill is modelled on the EARC bill and, accordingly, is far more comprehensive in its detailing of definitions, investigative responsibilities, annual reporting requirements, remedies and penalties provisions.

48 PEARC report, p.7.

49 Select Committee on the Establishment of an ACT Public Service Report, p.20.

4.82 The PSM Act provides for disclosure to the ACT Auditor-General, Ombudsman or an authorised official on certain matters. The information which can be disclosed include an indictable offence against a law of the Commonwealth, States or Territories, gross mismanagement or waste of public funds, or a substantial danger to public health or safety. A person making a disclosure must reveal their identity. Other provisions include reporting obligations of authorities responsible for dealing with public disclosures, and discretion not to investigate if a disclosure is found to be frivolous, vexatious or not in good faith.

4.83 Protection against reprisals is available if a disclosure is made to persons other than those specified in the PSM Act and such action can be deemed reasonable. Imprisonment for 1 year is included as a penalty for persons who prejudice the employment or engagement of the whistleblower as a result of their disclosure.

4.84 The PID bill designates any public sector unit as a proper body to receive a whistleblowing complaint concerning its own operation or the behaviour of one of its officers. Public sector units must establish internal procedures which detail: how public interest disclosures may be made, assistance and counselling available to whistleblowers, duties to protect a person who makes a disclosure from unlawful reprisals and lastly, how to action disclosures.

4.85 Proper investigating authorities are empowered in the bill to refer a public disclosure to another authority if it is more appropriate or functionally better equipped to deal with the disclosure. The ACT Ombudsman is nominated as a responsible authority to receive public interest disclosures from any person and oversee the handling of public interest disclosures by public sector units.

4.86 While any person may make a public interest disclosure to a prescribed "proper authority," the authority may refuse to deal with the disclosure if it is found that the disclosure is frivolous, vexatious, misconceived or lacking in substance, trivial or has already been adequately dealt with.

4.87 The PID bill prescribes penalties for unlawful reprisals and offers civil remedies for any person subject to reprisal action, including damages, injunctions or orders to be determined by a court. It is an offence to knowingly or recklessly disclose a false or misleading statement in the expectation that it will be acted on by a proper authority. The PID bill also protects any person from liability for defamation or breaches of confidentiality when making a disclosure to a proper authority.

4.88 Public sector units are also given annual reporting obligations under the Bill which require detailing of what procedures they have in place for handling public interest disclosures and statistics of any disclosures that are processed. Provision is also made for progress reports to be provided by the investigating authority on request to the person who made the original disclosure or the authority who referred the complaint.

4.89 The Select Committee in a majority report concluded that the most appropriate and comprehensive form of protection would be provided to whistleblowers both inside and outside the public sector through stand alone legislation. Accordingly, the Select Committee recommended that the whistleblowing provisions of the Public Sector Management Bill (Division XII) should remain in place until such time as stand alone legislation is passed by the Assembly and that the Public Interest Disclosure Bill be considered as a basis for future whistleblower legislation.⁵⁰

4.90 The Select Committee also recommended amendment and review of certain aspects of the PID bill. The definition describing what type of information may be disclosed in the PID bill was considered to be too broad. The Select Committee preferred the definition contained in the PSM Act. The definition for corrupt conduct in the PID bill, was likewise viewed as being too broad in its scope. The Select Committee also commented that the granting of power to the Ombudsman to direct public sector units on procedures was not appropriate and required further

50 *ibid.*, p.21.

consideration. Also, with the eventual transition to stand alone whistleblower legislation, the Select Committee considered it important to maintain consistency in definitions and terminology to avoid confusion.

4.91 When the PSM Act was passed, the ACT Assembly agreed to the Select Committee's recommendations that further consideration should be given to the enactment of stand alone legislation. Until such time as stand alone legislation is passed the provisions of the PSM Act relating to whistleblowing remain in force within the ACT.

CHAPTER FIVE

WHISTLEBLOWING: THE HUMAN DIMENSIONS

5.1 In this chapter the Committee describes from the whistleblowers perspective the human dimensions of whistleblowing. Evidence, both formally received by the Committee and anecdotal, has been utilised to portray the people who become whistleblowers, describe their motivation and seek to understand the personal effects they suffer from the act of whistleblowing.¹

5.2 In providing this perspective, the Committee acknowledges the evidence of so many witnesses which bears testimony to comments by Dr Simon Longstaff of the St James Ethics Centre.

In discussing the issue of whistleblowing, there is a tendency to lose sight of the fact that our deliberations have a direct bearing on the welfare of individual human beings and, through them, on society at large. It is somewhat paradoxical that in developing systems and procedures that protect whistleblowers one can be seduced by the intellectual challenges of developing technique to such an extent that the human scale of the problem is lost from sight.²

The Committee wholeheartedly endorses these sentiments.

5.3 The Committee believes that people who have not been exposed to the human dimension of whistleblowing are often sceptical of the motives of whistleblowers and are unaware of the impact upon the lives of those who have taken

1 The scope of the case histories received by the Committee can be seen from the resumes of whistleblowers' experiences provided by the Queensland Whistleblower Study and Whistleblower Action Group - QWS evidence pp.1012-1016 and WAG evidence pp.1073-1084. For other whistleblowers' personal experiences recounted in evidence see Len Wylde and Jack King, pp.413-421; Ken Smylie, pp.431-432; Christina Schwerin and colleagues, pp.490-508; Alwyn Johnson, pp.525-556; Bill Toomer and Keith Potter, pp.558-588; Dr Kim Sawyer, pp.627-640; Shirley Phillips, pp.648-657; Dr Jean Lennane, David Roper, Kim Cook, Vince Neary and Alan Barry, pp.711-719; Greg McMahon, Tom Hardin, Peter Jesser, Robert Osmak, Robin Rothe, Denis Grove and Gordon Harris, pp.1106-1123; Kevin Lindeberg and Des O'Neill, evidence pp.1132-1144; Bill Wodrow, pp.1372-1384. These cases and many others are detailed in the submissions received by the Committee.

2 Dr Simon Longstaff (St James Ethics Centre), Submission no. 118, p.2.

this drastic step. Indeed, the members of the Committee developed a greater understanding and appreciation of the personal issues involved with whistleblowing as the inquiry progressed.

Whistleblower support groups

5.4 An academic study of approximately 100 whistleblowers and their cases, known as the Queensland Whistleblower Study (QWS),³ has been undertaken by the Department of Social Work and Social Policy at the University of Queensland. This study investigated the personal and organisational impacts of public sector whistleblowing in Queensland since 1990. It has created a valuable data base on whistleblowers and their personal experiences. By bringing together a large number of whistleblowers, the Queensland Whistleblower Study provided the genesis of the Queensland Whistleblowers Action Group.

5.5 Whistleblower support groups are growing in each State. These groups operate with voluntary assistance and are staffed by dedicated individuals. Whistleblowers Australia⁴ which operates on a national level with branches in a number of States and the Whistleblowers Action Group (WAG)⁵ which operates as an autonomous group in Queensland, are the major support groups for whistleblowers. Not only do these groups provide support, counselling and general assistance, but they have also developed a capacity to lobby on whistleblowing in the abstract and on behalf of individual members in particular. WAG is also assisted by the Queensland Justices and Community Legal Officers' Association through the provision of legal and financial support. It is primarily from the evidence of these groups, their members and other whistleblowers that the Committee has based its comments on the personal experiences described in this chapter.

3 Queensland Whistleblower Study, evidence p.1011.

4 Whistleblowers Australia, evidence p.699.

5 Whistleblowers Action Group, evidence pp.1093, 1100 and 1129.

Who becomes a whistleblower

5.6 Recognition of whistleblowers and the role of whistleblowing has grown significantly in recent years. As discussed in Chapter 4 the importance of whistleblowers to the Fitzgerald Royal Commission, references to the subject in parliamentary and other government reports and the move towards legislative protection by a number of States and territories are indicative of the growing awareness and acknowledgment of the practice and influence of whistleblowing.

5.7 Evidence given to the Committee has suggested that this is reflective of a demise within the political and public administration environment in Australia. Witnesses have constantly referred to a diminution of the traditional values of ethics, honesty and professional integrity at all levels of society. A culture of self interest and reduced responsibility has overtaken that of public duty and the greater national interest. It is within this environment that the practice of whistleblowing has steadily grown.

5.8 The Committee received submissions and heard evidence from many whistleblowers during the course of its inquiry. They came from the Commonwealth and State public sectors; local government institutions and instrumentalities; police, banking, legal and health care professions and academic institutions. Geographically, whistleblowers were not restricted to particular States. Submissions were received from all States indicating that whistleblowing is an activity undertaken on a nationwide basis.

5.9 Members of the Committee had not previously realised that the occurrence of whistleblowing was so widespread and involved such diverse areas of public and private sector employment. The people who become whistleblowers cover a wide cross-section of society. They have diverse socio-economic backgrounds and a range of educational qualifications. Yet within this diversity there was a commonality in the type of person who becomes a whistleblower.

5.10 Whistleblowers are generally noted for their intrinsic honesty and integrity. The Queensland Whistleblower Study has reported that the whistleblowers in its study are mostly model employees. They are described by QWS as extremely conscientious and, before deciding to blow the whistle, regarded as highly valued employees by their organisation. They are invariably educated, experienced, efficient, hardworking, honest and perceptive of how their organisation functions. They have been socialised through their family and through the education system to believe in the institutions of the Westminster system, such as Parliament and bureaucratic accountability. They believe in the system's safeguards - principally the law and the administrative procedures and authorities established for the purpose of protecting 'the system'. They expect that such authorities will undertake their duties in an honest and ethical manner. QWS indicates that it is, therefore, with a feeling of great faith and certainty that they approach these authorities when they see some form of wrongdoing with an expectation that the authority will deal with the matter in an honest and ethical manner. The action, or in many cases lack of action, subsequently taken by the authority is often regarded by the whistleblower as inadequate, inappropriate or unsatisfactory. The whistleblower finds it difficult to believe and accept this reaction to their disclosure, resulting in significant levels of disaffection with the bureaucratic structures and loss of faith in 'the system' generally.⁶

5.11 Not all people become whistleblowers by making a deliberate decision to blow the whistle, usually after considerable soul searching and possibly even taking legal advice. In some instances people may become whistleblowers almost by accident. A person who is in the wrong place at the right time may inadvertently become a whistleblower after seeing a wrongdoing and simply commenting upon it within their working environment. Pressures brought to bear may compel such a person to make a moral choice - to either conform by accepting the wrongdoing, or dissent and blow the whistle.

6 Dr William de Maria and Cyrelle Jan (QWS), evidence pp.1037, 1040.

5.12 Other witnesses suggested that the problem with whistleblowing is that they did not realise they were involved until it was too late. Events often 'snowball' so that they are not aware that they have become a whistleblower until they suffer a detriment by the organisation. Until that time they believe they have just been doing their job. This attitude was expressed by many whistleblowers who regarded themselves as ordinary people simply doing their job.⁷

5.13 Whistleblowers frequently display a humble and modest attitude. By contrast a researcher with the QWS asserted that:

whistleblowers are a valuable workplace resource. They are the ones who are endeavouring to keep the workplace honest, to keep it efficient and effective. These people are vital and necessary. They are national treasures and should be revered as such. They should not only be protected but nurtured, encouraged and rewarded. They are the perfectionists in a 'she'll be right' society.⁸

Motivation and considerations in becoming a whistleblower

5.14 Although some people may become whistleblowers almost by accident, for most the decision to blow the whistle is taken deliberately. In evidence before the Committee, whistleblowers were described as honest and possessing a great sense of integrity. The Committee accepts that in the majority of cases a whistleblower is motivated by a high altruistic concern for the public good.

5.15 However, the Committee recognises that whistleblowers may not always be motivated by noble intentions. Whistleblowers may also be motivated by personal benefit, malice or ill-will. The Senate Standing Committee on Finance and Public Administration Report on the Management and Operations of the Department of Foreign Affairs and Trade, referred to in Chapter 4, commented upon this aspect in relation to the actions taken by whistleblowers in DFAT. The F&PA Committee

7 Dr Kim Sawyer, evidence p.638 and Tom Hardin (WAG), evidence p.1111.

8 Cyrelle Jan (QWS), evidence, p.1038.

concluded that the actions were "improper, reckless and likely to have damaged the reputations of innocent individuals and to have been contrary to the public interest".⁹

5.16 It is sometimes not possible to differentiate disclosures driven by altruism from those based upon lesser motives. Disclosures made in good faith and with the best of intentions may be based on little more than supposition or innuendo resulting in adverse effects upon other people and property. Similarly, sincere and well-intentioned whistleblowers may assert things that are subsequently proven to be incorrect. Genuine mistakes can be made.

5.17 An issue which may arise when considering a malicious disclosure as distinct from the frivolous, vexatious or misconceived is that it is quite feasible that a factual disclosure could be made with malicious intent.¹⁰ Irrespective of the motivation such disclosure would still warrant investigation. The impact of motivation and the accuracy of the disclosure in relation to protection for the subjects of whistleblowing is discussed further at paragraph 9.37.

5.18 In determining whether to blow the whistle consideration needs to be given to the personal privacy and professional reputation of those against whom allegations are made. Richard G. Fox has recently written that legislation, such as that being developed by the States as referred to in Chapter 4, defines the categories of disclosure which are to be encouraged under statutory protection in order to reduce the need for potential whistleblowers to make personal moral judgements about when a matter is sufficiently grave to warrant risking the reputation and morale of those about whom the complaint is made.¹¹

5.19 A further consideration in determining whether to blow the whistle relates to the well documented suffering and indignity that whistleblowers are subjected to as

9 F&PA DFAT Report, op.cit., p.42.

10 Dr Jean Lennane, evidence p.707.

11 Richard G. Fox, Protecting the Whistleblower, Adelaide Law Review, v.5 n.2 1993, p.145.

a result of their action (described later in this chapter). This raises the question why anyone would report wrongdoing at all knowing that the likely outcome will be harassment and victimisation.

5.20 The responses from witnesses to this dilemma were varied. Most indicated that the cause was of such importance that exposing the problem was paramount. A few indicated that they were unaware that their action could possibly have led to a chain of events ultimately having such personal impact. Rarely was it suggested that they should not have undertaken the action.

5.21 The Queensland Whistleblower Study referred to the paradox of whistleblowing. On the one hand whistleblowing is not worthwhile due to the overwhelming personal costs outweighing the partial benefits. On the other hand, a high percentage of whistleblowers, knowing now what happened on a personal level when they blew the whistle, say that they would do it again. The QWS explained:

Some respondents considered that the costs outweighed the benefits, and therefore they would not do it again. Others thought that corruption and wrongdoing were so entrenched in their organisations that future disclosures would be futile. Nevertheless many reported that they would do it again, notwithstanding the enormous personal and professional cost. Comments like "I could not live with myself [if I saw wrongdoing and did not report it]", are characteristic of these respondents. In effect, their view is that the moral imperative to disclose wrongdoing outweighs the fact that the costs of disclosure outweigh the (tangible) benefits.¹²

5.22 Many people begin their involvement with whistleblowing by using internal mechanisms provided by their organisation to receive or investigate complaints about wrongdoing. These people get fully involved in whistleblowing when they become frustrated and exasperated at the inaction and ineffectiveness of these internal mechanisms. They then turn to alternative, usually external, sources such as the media to voice their complaints. Whistleblowing to the media is discussed in Chapter 9.

5.23 This process, which has been described by many whistleblowers as typical of their introduction to whistleblowing, does not imply universal condemnation of the effectiveness of internal mechanisms. Dr William de Maria has noted that some of the QWS respondents expressed satisfaction with the internal mechanisms they used.¹³

5.24 In most cases people do not regard themselves as whistleblowers when making the initial report to their internal mechanisms. At that time they regard themselves as just fulfilling an ethical obligation to the organisation or a legislative duty to report wrongdoing. They are simply doing their job. It is when the system does not respond and repercussions and harassment begin that they become a whistleblower.

5.25 One witness described this approach in terms of the only thing a whistleblower ever wants is an inquiry. They only want people to examine the facts and give them an honest assessment. They then want to get on with the job they have been performing.¹⁴

5.26 The outcome of the action taken by organisations in response to the whistleblower's disclosure of wrongdoing has been summarised by the Queensland Whistleblower Study. It indicated that whilst many whistleblowers believed that little or no response was made to their disclosure, others claimed that their action had at least some positive impact, even if it was only an equivocal or relative impact. Thus, despite the generally perceived negativity with which organisations respond to public interest disclosures some whistleblowers were able to find relatively positive organisational outcomes to their disclosure.¹⁵

13 Dr William de Maria (QWS), evidence p.1060. It was a small group of 10-15% of the QWS respondents who expressed satisfaction with the internal reporting mechanisms they had used.

14 Dr Kim Sawyer, evidence p.639.

15 Queensland Whistleblower Study, evidence p.1019.

5.27 A possible motivation which has been discussed in relation to whistleblowing schemes concerns financial reward. Australian whistleblowers do not expect financial reward, unlike the system which operates in the United States. Indeed, it was argued by many before the Committee that such a system was opposed to the very reason why they decided to become whistleblowers which was to take action after being ethically disturbed by the wrongdoing they had seen. Financial reward has been seen as a dangerous inducement upon which to expect people of goodwill to report wrongdoing. This aspect is discussed further in Chapter 11.

Personal effects suffered by whistleblowers

5.28 The overall effect upon a whistleblower at a personal level can be devastating. Case histories presented by Whistleblowers Australia, the Whistleblowers Action Group and Queensland Whistleblower Study indicate that the experiences of whistleblowers conform to a pattern. This pattern was borne out by the evidence of witnesses before the Committee who described the impact of whistleblowing on their personal situations.

5.29 The overall personal cost to the whistleblower is enormous - it can include loss of job, loss of career and employment prospects, financial loss, damage to personal and professional reputation, protracted legal processes and damage to personal life, including loss of spouse or partner, family and friends and health. The traumatic effects of the process often extends from the whistleblower to his or her immediate family, relatives and friends.

Organisational response to the whistleblower

5.30 The Committee received considerable evidence referring to the organisational response to whistleblowers. The corruption within an organisation was described by one witness as "a cancer". He wrote:

The whistleblower identifies the cancer, attempts to remove it, and then is attacked by it. The attack usually takes the form of harassment of varying degrees of intensity.¹⁶

Although the mode of attack may differ, many experiences of whistleblowers are disturbingly similar.

5.31 Whistleblowers Australia describes a process whereby as soon as a disclosure is made a pattern of behaviour emerges which usually leads to a predictable outcome. The whistleblower is discredited, their personal life and career is ruined and they are emotionally and psychologically damaged. The behavioural response of an organisation to the disclosure is seen as having two phases. First, an intense stress factor is exerted on the whistleblower which eventually results in a breakdown of his or her health. Secondly, victimisation and harassment occurs within the workplace. The whistleblower is set up, given menial duties to perform, ostracised, maligned and defamed. Distorted accounts of work practices are submitted. Personal files damaging to the whistleblower are built up with contrived evidence.¹⁷

5.32 It has been noted that this organisational response can occur over a period of several years and generate circumstances which overtake the initial disclosure as grounds for the organisations actions.¹⁸ Gordon Harris, Secretary of WAG, described the experience of whistleblowing as a matter

... of pure survival leaving the messenger often open to ridicule, contrived charges or plain reprisal from more powerful forces in "the system". The message becomes deliberately buried under a smokescreen often making the original alleged corrupt act much worse by its deliberate cover-up through either political patronage or intimidation.¹⁹

16 Professor Kim Sawyer, evidence p.627.

17 Whistleblowers Australia, evidence p.699.

18 Len Wylde, evidence p.414.

19 Whistleblowers Action Group, Submission no. 49, p.14.

5.33 Organisations react to whistleblowing by adopting defensive mechanisms and attempting to discredit the whistleblower. The organisation exerts pressure upon the whistleblower to prevent him or her publicly exposing the wrongdoing. Internal review processes and grievance procedures are perceived as strategies designed to contain dissent within the organisation and silence the whistleblower. Organisations focus their attack on the whistleblower thereby marginalising, minimalising and trivialising the problem. It is the problem raised by the complaint which needs to be objectively assessed, not the whistleblower who raised the problem in the first instance.

5.34 Negative characterisation of the whistleblower is frequently cited as part of the organisational response. The whistleblower is variously cast as "a troublemaker, a zealot, a crusader, a pursuer of trivia..."²⁰ The unmistakable inferences carried by the use of such epithets cause substantial damage, not only to the whistleblowers reputation, but also to the course of the investigation of the disclosure. The insidious nature of such name calling is that the inferences which are raised are surprisingly difficult to 'shrug off'. The onus of proof swings onto the whistleblower - not to prove the truth or otherwise of the allegations, but to prove that he or she is not incompetent or unbalanced or vindictive. Organisations and the agency investigating disclosures ought to be particularly sensitive to the use of such labels about whistleblowers.

5.35 The whistleblower is accused of diminished work performance and complaints about personality faults and psychological imbalance are filed against them. Through a process of victimisation and harassment the whistleblower is shunned by previously supportive and friendly work mates and becomes socially ostracised. In effect, the culture of the organisation has imposed itself as staff adopt attitudes and behave in an out of character manner.

20 Professor Kim Sawyer, evidence p.627. See also Whistleblowers Action Group, evidence p.1091: "It is a common tactic to subjectively attack the individuals personhood by demeaning and labelling that person as less than nominal"; C.R. McKerlie, Submission no. 54, p.1: "I will be, at least subconsciously, dismissed as a ratbag, a troublemaker, a malcontent"; Keith Potter, evidence p.567: "busy bodies, doblers, zealots, stirrers, anti-establishment, etc. ... system buckers".

Employment related effects

5.36 Employment sanctions which a whistleblower can suffer include disciplinary action such as reprimand, transfer, demotion or dismissal. Other kinds of actions taken by an organisation against individuals occasionally appear to be less offensive actions implemented at lower levels. These can be manifested as more subtle, unofficial or indirect actions such as questioning of motives and personal attacks, abuse in the workplace by management or colleagues, social ostracism and intense scrutiny of work practices including investigation of time sheets. Referral for psychiatric assessment or treatment may occur for reasons which are tenuous and sometimes fabricated. The use of psychiatry is discussed further in Chapter 9.

5.37 Retaliatory measures used against whistleblowers by their organisations which have been reported to the Queensland Whistleblower Study include:

being assigned meaningless work, no work or excessive work; physical isolation, deprivation of resources; retrenchment, dismissal or forced resignation; punitive transfers; legal action designed to exhaust the employee's resources before justice can be had; "blacklisting" and denial of promotional opportunities; verbal and physical abuse; malicious and fictitious counter-allegations of wrongdoing; alleged insanity or other unsuitability for work; social sanctions such as ostracism; and "stakeouts" by private detectives.²¹

5.38 In certain professionally oriented areas of employment the actions taken against the whistleblower amount to intellectual suppression. This can include withdrawal of research funding, appropriation of intellectual property, restricting access to or withdrawal of support staff, denial of publication rights and rights to speak at conferences and destruction of the working environment in general.²² However, the subject of intellectual suppression or suppression of intellectual dissent is much broader than just whistleblowing. Dr Brian Martin advised the Committee that:

21 Queensland Whistleblower Study, evidence, p.1017.

22 Dr Kim Sawyer, evidence p.628 and Greenpeace Australia, evidence p.1297.

Basically, the concept of intellectual suppression looks at the source of the problem which is the power of various organisations or other bodies to stop a free discussion of ideas. By focusing on whistleblowing, you focus on the person who is perhaps challenging that power and in some ways is victimised.²³

5.39 The Australian Nursing Federation outlined some of the means of retaliation which may be used against a whistleblower in the nursing profession - the changing of rosters to disadvantage the whistleblower's employment, relocation of the whistleblower to an area requiring expertise for which the whistleblower is ill-equipped causing stress and eventual resignation and the making of notations on a whistleblowers employment record which can influence references for future employment.²⁴

5.40 Anecdotal evidence as to the personal effects suffered by whistleblowers was not limited to whistleblowers themselves or whistleblower support groups. Some investigative bodies also made reference in their submissions and evidence to these effects. The CJC described an extensive campaign of victimisation against a whistleblower which included: malicious rumours about the officer's sexual conduct; refusal of assistance from peers in the normal course of duties; picked on for trivial deviations from standard procedures; refusal by other staff to put through telephone calls; receipt of anonymous abusive and threatening mail and telephone calls and damage to whistleblower's vehicle.²⁵

5.41 The process of pressuring an employee out of the workplace can be readily achieved under the guise of redundancy procedures. These procedures provide employers with an ideal mechanism by which they can rid their organisation of whistleblowers. In subsequent investigations it can be difficult to prove that a

23 Dr Brian Martin, evidence p.814. See also Senator John Coulter, evidence pp.358-364. Intellectual suppression is considered further in the section on Education in Chapter 8.

24 Australian Nursing Federation, evidence p.472.

25 Criminal Justice Commission, evidence p.1165; see also David Landa (NSW Ombudsman), evidence p.743.

redundancy (or indeed redeployment or sacking) occurred due to an employee's whistleblowing and not due to the officially stated reasons of work demands, incompetence, inefficiency or personality problems. The linkage between whistleblowing and victimisation may in some cases, be beyond substantiation.

5.42 For the whistleblower problems can become self-perpetuating. The cumulative effect of the behaviour directed towards the whistleblower can lead towards reduced competency and efficiency. It is difficult to work at optimum performance levels when a person is suffering extreme psychological stress of workplace victimisation, harassment and ostracism. Extreme stress can lead to memory loss and other symptoms of ill-health which undoubtedly affect workplace performance. Days off work due to illness often follow and on occasions psychiatric assessment may be involved. These factors are then held by the organisation as evidence that the whistleblower is unable to cope with the demands of the job. They are portrayed as difficult, obstructive, incompetent, lacking commitment and lazy. The organisation can then sack the whistleblower with impunity.

5.43 Whistleblowers who have been sacked or forced to leave a particular job or employer often face discrimination in future employment. Case studies provided to the Committee have shown that whistleblowers face significantly reduced chances of obtaining future employment.²⁶ This applies across professions. In some instances whistleblowers have had to leave their chosen profession and apply for employment in alternative vocations at levels of pay and responsibility no longer commensurate with their qualifications and experience.

5.44 This loss of career and employment prospects is invariably associated with considerable financial loss. Some whistleblowers have become involved in protracted legal processes, the expense of which also significantly affects their financial situation. The stress generated by legal proceedings can contribute to a deterioration in health and personal relationships.

26 Desmond Childs, submission no. 45, p.3.

Health effects

5.45 Other effects upon whistleblowers involve their personal life. Many whistleblowers have reported adverse effects upon their physical or psychological health and well-being, usually attributed to stress. Symptoms have ranged from heart attacks, palpitations, menstrual irregularities, immune breakdown, migraines and weight gain and loss to insomnia, lethargy, sweats, flushes, agoraphobia, irritability, paranoia, and thoughts of suicide.²⁷ These general medical effects, particularly psychological, have been described in an article by Dr Jean Lennane printed in the British Medical Journal in September 1993.²⁸

5.46 The stresses involved from whistleblowing resulting in psychiatric and physical ill-health affect not just the whistleblowers, but also their spouses and children. There are often lasting or long term effects. Resultant medical costs, lost production and personal suffering and chronic disability are an enormous burden on both individuals and the community at large.

5.47 Symptoms associated with post-traumatic stress disorder (PTS) appear similar to those suffered by some whistleblowers. PTS is now recognised as a medical disorder which occurs when a victim's response to trauma involves intense fear and a profound sense of helplessness. In the crisis the person has had a change imposed upon their life with no right of reply. Taken to an extreme this crisis becomes a trauma. It involves symptoms such as anxiety attacks, nightmares, cold sweats, paranoia and a general feeling of helplessness.²⁹ For whistleblowers this can be reflected in obsessive behaviour, pursuing their case with a consuming passion and a loss of judgment in responding to people in relation to their case. Personal

27 Queensland Whistleblower Study, evidence p.1018.

28 Dr Jean Lennane, "Whistleblowing": a health issue, British Medical Journal vol. 307, September 1993, pp.667-670.

29 Mayo Clinic Family Health Book, William Morrow and Co., New York 1990, p.1037.

experience of these symptoms were related to the Committee by a number of whistleblowers.

5.48 Dr Lennane has noted with interest that it is becoming clear that even some whistleblower's persecutors are also under intense stress at times and may also experience adverse effects.³⁰

Effects upon family life

5.49 Personal relationships also suffer. Adverse effects upon relationships have included decreased friendliness, decreased sexual contact, preoccupation, irritability, relationship deterioration, and in some cases relationship breakdown.

5.50 Whistleblowers have reported that spouses who may be employed by the same organisation or within the same area of work have suffered personal harassment and detriment to career opportunity. There are some reports of whistleblower's children being victimised by class mates at school.

5.51 Evidence given to the Committee has demonstrated that whistleblowers can be very determined people. It is therefore difficult to understand why organisations involve themselves in costly exercises pursuing whistleblowers by attempting to discredit the individual rather than addressing the problem/wrongdoing which has been raised.³¹

5.52 This situation was summed up by Bill Toomer who wrote that most people:

30 Dr Jean Lennane, evidence p.707.

31 See also F&PA DFAT report, op.cit, p.53 which noted that the costs of continuing whistleblowing activity, to the individual and organisational targets, to the taxpayer and to the whistleblowers themselves can be large and will increase as the episode persists.

can surely see that it is far cheaper to 'grab the nettle' and investigate a whistleblowers complaint honourably and promptly than to consume vast resources trying to stymie a whistleblower who is likely to proceed in a determined search for redress.

It seems to me that a person with the type of character who will 'blow the whistle' on crime, wastes and injustices will predictably pursue action indefinitely against those injustices directed against him\her.

It can be self destructive to the whistleblower but the incredible waste of human resource and money by obtuse government authorities is all so needless in a country where such energy could be directed elsewhere to a positive effect.³²

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.

CHAPTER SEVEN

AN INDEPENDENT WHISTLEBLOWERS AGENCY?

7.1 Having determined that the practice of whistleblowing should be the subject of Commonwealth legislation to enable the making of such disclosures in the public interest, the Committee now focuses upon paragraph 2(c) of the terms of reference - whether a new agency should be created to receive and investigate disclosures and to investigate any discrimination suffered by whistleblowers as a result of those disclosures, or whether an existing Commonwealth agency should have that role.

7.2 The Committee received a diversity of views and opinions on this aspect, ranging from the creation of a new all powerful agency through to virtually no change in the role and responsibility of existing Commonwealth agencies.

Creation of a new agency

7.3 Senator Chamarette's Whistleblower Protection Bill proposes the establishment of a whistleblowers protection agency with powers to receive and investigate allegations of wrongdoing, to provide protection for whistleblowers, to investigate allegations of discrimination and harassment and to take or recommend the taking of corrective action. Comments on this bill and the proposed agency are considered in Chapter 12.

7.4 The functions and powers envisaged for such an agency in the Whistleblower Protection Bill can be seen as one end of the spectrum. The establishment of such a powerful new agency received support from some people in evidence.¹ It was even suggested that a new agency should be given powers to cross jurisdictions. For example, Len Wylde recommended that "a national whistleblowers protection body be set up to examine complaints made by or on behalf

1 e.g. Christina Schwerin, evidence p.429; Bill Toomer, evidence p.579; Greenpeace Australia, evidence p.1292.

of whistleblowers. It must be given sufficient authority to override State, local or financial influences in the public examination of complaints".²

7.5 However concerns were expressed over the creation of a large, powerful agency within the mainstream of bureaucracy. On one hand was a bureaucratic concern that the agency would duplicate certain functions and powers of existing organisations.³ On the other was that, even though such an agency would be established with good intentions, by existing within the bureaucracy it would ultimately become a part of and reflect the culture which whistleblowers distrusted.

7.6 Whistleblowers, although generally supportive of a new agency, were particularly sceptical in their comments by emphasising the need for independence. As the Queensland Whistleblower Study noted its respondents had an 'understandable disillusionment with all emanations of the state'. The problem for these people was to envisage how any new state-resourced organisation could avoid becoming what they perceived all other state-funded watchdogs had become - as corrupt as the systems they were intended to rectify.

7.7 The Queensland Whistleblower Study envisaged strong, independent whistleblower controlled organisations at the federal and each State level which could "enter into abrasive and sometimes conciliatory relationships with investigative authorities at the federal and state level to pursue systemic corruption".⁴ As noted in paragraph 6.57 QWS suggested that effective and incorruptible protection for whistleblowers would be best provided by an organisation based outside state apparatus, possibly without any legislative framework. The QWS responded to comments that such an organisation might be unable to act with authority and could

2 Len Wyde, evidence p.415. See also Dr Kim Sawyer who contends that a Federal Whistleblowing Agency is required, evidence p.634.

3 Merit Protection and Review Agency, evidence p.1225.

4 Dr William de Maria (QWS), evidence p.1065.

be marginalised, by suggesting that marginalisation would be preferable because in that situation whistleblowers retained their independence and freedom of action.⁵

7.8 Whistleblowers Australia indicated that whistleblowers would not avail themselves of procedures or organisations which have, in the past, had the power and resources to investigate discrimination, victimisation and harassment, yet failed to do so. 'The system' was too entrenched to be changed by legislation alone. Whistleblowers Australia believed:

An approach outside the existing system is necessary if the whistleblower is to be protected in a positive manner. A new body, aware of the present short comings, and independent of the current system's control, is essential. ... A separate independent agency, however, must not become a form of government control over dissent.⁶

7.9 Much of the argument against the creation of a new agency centred around resource/cost issues of duplicating functions of existing organisations. The Australian Conservation Foundation offered a further reason. It was wary that "a single purpose agency may be easily disbanded, and its important functions lost, in the different political climate of some future time".⁷

Stakeholder Councils

7.10 An alternative approach was suggested by Mr Shann Turnbull based upon the introduction of corporate senates and stakeholder councils for every significant public or private sector organisation. Corporate senates would overview and resolve potential conflicts of interests by management and directors of organisations in matters of fiduciary interest and private duty. Stakeholder councils would be composed of elected representatives of employees, customers and

5 ibid.

6 Whistleblowers Australia, evidence p.702.

7 Australian Conservation Foundation, evidence p.1289.

suppliers. As elected representatives, the councils would have power independent of the executive - be it the chief executive of a private corporation or a government minister. The councils would act like a performance auditor, advising ministers as well as chief executive officers and boards of directors. They would provide a watchdog role.⁸

7.11 The Australian Shareholders' Association supported this proposal, suggesting that "such a system would be easier to set up, be less bureaucratic, closer to the problem and as a consequence, provide a better chance to resolve the concern and protect the rights of both the whistleblower and the subject of the whistleblowing".⁹

Use of existing agencies

7.12 Moving to the other end of the spectrum is the suggestion that a type of hybrid whistleblower protection agency could be created within or attached to an existing agency. For example, a whistleblower ombudsman operating from within the Commonwealth Ombudsman's Office. The Privacy Commissioner proposed that rather than creating a separate agency, it might be possible to require the Commonwealth Ombudsman, or any other agency that receives a whistleblowing complaint, to so designate the complaint. Complaints designated as whistleblowing complaints could then be kept within a separate unit or stream, subject to the control of a separate officer. An external person could have a monitoring role.¹⁰

7.13 Proposals such as this are closely linked with the powers of existing agencies in handling whistleblowers complaints and the possibility of enhancing these powers.

8 Shann Turnbull and James Guthrie, evidence pp.983-987. Mr Turnbull details institutionalising whistleblowers through stakeholder councils in his submission and supporting documents, evidence pp.911-976.

9 Australian Shareholders' Association, evidence pp.457-8.

10 Privacy Commissioner, evidence p.841.

7.14 It was noted in Chapter 4 that the Gibbs Committee and a number of parliamentary committees recommended or suggested greater powers for existing organisations to deal with whistleblowing. The State legislation proposals referred to in that chapter also place responsibility for the receipt and investigation of whistleblowers reports, together with their protection, in the hands of existing organisations.

7.15 The view that existing organisations, rather than the creation of a new agency, should deal with whistleblowing was also expressed by a number of witnesses.¹¹ In particular, the roles of the Commonwealth Ombudsman and the Merit Protection and Review Agency (MPRA) were canvassed. In virtually all cases this view was qualified by the comment that additional or enhanced powers and responsibilities would be required to ensure that protection and investigation of whistleblowers and their complaints were satisfactorily addressed. In considering this issue, one witness emphasised that:

the overriding determining factor when choosing between establishing a new agency or utilising the infrastructure of an existing agency is that whistleblowers must have complete confidence in whom they are dealing with and in the integrity, honesty and compassion of the personnel who should have appropriate training, skills and experience to enable them to carry out their duties professionally and without favour or bias.¹²

7.16 A common reason given by whistleblowers when discussing their loss of faith in 'the system', related to the lack of action taken over their case by existing organisations on jurisdictional grounds. Regularly they would be told by an organisation that it could not provide assistance because dealing with the particular complaint was not within their power. Some whistleblowers suspected that organisations would interpret their statutory responsibilities narrowly so as not to have to deal with the 'problem' whistleblower.

11 Attorney-General's Department, evidence pp.124, 131; Department of Defence, evidence p.1340; National Crime Authority, evidence p.438; Privacy Commissioner, evidence pp.835, 838; Australian Federal Police, evidence p.84.

12 Alwyn Johnson, evidence pp.533-534.

7.17 In referring to this jurisdictional problem, the Queensland Whistleblower Study indicated that a number of investigative agencies are "jurisdictionally strangled" and that "whistleblowers are perpetually falling through the gaps in those jurisdictions".¹³

7.18 The Commonwealth Ombudsman and the MPRA have identified shortcomings in their statutory powers when dealing with whistleblower complaints.

7.19 The Commonwealth Ombudsman currently receives and investigates whistleblower complaints although in some circumstances it would be desirable if certain complaints could be referred to another agency for investigation. In some cases it is difficult to distinguish an employment issue from discrimination or retribution which may have arisen from the action of whistleblowing. This limits the action which the Ombudsman can take on the case.

7.20 The Ombudsman has suggested that the situation would be improved by enhancing the referral arrangements available to the Ombudsman so that the specialist agency, eg the MPRA or Equal Opportunity Commissioner, can be fully briefed and advised as to the result of the Ombudsman's investigation and the significance of the case. There is also a need to enhance the protection provisions to ensure that the referral to another agency remains fully protected.¹⁴

7.21 The MPRA referred to the situation where a whistleblower, who is a Commonwealth employee, claims to have been discriminated against in their employment as a result of their whistleblowing disclosures and lodges an appeal or grievance with the MPRA. The MPRA can only make a recommendation to the relevant organisation. This was regarded as clearly insufficient in the case of proven discrimination against a whistleblower by that organisation.

13 Dr William de Maria and Tony Keyes (QWS), evidence p.1038, 1049. Wider jurisdictional issues involving Commonwealth v State and public v private sector legislative coverage are considered in Chapter 8.

14 Commonwealth Ombudsman, evidence p.45.

7.22 In addition, if a Commonwealth employee leaves Commonwealth employment for any reason, he or she loses the right to lodge a grievance with the MPRA. This prevents whistleblowers who allege that they were either forced, or otherwise unduly influenced, into resigning from having an avenue for redress.

7.23 In these circumstances the MPRA submitted that

- (a) for the purpose of being able to lodge an appeal or grievance under the *Public Service Act 1922* and regulations made under that Act, a person who ceases to be a Commonwealth employee should be deemed to continue to be a Commonwealth employee - for a period of, say, 6 months - in relation to actions that were taken in relation to the person's employment as a Commonwealth employee; and
- (b) in relation to actions that were taken in relation to the employment of a Commonwealth employee who had been, or proposed to be, a whistleblower in the terms of any proposed whistleblower protection legislation, the MPRA (or a tripartite review committee established by the MPRA) should have the power to make a determination that would be binding on the agency concerned - in cases of unfair dismissal and similar, this should include the power to re-instate the employee concerned.¹⁵

Considerations in formulating a recommendation

7.24 After deliberating upon the form that legislation should take and whether a new agency should be created, the Committee based its decision on three major considerations.

7.25 Firstly, it was anticipated that once educational campaigns directed towards bringing about attitudinal and cultural change begin to take effect, the response to reports of wrongdoing should become much more positive. In the long term, this would significantly reduce the need for whistleblowing. However, it was

15 Merit Protection and Review Agency, evidence, p.1228.

recognised that such change would not occur overnight and that action needs to be taken on the situation regarding whistleblowing as it currently exists.

7.26 Secondly, there was concern at the need for independence to be very visible in any agency which has, or would have, responsibility for acting upon whistleblowers reports. It was crucial that any agency gained the trust and confidence of whistleblowers.

7.27 Thirdly, there was an acknowledgment that there already existed procedures and organisations which are involved in responding to whistleblowers and offering protection. It was accepted that many of these procedures and organisations were not operating to the satisfaction of whistleblowers. In recognising this point the Committee nevertheless accepted that it was not feasible to make recommendations which would duplicate the roles and responsibilities of existing organisations. Rather, these existing procedures and organisations should be made to operate in the manner intended and to the satisfaction of all parties involved. The Committee was also cognisant of the recommendations and suggestions made in previous parliamentary reports.

Model for receiving whistleblowers' reports

7.28 In balancing these considerations with the evidence presented to it, the Committee has formulated the following model for receiving whistleblowers' reports.

7.29 The Committee is in general agreement with the three level reporting procedure supported by Professor Finn and the Gibbs, Elliott and Finance and Public Administration Committees. However, the Committee has expanded aspects of these procedures which it sees operating together so as to provide reporting options, rather than a sequential process. The Committee considers that internal reporting procedures within organisations are the cornerstone to whistleblowing. If they are operating effectively and people have confidence in using them, many reports of

wrongdoing could be resolved at this level. Internal reporting procedures are discussed further in paragraphs 9.25 - 9.31.

7.30 The second tier to the Committee's model is the establishment by legislation of a small but powerful independent agency to be known as the Public Interest Disclosures Agency (the Agency). The role of the Agency would be to receive and register public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures, to provide a national education program and to make and oversee the implementation of recommendations relating to its role.

7.31 It is anticipated that the disclosures to the Agency would usually be by people who for whatever reason felt unable to raise their complaint with the internal reporting procedures of their organisation or who were dissatisfied with the procedures or results of an internal investigation.

7.32 Reporting through the media would remain a third option in specific cases, although the Committee believes that with the developments recommended for reporting and investigating complaints of wrongdoing and the protection of the whistleblower, recourse to the media should be considerably reduced. Whistleblowing to the media is discussed further in Chapter 9.

Public Interest Disclosures Agency and Board

7.33 The Committee decided to name the Agency 'Public Interest Disclosures' in preference to 'Whistleblowers Protection' primarily to emphasise the positive benefits from the action of whistleblowing, rather than focussing upon the negative reaction to the person who undertook the action. This does not diminish the fact that protection of the whistleblower is an integral part of the Committee's scheme.

7.34 The Committee proposes that the investigation of whistleblower complaints and protection from harassment and victimisation should be primarily

undertaken by existing organisations, but with oversight by the Agency. The Committee considers that this proposal should operate in conjunction with the strengthening through legislative means of the powers and responsibilities of these organisations especially the Ombudsman and the Merit Protection and Review Agency. These organisations should provide reports back to the Agency on the result of all investigations and the action taken. The Agency should provide an avenue of appeal if the whistleblower is dissatisfied with the report, leading to special reports to Parliament, if necessary.

7.35 The Committee recognises, however, that in some circumstances these investigations may be impractical, be progressing unsatisfactorily or have been inappropriately dealt with, in which case the Agency should have the power to conduct its own inquiry or resume the existing inquiry by using relevant experts on short-term contracts.

7.36 The Committee is concerned to ensure that the Agency remain small and essentially non-bureaucratic by not becoming a burgeoning part of the bureaucracy. It is equally important that the Agency gains the trust of whistleblowers in the performance of its functions. For these reasons the Agency needs to be a step removed from existing organisations and have as its major focus the provision of a central point of assistance and protection for whistleblowers and to monitor and oversight various investigations. This point is emphasised by recommending strong accountability mechanisms for the Agency including reporting, record keeping and client satisfaction surveys.

7.37 The functions of the Agency are discussed in detail in ensuing chapters. They 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. (see para 9.38)

- . To advise and assist in respect of those matters which are not identified as public interest disclosures and to make formal referrals to the appropriate authority. (see para 9.39)
- . To receive, register and oversee the investigation of public interest disclosures or alleged wrongdoing. (see para 7.30)
- . To receive reports on the result of investigations and action taken and to provide an avenue of appeal if the whistleblower is dissatisfied with the report. (see paras 7.34 and 7.46)
- . To oversee the investigation of complaints of harassment, ill-treatment or victimisation of whistleblowers. (see para 9.59)
- . To have an appeal role over actions taken as a result of the investigation of such complaints. This role should involve a mediation process.(see para 11.6).
- . To ensure that whistleblowers and those who are the subjects of whistleblowing have access to a confidential counselling service. (see 9.99)
- . To devise and implement a national education program, in liaison with other organisations concerned with workplace ethics and to assist and co-ordinate education programs devised by individual organisations. (see paras 6.35, 6.50 and 9.77)
- . To monitor client satisfaction and the success of education programs.
- . To undertake ongoing monitoring, evaluation and comparison of the different approaches to whistleblower protection and future developments within comparable international legislatures. (see para 3.34)

7.38 The Committee believes that a level of independent control should be provided to act as a safeguard over the activities of the Agency. Accordingly, it proposes that a Public Interest Disclosures Board should be created whose role would be to provide direction to and control over the Agency in the performance of its functions. The independence of the Board would be emphasised through a membership balance between Parliamentary, public service and community-based representatives.

7.39 The Committee acknowledges that for whistleblowing legislation to be effective and its benefits realised, both potential whistleblowers and employer organisations must have confidence in the legislation and accept it as credible and workable. As an adjunct to this objective, the Committee has endeavoured to propose the most appropriate and cost effective means to achieve greater accountability and responsiveness from government processes. Creation of a separate Agency through whistleblower legislation will have a twofold benefit. In the most tangible way it demonstrates a commitment to recognising the legitimacy of whistleblowing and in practical terms provides an 'open' system which facilitates the reform process by highlighting maladministration and exposing corruption.

Parliamentary involvement in whistleblower protection

7.40 A number of proposals were made relating to parliamentary involvement with whistleblower protection. Senator Chamarette's Whistleblowers Protection Bill 1993 proposes the establishment of a Parliamentary Joint Committee. The main duties of the Joint Committee would be to inquire into and report on activities of the proposed Whistleblowers Protection Agency and any matters drawn to the Joint Committee's attention by the head of the Agency or referred by Parliament, and to examine and report on any matters arising out of the special reports or annual report prepared by the Agency and tabled in Parliament.¹⁶

7.41 Professor Finn also suggested that the third-tier of his reporting model 'going-public' should include making a report to a parliamentary committee of any matter which could have been reported either 'in-house' or to an independent agency under the Finn proposals, where that parliamentary committee has undertaken an inquiry into a matter in relation to which that report would be a relevant consideration.¹⁷

16 Whistleblowers Protection Bill 1993 (Commonwealth) clauses 40-42.

17 Finn Report, *op. cit.*, pp.7, 60-61.

7.42 A number of witnesses expressed their confidence in the capacity of parliament to independently examine and assess issues and scrutinise government operations. They therefore suggested that Parliament should have a role in the protection of whistleblowers and the investigation of disclosures.¹⁸ The Health Insurance Commission suggested that "there was much to be said for disclosures being made to a Parliamentary Commissioner so that any investigations of disclosures and the protection of any witnesses might properly fall within the ambit of Parliamentary privilege."¹⁹

7.43 The Committee has considered this matter and believes that the most appropriate form of parliamentary involvement should be as follows - House of Representatives and Senate membership of the Public Interest Disclosures Board and the enabling of the Public Interest Disclosures Agency to provide annual and special reports to the Parliament.

7.44 The F&PA Committee noted in its report on the Department of Foreign Affairs and Trade that:

a parliamentary inquiry into a whistleblowing episode can easily elevate the status and significance of the episode above any level that could be justified on its merits. Parliamentary committees, in any case, have no power to rectify any malpractice they might find. To the extent that parliamentary involvement would be desirable in a whistleblowing episode, it would best take the form of a committee review of a report on the episode by an independent body.²⁰

7.45 In relation to the reporting to Parliament, the Committee is aware that some organisations, for example the Ombudsman and MPRA, must submit annual

18 e.g. Keith Potter, evidence p.575; Dr Kim Sawyer, evidence p.635.

19 Health Insurance Commission, evidence p.1269.

20 F&PA DFAT Report, op. cit., p.56.

reports and may make special reports to the Prime Minister or the Parliament,²¹ although there is no obligation that these reports will be acted upon.

7.46 The Committee considers that the Public Interest Disclosures Agency should be given similar powers to make special reports to Parliament on any matters relating to its functions and operations which the Agency considers need Parliamentary support or action. However the Committee believes that this power should be strengthened by a requirement that action must be taken over these reports.

7.47 The Committee recommends that:

Public Interest Disclosures Agency -

- . **Legislation be enacted to establish an independent agency, to be known as the Public Interest Disclosures Agency (the Agency).**
- . **The role of the Agency should be to receive public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures, to provide a national education program and to make and oversee the implementation of recommendations relating to its role.**
- . **The Agency should consist of an administrative unit with the capacity to contract relevant experts as required, and an education unit.**
- . **The Agency should have the following accountability mechanisms:**
 - a. **Report annually to Parliament;**

21 Ombudsman Act 1976, sections 16-19 and Merit Protection (Australian Government Employees) Act 1984, sections 52 and 53.

- b. Present special reports to Parliament on any matters relating to its functions and operations which the Agency considers need Parliamentary support or action;
- c. Maintain files, statistics and records of cases;
- d. Provide evidence of client satisfaction through surveys, the results of which will form part of the annual report.

Public Interest Disclosures Board -

- . A Public Interest Disclosures Board should be created whose role would be to provide direction to and control over the Agency in the performance of its functions.
- . The Board should be supported by a small secretariat from within the Agency.
- . Appointments to the Board should aim at achieving gender equality and include nominees from the following organisations: Human Rights and Equal Opportunity Commission, Privacy Commission, Commonwealth Ombudsman's Office, Merit Protection and Review Agency, a recognised whistleblower support group, a Public Interest Advocacy Centre, an Ethics group, a Trade Union, and other national community organisations.
- . Parliamentary involvement should be included by the appointment of a Senator and Member of the House of Representatives. The Member should be a government nominee and the Senator a non-government nominee or alternatively the Parliamentary members should include a government and non-government nominee.

Members of the Board should be appointed for a period of three years, with eligibility for reappointment to a second term only.

CHAPTER EIGHT

COVERAGE BY LEGISLATION

8.1 The following chapters are concerned with the jurisdictional and operational features of the proposed Public Interest Disclosures Agency. The Committee is required, by the terms of reference, to consider those matters which will affect the reach of the agency and the ability of the agency to act effectively. The latter involves prescribing the powers with which the Agency, and the investigating agency should be equipped, and the protections which should be afforded whistleblowers, the subjects of whistleblowing and the investigating agency.

Jurisdiction

General observations

8.2 The Committee's conclusion as to what persons and organisations, as subjects of whistleblowing, should be covered by the legislation, extends further than was suggested by some witnesses as to what persons and organisations can be covered. The summation of the evidence to the Committee regarding the need for whistleblower protection legislation has to be tempered by the constitutional limitations on the Commonwealth Parliament's ability to legislate. The Committee has also taken into account policy considerations ancillary to the issue of jurisdictional coverage of the proposed scheme.

8.3 It was strongly argued in evidence that whistleblower protection legislation should apply to the makers of disclosures involving "wrongdoing" in both the public and private sectors and at all levels of management in the federal, State and local government spheres. The Committee acknowledges that there are factors which differentiate the two sectors which are relevant to the formulation of a possible whistleblower protection scheme. The Committee has made its recommendation regarding the preferred coverage of the proposed legislation taking into account these sector differentials, constitutional limitations and policy considerations.

8.4 Particular submissions addressed the question of the constitutional limitations on the Commonwealth to legislate to protect whistleblowers. The Commonwealth Parliament's ability to legislate is restricted to those matters which are provided for in the Constitution. The question of the extent of the Commonwealth Parliament's power to legislate with respect to the protection of whistleblowers becomes particularly relevant in examining the potential extension of a whistleblower scheme into the private sector.

Public and Private sectors - Indistinct concepts

8.5 In determining the jurisdictional limits of a scheme which has as its objective, the public interest disclosure of wrongdoing, it is clear to the Committee that the public interest may be adversely affected by private interests. The terms 'private' sector and 'public' sector seem to indicate that the two sectors exist as separate entities. From the whistleblower protection perspective, there is no clear demarcation between the sectors. There is no basis upon which the public and private spheres can be distinguished so as to justify the scheme being limited to either 'sector'. Amongst other things, financial and contractual arrangements blur the sectors.

8.6 The Committee believes that if legislation covered only one sector the fundamental notion of promoting the "public interest" would be distorted by protecting only selected makers of disclosures. Not only would the public interest not be served by providing coverage for only one sector, but also the increasing economic dependency and interaction of the public and private sectors would make such partial legislative coverage inadequate.

"Public monies", privatisation, and contractual arrangements

8.7 There are those who asserted that coverage ought to be tied to the concept of "public monies".¹ The meaning of the concept of "public monies" has

1 See for example Geoff Dannock, Submission no. 11, p.1; Malcolm MacKellar, Submission no. 12, p.8; Civil Aviation Authority, evidence p.238.

evolved. Changes in policies, such as the introduction of the "user pays" system, have impacted on the meaning. The term "public monies" was once primarily applied to those monies appropriated for public sector activities under the budget, and little else. However, public sector organisations and Departments are shifting (or have shifted) to self-funding mode (user pays). The monies received in exchange for functions or services performed by a public sector organisation are generally brought under the "public monies" umbrella. Theoretically, the public interest is tied to the performance of those functions.

8.8 The following two cases exemplify the extent of the financial dealings between the two sectors. The Civil Aviation Authority submitted that 90% of its revenue is derived from industry.² The Department of Defence submitted that "its expenditure of approximately \$5 billion per year on goods and services gives rise to close dealing between both the public and private sectors, including the outsourcing of many public sector activities to the private sector".³ Although drawing no conclusion regarding coverage, the Department made the observation that were coverage to be restricted to the public sector, those in private sector employment might be deterred from reporting possible fraud, waste or abuse in government contracts.⁴

8.9 The State Public Services Federation supported linking coverage to "public monies". Whistleblower protection should exist wherever public monies are appropriated. The Federation submitted:

It should also cover, for example, private firms which are contracted to the tiers of government for the provision of public services such as private prison contractors, the northern coast watch, pipe layers for the water authorities and private schools which are in receipt of government funds.⁵

2 Civil Aviation Authority, evidence p.238.

3 Department of Defence, evidence p.1339.

4 *ibid.*

5 State Public Services Federation, evidence p.513.

8.10 The concept of privatisation has blurred the distinction between the public and private sectors. So too, the provision of public services by private companies or contractors has impacted upon the distinction. There seems to be a wide range of such services being performed by private interests from aerial coast watch services to computerised pension-payment schemes to outsourcing of Defence related activities. Bill Toomer recommended coverage of private sector organisations in general and particularly "those companies conducting business under the policy of privatisation, and those providing consultancy work to government authorities".⁶ He warned that:

the expanding policy of private enterprise accepting hitherto government responsibilities; working more closely with government departments and sharing computerised information on a growing scale raises the expectation of a corresponding growth in sophisticated crime.⁷

8.11 The fact that persons employed in the private sector are increasingly in a position to have knowledge of wrongdoing by public employees in government departments and statutory authorities, was recognised in a number of submissions.⁸ Clearly, there is also a corresponding increase in the opportunity for private sector employees to detect and report incidence of wrongdoing within the private sector itself, in relation to its dealings with the public sector.⁹

Public Sector Coverage

8.12 In considering whistleblower protection in the public sector, the Committee acknowledges the vast amount of work already produced which relates either directly or indirectly to this subject. As was discussed more fully in Chapter 4, in addition to the reports and articles prepared in respect of the introduction of

6 Bill Toomer, evidence p.578.

7 *ibid.*

8 See for example, Lesley Lyons, Submission no. 59, p.4.

9 Department of Defence, evidence p.1339.

whistleblower protection legislation in Queensland, South Australia, New South Wales and the ACT there have also been Inquiries and Reports in the Commonwealth sphere which have contributed to the growing body of material on the subject of whistleblowing.

8.13 The overwhelming response to the Committee was that a whistleblower protection scheme should, in the very least, be applicable to disclosures concerning wrong-doing in the public sector. The Constitutional power of the Commonwealth parliament to so legislate is clear.¹⁰ The Committee believes that the advantages to be had from such a scheme are many. The scheme would provide ethical direction and guidance for employees of the Australian Public Service (APS). There would be enormous savings to the taxpayer. But, most significantly, such a legislative initiative would serve to entrench the expectations of both government and the community upon those employed in the administration of government.

8.14 The evidence to the Committee supported these conclusions. The Public Service Commission (PSC) welcomed a legislatively based whistleblower protection scheme in the public sector. The PSC expressed the view that APS staff would benefit by having an identifiable process through which to report instances of corruption and serious maladministration. The PSC stated:

Such a scheme could contribute to a more efficient and effective Public Service; a greater awareness of ethical conduct; and the identification of any inadequacies in existing legislative and administrative structures to avoid these problems.¹¹

8.15 From the evidence received by the Committee, it appeared that there was a general feeling of concern as to the ethics underpinning the administration and operation of the Public Service. Whilst the Committee believes that the majority of

10 See the Constitution of the Commonwealth of Australia, sections 52 and 67.

11 Public Service Commission, evidence p.182. The PSC confined their views to APS staff (permanent/temporary) employed under the Public Service Act 1922 in departments and statutory authorities.

public servants are committed and loyal workers, there is abundant anecdotal evidence about the opportunity for wrongdoing to occur. One witness noted:

In this kind of statistical climate, the temptations for SES officers and middle managers to overlook fraud, to approve fraudulent applications, and to cut legal corners are endless.¹²

8.16 Given the relationship of the APS to government and the concept of the public interest, public perceptions are important. It is a case of "not only must justice be done, but justice must be seen to be done". The recent case involving employees of the Department of Social Security being prosecuted for, and to date at least some convicted of, fraud against the Commonwealth illustrates the need for concern about public sector employees respecting the public interest.¹³

8.17 There are those who believe that corruption is systemic. That is, where corruption exists and is tolerated in the lower ranks of an organisation, the attitude of tolerance to corruption must logically exist at the upper echelons of the organisation. It has been reported that:

There is mounting concern amongst the general public and public service staff about the rigidity of the Australian public services and their inability to recruit responsible staff and use them effectively. In spite of major reforms since 1984 aimed at increasing efficiency, there is evidence that the fundamental organisational problems have not yet been fully understood.¹⁴

12 Malcolm MacKellar, Submission no. 12, p.8. The "statistical climate" referred to is the use of statistical measurements of efficiency to indicate productivity in the Public Service and that "it is easier to maintain the productivity target by approving applications than by detecting fraud".

13 Reported in The Australian, 20 June 1994; The Sydney Morning Herald, 18 March 1994, 1 April 1994; The Canberra Times, 4 February 1994.

14 A.E. Jackson "Judgement in Decision-Making Strategic Planning in Public Sector Management", paper annexed to Submission no. 41.

8.18 Over the last 10 years, there have been some well documented cases of public sector whistleblowers. But regardless of the amount of media coverage or debate in the public arena about particular cases, the evidence to the Committee from public sector whistleblowers indicated that little had changed in so far as the organisational response to whistleblowers was concerned. The Committee noted that the organisational response to whistleblowers seemed to be a conditioned or a patterned response. The bureaucracy redirects the focus of an inquiry or investigation into a disclosure onto the maker of the disclosure. Of whistleblowing in the public sector, one witness observed:

It was easier to "crush and destroy" me than it was to fix the problems and lose credibility within the "group". It was the old story of "we don't want to [to] be burdened with your problems, let's shoot the messenger".¹⁵

The organisational response to the whistleblower is considered in Chapter 5.

8.19 After briefly referring to his experiences with the Merit Protection Review Agency and the Public Service Commission, the witness reflected - "It begs the question "Who minds the minders? and "Who focuses accountability on the Public Service?" He asserted that, from a public servant's perspective, whistleblowers must be able to confide, free from fear of retribution and public exposure.¹⁶ In order to overcome the bureaucracy's conditioned response to whistleblowers, greater accountability of the response is required. There are already in place various pieces of legislation which recognise the need for accountability in the APS work environment.¹⁷

15 Desmond Childs, Submission no. 45, p.2.

16 *ibid.*

17 See for example the Sex Discrimination Act 1984, Racial Discrimination Act 1975, Human Rights and Equal Opportunity Commission Act 1986.

Public and private sector duty

8.20 Public servants are, by the nature of their position and their work, obliged to provide the government of the day with "objective and impartial advice". This obligation is peculiar to the public sector employee and is entrenched in the legislation which regulates their employment.¹⁸ Public servants are required to perform their work with fairness and propriety and to report instances where these provisions are breached.¹⁹

8.21 Whereas private sector employees are required to adhere to the common law duty of confidentiality, there is nothing that compares with the legislative obligations on public servants. Doubtless, private sector employees have a sense of loyalty to their employers, which may be borne out of observation of commercial-in-confidence principles, or it may be borne out of fear of dismissal or demotion. Alternatively, loyalty may be borne out of the respect which workers have for their employers. However, there is no equivalent legislative duty on private sector employees to that of the legislative duty imposed upon public sector employees to the government of the day.

Public sector secrecy provisions

8.22 The Committee is aware of those factors which differentiate the public and private sectors and which are pertinent to any whistleblower protection proposal. One of the fundamental differences between the two sectors is the duty of secrecy to which public servants are subject. Public servants have had to try and reconcile the public interest ramifications of the information to be disclosed with the consequences of breaching relevant secrecy provisions. This has involved the balancing of the public interest value of the information against the risk of personal prosecution for breach of

18 See, for example, the Public Service Act 1922 and Regulations thereunder.

19 Public Service Commission, evidence p.183.

secrecy provisions in addition to other consequences which may flow from such an action.

8.23 The duty of secrecy on employees in the public sector may rest upon a number of bases, the most obvious being the entrenchment of the secrecy culture in statute. These provisions serve as a statutory reminder of the duty of confidentiality. Legislative manifestations of the secrecy culture affect the access to, and publication of, confidential information. For example, particular provisions in the Privacy Act 1988 make it a criminal offence punishable at law to access official information without proper authorisation. Provisions contained in the Crimes Act 1914 restrict the publication or disclosure of information. Section 70(1) provides as follows:

Disclosure of information by Commonwealth officers

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

In addition, section 70(2) makes it an offence for a former Commonwealth officer to disclose such information. The penalty provided is imprisonment for two years. Sections 78 and 79 of the Crimes Act extend the secrecy provisions to 'Espionage and similar activities' and 'Official secrets'.

8.24 The Attorney-General's Department provided the Committee with a list of secrecy provisions contained in over 100 Commonwealth Acts which reinforce the secrecy requirement of Commonwealth officers in particular areas of employment.²⁰ Such provisions may be in the following terms:

20 Attorney-General's Department, evidence pp.135-8. The list, which was not exhaustive, was prepared in October 1992 for the House of Representatives Standing Committee on Legal and Constitutional Affairs in relation to its inquiry into the protection of confidential personal and commercial information held by the Commonwealth.

16(2) Subject to sub-sections (3) and (4), a person to whom this section applies shall not, except when required or permitted by law or for the purposes of the performance of the person's duties, disclose any information or produce a document to another person if the disclosure of the information or the production of the document would constitute a breach of confidence.

Penalty: \$5,000 or imprisonment for 2 years, or both.²¹

These provide legislative protection for the information held by law enforcement agencies and revenue collecting departments.

8.25 Alternatively, the common law recognises that an action for breach of confidence may be founded in contract, equity, tort or property.²² For example, the duty of secrecy may be imposed as a condition of employment for contractors. In such a case, the duty would be primarily a contractual matter. Such a duty has long been recognised at law:

...it is said that there is an implied term of the contract of employment that the servant will observe this confidence: alternatively, it is said that this duty of confidence is a duty which is imposed by the law because manifestly in the public interest servants should not disclose to the world what they are confidentially told about their master's business.²³

Clearly, employees owe a duty of confidentiality to employers. The common law counters this duty of confidentiality by recognising that an employee cannot be dismissed if the employee made a disclosure, hence breaching the implied condition, in order to protect the public interest.²⁴ However, the duty of confidentiality may still arise because government employees may be required to enter "secrecy agreements" to override the common law protection.

21 Customs Administration Act 1985, Section 16 - Breaches of confidence.

22 See Yvonne Cripps, *The Legal Implications of Disclosure in the Public Interest*, ESC Publishing, Oxford 1986: pp.21-29.

23 *Initial Services Ltd v. Putterill*, [1968] 1 QB 396 at 408.

24 Richard G. Fox, *Protecting the Whistleblower*, op.cit., pp.137-163.

8.26 Another origin of the duty of confidentiality is in the law of equity. The principle is concisely stated by Fox:

"... irrespective of particular contractual or statutory obligations, the superior courts will, as a matter of equity, restrain the publication of confidential information improperly obtained, or information imparted in confidence, which ought not to be divulged."²⁵

8.27 The Committee acknowledges that the "public interest" provides a defence at law to an action for breach of confidence. However, although the High Court has indicated that the duty of confidentiality may, in particular cases, be modified by the concept of public interest, the category of cases has by no means been described exhaustively. Nor can it be said that the dicta have provided any degree of certainty in the law for whistleblowers.

8.28 The Law Institute of Victoria expressed concern that secrecy laws (and other laws of general application) act as a deterrent to potential reporters of wrongdoing. The Institute asserted:

In the absence of a statutory right to protection from the consequences of disclosing confidential information, an informant is susceptible for liability for defamation, breach of confidence, breach of contract and/or prosecution for breach of secrecy provisions. The Institute considers that the potential threat of prosecution or litigation against whistleblowers works against the exposure of corruption, fosters a climate of collusion and secrecy and prevents redress of public wrongs.²⁶

8.29 Referring to the secrecy provisions and the laws of commercial-in-confidence, Greenpeace Australia proposed that such "constraints" to disclosure of information should be removed. Greenpeace asserted:

25 *ibid.*, p.148.

26 Law Institute of Victoria, Submission no. 85, p.3.

The argument that there is information so important that it must be withheld from the public "in the national interest" is ludicrous. Instead, the opposite is true; the more important the information is for "the national interest", the more important it is that it be available for public examination and discussion. It should not be restricted to small groups of powerful individuals, especially when they are so frequently non-elected officials.²⁷

As to the rule of law of commercial-in-confidence, Greenpeace argued that to recognise such a proposition is to place the profits of corporations above the interests of the community. Again, the language of democratic fundamentals forms part of the debate about rules of law which strengthen the inaccessibility of information. Greenpeace stated:

The health and vitality of our democracy should be judged by the accessibility of information and the transparency of decision making processes. Secrecy has no place in our society.²⁸

8.30 The majority of submitters who addressed the issue were of the view that in most circumstances genuine whistleblowers should be exempt from secrecy provisions.²⁹ The Committee, however, considers that there should be a narrowly defined category of information the unauthorised disclosure of which would attract sanction. This is similar to a recommendation made by the Gibbs Committee which proposed that there should be a "limited number of narrowly described categories of official information, the unauthorised disclosure of which would attract criminal sanction".³⁰ The Committee makes recommendations in relation to protection from the application of secrecy provisions at paragraph 9.52.

27 Greenpeace Australia, evidence p.1292.

28 *ibid.*

29 See for example Independent Commission Against Corruption, evidence p.738.

30 Gibbs Report, pp.349-350.

8.31 The Committee is also aware that State Public Service Acts contain provisions which make it an offence for an employee to disclose certain information affecting the employing agency or gained through their employment.³¹ The Committee notes with concern the impact which such provisions may have on potential whistleblowers. The Committee considers that such legislative provisions would be perceived by employees as threatening if an employee was contemplating making a public interest disclosure.

8.32 The Committee encourages the development of a Commonwealth-State consensus to overcome provisions such as these which exist at the State level. Although Constitutional limitations prevent the Commonwealth Parliament from being able to legislatively influence the situation of employees in State public services, the Committee considers that States should be encouraged to initiate moves towards redressing legislation which discourages public interest whistleblowers.

8.33 The Australian Nuclear Science & Technology Organisation (ANSTO) submitted that disclosures about "some establishments" could be directed to an independent body on an in-confidence basis. According to ANSTO, the types of matters which might be part of this category include disclosures about defence matters which may affect the national interest, commercial-in-confidence matters and disclosures involving foreign relations and bilateral negotiations. The Committee welcomed the suggestion that there should be some avenue where the public interest nature of disclosures may be examined to ensure that that narrowly defined category is not transgressed.

8.34 The Committee is also of the view that the standards of privacy currently attaching to the personal information of individuals should not suffer. The Health Insurance Commission noted similar concerns:

31 For example the Australian Education Union (Tasmanian Branch), Submission no. 22, p.2, referred to such provisions in the Tasmanian State Service Act.

As a body with access to a considerable volume of information of the most personal kind on a very large number of individuals in Australia, the Commission is conscious of the need to protect that information against unauthorised disclosure virtually at all costs. ... It would not wish whistleblowing legislation to be a back-door avenue for release of personal information otherwise subject to protection.³²

The Committee is keen to ensure that the personal privacy of individuals is respected and standards maintained. This issue is not to be confused with the issue of the unauthorised release of information which may impact on the public interest.

8.35 The Public Service Commission believed that a whistleblower protection scheme which guides and assists public servants through the conflict of secrecy versus public interest would be a valuable addition to the public service workplace.³³ Similarly, the Attorney-General's Department maintains that any whistleblower protection scheme for public sector employees which does not legislatively clarify the position of whistleblowers with respect to secrecy provisions would be "deficient". The scheme could either acknowledge the existence and application of such provisions to whistleblowers or exempt whistleblowers from them.³⁴

8.36 The Committee acknowledges that whistleblowers in some discreet areas cannot be absolutely absolved from being subject to secrecy provisions. There are categories of cases where the national interest, howsoever defined, would be prejudiced by the unauthorised disclosure of information. The wider public interest would, in fact, be compromised by the disclosure of material or information to expose any form of internal corruption. To this end, the Committee maintains that a balance must be achieved whereby whistleblowers can disclose information in the public interest free from sanction for breach of secrecy, but not in such a way as would compromise the national interest or the wider public interest. A number of submissions noted that such circumstances exist in the areas of defence and

32 The Health Insurance Commission, evidence p.1266.

33 Public Service Commission, evidence p.182.

34 Attorney-General's Department, evidence p.126.

intelligence which might warrant special treatment to ensure that whistleblowing does not prejudice the national interest³⁵. Further discussion and recommendations on this issue are in Chapter 9.

Public v private sector workplace regulation

8.37 Another factor which serves to differentiate the public from the private sector is the workplace environment itself. Whereas some private organisations can exist in virtual isolation, all areas of the Australian public service are required to reflect (as far as possible) attitudinal changes to work conditions and ethical practices. Private sector managers may adopt the view that private sector organisations are only required to satisfy minimum legal standards. However the Committee acknowledges that many private sector organisations go further than satisfying minimum requirements.

8.38 Resources are allocated to develop and implement strategies which impact upon the workplace of Australian public servants. Notable examples of such programs are the recent directions taken in promoting Equal Employment Opportunities and Industrial Democracy. The Public Service Commission listed other areas in the public service workplace currently under development. These are the processes of decentralisation and devolution of decision making, risk management and further developments in administrative review. At the policy level, there is a move towards "greater emphasis on outcomes and less emphasis on process" and a "more integrated approach" is evolving in the area of human resource management.³⁶

8.39 The same cannot be said of all areas of the private sector. It is generally accepted that the cost saving to private organisations would only be felt in organisations large enough to absorb the initial cost of workplace strategies and

35 National Crime Authority, evidence p.436 and Malcolm Mackellar, Submission no. 12, p.8.

36 Public Service Commission, evidence p.183. As to human resource management, see 'A Framework for Human Resource Management in the Australian Public Service', PSC 1992.

programs and where a higher production level overall may flow from, for example, a subsequent boost to morale. It is far easier to persuade participation in such programs in larger organisations than it is in smaller organisations which may not have the capacity to absorb the cost of such programs themselves. Long term benefits are not always the practicable alternative for industries which are striving to survive in the short term.

Internal reporting systems in the public sector

8.40 Some public sector authorities and instrumentalities already have in place procedures for the reporting of matters which affect the operations of their organisation including fraud control and audit reporting. The Civil Aviation Authority (the CAA) outlined two avenues which serve to receive allegations of malpractice or illegal activity in the aviation industry which have the potential to affect public safety. These are the Directorate of Aviation Safety Regulation and the Bureau of Air Safety Investigation (BASI). BASI also operates a Confidential Aviation Incident Reporting system whereby industry personnel, members of the public and CAA staff can report concerns about perceived dangerous practices or occurrences to BASI. After establishing their bona fides, BASI passes the concerns anonymously to the CAA. The CAA then investigates the information or allegations received from these bodies and, if warranted, counselling or prosecution action is taken.³⁷

8.41 Notwithstanding the measures already available, the CAA submitted that it supports coverage of the CAA by whistleblower protection legislation. The CAA asserted that "if legislation does not extend to the private sector, where there is much anecdotal evidence of reprisals by employers, it is all the more important for government regulators, who are often the recipients of whistleblowing disclosures, to have procedures in place to protect the identity of their informants".³⁸

37 Civil Aviation Authority, evidence p.238.

38 *ibid.*

8.42 The CAA indicated that 90% of its revenue is derived from industry rather than allocated by Parliament. Nonetheless, the CAA considers this does not derogate from its duty to use these funds and resources efficiently:

Any measures that add value to the process of public administration by encouraging the disclosure, investigation and correction of illegal or improper conduct or danger to health or safety should therefore be supported by public sector instrumentalities and will be provided those measures are structured in a cost effective fashion.³⁹

8.43 Recent BASI reports into air accidents at Young and Canberra in 1993 have, by addressing civil aviation safety procedures, identified a number of deficiencies with the CAA's operations. These reports demonstrate the importance of reviewing internal reporting procedures to ensure that they are operating efficiently and effectively.

8.44 The Department of Defence, like many other public service organisations, has an internal reporting system. Complaints/allegations of fraud, waste and abuse may be reported to the Inspector-General's office. Complaints may originate in the public or private sector. The Department has in place a Defence Fraud Control Plan which is described as "a two-tiered risk management strategy - at the corporate and commanders/line managers level - to combat fraud".⁴⁰ Encouragement for whistleblowers to come forward, is officially endorsed in the booklet entitled "Fraud, Personal Rights and Other Issues".

8.45 The Committee recommends at paragraph 9.31 that all organisations should be required to formulate or, where appropriate, review and expand relevant internal reporting systems and procedures available to whistleblowers. The Committee encourages the use of such internal systems as the primary mechanism through which to report wrongdoing.

39 *ibid.*

40 Department of Defence, evidence pp.1337 and 1343-48. See also section on fraud control policy in the Australian Public Service in Chapter 6.

International legal obligations

8.46 In addition to Australia's constitutional arrangements, the Committee's attention was also drawn to Australia's obligations under international law. Some witnesses expressed the opinion that, by virtue of being a signatory to the International Covenant on Civil and Political Rights which is a schedule to the Human Rights and Equal Opportunity Commission Act, Australia was obliged to legislate to protect freedom of speech wheresoever it might be impaired.⁴¹ The view was put to the Committee that the freedom of whistleblowers is impaired and so the obligation to legislate arises with respect to whistleblower protection legislation. Arguably, the provisions of Article 19 may be relevant to the recognition of the rights of whistleblowers:

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

8.47 The International Declaration of Human Rights may also be of relevance to the protection of rights of whistleblowers. Article 19 states:

41 e.g. Australian Press Council, evidence p.898; Tony Keyes (QWS), evidence pp.1048-9.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Private Sector

8.48 The Attorney-General's Department submitted that the Commonwealth Parliament lacks sufficient constitutional power to enact a comprehensive scheme which would enable whistleblower protection to apply generally throughout the private sector. The Parliament may, however, regulate the activities of specific kinds of private sector organisations.⁴² The options before the Committee were either to recommend the restriction of the whistleblower protection scheme to the public sector, or to recommend extension of the scheme to those areas in the private sector in respect of which the Commonwealth Parliament is constitutionally able to legislate.

Constitutional restrictions

8.49 In elaborating on the possible scope of whistleblower protection legislation, the Attorney-General's Department expressed the view that the Commonwealth Parliament could legislate to protect whistleblowers under the following heads of power in the Commonwealth of Australia Constitution Act 1900:

Section 51(xx), the corporations power, would support a law which empowered a Commonwealth body to investigate and report on the activities of a foreign, trading or financial corporation;

Section 61, the executive power, would support a law in respect of whistleblowing which relates to breaches of a Commonwealth law, and Section 51(xx), the express incidental power, would support laws giving

42 Attorney-General's Department, evidence p.128.

the Commonwealth body the requisite investigative and reporting powers.

The Department noted that other heads of power may be relied upon, but their coverage is limited; for example, section 51(i), the inter-State or overseas trade and commerce power; section 51(v), the telecommunications and broadcasting power; section 51(vi), the defence power; and sections 51(xiii) and 51(xiv), the powers which support laws about banking and insurance respectively, other than State banking and State insurance. In addition, there are other powers which may be relied upon.⁴³

8.50 However, the Department concluded that even if the Commonwealth called upon all its powers to give the whistleblower protection legislation the widest possible scope, "there would be gaps that the Commonwealth alone could not fill".⁴⁴

8.51 The Attorney-General's Department suggested that the legislature should not be guided by constitutional limitations alone. The Department noted that policy issues and other associated legal matters raised in its submission supported the conclusion that " ... it is not considered desirable to extend the proposed legislation to private sector activities"⁴⁵, although it may be constitutionally able to so legislate in respect of some activities. One such consideration noted by the Department seemed to be based on the notion that existing public sector bodies would be charged with the responsibilities for the private sector under the whistleblowers protection legislation. The Department stated that "to extend the jurisdiction of existing mechanisms ... would significantly distort the role and character of those bodies."⁴⁶ The Department warned that a further policy issue may arise with "overlapping jurisdictions".

43 Attorney-General's Department, evidence pp.129-130. See also sections 52(i) and 122 of the Constitution.

44 Attorney-General's Department, evidence p.130.

45 *ibid.*, p.131.

46 *ibid.*, p.128.

8.52 The Gibbs Committee raised particular reservations about the extension of a whistleblower protection scheme to the private sector. The Gibbs Committee noted that in the public sector, whistleblowing is "interlocked" with the issue of "unauthorised disclosure of official information". The public sector whistleblower requires legislative exemption from criminal sanctions and disciplinary sanctions.⁴⁷ Whistleblowing in the private sector is not "interlocked" with any such issue. Whilst the Committee acknowledges that such a distinction may be drawn between whistleblowing in the two sectors, the Committee does not consider such a distinction should prevent legislation extending into the private sector.

8.53 The Committee considers that legislation properly drafted can distinguish between public and private sector whistleblowing, so that, as far as public sector whistleblowing is concerned, the exemption from prosecution for breaches of relevant secrecy provisions can be retained.

8.54 The Gibbs Committee raised a broader consideration - that extension of the scheme into the private sector would involve the enactment of a general law providing protection to anyone who reports wrongdoing of the kind specified. The Gibbs Committee expressed the concern that "institution of such a system of protected informers is usually one of the first steps of a totalitarian society."⁴⁸ It suggested that such a system can be distinguished from one which is limited to protection of whistleblowers in the public sector because it involves the reporting of wrongdoing which involves misconduct, waste or negligence by persons entrusted with statutory powers or control of public moneys. The Gibbs Committee concluded that the whistleblower protection scheme should be confined to the public sector.

8.55 However, the Committee makes two observations in respect of these reservations. First, the division between the public and private sectors is less discernible in recent times. In addition to the provision of goods to government, the

47 Gibbs Report, p.350.

48 Gibbs Report, p.351.

private sector is often contracted to perform government work. Although the most obvious, the Committee does not consider that financial matters alone have bridged the separateness of the two sectors. There may be more far reaching implications from the greying of the two distinct areas than are presently foreseeable. Secondly, although abuse of power or public monies are the concern of taxpayers and hence the proper subjects of whistleblowing legislation, the private sector is engaged in a range of activities and industries which may, in the absence of adequate accountability mechanisms have a deleterious impact on the health and/or safety of Australians, or the environment.

Wrongdoing in the private sector

8.56 The Committee empathised with the predicament of genuine whistleblowers in all spheres of employment. The Committee is aware of much anecdotal evidence of wrongdoing in the private sector which should, for the greater public interest, be exposed. Whilst aware of the constitutional limitations which serve to restrict the Commonwealth's ability to legislate for the purpose of protecting whistleblowers, the Committee felt that, on balance, such legislation should, as far as possible, protect the makers of disclosures concerning:

persons and organisations whose failure of duty has the capacity to facilitate perpetuation of wrongdoing against the public interest.⁴⁹

8.57 The Committee has no doubt that there exists the need in the private sector for whistleblower protection legislation. Evidence was received about wrongdoing of a public interest nature which involved the private sector. For example the Queensland Conservation Council reported:

49 Keith Potter, evidence p.560.

It appears that it is common practice for both the private and public sector that scientific reports in particular have been doctored or censored, causing the decision making process to be flawed.⁵⁰

8.58 The National Crime Authority (NCA) pinpointed three areas of difficulty in enacting a whistleblower protection scheme for the private sector. The NCA referred to the constitutional limitations on the Commonwealth Parliament's power, the cost factor in establishing and operating such a scheme and the nature and the powers of the investigating agency which might raise controversy. The NCA concluded that, although whistleblowing legislation should eventually be extended to cover sections of the private sector, such an extension should preferably follow a "wider community debate".⁵¹ However, the NCA acknowledged that without such an extension, wrongdoing in the private sector which affects the public interest may continue undisclosed.

Accountability

8.59 The notion of accountability was a stated concern in many submissions. Accountability is an underlying theme of whistleblower protection legislation. But accountability from whom and to whom? It is common to acknowledge that accountability is a hallmark of the processes of democracy, and that within the public sector, accountability, ultimately to the people, is part of the constitutional cycle of responsibility. However, the Committee considers that accountability and constitutional responsibility does not end with the public sector. The responsibility of Government should not be seen as being so confined. Within its constitutional frame of reference government has a wider responsibility to the people to ensure that whistleblowing, as part of the democratic process, can surface wheresoever the public interest is threatened. To align the concept of responsible government with the concept of the public sector is to give democracy so narrow a focus as to undermine its existence.

50 Queensland Conservation Council, Submission no. 66, p.3.

51 National Crime Authority, evidence p.437.

8.60 In particular, witnesses raised concerns about the lack of accountability by providers of government services in the private sector. The Committee was told that clients of these service providers were already less protected than clients of government service providers.

As a taxpayer I am concerned that my taxes are being spent increasingly in a sector that does not have adequate accountability controls.⁵²

8.61 The Committee is concerned that the concept of accountability be given an extended meaning, and that it be generally accepted that the concept extends further than the mere furnishing of details about the use of power or public funds and resources.

Private sector employment provisions

8.62 Although John McMillan made a number of proposals concerning a whistleblower protection scheme, he expressed doubts as to how far his suggestions could be applied to the private sector. McMillan considered that:

Essentially, the problem that arises in the private sector is that there is limited common law or statutory protection for employees. A standard feature of most employment contracts is that an employee's service is terminable at will - for any reason, for no reason, or for the wrong reason".⁵³

8.63 Given the lack of adequate protection of employment in the private sector, McMillan questioned the appropriateness of attempting to "reformulate that employment relationship in the specific context of whistleblower protection, bearing in mind the difficulties ... of distinguishing between whistleblowing and other work place

52 J. Dickenson, Submission no. 26, p.1.

53 John McMillan, evidence p.268. Although McMillan noted the possible introduction of concepts such as natural justice and termination for cause, which are part of public sector employment.

disagreements [and concluded that] maybe the issue warrants a more general analysis".⁵⁴

Public and private sector legislative coverage

8.64 The majority of those who addressed the issue considered that whistleblower protection legislation should be given as wide a coverage as is constitutionally possible, across both the public and private sectors. Submissions frequently described appropriate coverage in terms similar to:

All Government departments, agencies, instrumentalities, public servants (serving and former members), members of the public, members of the judiciary, members of the Parliament and any person, organisation, or other body.⁵⁵

8.65 The Committee received evidence from some organisations who were opposed to the introduction of legislation to protect whistleblowers in either the public or private sectors. The Business Council of Australia did not believe that the absence of such legislation unduly inhibits the disclosure of information that is broadly in the public interest. In fact, the conflict of secrecy versus public interest experienced by public servants when deciding to blow the whistle "ensures that only matters of real public interest are disclosed as the sanctions are too severe for the disclosure of less important matters".⁵⁶ If public servants decide to become whistleblowers, they must accept the consequences of their actions including discrimination if they are found out. The Business Council of Australia was of the opinion that the introduction of such legislation would undermine the trust between employer and employee.

8.66 The Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia (the Accountancy Bodies) jointly

54 *ibid.*

55 Australian Federal Police, evidence p.83.

56 Business Council of Australia, Submission no. 23, page 1.

submitted that "the public interest is more likely to be advanced by whistleblowing when it relates to conduct in the public sector rather than the private sector".⁵⁷ The Accountancy Bodies suggested that whilst "accountability" and "good governance" are matters of importance in the private sector, there are more appropriate means by which they can be achieved such as shareholder action and intervention by regulatory bodies such as the Australian Securities Commission.⁵⁸ Nonetheless, the Accounting Bodies preferred that whistleblower protection legislation, if enacted, should be given the widest possible application in both sectors. They were convinced, and the Committee agrees, that "one regulatory system can be put in place to deal with all instances of public interest whistleblowing".⁵⁹

8.67 The Committee considers that, with mutual cooperation between the Commonwealth, the States and industry groups, whistleblower protection can be a reform on a national level.

Government Business Enterprises

8.68 The Committee notes that Government Business Enterprises are increasingly falling between the public and private sectors. In many cases the 'government' emphasis to these enterprises has diminished or is non-existent. Scrutiny and accountability has been reduced or lost through the hiving-off of commercial activities. The ability of Parliament to exercise its proper role of scrutiny has been considerably weakened, although the convention of ultimate ministerial responsibility remains. This problem was identified in 1989 by the F&PA Committee⁶⁰ and has deteriorated during the intervening years. The Committee agrees with the F&PA Committee that such enterprises should be no less accountable than a statutory

57 ASCPA and ICAA, Submission no. 71, p.3.

58 *ibid.* See Institute of Internal Auditors - Australia, evidence pp.865-6, who also argued against the introduction of legislation citing seven other means to the same end.

59 ASCPA and ICAA, Submission no. 71, p.5.

60 Senate Standing Committee on Finance and Public Administration, Report on Government Companies and their Reporting Requirements, November 1989, pp.15-17.

authority. GBE's should therefore be covered by the whistleblower protection legislation.

8.69 The Committee recommends that the Public Interest Disclosures Agency and the provisions of the supporting legislation be given the widest coverage constitutionally possible in both the public and private sector.

8.70 In recognition of the constitutional limitations of the Commonwealth Parliament to enact a comprehensive scheme to cover whistleblowers throughout the private sector, the Committee encourages States and/or relevant industry groups to provide avenues for the reporting and investigation of wrongdoing, in those areas where the Commonwealth Parliament cannot constitutionally act.

Specific areas of public/private sector involvement

8.71 The Committee acknowledges that there are some areas in respect of which the Commonwealth Parliament cannot constitutionally legislate. In other areas, part coverage may be achieved. Notwithstanding the inability of the Parliament to comprehensively legislate with respect to certain areas, the Committee feels obliged to raise concerns brought to its attention regarding a number of areas. The Committee believes that, with the cooperation of the States, relevant industrial bodies and employer organisations, some, if not all of the deficiencies identified may be remedied. Based upon the weight of evidence received by the Committee, particular attention has been paid to the following areas: Education, Health care and administration, Financial regulation and banking and Policing.

Education

8.72 The Committee acknowledges the importance of academic freedom, and the "self regulation" of the education industry in so far as this is practicable. However, the Committee has heard evidence that the self-determination existing within academia has, in some instances, resulted in sectors of academia operating as isolated pockets

of tyranny. By operating under a policy of self determination educational institutions are able to determine for themselves the allocation of the public funds granted to them. The evidence received seemed to reveal a philosophical hypocrisy or enigma underlying the higher education system. Whilst on the one hand, the notion of academic freedom justifies the policy of economic self determinism in relevant institutions, that very same policy is allegedly threatening intellectual freedom. As one witness commented:

The traditional value of intellectual self regulation has collapsed in the face of economic determinism but the pretence to its continued relevance has given those who control academic institutions immense freedom from accountability.⁶¹

8.73 In some academic environments this has produced, in conjunction with other reasons, intellectual suppression or the suppression of intellectual dissent as it may in some instances be called. However, it must be noted that intellectual suppression and whistleblowing, whilst sharing some mutual concerns are not entirely interchangeable terms. Some forms of intellectual suppression may not constitute the activity of whistleblowing and vice versa. Clearly, however, the two concepts have much in common. Both are forms of dissent. Two main features of intellectual dissent have been described:

First, a person or group, by their public statements, research, teaching or other activities, threatens the vested interests of elites in corporations, government, professions or some other area. Typically this is by threatening profits, bureaucratic power, prestige or public image, for example by providing support to alternative views or by exposing the less attractive sides of the powerful group.⁶²

8.74 The second feature is broadly the response which, being the act of suppression, may take many forms. It is "an attempt by a powerful individual or group

61 Shirley Philips, evidence p.649.

62 Brian Martin, et al (eds), "Intellectual Suppression", Australian Case Histories, Analysis and Response, Angus and Robertson, Australia, 1986:p.1.

to stop or to penalise the person or activity found objectionable⁶³ This may involve denying funds or work opportunities, blocking appointments, tenure, promotion, courses, publication and blacklisting and harassment. The subtlety of the organisational response to whistleblowers, noted in Chapter 5, is also common to cases of intellectual suppression. Reference has been made to 'direct' suppression (as already described) and 'indirect' suppression which takes the form of implied or overt threat of sanctions or because of a general climate of fear or pressures for conformity.⁶⁴

8.75 The overlap between intellectual suppression and whistleblowing may occur when pressure is exerted to alter or falsify academic research or reports, or where suppression of material is the result of abuse of power or departmental corruption or maladministration. When people are not willing to submit to suppression, their response may be to blow the whistle. As Dr Brian Martin described "a whistleblower making a complaint is simply using one strategy against suppression".⁶⁵

8.76 Intellectual suppression occurs in virtually all parts of society, although most research has centred on academic or scientific institutions. The Committee recognises that intellectual suppression within Australia is an important and unresolved issue the coverage of which goes beyond the scope of this Committee.

8.77 At a time when attention is focussed on the concept of accountability there are ample reasons to examine the accountability mechanisms of academic institutions. According to one witness:

The legislative bias in public accountability could not have a better expression than in the idea of 'trust for the ethical scholar'. Scholars are

63 *ibid.*, p.2.

64 *ibid.*, pp.1-2. See also suppression of academic freedom in Australian higher education institutions, National Tertiary Education Industry Union, evidence pp.612-17.

65 Dr Brian Martin, evidence p.822.

no more ethical than anyone else. It is an intellectual fraud that is being perpetrated on the community as millions of dollars are handed to these autonomous institutions to deliver the economic goods for governments with no questions asked about the means they use to do it.⁶⁶

Clearly, academic institutions are in receipt of large amounts of public monies. Again, the question "Who minds the minders?" is relevant.

8.78 The Committee recognises that economic self determination may ultimately lead to isolation in work environments. This is particularly where administrative managers are free from effective public accountability measures. The Committee empathises with the plight of those in academia, who, striving for intellectual growth and achievement, or for improving teaching conditions and the methods of imparting knowledge to their students, risk serious interruption to their careers by exposing administrative or academic wrongdoing. Shirley Phillips suggested that this social construct of freedom from accountability produced an environment where "naive or courageous academics try to protect the intellectual credibility of their research and teaching instead of their careers - especially when they come into conflict with the wishes, demands and self-interest of colleagues who are further up the administrative hierarchy".⁶⁷

8.79 The Committee is concerned to ensure that, regardless of the legislative coverage of the proposed whistleblower protection scheme, academic institutions aim to review their ethical accountability structures. If economic self-determinism is a policy which in practice, is a catalyst for corruption or the perpetration of maladministration then that policy should be re-examined.

8.80 The Committee finds sentiments such as those expressed by Professor Kim Sawyer, as disturbing. Professor Sawyer, reflecting on his own experience stated:

66 Shirley Phillips, evidence p.653.

67 *ibid.*, p.649.

... I have lost all confidence in the institutions and traditions of this country. I regard the education system as corrupted, corrupted by the entrepreneurs of education that Professor Stephen Fitzgerald recently so appropriately described as carpetbaggers and goldiggers. Corrupted also by the failure of the governing bodies of universities to accept any real accountability or public responsibility. Corrupted also by an education bureaucracy that cannot define nor implement a regulatory process in a deregulated environment. And finally corrupted by a system that apparently perceives the Vice Chancellors of our universities to be above the law.⁶⁸

8.81 The Committee acknowledges that improving the lot of whistleblowers in the education system, will also require that academic and education institutions should re-examine their internal legislation and by-rules. Such re-examination should be undertaken with a view to removing those rules which serve to inhibit a staff member from serving the public interest and disclosing particular classes of information.

8.82 Peter Jesser stated that "when morality is legitimated by expediency ... efficiency tends [to] become a surrogate for ethical decisions and choices".⁶⁹ He was referring to another type of corrupt behaviour which occurs in educational institutions - the arbitrary assessment of students. Clearly there is an enormous range of issues within the education sphere that may constitute "wrongdoing" and which should be reported for the public interest.

8.83 The National Tertiary Education Industry Union whilst acknowledging the constitutional barriers to bringing universities directly under legislation, strongly urged that some means be developed so that the requirements, processes, procedures and structures of any whistleblower protection legislation apply to universities.⁷⁰ **The Committee recommends that legislation extend to academic institutions, where it can,**

68 Professor K. Sawyer, evidence p.629.

69 Peter Jesser, Submission no. 20, p.4.

70 National Tertiary Education Industry Union, evidence p.619.

and, regardless of legislative initiatives, the Committee encourages institutions to accept dissent as integral to the pursuit of knowledge.

Health care and administration

8.84 The Committee acknowledges the vital contribution to society made by the health care industry and the workers within. Because of the nature of the work performed by the health care industry, the Committee was concerned to receive evidence about the suppression of information relating to malpractice and maladministration.

8.85 There is a public expectation that the ethical standards of this industry and associated professions, should be proportional to the onerous responsibilities which it must perform. Regrettably, the Committee has received evidence of situations where the ethical standards within the health care industry have not met expectations. The health care industry has been described as an industry where:

a strict hierarchal and interdependently tied population accept an orthodoxy which is more rigid than most other professions. This may mean that whistleblowing is seen as akin to treason, and carries the extra stigma, if criticism is made public, of inducing fear in the general population about standards of care. Consequently, whistleblowing carries a higher penalty for health care providers.⁷¹

8.86 The Committee encourages the disclosure of information in the public interest which may lead to a wider debate about the health care industry. As a general observation, it seems to be the case that it is often the disclosure of such information which prompts significant reforms. However, whilst the Committee encourages disclosures of wrongdoing in the public interest, the Committee is concerned that the confidentiality of patient's personal information be preserved. The Committee considers such confidentiality is vital and should be protected. The Health Insurance Commission stated that:

71 Paul Maher, Submission no. 25, p.1.

The Commission places onerous obligations of confidentiality upon its staff. It would not wish whistleblowing legislation to be a back-door avenue for release of personal information otherwise subject to protection".⁷²

8.87 The Australian Nursing Federation (ANF) drew the Committee's attention to the precarious position of nurses. No one could dispute the valuable work of this profession as they perform "hands on" care and treatment of patients. Nurses are required to work as members of a health care team, and yet, as anecdotal evidence invariably suggests, it is presumed by the heads of the team that they will remain compliant and silent, no matter what wrongdoing they may see. The ANF indicated that:

Nurses are privy to endless abuses of ethics, privacy, confidentiality, safety and human rights. They are witness to, and sometimes actually requested or required by their employers to participate in fraud (euphemistically known as Medifraud).⁷³

8.88 The workers in the health care industry are constrained from making public interest disclosures by the complexity of the environment in which they work. Their loyalty as team members, and their constant interaction with a multitude of health care providers from different origins accentuate this complexity. The ANF recommended that whistleblowing protection legislation should include all health, welfare and community services, their clientele and their staff. The ANF emphasised the necessity for including nursing homes and hostels for the aged and disabled.⁷⁴

8.89 The Human Rights Commissioner, Brian Burdekin, used the experience from the National Inquiry into the Human Rights of People with Mental Illness to confirm the problems faced by nurses and others employed by health administrations around Australia in raising matters of concern. Mr Burdekin referred to the significant

72 Health Insurance Commission, evidence p.1266.

73 Australian Nursing Federation, evidence p.470.

74 *ibid.*, p.472.

number of nurses who would only give evidence and submissions in camera or in such a way that it did not identify the authors. The reason stated was fear of reprisal by employers or colleagues, and in particular for their future employment, if they spoke out publicly about deficiencies and abuses within the organisations for which they worked.⁷⁵ Mr Burdekin also noted that the people at the bottom of the hierarchical system in terms of power - the patients and the carers - were the people who genuinely felt themselves to be in considerable danger if they gave evidence.

8.90 However, it was not just nurses, but also psychiatrists and allied health professionals, who feared speaking out publicly and giving evidence because of what they feared to be a very real risk of retribution. Because of the "climate of apprehension concerning perceived disloyalty by employees to their organisation, whether public or private", the Commissioner believed in the necessity of enhanced whistleblower protection mechanisms with as wide a legislative coverage as possible. In particular he was concerned about the coverage of institutions which are not operated by the federal government and those which do not operate as part of the public health system.⁷⁶

8.91 The Constitutional limitations on the Commonwealth Parliament's legislative ability necessitate action and initiatives to be undertaken by many sections of the health care industry. The Committee recognises that some sections of the health care industry have mechanisms for addressing concerns. The Australian Medical Association's Code of Ethics states as part of the professional conduct requirements of the doctor and the profession:

Report to the appropriate body of peers any conduct by a colleague which may be considered unethical or unprofessional.⁷⁷

75 Human Rights Commissioner, evidence p.7 and Submission no. 82, pp.9-10.

76 *ibid.*, evidence p.10 and submission pp. 12 and 16.

77 Australian Medical Association Code of Ethics, July 1992.

8.92 The Committee recommends that, where constitutionally possible, the Commonwealth Parliament should legislate to provide whistleblower protection for disclosures made about the health care industry. The Committee acknowledges the public interest nature of the work of all sections of the health care industry, and welcomes initiatives at/in work places within the industry to encourage and protect those who make disclosures in the public interest.

Financial regulation and banking

8.93 Strong representations were made to the Committee about the need for reform in the banking industry and in particular, the need for bank employees to be covered by whistleblower protection legislation. Banks occupy a position of trust to the large numbers of depositors whom they represent. Again, as in the health care industry, the onerous responsibilities of banks precipitate high public expectation about the ethics and work practices within banking organisations.

8.94 The Committee understands the importance of reputation when employees seek mobility within the banking industry. It was noted by the Committee that whistleblowers within the industry have been few and far between, yet in recent years a number of banks have experienced "spectacular failures".⁷⁸ The Committee was concerned that prospective whistleblowers in the banking industry have no where to confide their concerns.

8.95 A representative from the Reserve Bank of Australia told the Committee that, in discharging its function as prudential supervisor of banks, the Reserve Bank has very rarely received a whistleblower type complaint which relates to that function. In response to the Chair's query as to whether potential whistleblowers regard the Reserve Bank as the appropriate body to go to, Mr L.J. Austin, an Assistant Governor of the Reserve Bank, commented:

78 Evidence p.1310, per Senator Chamarette.

If there was a concern about some management practice that was happening that could lead to a threat to the viability of the bank, it would be quite appropriate for a person to come and talk to us about that. If it was a case where the viability of the bank was not going to be threatened and yet somebody felt that the bank was being run in a manner which was not as efficient as could have been the case, possibly they would not see that as something that they should raise with us.⁷⁹

8.96 Opposing inferences may be drawn from the fact that the Reserve Bank has only "rarely" received whistleblower complaints. As became apparent from comments between the Chair and Mr Austin, either whistleblowers do not regard the Reserve Bank as an appropriate body to approach with concerns or do not regard it as their duty to disclose their concerns, or as Mr Austin said, alternatively they did not have particular concerns.⁸⁰

8.97 The Committee is of the view that there needs to be a safe avenue for whistleblowers within the banking industry. As in all other industries, an internal reporting system or mechanism needs to be in place so that allegations of wrongdoing which affect the public interest can be reported without the whistleblower having to fear retaliation and reprisal from the employer organisation. The functions and powers of the Reserve Bank as prescribed under the Banking Act 1959 and the Reserve Bank Act 1959 do not presently include such matters as would make the Reserve Bank the appropriate body to receive such disclosures in many circumstances. The Reserve Bank is primarily responsible for the protection of depositors and for the prudential supervision of banks, not for the protection of public confidence in the banking industry.⁸¹

8.98 Whilst giving evidence to the Committee, Mr Austin was asked to comment generally on the role and function of the Reserve Bank. Mr Austin stated:

79 Evidence p.1312.

80 Evidence p.1313 per Senator Newman and Mr Austin.

81 Evidence p.1309 per Mr Austin.

According to the Banking Act, we have specific responsibility to protect the depositors with the banks and a more general responsibility to supervise the prudential operations of the banks. We do that by putting in place a range of standards which the banks are required to follow.

Probably the most fundamental is the capital ratio that we apply to banks. Capital is a buffer to absorb any losses that a bank might have before the depositors face any loss. Banks are businesses like any other businesses and they may well record a loss in the operation of their business. If that happens, it is our task to see that it does not affect the depositors.⁸²

8.99 The Committee considers that the Reserve Bank should be empowered to receive and investigate public interest disclosures. Notwithstanding other avenues which may become available within the banking industry, the Reserve Bank should officially be an appropriate organisation to which whistleblowers can report wrongdoing in the industry.

8.100 The evidence received by the Committee indicated that the community was becoming increasingly disturbed about internal management banking practices which occasionally threaten financial collapse. A prominent whistleblower from this industry recommended that whistleblower protection legislation cover:

Employees of organisations either, public or private, engaged in activities that are of national significance or of major economic importance due to the involvement of large amounts of public or private money".⁸³

Included in this, of course, was the banking system.⁸⁴

82 Mr L.J. Austin (RBA), evidence p.1309.

83 Alwyn Johnson, evidence p.528.

84 Other organisations listed for inclusion are - superannuation funds, management industry,, insurance companies, communications, energy, fuel storage, toxic waste disposal, health, national safety, transport, environmental concerns such as pollution of our air, soil and waterways.

8.101 The Australian Shareholders Association, preferred a non-legislative approach, such as the use of Corporate Senates and Stakeholder Councils.⁸⁵ However, the ASA believed that if legislation is to be introduced, it should cover "publicly listed companies, superannuation funds, unit trusts and any other body involving subscription of funds by the general public".⁸⁶

8.102 It was generally asserted by submitters who addressed the issue of whistleblower protection in the banking and finance areas that, given the significance of the banking industry, not only to individual depositors but to the stability of the economy as a whole:

... the most recent examples of mismanagement within the banking sector in Australia should make whistleblowers protection in either a legislated or arms length self regulated format an issue of concerted state, federal and international interest in the interest of international financial stability.⁸⁷

8.103 The Committee encourages initiatives within the banking industry itself to ensure that persons can disclose public interest concerns and that mechanisms exist for the proper investigation of such disclosures. The Committee supports any initiative within the industry for encouraging persons to come forward to express genuine concerns and for protecting the further employment of such persons. In this context the Committee discusses in Chapters 9 and 10 a role for industry ombudsmen and regulatory bodies in the protection and investigation of whistleblowers and their disclosures.

8.104 The Committee recommends that, as in the education and health care spheres, the banking industry should be subject to whistleblowers protection legislation to the extent to which the Commonwealth Parliament is constitutionally able.

85 Australian Shareholders' Association, evidence p.457. See also Stakeholder Councils in Chapter 7.

86 *ibid.*, p.458.

87 Bruce Hamilton, Submission no. 81, p.1.

The Committee further recommends that the Charter of the Reserve Bank of Australia be amended to empower the Reserve Bank to receive and investigate public interest disclosures relating to the banking industry.

Policing

8.105 Corruption in Australian policing systems has in recent years received a great deal of press coverage. It has been the subject of high-profile inquiries, such as the Fitzgerald Commission of Inquiry in Queensland and the focus numerous books and articles. And yet, notwithstanding reforms and strategies to reduce the incidence of corruption, the Committee received evidence, anecdotal and otherwise, about not only misdemeanours, but also more serious practices within police forces.

8.106 The Committee is concerned that the well documented 'code of silence' still operates to prevent police officers from being able to forthrightly, and without fear, report irregularities, and breaches of any degree of seriousness, to the appropriate authorities. The inquiries and reports into policing have invariably raised concerns about the "police culture".

8.107 The Fitzgerald Commission considered the notion of the "police culture" to be of such significance that it devoted an entire chapter to it in its report. The Commission noted that police officers collectively form a strongly-bonded separate social group which has a unique culture. Whilst this culture generally reflects the values of society, the presence of criminal members of the police force merely echo the society generally. This develops into a problem when the police culture exhibits features which do not reflect society, especially where that culture involves contravention of the law. The Commission wrote in scathing terms about the effects a corrupt police culture can have on a police force, in reference to the Queensland Police Force in the late 1980s.⁸⁸

88 Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Report), Queensland, 1989, p.200.

8.108 The Committee received evidence in relation to the current influence of police culture. It was suggested that in South Australia there had been a noticeable change over the past decade in the willingness, particularly of younger officers, to disclose wrongdoing by their fellow officers.⁸⁹ This was attributed to the education now provided to recruits having a positive effect. Nevertheless there were still circumstances where officers were victimised by the code of silence or refusal to ride in patrols for reports at variance to those of their colleagues. The NSW Police Service has also moved to bring about cultural change, however concern was expressed at the commitment within the Service to bring about such change.⁹⁰ It has been written, and the Committee is in complete agreement, that:

The creation of a more open and responsive culture in which officer's concerns about malpractice can be raised will help win back public confidence in the integrity of the police force.⁹¹

8.109 The Independent Commission Against Corruption recently reported on an investigation into the relationship between police and criminals. ICAC examined complaints about police by police and the internal mechanisms available to deal with such complaints and made some general observations and recommendations which are a valuable resource for the developing and implementation of a scheme to assist police whistleblowers. It also identified the "police culture" as a major obstacle preventing police officers reporting misconduct. Words such as "group mentality", "brotherhood syndrome", and "police ethos" are but a few expressions referring to the culture.⁹²

89 Peter Boyce (Police Complaints Authority) and Supt. Paul Schramm (SA Police), evidence pp.337, 345-6.

90 Det.Sgt. Kim Cook, evidence pp.726-7.

91 "Speaking Up by sector, The Police", Public Concern at Work, London, 1993.

92 Independent Commission Against Corruption, Investigation into the Relationship Between Police and Criminals, Second Report, April 1994, p.58.

8.110 In the course of its report the ICAC indicated that police officers must not only be encouraged by the Police Service to report misconduct, they must be supported by the Service for doing so. The importance of reporting misconduct was emphasised by ICAC:

If a police officer engages in corrupt conduct then his or her workmates will often be the first to become aware of this. It is in the public interest for police misconduct to be reported. Abuses of office by police are damaging to society and bring the entire Police Service into disrepute. Reporting corrupt conduct will also be in the best interests of the individuals who report, because it increases the likelihood that they will work in a Police Service of which they can be proud.⁹³

The active encouragement and support of complainants within the Police Service must include institutional protection against harassment and threats. The personal experiences of Sergeant Kim Cook as described by ICAC⁹⁴ and in evidence to the Committee demonstrate the need for such protection.

8.111 The New South Wales Police Service has developed an Internal Informers Policy to encourage and protect police whistleblowers. The policy provides for police officers to be reminded of their statutory obligation to report misconduct. The "internal informer" should report wrongdoing to the Commander, Professional Responsibility. The informer's interests are then identified prior to the commencement of any investigation. The internal informer will be referred to an "Informers Support Group", consisting of representatives from within the Police Service. The support group makes recommendations for the protection or otherwise of the internal informer, but the decision to take any action rests with the Commander. The internal informer nominates a "mentor" who should be prepared to aggressively pursue any issue on behalf of the internal informer. A case officer is assigned to each internal informer. The policy outlines the responsibilities of other members of the Police Service and Commanders to the internal informer and to informers generally.

93 *ibid.*, p.59.

94 *ibid.*, p.60.

8.112 The NSW Police Internal Informers Policy was being used by the SA Police as a model to develop their own policy for the encouragement and support of police whistleblowers.⁹⁵ Under the SA Whistleblowers Protection Act, the police and the Police Complaints Authority are designated appropriate authorities to receive disclosures of relevant public interest information.

8.113 However, the Committee received evidence that the NSW Police Internal Informers policy was flawed and not working as intended.⁹⁶ ICAC noted that the policy was an 'important first step' which needed monitoring and evaluation against policy goals. If it was to be judged as successful there needed to be an increase in both the frequency and seriousness of internal complaints. ICAC warned that:

the Police Service must ensure that the policy is implemented in a conscientious fashion. From what is known of the prevailing police ethos in this regard, considerable work will be needed to gain acceptance for the policy.⁹⁷

8.114 In view of the evidence it received, the Committee welcomes the establishment of the Royal Commission into the NSW Police Service which will give particular attention to internal investigations and the internal informers policy. The Royal Commissioner has been directed under the Letters Patent to inquire into the operations of the New South Wales Police Service, with particular reference to matters including the activities of the Professional Responsibility and Internal Affairs Branches of the Police Service in dealing with any problems of corruption and internal investigations generally and the efficacy of the internal informers policy.⁹⁸ The Committee expects that the Royal Commission's findings will have relevance to all Australian police forces.

95 Supt. Paul Schramm, evidence pp.333-4.

96 Det.Sgt. Kim Cook, evidence p.726.

97 ICAC, Second Report, p.65.

98 Letters Patent, Royal Commission into the New South Wales Police Service, dated 13 May 1994.

8.115 The Committee recommends that the Australian Federal Police be covered by the whistleblower protection legislation and, in noting the reporting inadequacies which exist in the State police forces, strongly urges reform in those areas. Given the seeming lack of success of police force reform to date, the Committee is of the view that additional action in the form of education initiatives and strategies needs to be directed at whistleblower protection in police forces together with the development of a policy to assist and encourage internal informers within all State police forces.

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

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 convey 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

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.

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

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

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

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 overseeing 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

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

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.

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

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

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.

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 individual's 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.

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.

9.72 The Committee is aware that there has been some difference of opinion between the various professional medical bodies concerning the Guidelines and in fact, concerning the use of psychiatry in whistleblowing matters. The Royal Australian and New Zealand College of Psychiatrists (the "RANZCP") informed the Committee that it is not appropriate for the RANZCP to advocate for or against the practice of whistleblowing or to make judgements concerning any individual case of whistleblowing. However the RANZCP considered that its own Code of Ethics which applies to all Fellows of the College indicates clearly that it is opposed to the misuse of psychiatry in such cases and that this Code addresses the ethical concerns raised by Dr Lennane in her evidence to the Committee. The RANZCP has urged the withdrawal of the AMA (NSW Branch) Guidelines.³⁰

9.73 The RANZCP further informed the Committee that it had undertaken work in relation to allegations by whistleblowers of psychiatric malpractice. The conclusion reached was that there was no evidence of such malpractice in the particular cases examined. The RANZCP did advise the Committee that although it considered its code of ethics to be an adequate framework in which practitioners could work, more detailed guidelines would be of assistance in the area of medico-legal referrals of the type referred to by whistleblowers.

9.74 The AMA has advised the Committee that the AMA's Ethics, Education and Social Issues Committee (the Ethics Committee) has met with a representative of the NSW Branch Council and a representative of the RANZCP to consider the matter of guidelines. The Ethics Committee resolved that the AMA's Code of Ethics is the principal document governing ethical relationships between doctors, their patients and others. The Ethics Committee further recommended that the NSW Branch's Guidelines should be urgently revised following consultation within the medical profession particularly with representatives from the RANZCP. The advice to the

30 See correspondence from Dr R.F. Broadbent, Executive Director, RANZCP to the Committee dated 7 March 1994 (in evidence p.825) and dated 31 May 1994 (published as a response to Submission no. 29).

Committee is that national guidelines are to be settled and eventually endorsed by the AMA Federal Council.³¹ The Committee welcomes and supports this decision.

9.75 The Committee recognises the extent to which psychiatry can be used as a means to discredit a whistleblower. There is still a social stigma attaching to mental illness, and it is that stigma which makes psychiatry such an attractive and powerful means of retaliation to an employer organisation. Referrals occur at a time when an assessment is being made of an individual who is already under stress as a result of having blown the whistle. The referral of a whistleblower to a psychiatrist can have the following ramifications:

- a) It signifies to colleagues that management regard the whistleblower as "unbalanced", thus effectively silencing further dissent and/or support for the whistleblower;
- b) It refocusses the attention of an inquiry from the whistleblower's allegation onto the mental competency of the whistleblower;
- c) It undermines the self confidence of the whistleblower. Not only must the whistleblower deal with the referral itself, but he or she must also deal with the doubts the referral may raise about his or her competency in the minds of colleagues; and
- d) It casts a shadow on the whistleblowers integrity, soundness of mind, judgment and reputation, both work wise and personally, which, once cast, is almost impossible to remove.

9.76 The Committee considers the use of psychiatry in this manner to constitute an infringement of human rights, and to be, perhaps, one of the most insidious and vile weapons used against whistleblowers. For this reason, the Committee strongly urges the medical profession to settle the relevant guidelines and

31 See correspondence from Dr P.S. Wilkins, Assistant Secretary General, AMA, to the Committee dated 8 April 1994 (published as a response to Submission no. 29).

thereby send an unequivocal signal to members of the profession about what is required of them in cases involving referrals from employers.

9.77 **The Committee recommends that the medical profession settle guidelines which expressly describe the ethical obligations of medical practitioners, especially psychiatrists, where patients are referred by employers.**

The Committee recommends that the use of psychiatry in relation to whistleblowers be comprehensively dealt with as part of the national education program. Such inclusion should be with a view to expanding community awareness and to developing employer sensitivity in relation to such matters.

Protection for the subjects of whistleblowing

9.78 In developing a whistleblowers protection scheme, the rights of the subjects of whistleblowing must be fairly balanced against those of the whistleblower, and the possible public interest aspect of the allegations of wrongdoing. Protections which have as their primary purpose the protection of the subjects of whistleblowing, have, in practice, a dual protective role in that they ultimately provide protection for whistleblowers themselves. The Committee recognises that in the majority of cases, makers of public interest disclosures do so for the "right reasons". However, as is recognised by whistleblowers, there exists a small minority of persons who make allegations and disclosures knowing the same to be false and misleading in a material particular. Whistleblowers seek to distance themselves from such persons as those individuals can cause a substantial amount of damage to the overall cause of whistleblowing. The Committee makes recommendations for the protections of the subjects of whistleblowing acknowledging the benefits to be gained by all sides of a disclosure.

9.79 The submissions which addressed the rights of those accused of adversely affecting the public interest, recommended that adequate mechanisms be put in place to ensure that the rights of accused persons are protected and

preserved. The Attorney-General's Department referred to the need to ensure protections of this kind. The view expressed was that the Ombudsman Act 1976 provides the required "framework" for such protections. The Department listed the following provisions as being of particular importance:

- . Accused persons should be guaranteed rights of natural justice;
- . Investigations should be conducted in private; and
- . Details of complaints should not be released if the allegation is not sustained.³²

The Committee agrees with these provisions. In addition, the Committee is of the view that the screening mechanisms of the Agency will, by the nature of their function, provide substantial protection for the subjects of allegations.

9.80 The Committee recommends that the rights of the subjects of whistleblowing be protected in accordance with the principles of natural justice. In addition the investigations should be conducted privately in so far as the public interest is best served, and, where allegations are not substantiated after due and proper investigation, the details of the complaint should not be publicly released.

Penalties for false allegations

9.81 It was recognised in the submissions to the Committee that the subjects of whistleblowing should be protected specifically against false or malicious allegations.³³ Some submitters considered that where a person makes an allegation knowing the same to be false in a material particular, the identity of that person should

32 Attorney-General's Department, evidence p.131. See for example Ombudsman Act 1976 subsections 8(5) and 8(1).

33 Geoff Dannock, Submission No. 11, p.3 and see also Public Sector Union, evidence p.212.

not be protected.³⁴ However, if the investigation had been conducted in private and the "whistleblowers" identity to date concealed, such a revelation may result in the publication of the allegation which may not previously have occurred. It has been suggested that where a person is the victim of a false allegation, he or she should be able to obtain retribution from the whistleblower. However, the Committee is of the view that disclosure of the identity of the maker of such a false allegation should be ordered by the Agency, only after due consideration of the issues involved, and then disclosure should only be to the victim of the false allegation, to prevent any or further publication of the matter by the Agency. However, the right to sue for defamation would still be available.

9.82 Some witnesses proposed that, regardless of other remedies available at Common Law, the whistleblower who makes a false disclosure should be subjected to a penalty under the whistleblower protection legislation.³⁵ The Committee believes that the legislation should make it an offence for a whistleblower to knowingly make a false accusation against another person. Such a matter has to be distinguished from that class of allegation which, after investigation, proves to be false or unsubstantiated but which existed as an honest belief reasonably held by the whistleblower. The National Crime Authority concurred with the idea of a penalty, asserting that "there should be some sanction for allegations that are revealed to be malicious, lacking in good faith or false in a material particular to the knowledge to the whistleblower".³⁶

9.83 **The Committee recommends that where a person makes an allegation, knowing it to be false in a material particular, the making of such a false allegation should constitute an offence under the whistleblowing protection legislation. Where such an offence is proven, the person who made the allegation should be subject to a penalty being fine and/or community service orders.**

34 Geoff Dannock, Submission No. 11, p.3.

35 e.g. Otto Pelozar, Submission no. 17, page 2; Criminal Justice Commission, evidence p.1170.

36 National Crime Authority, evidence p.439.

Costs recovery - Subjects of whistleblowing

9.84 It was also submitted, and in limited circumstances the Committee concurs, that the subjects of whistleblowing should be able to recover costs incurred by them in defending unfounded allegations.³⁷ The circumstances in which the Committee considers such cost recovery to be appropriate are where allegations are made which are knowingly false or inaccurate in a material particular. In this spirit, the Criminal Justice Commission asserted:

there should also be provisions for courts to impose reasonable compensation for the cost of investigations made or any other action taken by agencies because of false, vexatious or frivolous complaints or information.³⁸

9.85 Limiting cost recovery to these types of instances takes into account the fact that allegations of wrongdoing involving illegality, or substantial mismanagement or waste of public monies will be formally received by the Agency. This being the case, the public interest is served by the investigation of allegations of this nature which are based on an honest belief held by the whistleblower on reasonable grounds. It raises the question, however, at what point in the matter is the accused entitled to claim costs? The Committee considers that the claim cannot be made until the Agency has made a formal finding in respect of the matter but the claim can be made in respect of any legal costs incurred at any time after the making of the 'disclosure' to the Agency. If a potential whistleblower is unsure of whether the grounds for such a belief are "reasonable" or not, he or she should seek guidance through the counselling facilities.

9.86 The Committee does not consider that either the taxpayer or the whistleblower should ordinarily be required to cover the costs of the subject of the whistleblowers defence, except in exceptional circumstances, such as where the

37 R.C. Windsor, Submission no. 52, p.1.

38 Criminal Justice Commission, evidence p.1170.

subject has been put to 'great expense' in so defending himself or herself, and where ultimately, the evidence is so lacking that an order is made that there is no case to answer.

9.87 . The Australian Press Council stated its expectation that protection under a whistleblowers protection scheme should not extend to the protection of disclosures made frivolously, vexatiously or not in good faith and that in such cases, an agency may decline to investigate the disclosure. Protection in such cases for the whistleblower should only continue up until the point where a determination is made not to investigate the disclosure.³⁹ The Committee concurs with this conclusion.

9.88 The need to ensure a balance between protections offered under a whistleblowers protection scheme was generally acknowledged. The Australian Nuclear Science and Technology Organisation stated:

Often allegations are made about performance, or a management practice that when investigated are simply not true and the end result provides not only for large amounts of expenditure of public monies from budgets that are already stretched but often with no change either to practice or operation of the Organisation.⁴⁰

9.89 The Committee considers that the risk of cost blow out would be controlled by the operation of the screening process and by ensuring that the types of allegations to be investigated are in accordance with the definition of "wrongdoing". As mentioned above, these two processes will have a dual function. The primary function of these processes will be to perform a protective role, ensuring that only allegations of wrongdoing which are genuine public interest disclosures will absorb the resources of the Agency. Secondly, as a consequence the reputation of whistleblowers collectively will be protected by these processes.

39 Australian Press Council, evidence p.899.

40 ANSTO, Submission no. 96, p.1.

Counselling services

9.90 The Committee emphasises the role of counselling which is to be part of the whistleblower protection scheme. The view was generally expressed that a Whistleblowers Counselling Service should be established.⁴¹ It is envisaged by the Committee that there should be a broadly based counselling function available to all parties involved in a whistleblowing matter - the whistleblower, the subject of the whistleblowing and those relatives and work colleagues implicated in, or affected by association with those involved, in the whistleblowing activity.

9.91 The protective function of counselling would become apparent in its practical application within the scheme. Making informed choices would assist users to maintain control of the disclosure process in making the original decision and during the course of the investigation. Thus, counselling and advice can be needed from initially determining whether to become a whistleblower through to coping with events after blowing the whistle. Those who become involved, either directly or indirectly, in whistleblowing require guidance on a range of issues. They require guidance and support through the emotional labyrinth which accompanies whistleblowing; they require advice as to the options available under the relevant whistleblower protection legislation; they require information about common law and statutory rights and obligations which may arise from a chosen option or course; and they require counselling which, in appropriate circumstances, can facilitate a mediation process to achieve a resolution.

9.92 The Queensland Whistleblower Study, whilst acknowledging the need for a counselling service, warns that any such legislative provision of counselling must incorporate "foolproof independence and confidentiality" as part of the framework. Without these safeguards, counselling would be "futile at best and counter productive

41 e.g. Whistleblowers Action Group, evidence p.1093; Australian Conservation Foundation, evidence p.1288.

at worst".⁴² The distrust which characterises whistleblower's expectations and perceptions of government bodies, demands that these safeguards be addressed to ensure a workable service. It was also suggested that counselling services should be located away from the state/bureaucracy, and placed into organisations such as the Whistleblowers Action Group or Whistleblowers Australia.⁴³

9.93 The Queensland Parliamentary Committee for Electoral and Administrative Review (PEARC) also commented on this aspect. In its consideration of the EARC recommendation for the establishment of a whistleblowers' counselling unit within the CJC, PEARC suggested that it would become difficult to distinguish between the counselling role of the unit and the investigative role of the CJC. A similar problem could occur if the counselling unit was located in the Ombudsman's office. PEARC made no formal recommendation as to the administrative location of a counselling unit, but did not necessarily regard the CJC as the desirable location. PEARC considered that "it is important that there be seen to be independence between the counselling and investigative stages of the whistleblowing process".⁴⁴

9.94 The Commissioner for Equal Opportunity (South Australia) also queried the wisdom of charging one agency with the responsibility of providing investigation services, counselling and protection. The Commissioner suggested that it may be "more appropriate" to fund a private body or interest group, such as a whistleblower group, to provide the necessary counselling services.⁴⁵

9.95 The Committee is of the view that counselling services should be community based. These services should be provided through a private/community group or ethics foundation, preferably with mixed government/corporate financial support. The counselling service should be confidential, user friendly and accessible,

42 Queensland Whistleblower Study, evidence p.1026.

43 *ibid.*

44 PEARC Report, *op. cit.*, p.12.

45 Commissioner for Equal Opportunity (SA), evidence p.396.

with wide ranging responsibilities. Paralegals, properly trained, should be available to explain the legislation, its operation and application.

9.96 The St James Ethics Centre offers a free, confidential counselling service for people who encounter an ethical dilemma and seek assistance in its resolution.⁴⁶ This service is available for use by people in both the private and public sectors throughout Australia. Whilst the Centre's counselling service is not specifically designed to accommodate the concerns of whistleblowers, it can provide advice to people on the ethical problems involved with deciding to blow the whistle. The counselling service offered by the Centre is in the process of being expanded with the establishment of a national free call telephone advice line and the finalisation of an agreement with the Public Sector Union to provide a first place of contact for public servants wishing to discuss ethical problems.

9.97 The Committee has referred in paragraphs 3.19 - 3.23 to the existence and operation of Public Concern at Work in the UK. The Committee believes that the operation, structure and funding arrangements of Public Concern at Work provide a model upon which an Australian group or foundation for whistleblower assistance and support, primarily through counselling services, could be based. The Committee strongly encourages and supports private philanthropy in the provision of such services. It does not believe that this should necessarily be limited to a single group or body, providing there is co-ordination to ensure a similarity in approach to the provision of counselling and support services.

9.98 The Committee formed the view that counselling services should be community based not only as a result of the negative anecdotal information it received about the effect upon individuals of organisational or bureaucratic influence over counselling and its position in the disclosure process. It was also formed through an appreciation of the ramifications which disclosures may have for the whole community.

46 Dr Simon Longstaff, St James Ethics Centre, Submission no. 118, p.7.

Disclosures are, in fact, a community concern, and the disclosure process will benefit by constant reference to the wider community.

9.99 The Committee recommends that counselling services should be community-based, provided through a private/community group or ethics foundation with mixed government/corporate financial support, preferably based on the model of the St James Ethics Centre or Public Concern at Work in the UK.

The Agency's function in relation to counselling should be to ensure that whistleblowers and those who are the subjects of whistleblowing have access to confidential counselling services. The Agency should maintain regular liaison with the counselling services to ensure that whistleblowers needs are being met.

Advice Hotline

9.100 Representations were made to the Committee concerning the accessibility of a Commonwealth scheme to protect whistleblowers. There are Commonwealth employees and contractors Australia wide, as there are also private sector organisations which would be subject to the legislative provisions. The Committee considered the options available for ensuring that the scheme was accessible to those who need it. Various submissions recommended the use of a "Hotline",⁴⁷ commonly referred to as a "008" number, allowing toll free calls for assistance and advice.

9.101 WAG suggested that to encourage and protect the people who risk everything in the public interest, there needs to be a "hotline":

A communication setup in all states that allows the potential whistleblower and the whistleblower access to information on how to blow the whistle properly and how to be protected when be blows the whistle. The problem ... with this is that if the communications were Government controlled and organised then they wouldn't complain

because of reprisal fears. Experience has shown that "whistleblowers only trust other whistleblowers".⁴⁸

9.102 The Committee is keen to assist these people and considers that the idea of establishing a "hotline" has merit, notwithstanding the reservations and fears expressed by some whistleblowers. The Committee is optimistic that with growing community awareness and acceptance of whistleblowers and the valuable contributions which they make, whistleblowers will be able to shed some of the fears they currently have.

9.103 The proposed hotline should be located within the Agency. If the particular inquiries require further advice or assistance, the Agency should refer the person to the counselling services. The hotline number should be exposed nationally as part of an extensive education campaign, including advertising through publications such as the Commonwealth Gazette and business and union newsletters.

9.104 **The Committee recommends the establishment of a toll free hotline to enable Australia-wide point of contact with the Public Interest Disclosures Agency.**

Legal aid and assistance

9.105 The Committee empathises with those who incur legal expenses in the course of making, or deciding to make, a public interest disclosure, as well as those who require legal advice after experiencing any form of victimisation for having made such a disclosure. The Committee appreciates, however, that whistleblowers are not alone in deserving assistance to meet legal costs; there are the subjects of whistleblowing, some of whom may be wrongly accused; there are the spouses and others associated with the whistleblower who suffer as a result of the public interest disclosure.

48 WAG, evidence p.1090.

9.106 It may be argued that there are many other categories of people who deserve special assistance from the public purse. In each category, arguments can be made to support the giving of monetary assistance; for example, all those charged with criminal offences, who, having successfully defended themselves, are unable to secure reimbursement for their necessarily incurred legal expenses. Similarly, there are those litigants who will never recover the full costs actually paid for bringing or defending a legal action. The shortfall between orders for costs and costs actually paid are generally not recoverable.

9.107 The Committee acknowledges suggestions made for assisting whistleblowers with meeting legal expenses. Mr J.G. Starke QC noted:

I consider it important that a genuine whistleblower should be indemnified for the costs of procuring legal advice as to whether or not a disclosure should be made and as to the manner of making such disclosure if this is justified. Moreover, a kind of appropriate sinking fund should be established by statute, from which fund indemnification should be provided as this becomes legitimate.⁴⁹

9.108 The Committee, whilst of the view that the suggestion of a 'sinking fund' has merit, believes that whistleblowers should make use of some of the services which currently provide legal assistance. In every State there are legal aid initiatives aimed at providing legal services. These services are in addition and supplementary to the provision of legal aid services by the Legal Aid Commissions based in every State and territory.

9.109 The Queensland Justices' and Community Legal Officers' Association provides legal and financial assistance to the Whistleblowers Action Group. The Committee encourages other services to consider contributing to the provision of legal services to whistleblowers and associated persons; for example Community Legal Centres, Public Interest¹ Advocacy Centres, Law Society sponsored legal advice

49 J.G. Starke QC, Submission no. 119, p.1.

services and organisations formed for the purpose of promoting ethical standards and practices.

9.110 Although representations were made to the Committee concerning the provision of legal aid for whistleblowers, the Committee makes no particular recommendation, other than that Legal Aid Commissions should be informed that whistleblowers and actions arising from a whistleblowing activity ought to be considered as one of the types or categories of actions for which legal aid may be granted, if the applicant is otherwise assessed (means tested) as being eligible. It may be that each Legal Aid Commission will have to formulate specific guidelines for the assessing of eligibility in respect of whistleblower-type matters.

9.111 The Committee encourages whistleblowers and those associated with a whistleblowing activity, to make proper use of the counselling facilities established as part of the scheme. The counselling service should be able to advise as to rights and obligations under the legislation, as well as providing general guidance and emotional support. Where a whistleblower decides to obtain legal advice privately, the Committee agrees that the optimum situation would be for the genuine whistleblower to be able to obtain reimbursement for costs. However, the determination of whether a particular claim should be allowed might itself constitute an action. Whether a "sinking fund" or other means should be established to provide for such reimbursement, and in what circumstances such reimbursement should occur, would require further inquiry. The Committee is not of the view that it should make any such recommendation at this time.

9.112 **The Committee recommends that Legal Aid Commissions be informed that whistleblowers and actions arising from whistleblowing ought to be considered as one of the categories of actions for which legal aid may be granted, if the applicant is otherwise assessed as eligible. The Committee encourages community oriented legal services to provide legal assistance and advice to whistleblowers and associated persons.**

Whistleblowing to the Media

9.113 The Committee suspects that there is a perception held by the general public that whistleblowing always involves 'leaking' to the media. This is a misconception. Most of the whistleblowers who gave evidence had not regarded it as necessary to take their case to the media, although a number had sought action through the media. Many of the whistleblowers had initially attempted to use 'the system' by reporting wrongdoing through internal or existing channels, before finally going to the media.

9.114 Whistleblowers who have approached the media have done so for a variety of reasons. Some whistleblowers have been so disillusioned with "the system" and have such a lack of faith in "the system", that they have felt that there was no other avenue available to them. Some felt that going public was the only means by which they could ensure protection. Some whistleblowers have tried and tested the conventional means of reporting wrongdoing and been dissatisfied with the action, if any, taken. Other whistleblowers, weighed down by the enormity of the public interest involved, have felt an onerous responsibility to society and approached the media as the only medium through which the public could be informed, the wrongdoers brought to justice and the process of reform instigated. The Committee believes that in many cases, whistleblowers have not chosen to make public interest disclosures through the media, but rather they have been morally compelled to do so.

9.115 An issue with many arguments for and against, is whether the whistleblower protection scheme should provide protection for those whistleblowers who disclose matters of public interest to the media. This raises a number of questions. For example, is it in the public's interest for the public to be informed of disclosures concerning matters of public interest? Should a whistleblower be denied protection under the legislation for informing the public of wrongdoing within organisations which ultimately affects them either in their capacity as taxpayers, consumers or ordinary citizens?

9.116 The Gibbs Committee recommended that where information concerning wrongdoing:

was such that its disclosure without authority would not be a breach of the penal provisions proposed in [Chapter 31 of the Gibbs Report] or any special penal provision, the person would be exempted from any disciplinary sanction for publishing it to any person including the media if -

- (i) he or she reasonably believed the allegation was accurate; and
- (ii) notwithstanding his or her failure to avail of the alternative procedures, the course taken was excusable in the circumstances, which would of course include the seriousness of the allegations and the existence of circumstances suggesting that use of alternative procedures would be fruitless or result in victimisation,

but such a person would not be given any special protection as regards the law of defamation or any other law of general application.⁵⁰

After due consideration of the evidence, the Committee is of the same view that whistleblowers should have access to the media in particular circumstances which would entitle them to the protections under the legislation.

9.117 Under the Gibbs Committee recommendations, access to the media by whistleblowers would not be restricted on the basis that there exist other avenues available for the whistleblower to make the disclosure. Senator Chris Schacht disagreed with the media access envisaged by the Gibbs Committee. Senator Schacht submitted that the risk of damage to reputations made by unsubstantiated public allegations outweighed the need for protected media access. He asserted that:

The legislation should require any whistleblowing allegations to be made through official channels.⁵¹

50 Gibbs Report, p.354.

51 Senator the Hon. Chris Schacht, Submission no. 79, p.1.

9.118 The scheme recommended by EARC does not provide protection to a person disclosing information to the media, with one exception:

Protection would be available for a disclosure to the media of the existence of a serious, specific and immediate danger to the health or safety of the public where the whistleblower has an honest belief, reasonably based, as to the existence of such danger. This exception is a recognition of the fact that in cases of serious and immediate danger, the use of the media to reach the largest number of people as quickly as possible should be permitted. In any other cases where a whistleblower takes a matter to the media no special protection would be available.⁵²

9.119 The Committee considered the option of making protection conditional upon the whistleblower adhering to specified reporting channels which do not include access to the media. There are several issues associated with adopting this course which are relevant:

- . The communities right to know about matters affecting the public interest;
- . The familiar complaint by whistleblowers about the futility of reporting matters to existing agencies;
- . The appreciation of the Committee of the fear of retaliation or victimisation engendered in some whistleblowers.
- . The Committee's appreciation of the subtlety with which organisations and individuals retaliate.
- . The concern that, if whistleblowers lose protection for making disclosures to the media, there will be instances of wrongdoing which will go unreported and unchecked and consequently cost the taxpayer vast amounts of resources.

9.120 The difficulty is that if a whistleblower bypasses the Public Interest Disclosures Agency by going directly to the media, then he or she loses the

52 EARC Report, p.232. The Australian Federal Police also believed complaints should not be made directly to the media "unless there were pressing public interest reasons for doing so", evidence p.84.

opportunity of having the allegation "screened" for the purpose of determining whether it is one which should appropriately be investigated under the legislation. Whilst this may not necessarily disqualify the whistleblower from protection, it may lead to loss of protection should the allegation subsequently be proven to not fall within the coverage of the legislation.

9.121 This being so, the Committee encourages those who consider making a media disclosure, to avail themselves of the counselling facilities under the whistleblowers protection scheme. Part of the counselling function will be to advise potential whistleblowers in relation to the options for disclosure which are available. Whistleblowers who are considering a media-disclosure would need to be informed that in the event that the allegations are later proven to be unsubstantiated, the whistleblower may not be protected under the legislation and could also be sued for defamation by the subject of the whistleblowing. There may be a range of civil actions to which the whistleblower would be vulnerable, if public disclosure is made of false or inaccurate information concerning an individual or organisation.

9.122 The Australian Press Council's views went further than the recommendations of the Gibbs Committee. The APC submitted that disclosure to a journalist, or to the media generally, should be a protected disclosure "where the whistleblower, in good faith, believes in the truth of the matter and that it is, in the public interest, for example, to disclose corrupt conduct, maladministration or substantial waste."⁵³

9.123 In considering whether whistleblowers should have recourse to the media without suffering a consequential loss of protection under the scheme, the Committee was concerned to acknowledge the implications for the principle of freedom of speech. The Australian Press Council described whistleblowing as "based on the principle of freedom of expression which is expressly protected under international law

53 Australian Press Council, evidence p.896.

and accepted by all liberal democracies".⁵⁴ As the APC points out, freedom of speech is not guaranteed in any specific enactment in Australia, but, as a democracy, such freedoms are implied as being fundamental human rights of Australians.⁵⁵

9.124 The Committee considers that the proper balance is achieved by the Gibbs Committee's recommendations concerning whistleblowers' recourse to the media. Indeed, the Committee believes that limiting the circumstances in which recourse may be had without losing protection under the legislation, will preserve the rights of all parties to a disclosure. In a practical sense, the Committee believes that generally whistleblowers have exercised discretion when deciding to approach the media and that journalists have given careful consideration to the publication of material.

9.125 Whilst promoting disclosures of wrongdoing in the public interest, the Committee discourages the use of the media as a "sounding board" for potential informers. With the cultural and attitudinal change towards whistleblowers which the Committee believes that whistleblower protection legislation will help facilitate there should be a decline in the number of whistleblowers needing to resort to the media. The whistleblowers protection scheme should provide whistleblowers with the opportunity to report wrongdoing, and to have the matter properly investigated. There should be a corresponding decrease in the number of cases where whistleblowers are, or fear they will be victimised.

9.126 The Committee is mindful, too, of the right of government to inform itself, first and foremost, of wrongdoing within its ranks, to enable government to reform, re-educate and correct, as and where necessary, without undue and unnecessary interference. The right to be informed is not limited to government. Private sector organisations should also be allowed, wherever possible, the opportunity to correct

54 *ibid.*, evidence p.897.

55 See Australian Press Council, evidence p.897, citing *Nationwide News Pty Ltd v. Wills* [1992]. The APC further acknowledges the balance that must be struck between the liberties of individuals and the public or State - freedom of speech not being an "absolute right".

wrongdoing, to improve operations and generally implement reform within their own ranks.

9.127 The Committee appreciates, that the issue of whistleblowing to the media exemplifies the differences between the situations of the private and public sector whistleblowers. Public sector whistleblowers seek exemption from secrecy provisions and disciplinary sanction for making public interest disclosures to the media. This, the Committee believes, they should have, in appropriate circumstances. Whistleblowers in the private sector who make disclosures to the media, may be in breach of the common law in contract, equity, tort or property. By recommending that the private sector formulate procedures to accommodate whistleblowers the Committee believes that the existence of such procedures would reduce the need for private sector whistleblowers to resort to the media.

9.128 In making its recommendation concerning protection for whistleblowers who make disclosures through the media the Committee considers that such persons should not be exempt from the laws of defamation.

9.129 In this section the Committee has discussed whistleblowing to the media. The Committee received evidence which indicated concerns over whistleblowing within the media and the reaction to disclosures of wrongdoing involving the media. Witnesses referred to 'unscrupulous activities' going on within the media and to examples of media manipulation and the important role the media plays in government and ministerial accountability.⁵⁶ The Committee makes no judgment as to the comments received in evidence, but is concerned at the lack of response to this Inquiry from the media. The Committee believes that further parliamentary scrutiny of this area could be warranted. The Committee is concerned that if the media is not open and accountable itself then the openness and accountability of government could be jeopardised.

56 Chris Nicholls, evidence p.387 and Des O'Neill and Kevin Lindeberg, evidence pp.1137-9.

9.130 The Committee recommends that whistleblowers should have limited recourse to the media without being disentitled to protection under the legislation and endorses the Gibbs Committee recommendations in this regard. Whistleblowers should be protected where they make a disclosure of "wrongdoing" within the meaning of the legislation, to the media, where to do so is excusable in all the circumstances. In determining whether it is excusable in all the circumstances the factors to be taken account of should include the seriousness of the allegations, reasonable belief in their accuracy and reasonable belief that to make a disclosure along other channels might be futile or result in the whistleblower being victimised.

The Committee further recommends that whistleblowers who make disclosures through the media should not be given special exemption from the laws of defamation.

Defamation laws

9.131 The Committee is concerned to promote uniformity of the defamation laws within Australia. At present, different State and territory jurisdictions have different laws. Those laws are notoriously complex and conflicting. One whistleblower asserted that it was by the virtue of these laws that "the legal monopoly keep Australia a closed society".⁵⁷ The ramifications of such laws may be far-ranging and difficult to quantify. As a matter of principle, where the public interest is involved, plaintiffs should not be able to pick and choose jurisdictions.

9.132 The Committee considers that having conflicting laws between States and territories for the same subject matter is an undesirable state of affairs. Uniformity in legislation would increase certainty for litigants. Litigants and their legal representatives would also benefit by reducing the complexity of the laws. Similarly, there would be one less variable in the whistleblower's equation. Uniformity of defamation laws would enable legal advisers and counsellors to more precisely assist

57 John Little, Submission no. 92, page 2.

a potential whistleblower. The Committee received evidence from a number of witnesses supporting reform of defamation laws in Australia.⁵⁸

9.133 PEARC also recommended that the issue of liability for defamation for public interest disclosures other than to proper authorities should be referred to the Queensland Attorney-General for consideration in the context of the development of a uniform law of defamation among the Australian States.⁵⁹

9.134 The Committee is of the view that at present, whistleblowers and the subjects of whistleblowing, are able to place little if any reliance on the remedies for defamation available at common law or through the various pieces of legislation governing such actions. Not only is the complexity of the laws a bar to the defamation laws being of use to whistleblowers, but it also contributes to the high costs associated with initiating or defending such an action. Dr Brian Martin, referred to earlier in the discussion of the doctrine of the suppression of intellectual dissent, submitted that the media, as well as personal friends and supporters, is one of the most important aids for public interest whistleblowers. He stated that:

... the government can help to oppose suppression of dissent by giving untied support to autonomous whistleblower organisations and by changing the draconian defamation laws.⁶⁰

9.135 The Committee recommends that legislative changes be initiated to ensure the uniformity of defamation laws in all States and territories, in accordance with previous recommendations made by bodies such as the Law Reform Commission. Of particular concern to the Committee is the use of defamation law to suppress critical comment, including "stop writs" which prevent public consideration of matters of immediate concern.

58 See for example Privacy Commissioner, evidence pp.850-851, Australian Conservation Foundation, evidence pp.1298-99 and Tasmanian Council for Civil Liberties, Submission no. 48, p.1.

59 PEARC report, op. cit., p.18.

60 Dr Brian Martin, evidence p.766.

CHAPTER TEN

INVESTIGATION: POWERS AND PROTECTION

Powers of investigating agency

General observations

10.1 The Committee was required by its Terms of Reference to examine the question of powers for the relevant investigating agency. The model envisaged by the Committee places the power of investigation primarily with the employer organisation for internal disclosures and the organisation chosen as the most appropriate by the Agency to refer other disclosures to, in most cases likely to be the Commonwealth Ombudsman in the public sector and with relevant Commonwealth regulatory agencies in the private sector. Nonetheless, the Committee considers it important to discuss this term of reference generally so as to provide guidance and assistance in the formulation of any whistleblower protection scheme.

10.2 The need to discuss the issue of powers of investigation generally is amplified by the various levels at which investigations may take place. Although the Committee recommends that in the public sector the investigation function should primarily be with the employer organisation and Ombudsman, the Committee considers that because of the oversighting role which the Public Interest Disclosures Agency should have in investigations, the Agency itself should be vested with some powers of an investigatory nature. Similarly, where Commonwealth regulatory agencies are constitutionally able to be conferred with powers of investigation into public interest disclosures within the industries they regulate, the Agency should be vested with powers enabling it to perform the requisite supervisory role.

10.3 As with other areas of the whistleblower protection scheme, the Commonwealth Parliament will be unable to legislatively confer powers of investigation on an organisation to facilitate an inquiry into disclosures within some areas of the private sector. Where there are such gaps in the scheme, the Committee encourages

industries within the private sector to develop internal procedures to enable due inquiry of disclosures to proceed. It may be that disclosures in the private sector will usually involve illegality and consequently can be investigated by the relevant police agencies.

10.4 Many submissions contained express references endorsing the conferring of very wide powers on the bodies in the public and private sectors to be charged with the responsibility of undertaking the investigation of public interest disclosures. Des O'Neill suggested:

that no individual or organisation should be above the law and that for this reason alone the powers enacted by any legislation should be wide and as far reaching as possible.¹

Mr Jack King submitted that "The investigating body would need Royal Commission powers".²

10.5 The Committee considers that the powers of any investigatory agency should be determined by the nature of the work involved, and that regard must also be had to fundamental rights, freedoms and civil liberties. This view was reflected in many submissions received by the Committee. The Attorney-General's Department submitted:

Any external agency which is required to investigate allegations of serious misconduct within government agencies should be given the necessary powers (and resources) to ensure that complaints may be comprehensively dealt with in an efficient manner.³

1 Des O'Neill, Submission no. 64, p.9.

2 Jack King, Submission no. 91, p.2.

3 Attorney-General's Department, evidence p.132. See also Alan Barry, Submission no. 2, p.1; Public Sector Union, evidence p.212.

10.6 The Law Council of Australia referred to the need to weigh up the aims of the legislation against the conferring of draconian powers:

In the Law Council's view, a balance must be struck between the desirability of openness, honesty and accountability in government and the price paid for it in the bestowal of coercive powers".⁴

Such broad considerations provided useful parameters for the formulation of the Committee's recommendations.

10.7 **The Committee recommends that any investigating body must be equipped with sufficient powers to enable it to competently and efficiently perform the investigations with which it is charged.**

Powers of the Commonwealth Ombudsman

10.8 The Attorney General's Department listed some specific powers which it considered were necessary to enable an agency to comprehensively deal with complaints: the power to require the production of relevant information, documents and testimony, to examine witnesses on oath or affirmation and to enter premises. The Department noted that the Ombudsman Act 1976 provides the Ombudsman with some of the necessary powers.⁵ However, the placement of part of the investigative function with the Ombudsman's office as the Committee's model envisages, will require amendment to the Ombudsman's Act 1976 to provide for the enlargement of the powers and functions of that office as proposed in paragraphs 7.19 and 7.20.⁶

4 Law Council of Australia, Submission no. 95, p.1.

5 Attorney General's Department, evidence p.132. See Ombudsman Act 1976, sections 9 and 13 to 17.

6 See also Commonwealth Ombudsman, evidence pp. 30-38, which includes the submission of the former Ombudsman, Alan Cameron, to the Elliott Committee's Inquiry into Fraud on the Commonwealth, dated September 1992.

10.9 Following the recommendation in the F&PA Ombudsman Report, a specialist investigation unit has been established within the Ombudsman's office to investigate major complaints, including whistleblower complaints. However, "it's resources are modest and it remains the case that the [Ombudsman's] office's resource base would need to be augmented"⁷ if it took the role envisaged by the Gibbs Committee.

10.10 The 1994-95 budget provided the Ombudsman's office with a \$1.5 million funding increase. It is proposed that this funding will be used to strengthen the investigation unit allowing more investigations into systemic problems which have emerged from large numbers of complaints being received on the same subject or about the same agency. The Ombudsman will also be enabled to initiate inquiries instead of simply following up individual complaints. It is also proposed to develop a better service to departments, especially those with the majority of complaints, by establishing special liaison officers with policy and investigative responsibilities. Staff will be reallocated to regional offices where the majority of complaints are received.⁸

10.11 The Committee supports these developments within the Ombudsman's Office. However, the investigation of whistleblowers complaints envisaged by this Committee may require additional funding and resources for the Ombudsman's office.

10.12 **The Committee recommends that the Ombudsman's office should be the primary organisation to which the Agency would refer whistleblowers complaints for investigation, but with enhanced legislative powers and functions.**

Production of documents and examination of witnesses

10.13 The Criminal Law Committee of the Law Society of New South Wales, noted that the power to require the production of documents or answer questions

7 Commonwealth Ombudsman, evidence p.31.

8 Senate Estimates Committee A Hansard, 24 May 1994, pp.27-8.

should be tempered by acknowledgment of the principle that the subject of an inquiry should be excused from being required to do so, where it may constitute contravention of a law; it may tend to incriminate that person, and render that person liable to a penalty; or the information is the subject of legal professional privilege.⁹ Clearly the balancing of rights is critical to the question of powers of any investigating body and the Committee's recommendations reflect that process of consideration.

10.14 It is not the Committee's intention to set up an agency with powers which exceed the specific requirements of the work. The Committee considers that the powers to require the production of documents and the summoning of witnesses to give oral testimony are critical to the evidence-gathering task of the investigating agency. In this respect, the Public Interest Disclosure Agency and other investigating agencies, as appropriate, should be empowered to make orders for the production of documents or other evidence and the examination of witnesses. Keith Potter asserted that the powers should be confined to facilitating "exploration of specific complaints" and that the power to access, inspect and copy documents, to examine witnesses, and to enter publicly owned or leased premises should be expressly authorised in each instance by the "Commissioner" (head of the agency).¹⁰

10.15 Additional powers cited by the Attorney-General's Department were the powers to report to relevant agencies and the Prime Minister and Parliament, and to refer matters to other agencies for investigation.¹¹ The power to report to the head of an organisation which is the subject of the whistleblowing, or if not satisfied, to the responsible Minister, Prime Minister or Parliament was supported by the Health Insurance Commission¹². The Committee believes that the powers to report and refer are critical to the functions of the Agency and has recommended in paragraph 7.47

9 Law Society of New South Wales, Submission no. 105, p.2.

10 Keith Potter, evidence p.565.

11 Attorney-General's Department, evidence p.132; See also Geoff Dannock, Submission no. 11, p.5.

12 The Health Insurance Commission, evidence p.1269.

that the Agency should be able to present annual and special reports directly to the Parliament.

10.16 The Committee recommends that any organisation charged with the investigative function in relation to public interest disclosures should be conferred with powers to require production of documents and evidence, examine witnesses, and to report on and refer matters as relevant and appropriate.

Power of entry

10.17 The power of entry is one which the Committee cautiously recognises may be required by the investigating agency in particular circumstances. The Committee believes that the situations in which such a power should be utilised must be exceptional and the investigating agency must have reasonable grounds for the belief that the use of the power is necessary.

10.18 Accordingly, the power of entry should be restricted to circumstances where an officer believes that an act of wrongdoing has been committed or suspects on reasonable grounds is about to be committed. If relevant documents or evidence have been the subject of an order for production issued by the Public Interest Disclosures Agency, and that order has not been complied with and the investigating officer believes on reasonable grounds that the documents or evidence of such wrongdoing or anticipated wrongdoing are on certain premises, the officer may make an application to a Judge of the Federal Court of Australia for a warrant authorising the investigating officer to enter those premises. The warrant should specify the purpose of entry, being to procure documents, to take copies of such documents, to seize evidence, or such other purposes as may be necessary in all the circumstances to facilitate the officer's investigation. Such application having been made, the Judge may grant a warrant to enter and search premises if satisfied that an act of "wrongdoing" has been committed, or is suspected on reasonable grounds of having been or is about to be, committed and that the power of entry and search is likely to assist the officer in or in connection with the investigation of that "wrongdoing".

10.19 In conferring a limited power to search and enter premises, the Committee is balancing the civil liberties of individuals and organisations against the need to investigate public interest disclosures. The Committee appreciates the onerous responsibility connected with such a power. Some may argue that the legislative existence of such a power constitutes a denial of civil liberties. However, after hearing the evidence of whistleblowers, and from the accumulated anecdotal information passed to the Committee in the course of their parliamentary duties, the Committee is of the opinion that without such a power, albeit circumscribed, the ability of the agency to pursue matters of public interest would be severely limited.

10.20 The weight of evidence is in favour of the power of search and entry being available to the investigating agency. Whistleblowers generally insisted on the need for such a power:

... in particular the Agency should be able to enter premises without notice in order to either seize documents or evidence, examine witnesses or witness a wrongdoing (e.g. disposal of chemicals affecting public health). The giving of notice could lead to the destruction of or the coverup of evidence ...¹³

10.21 Those groups concerned specifically with civil liberties who made submissions did not oppose the need for the power of entry in whistleblowing matters. The Tasmanian Council for Civil Liberties stated, for example, that the investigative body should have the same powers as the National Crime Authority.¹⁴

10.22 Whistleblowers Australia summarised the position of many whistleblowers with respect to the balancing of rights and the public interest:

13 Alwyn Johnson, evidence p.535. See also Bill Toomer, evidence p.585.

14 Tasmanian Council for Civil Liberties, Submission no. 48, p.1.

The propriety of investigative powers must not be shackled in any respect. Public interest, being truth and accountability, must prevail over secrecy where secrecy for whatever reason, may protect the corrupt.¹⁵

10.23 Whilst many witnesses confined their comments to search and entry of public sector organisations, the need for this power to be available in respect of the private sector was clearly identified to the Committee. For example, in the case of environmental pollution, the Committee was told that the power might be particularly relevant in the private sector.¹⁶ Keith Potter expressed the view that the power to enter private premises, however, should be "invoked under normal processes and implemented by the Australian Federal Police".¹⁷

10.24 The Committee, having determined that a power of entry and search is a necessary power in a whistleblower protection scheme, considered whether any prior notice should be given to the subjects of whistleblowing of the intended exercise of the power to enter premises. There was certainly the suggestion made that early warning might result in the destruction or cover up of evidence,¹⁸ and that to ensure genuine results from investigations, procedures must be carried out with little or no pre-warning. However, the Committee, in weighing these considerations against the civil liberties involved in forcing entry to private property, decided that justice demands that individuals and organisations should be given the opportunity to voluntarily produce evidence and the right to respond to requests and orders for production of documents and evidence.

10.25 The Committee places great emphasis on the principles underpinning the administration of our justice system, in particular, the presumption of innocence. To force entry to premises without warning of the investigation at hand, and without

15 Whistleblowers Australia, evidence p.703.

16 Dr Jennifer McKay, Submission no. 28, p.1.

17 Keith Potter, evidence p.565.

18 Alwyn Johnson, evidence p.535.

the opportunity to voluntarily produce material in accordance with an order from the Agency, strikes at that presumption, and may constitute an infringement of basic civil liberties. Notwithstanding the enormity of the public interest at stake in some whistleblower matters, the Committee is of the view that the wider public interest would not be served by the recommendation of powers which would be at variance with any of the fundamental elements of our justice system.

10.26 The Committee appreciates that the Ombudsman's office has a power of entry under section 14(1) of the Ombudsman Act 1976. That power is to enter "any place occupied by a Department or prescribed authority". That existing power may need to be circumscribed in relation to the investigation of whistleblower complaints requiring the proper application for a warrant to be obtained from a Judge of the Federal Court.

10.27 **The Committee recommends that the power of entry should be available to the Public Interest Disclosures Agency and the relevant investigating body in prescribed circumstances on application to a Judge of the Federal Court of Australia for a warrant.**

Engagement of Experts

10.28 The necessity of the Agency or any other investigating agency to be able to consult with or to engage staff and consultants for the purpose of utilising particular expertise demanded by the subject matters of a whistleblower's complaint was recognised by the Committee. Whistleblowers from particular industries noted the need, as did the National Crime Authority.¹⁹

10.29 Expertise and resources are crucial to the Agency and the investigating agency being able to perform their functions. It was even suggested that the use of relevant expertise was so critical to the powers of investigating and determining

¹⁹ Alwyn Johnson, evidence p.535; National Crime Authority, evidence p.438.

complaints that the power to second experts should constitute a "primary" power of the investigating agency.²⁰

10.30 The Committee recommends that the Public Interest Disclosures Agency and the investigating bodies be empowered to utilise expertise as and where it is deemed necessary. Such expertise may be procured by secondment, transfer, contract or by whatever means are necessary to obtain expert services.

Private sector investigations

10.31 The above comments whilst relating generally to the powers of organisations charged with the responsibility of investigating public interest disclosures, are applicable to the private sector. The Committee is of the view that where the Parliament can legislate for the private sector, it should do so by providing relevant regulatory agencies with powers of investigation. Regulatory agencies which could be charged with the responsibility of receiving and investigating public interest disclosures of wrongdoing in the private sector include Austel, Australian Securities Commission, Civil Aviation Authority, Environment Protection Authority, Health Insurance Commission, Insurance and Superannuation Commission and Reserve Bank of Australia.

10.32 As far as it is constitutionally able, Commonwealth regulatory agencies should also be equipped with sufficient powers to enable proper investigation of public interest disclosures. They should be able to require the production of documents and evidence, to examine witnesses and hear oral testimony, to report and refer matters to industrial organisations and Parliament and to procure necessary expertise. The power of entry, however, should be exercised by officers of the relevant police force.

10.33 The Committee appreciates that existing Commonwealth regulatory agencies have powers of varying degree tailored to investigations within the ambit of

20 Colin McKerlie, Submission no. 54, p.5.

their authority. In some cases, the legislation governing these bodies may require amendment.

10.34 The Committee recommends that Commonwealth regulatory agencies, where applicable, be responsible for the investigation of public interest disclosures in the private sector.

Secrecy Provisions

10.35 Based upon the evidence of the Privacy Commissioner,²¹ the Committee recommends that investigating agencies should have power to override secrecy provisions which serve to prevent information being disclosed which might assist the investigators in their task. The Committee has recommended in Chapter 9 that public sector whistleblowers be exempt from sanctions for contravening relevant secrecy or confidentiality provisions in all but a narrow category of cases. The Committee further recommends that the same exemption should also apply to witnesses who are called upon to give evidence relevant to an investigation of a public interest disclosure.

Protection for investigating body and its members

10.36 The Committee is aware of the sensitive nature of the matters which the Public Interest Disclosures Agency and Board, and the investigating agency will be required to deal with under the proposed legislation. The Committee is therefore concerned to ensure that the Board members, Agency officers and the investigating officers should be adequately protected. Protections are necessary to ensure that members and officers can perform their duties diligently without fear or favour. The public interest aspect of the investigations to be conducted demand freedom from coercion. The independence of the Agency and its aims should not be compromised.

21 Privacy Commissioner, evidence p.835.

10.37 The Committee is of the view that there are two requisite forms of protection needed - protection from civil action and protection from intimidation or harassment in the performance of their duties.

Protection from civil action

10.38 Members of the Public Interest Disclosures Board, officers of the Agency and officers acting under the direction of the investigating agency should not be liable to an action, suit or proceeding for, or in relation to, any action done in good faith in pursuit of the performance of their duties. This protection from civil action is modelled on section 33 of Ombudsman Act 1976:

Ombudsman not to be sued

33. (1) Subject to section 35, neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of any power or authority conferred by this Act.

The Inspector-General of Intelligence and Security Act 1986 provides immunity in similar terms in section 33(1).

10.39 The abovementioned Acts also provide that where a complaint is made or a document produced or evidence given to the Ombudsman or the Inspector-General as the case may be, a person will not be liable for any loss, damage or injury suffered by reason only of the making of the complaint or production of the document on giving of evidence.²² Any investigating agency and its officers entrusted with the function of investigating public interest disclosures, will require protection couched in terms similar to these provisions. Together, such provisions would sufficiently protect the investigating officers from civil suit. Given that the Public Interest Disclosures Agency will be overseeing the investigation process, the same protections should be expressly conferred on the members and officers of the Agency. The Committee is

²² See Ombudsman Act 1976 section 37; Inspector-General of Intelligence and Security Act 1986, section 33(2).

of the view that protections of this nature should be available to all officers who are involved, either directly or in a supervisory capacity, in the investigation of disclosures.

Protection from intimidation or harassment

10.40 The members of the Public Interest Disclosures Board and officers of the Agency should also be protected from acts of intimidation encountered in the course of their duties. In this respect the Committee is of the view that the whistleblower protection legislation should make it an offence to interfere with, harass, intimidate or obstruct members or officers of the Board, Agency or investigating agency in the performance of their duties. The Ombudsman Act provides penalties for wilfully obstructing, hindering or resisting the Ombudsman and officers in the performance of their duties. Given the serious ramifications of some of the work of the Agency and the investigating agency, it was proposed that there may be a need to increase penalties to ensure that investigations are undertaken without obstruction.²³ Increasing the range of penalty which may be imposed to include community work orders would indicate the diversity of categories of wrongdoing which may be investigated under whistleblower protection legislation.

10.41 Not only does the evidence to the Committee support the enactment of self-protection provisions,²⁴ but so too, does legislative experience. Organisations charged with special responsibilities typically have the in-built legislative protection mechanisms which accord members and officers immunity from civil or criminal processes. Examples of such protections are contained in:

- . The National Crime Authority Act 1984, section 36
- . Ombudsman Act 1976, section 33
- . Inspector-General of Intelligence and Security Act 1986, section 33

23 Geoff Dannock, Submission no. 11, p.6.

24 See State Public Services Federation, evidence p.513A; National Crime Authority, evidence p.439.

- . Human Rights and Equal Opportunity Commission Act 1986, section 48(1) and
- . Independent Commission Against Corruption Act 1988 (NSW), section 109 (1)
- . Criminal Justice Act 1989 (QLD), sections 100 and 101

The Privacy Commissioner noted that no special privacy issues appeared to be raised by the consideration of protections that should be extended to any investigating agency and its members.²⁵

10.42 The formulation of self-protective mechanisms for the agency must not be such as to compromise the accountability of the agency. A proper balance must be achieved so that such mechanisms do not enable members and officers to operate in a manner inconsistent with the objectives of whistleblowers protection legislation. In this context the use of phrases such as "in good faith" should be carefully considered. Whistleblowers submitted that "there should be very clear guidelines as [to] what constitutes "good faith" in the performance of that function".²⁶

10.43 The difficulties which may confront the Public Interest Disclosures Agency and investigating officers were described as being equivalent to the pressures placed upon whistleblowers themselves:

Any investigating body and its members can expect to be subjected to the very same strategies of attack, intimidation and reduction of standing and status as has faced any whistleblower to date.²⁷

It was asserted that in all levels of government and management there are those who will attempt to "stamp out anyone who questions them or attempts to remove the

25 Privacy Commissioner, evidence p.836.

26 Keith Potter, evidence p.565; See also Bill Toomer, evidence p.585.

27 Christina Schwerin, evidence p.493.

network of control they have established".²⁸ The Committee considers that the two types of protection recommended are proportionate to the risk of retaliatory action and harassment associated with the performance of duty under a Whistleblowers Protection(or public interest disclosures) scheme.

10.44 The Committee recommends that the Public Interest Disclosures Agency and Board, their members and officers and the investigating agency and its officers should, in the least, be protected from:

1. Harassment, intimidation and obstruction in the performance of their duties; and
2. Civil action arising from the performance of their duties, in terms similar to that protection contained in Sections 33 (1) and 37 of the Ombudsman Act 1976.

CHAPTER ELEVEN

REMEDIES AND PENALTIES

11.1 There are various remedies and penalties associated with any whistleblower protection scheme. Generally, they may be divided into two categories depending on the related subject matter:

1. Those remedies and penalties associated with the wrongdoing itself; and
2. Those remedies and penalties associated with the protection of the whistleblower.

The Committee is keen to ensure that a range of remedies should be explored rather than limiting the restitution to merely a monetary matter. This attitude, reflected in Senator Chamarette's Whistleblowers Protection Bill 1993, is also endorsed by the Privacy Commissioner.¹ It is a feature of the Bill which the Committee believes should be retained in any future legislation of this nature.

Proven wrongdoing

11.2 When the investigating agency determines that in fact, an act of "wrongdoing" (as defined in the proposed legislation - see Chapter 9) has been committed, then certain remedial or corrective action must follow. If an allegation involving illegality or infringement of the law is substantiated, the matter should be referred to the relevant police force for confirmation of investigation and briefing of the relevant Director of Public Prosecutions. If an allegation of substantial misconduct, mismanagement, maladministration or waste of public funds is substantiated, then the Public Interest Disclosures Agency should report to:

- (a) the Chief Executive of the relevant government agency,

¹ Privacy Commissioner, evidence p.834.

- (b) the Director or head of the relevant private organisation or professional or industrial body;
 - (c) the Auditor-General; or
 - (d) the responsible Minister, Prime Minister or Parliament,
- whichever is appropriate.

The Agency's power to report should be exercised in respect of wrongdoing in all other categories; for example, it should be exercised in respect of the category of wrongdoing which threatens public health and safety or the environment.

11.3 The Attorney-Generals Department recommended that where an allegation of wrongdoing is substantiated, the subject of the whistleblowing should be liable to the relevant disciplinary or criminal sanctions which would normally apply.² The powers of report and referral exist, in part, for the purpose of performing a remedial function.

Victimisation of the Whistleblower - Orders for restitution

11.4 The Committee has referred in paragraphs 9.58-9.61 to the role of the Merit Protection and Review Agency in investigating complaints of victimisation and harassment. The Committee is of the view that where the MPRA is satisfied that a public sector whistleblower has suffered victimisation, the MPRA should make appropriate recommendations and orders regarding such victimisation. The MPRA should be empowered to make orders for restitution in relation to employment, such as re-instatement of former position, and orders for the protection of the whistleblower. Such orders should be binding and have the force of law. The order for restitution should not include any monetary awards for damages in relation to a finding of victimisation. The subject of claims for compensation is dealt with below under the heading: Tort of Victimisation.

² Attorney-General's Department, evidence p.132.

11.5 The Attorney-General's Department recommended that where a whistleblower has suffered discrimination or harassment in relation to his or her employment, recommendations should be made as to the appropriate response. The Department considered this to be the business of "the agency responsible for protection".³ In the model proposed by the Committee, although the MPRA would be responsible for investigating complaints of victimisation in the public sector and making certain orders for restitution in cases where the complaint is substantiated, the Public Interest Disclosures Agency should have an oversighting and appeal role.

11.6 The appeal role of the Public Interest Disclosures Agency should be confined to a mediation process, whereby, in a non-adversarial setting, the MPRA and the parties to a finding of the MPRA (including the employer organisation) can have the opportunity to explore the issues further. The Public Interest Disclosures Agency should have powers to convene meetings, and to summons witnesses and experts for the purpose of resolving conflict. The MPRA should have accountability to the Public Interest Disclosures Agency, limited to the following matters. The MPRA should be required to furnish a report of the investigation and determinations made in cases of victimisation. In addition to participating as required by the Agency in a mediation process, the MPRA will be required to furnish the Agency with such further information and particulars as the Agency may deem appropriate in all the circumstances. Should the whistleblower remain dissatisfied with the finding of the MPRA, then the whistleblower should pursue the matter along conventional channels.

11.7 The Attorney-General's Department asserted that where recommendations are not acted upon, the agency should report to the Prime Minister or the Parliament.⁴ The Committee considers that non-compliance with recommendations or orders should form the basis of such a report.⁵ In addition, a

3 Attorney-General's Department, evidence p.132.

4 *ibid.*

5 The Committee has discussed the power of the Agency to provide special reports to the Parliament in Chapter 7. The MPRA already possesses this power.

system of "order registration" should be available which may render noncompliance with an order of the Agency a contempt of court for which the organisation or those responsible for orchestrating the noncompliance should be liable to a penalty. The "order registration" system would entail orders made by the Agency or the MPRA, being registered in the court of an appropriate jurisdiction.

11.8 The Committee considers that, where victimisation proves to have been particularly "blatant, severe and associated with malpractice" the matter should be referred to the police for prosecution if it appears that an actual offence has been committed. Such victimisation should be treated with the seriousness which it deserves and the offenders should be liable to fine and/or community service orders.⁶

Tort of victimisation

11.9 It is clear to the Committee that whistleblowers should be compensated for loss and injury suffered as a result of having been victimised for making a public interest disclosure. The whistleblower should be able to frame a civil action in tort for damages for loss of income, work related injuries induced by stress, loss of enjoyment of life and loss of reputation which may not be actionable under defamation laws. The Committee is of the opinion that expertise is required for the assessment of damages and such cases ought to be subject to the usual processes of judicial consideration.

11.10 The Whistleblower Protection Act 1993 (SA) created the tort of victimisation. Section 9 of that Act provides that where a person causes detriment to another on the ground, or substantially on the ground, that the other person or a third person has made or intends to make an appropriate disclosure of public interest information, that person commits an act of victimisation. The Act leaves open the definition of "detriment" noting in section 9(4) that it "includes" :

⁶ Geoff Dannock, Submission no. 11, p.6. This submission suggests that terms of imprisonment might be appropriate. The Committee disagrees and has commented on the use of prison penalties in paragraph 11.23.

- (a) injury, damage or loss; or
- (b) intimidation or harassment; or
- (c) discrimination, disadvantage or adverse treatment in relation to a person's employment; or
- (d) threats of reprisal.

11.11 Under the South Australian Act an act of victimisation may be dealt with as a tort and a victim may commence proceedings in a court seeking a remedy in tort. Alternatively, a complaint of victimisation may be lodged under the Equal Opportunity Act 1984. However, the two processes are mutually exclusive, and a victim having commenced proceedings of one kind, then cannot commence proceedings of the other kind. In effect, the victim must make an election.

11.12 The Committee is of the view that such an option should be available under the proposed whistleblower protection scheme. The Committee considers that the legislation should provide that a person who has suffered a detriment by virtue of having made, or intending to make, a disclosure may commence proceedings in a court in pursuit of a remedy in tort. However, the Committee recognises that access to justice in the court system remains problematical for many Australians. The huge costs and delays involved in litigation deter or prevent many potential litigants from seeking remedies at law to which they may be entitled. Accordingly, the Committee believes that an alternative forum and course of action should be available to whistleblowers who suffer victimisation. Such an alternative should be made available by extension of the powers of the Human Rights and Equal Opportunity Commission. Other than pursuing court action, recourse to the Commission may be the only means a private sector employee can use to seek a remedy.

11.13 The Committee recommends that whistleblower legislation make provision for a tort of victimisation. The Committee further recommends that, as far as is constitutionally able, the Human Rights and Equal Opportunity Commission through an extension of its powers be an alternative forum and course of action

available to public and private sector whistleblowers to facilitate their obtaining compensation for victimisation.

Rewards for whistleblowing

11.14 There was general agreement between those who addressed the question of rewards for whistleblowers that they should not be encouraged. Certainly the evidence to the Committee was that whistleblowers are not motivated by the thought of reward, rather they are generally motivated by public interest. As one submitter noted, whilst whistleblowers do not expect rewards, they should not expect to be victimised or disadvantaged for bringing matters of public interest to the community's attention:

I do not believe that whistleblowers expect to be rewarded, or should be rewarded for properly bringing matters of concern to public light. However, neither should they be penalised for their action provided it is undertaken in the public interest, and without malice".⁷

11.15 A feature of the United States legislation involves the granting of financial rewards to whistleblowers in recognition of savings achieved by the government through the exposure of wasteful practices and wrongdoing. However, this practice has not been adopted in the South Australian whistleblower legislation, nor is it proposed to be included in draft legislation under consideration in other Australian States and territories. The United States system was criticised in evidence to the Committee. It was observed that:

The American system is now a bounty hunting arrangement ... It seems to me that [rewarding whistleblowers] is an incorrect and dangerous inducement on which to expect people of goodwill to come forward. They should come forward on the old fashioned basis of just being ethically disturbed with what they see.⁸

7 See Geoff Dannock, Submission No. 11, p.5. As to the reference of "malice", see the Committee's comments at paragraph 9.37.

8 Dr William De Maria, evidence, p.1066.

11.16 The Privacy Commissioner raised strong objection to the notion of rewards for whistleblowers, by referring to comments made in evidence to the Elliott Committee Inquiry into Fraud on the Commonwealth. The Commissioner asserted:

It is different once you turn the community from being a disinterested participant in the criminal justice process into a self interested participant ... I think the proposal involves a fairly fundamental shift in current social arrangements and it must have some significant implications for the privacy of individuals.⁹

11.17 The former Commonwealth Ombudsman, Mr Alan Cameron, in a submission to the Elliott Committee, commented upon a proposed scheme to reward whistleblowers. The scheme, which was similar to the United States scheme, proposed that whistleblowers should be rewarded by the payment of up to 50% of the amount recovered which had been originally lost due to fraudulent activity. Mr Cameron drew attention to the administrative difficulties associated with such a scheme, including:

- . The scheme may involve the payment of very considerable amounts of public monies;
- . The scheme may be a disincentive to whistleblowers if the whistleblower was aware that the funds had been dissipated beyond recovery; and
- . On what basis would discretion be exercised to determine what percentage which whistleblowers should receive?¹⁰

11.18 The Elliott Committee received further, mostly negative, comments in relation to the proposed scheme. These included conflict of interest concerns, difficulty in relying on evidence from a witness with a direct pecuniary interest, social and privacy implications and baseless or unprovable allegations being made in the hope of pecuniary reward. The Elliott Committee concluded that:

9 Privacy Commissioner (Mr Kevin O'Connor), evidence p.833.

10 Commonwealth and Defence Ombudsman, evidence p.37.

As it is a citizen's duty to report fraud, theft etc. and it is part of the responsibilities of public servants to do the same and there is no proof that reward systems promote whistleblowing, the Committee considers the benefits of the proposal do not outweigh the difficulties.¹¹

11.19 EARC also considered a system of rewards for whistleblowers through the award of a percentage of the savings which result from their disclosures. EARC considered that the giving of awards "is contrary to one of the purposes of the scheme which is to encourage the development of appropriate ethical standards as part of the normal standards expected of public sector employees. Accordingly the Commission does not recommend, at this stage, that provision for rewards be built into the scheme".¹²

11.20 **The Committee agrees with these conclusions and recommends that a system of rewards for whistleblowing should not be included in the whistleblower protection scheme proposed in this report.**

Penalties for false allegations

11.21 The Committee discussed this matter in paragraphs 9.64 - 9.65, recommending that it should constitute an offence if a person knowingly makes a false allegation and where such an offence is proven, the person should be subject to a penalty of a fine and/or community service orders.

Imprisonment as a penalty option

11.22 The Committee has considered the use of imprisonment as a penalty. The Committee accepts that where proven wrongdoing has involved illegality or infringement of the law, normal legal processes would presumably follow which,

11 Elliott Committee Report, op.cit., pp.92-4.

12 EARC Report, op.cit., p.184. See also Greg Sorensen, evidence p.1158.

subject to the law which has been transgressed, may involve imprisonment as a part of the penalty provisions.

11.23 However the Committee believes that cases of victimisation or harassment of whistleblowers or of whistleblowers knowingly making false allegations, are primarily crimes against the person with public interest ramifications. The Committee does not consider imprisonment to be a suitable penalty in such situations and has recommended the imposition of community service orders (and/or in addition to fines) to be a more appropriate penalty. (see paragraphs 9.83 and 11.8).

CHAPTER TWELVE

WHISTLEBLOWERS PROTECTION BILL 1993 (SENATOR CHAMARETTE)

12.1 A Whistleblowers Protection Bill was first introduced on 12 December 1991 by Senator Vallentine. This bill lapsed following the 1993 federal election. Senator Chamarette subsequently undertook a rewrite of the Vallentine bill and tabled an exposure draft of a new bill on 26 May 1993. After further review and rewriting, Senator Chamarette introduced the Whistleblowers Protection Bill 1993 on 5 October 1993. The Senate referred the bill to the Committee on 27 October 1993.

Provisions of the Whistleblowers Protection Bill 1993

12.2 The objects of the bill are:

- . to facilitate public interest disclosures about conduct reasonably believed to be illegal, improper or constituting a danger to public health or safety or to national security;
- . to protect persons who are harassed or discriminated against for making such disclosures;
- . to investigate the public interest disclosures and alleged harassment or discrimination;
- . to promote the ethic of openness and public accountability; and
- . to improve community perception of whistleblowers, in recognition of the fact that they are responsible citizens.

12.3 The bill proposes the creation of a fully independent Whistleblowers Protection Agency, headed by a Commissioner with power to investigate allegations of wrongdoing within Commonwealth government or government agencies. Disclosures made by public service employees, prospective employees, and members of the public are covered by the bill. Allegation of wrongdoing is defined in clause 6 to include where a person has committed:

- (a) an infringement of the law; or
- (b) a gross waste of public moneys; or
- (c) an act constituting abuse of authority; or
- (d) an act which substantially endangers public health or safety; or
- (e) gross mismanagement of public moneys or property; or
- (f) suppression of an expert opinion, finding or document prepared by another person.

12.4 The main functions of the Agency are varied. Clause 9 of the bill proposes that the Agency would receive from any person and investigate allegations of wrongdoing, allegations of prohibited personnel practices and allegations of harassment. The Agency would be required to take, or recommend the taking of, corrective action in instances where any allegations are substantiated. Further, the bill proposes that the Agency bring to the attention of the Parliamentary Joint Committee to be established to oversee the Agency, any matter which in the Commissioner's opinion the Joint Committee's attention ought to be drawn. Finally, the Agency would have the functions of protecting whistleblowers from prohibited personnel practices or harassment, promoting the ethic of openness and public accountability and improving the community perception of whistleblowers.

12.5 The bill provides protection to whistleblowers from 'prohibited personnel practices', as defined at clause 7, which may cause discrimination or victimisation in the workplace. Whistleblowers would be provided with protection from harassment or discrimination concerning appointments, promotion, disciplinary action, transfers and pay matters. Protection would be available subject to whether the whistleblower had reasonable grounds to believe that the disclosure was true and not made with the intent to deliberately mislead.

12.6 The conduct of investigations of complaints is detailed at Part 4. A complaint may be made to the Agency orally or in writing and may be made

anonymously. However, the Agency may decline or cease to investigate a complaint if there was insufficient information provided or it was frivolous or vexatious. Clause 24 specifies how investigations should be conducted and provides guidelines on the appearance of persons giving evidence to the Agency.

12.7 The Commissioner of the Agency would have the power to require information relating to an investigation to be provided in writing, including the production of documents or records. Alternatively, the Commissioner may require a person to attend a hearing to answer questions and produce documents. Persons would not be able to refuse to furnish such information or records on the basis that it may contravene the provisions of another Act, is contrary to the public interest or on the basis that they may incriminate themselves or be liable to a penalty.

12.8 Power for staff of the Agency to enter, search and remove material from premises is proposed at clause 28. The Commissioner may apply for a warrant from a Judge of the Federal Court to affect such action.

12.9 Remedies available to whistleblowers, including re-instatement, re-location and if appropriate compensation payments, are proposed in Part 5. The Agency may assist whistleblowers in obtaining injunctions to prevent prejudicial action being taken against a whistleblower. Where desirable, the Agency may arrange for counselling to be provided to the whistleblower.

12.10 Part 6 provides expansive reporting and review mechanisms. The Agency must refer to the Attorney-General any evidence which substantiates that an offence had been committed. Similarly, the bill details the reporting chain to be used by the Agency, including to the Governor-General, where breaches of duty, misconduct or evidence of a prohibited personnel practice are detected. The Agency is also given annual reporting obligations and may submit reports on its operations to the Prime Minister, for presentation to Parliament.

12.11 A Parliamentary Joint Committee on the Whistleblowers Protection Agency would be appointed under Part 8 to inquire into and report on the activities of the Agency and other matters highlighted to the Joint Committee by the Commissioner. Other duties of the Joint Committee would include examining the annual report and any tabled reports prepared by the Agency and reporting to both Houses on matters arising from the reports to which Parliament's attention should be directed, and inquiring into and report on any question relating to its duties that is referred by a House.

Comments relating to the bill

12.12 A range of comments regarding the Whistleblower Protection Bill 1993 were made in submissions and evidence to the Committee. Witnesses were advised that the bill provided a possible model which could apply to whistleblower protection and therefore had no direct endorsement from the Committee. The comments, based upon this understanding, which were expressed in evidence are summarised below.

Terminology

12.13 The South Australian Equal Opportunity Commissioner was "not satisfied that the legislation was sufficiently clear to enable persons to know what their rights and protections are under the legislation."¹ As an example problems with the definition of "wrongdoing" in clause 6 were cited. First, it was assumed that people understand the law and what is meant by legal and illegal conduct. Secondly, the terms "gross", "substantial" and "expert opinion" are prone to different interpretation based on personal experience.

12.14 Failure to define "discriminate" was viewed as a serious oversight by the Commissioner, who recommended reference to the definition used for this term in Federal Human Rights legislation. Also, the definition of "harassment" was seen as

1 Commissioner for Equal Opportunity (SA), evidence p.393.

circular and subjective. The Commissioner suggested the term "victimisation," as defined in Equal Opportunity legislation, would be more appropriate.

12.15 The National Crime Authority commented that it may be difficult to prove the elements of suppression in an allegation of wrongdoing as defined in clause 6. The NCA suggested that a more objective or neutral term such as "withholding" or "failure to disclose" should be used.² The NCA also considered that the nature of assistance which may be provided to whistleblowers in clause 29, was imprecise.

Whistleblowers Protection Agency

12.16 Concern was expressed over the cost of establishing another Commonwealth statutory agency. Budget estimates for 1993/94 of comparative bodies such as the Ombudsman \$6.6m and MPRA \$4.9m, were offered as a guide to possible operating costs of a new agency. Accordingly, it was inferred that it would be "more efficient to draw upon the resources and expertise of existing bodies, rather than to create parallel authorities concerned specifically with whistleblowing."³

12.17 A number of submissions observed that potential problems with establishing a separate Whistleblowers Protection Agency might involve overlap and duplication of responsibilities, and competition for scarce, skilled resources.⁴ For example, investigative powers of the Agency overlap with the Ombudsman's powers and many of the Agency's protective functions are covered, although not as comprehensively, by the MPRA. In fact, the Attorney-General's Department considered that "the extent of overlap of proposed Agency functions with the functions of the existing statutory bodies ... is so great that amendments to those [existing] Acts to

2 National Crime Authority, evidence, p.439.

3 Attorney-General's Department, evidence p.124.

4 e.g. Australian Federal Police, evidence p.84; Attorney-General's Department, evidence p.126.

make adequate provision for whistleblowers would be preferable to a separate statute."⁵

12.18 Staffing of the Agency also attracted comment. It was questioned whether the Commissioner of the Agency needed to be a judge or lawyer, or should more appropriately be a person with a range of managerial or administrative skills rather than legal skills and experience.⁶ ICAC noted the importance of Agency staff possessing the requisite skills and experience to be able to make "credible determinations" regarding victimisation allegations which were denied by management.⁷

12.19 The Queensland Whistleblower Study argued against a political appointee to head the Agency as proposed in clause 12 of the bill, suggesting that the position should be an officer of the Parliament. The QWS also suggested that the Agency should rather be a 6 member commission consisting of a legally qualified person, 3 whistleblowers nominated or elected by whistleblower lobby groups and 2 other well regarded community identities nominated by the proposed Parliamentary Joint Committee.⁸

12.20 Although the bill has no specific provision for internal disclosure mechanisms, several submissions supported this option. The Privacy Commissioner considered there were advantages from a privacy perspective in encouraging internal disclosure, although this was not to suggest that whistleblowers should be obliged to use internal channels before approaching the neutral agency.⁹ ICAC argued that internal disclosure should attract the same protection as disclosure to an independent

5 Attorney-General's Department, evidence p.126; See also Equal Opportunity Commissioner (SA), evidence p.392.

6 Equal Opportunity Commissioner (SA), evidence p.395.

7 Independent Commission Against Corruption, evidence p.739.

8 Queensland Whistleblower Study, evidence p.1027.

9 Privacy Commissioner, evidence p.837.

agency such as that proposed in the bill. However, ICAC agreed that prior internal disclosure should not be required before disclosure to the Agency.¹⁰

12.21 Dr Jean Lennane commented that in relation to accountability of the Agency, the bill does not specify any time limits under which the Agency must respond to whistleblowing allegations. Delays in dealing with complaints is an important health issue for whistleblowers. Additionally, Dr Lennane suggested that to monitor the effectiveness of Agency operations, ongoing consumer satisfaction surveys should be conducted by an external, reputable academic body reporting to the Parliamentary Joint Committee.¹¹

12.22 With regard to Agency reporting requirements, the NCA felt it may be inappropriate that the Governor-General be included in the reporting chain described in clause 34. The NCA noted that there was no equivalent provision in the Ombudsman Act 1976. Also, the bill was unclear about what powers the Governor-General was expected to exercise which could involve that office in political or controversial matters. The NCA suggested that it would be more appropriate for the Prime Minister or Parliament to receive reports instead of the Governor-General, being a procedure which is used in other Commonwealth legislation.¹²

Legislative coverage

12.23 From a whistleblower's perspective, it was proposed that any legislation should be as broad in its coverage as possible. The QWS and Greenpeace argued for provisions, where possible, that cross Federal/State jurisdictions. This emphasis was needed to counter inadequacies perceived by whistleblowers with established independent watchdogs and to encourage uniform levels of cover for whistleblowers

10 Independent Commission Against Corruption, evidence p.737.

11 Dr Jean Lennane, evidence p.708.

12 National Crime Authority, evidence p.440.

in State legislation.¹³ The Attorney-General's Department assessed the bill's coverage of public administration as "very broad." Allegations of wrongdoing extended beyond the Gibbs Committee proposals to include summary offences, some decisions that are subject only to administrative law remedies and the suppression of an expert opinion, finding or document. The Department commented that "overall, this coverage appears to be potentially broader than the schemes which currently operate in other jurisdictions."¹⁴

12.24 The broad range of responsibilities given to the Whistleblower Protection Agency comprising investigation of complaints, protection of whistleblowers and arranging counselling, were viewed as potentially incompatible. Two submissions in particular commented that these functions are distinct in nature and require different skills.¹⁵ Potentially, the grouping of these functions under the responsibility of one body could lead to confused perceptions (whether deserved or not) of its role and loyalties.¹⁶ QWS suggested that the counselling function could be easily performed by specialist private sector or whistleblower support groups.

12.25 Another perceived shortcoming of the bill was that it ignores existing secrecy provisions and investigatory channels which deal with matters of national interest. The Attorney-General's Department argued that this lack of reference to the "application of secrecy provisions in existing legislation (either by recognising that such provisions apply or by exempting whistleblowers from them)" makes the bill defective.¹⁷ It was also argued, in keeping with the recommendations of the Gibbs

13 Queensland Whistleblower Study, evidence p.1024 and Greenpeace Australia, evidence p.1292. See also Human Rights Commissioner, evidence p.11;

14 Attorney-General's Department, evidence p.125.

15 Attorney General's Department, evidence p.126; Equal Opportunity Commissioner (SA), evidence 396.

16 Queensland Whistleblower Study, evidence p.1026.

17 Attorney-General's Department, evidence p.126. See also Privacy Commissioner, evidence p.837: who asserts that the bill has a clear intention to provide protection for breaches of secrecy provisions which might attract criminal sanction, but observes that there appears to be no specific provision included in the bill to cover such occurrences.

Report, that the existing investigatory power of the Inspector-General of Intelligence and Security makes it the most appropriate authority to inquire into matters of national security and intelligence.¹⁸

Investigative powers

12.26 The Committee received considerable comment concerning the investigative powers of the proposed Whistleblowers Protection Agency. For example, the Law Society of NSW believed that the Agency should not investigate anonymous complaints, that a whistleblower's name should not be released unless and until the individual's consent was obtained and that a person under investigation should not only have the right to make a submission to the Agency, but have the right to call evidence before an inquiry and be represented by another party.¹⁹

12.27 Conflicting views on protection from self-incrimination were also received. The Law Society of NSW strongly recommended that clauses 25 and 26 be amended to ensure that a person appearing before an inquiry would be excused from having to provide information or documents or answer questions which would contravene a law, incriminate or, make such a person liable to a penalty or where information was the subject of legal professional privilege.²⁰

12.28 The Australian Federal Police on the other hand, considered that the bill "does not take sufficient account of the existing provisions, principles and requirements underlying the application of the criminal law and laws of evidence."²¹ In contrast to the view of the Law Society of NSW, the AFP believed that employees subject to investigation by the Agency should not be able to decline to disclose

18 Attorney-General's Department, evidence p.125; National Crime Authority, evidence p.439.

19 The Law Society of NSW, Submission no. 105, p.1-2.

20 *ibid.*, p.2.

21 Australian Federal Police, evidence p.82.

information on the grounds that they would incriminate themselves. However, the AFP made the proviso that any information released by the Agency as a result of a direction to provide information, should not be admissible evidence in proceedings against the person complying with the direction. An exception to this would be if the person was subject to disciplinary or criminal proceedings for the supply of false or misleading information in consequence of a lawful direction.²²

Protections and remedies

12.29 The NCA observed that the bill does not appear to provide any protection for whistleblowers from criminal proceedings in respect of their disclosures.²³ The Privacy Commissioner commented that privacy protections in the bill could be strengthened with respect to the subjects of whistleblowing. He suggested that "a confidentiality clause, similar to that provided for whistleblowers, be included for all other individuals party to the allegation."²⁴ Dr Jean Lennane recommended that 'forced' referrals of employees for psychiatric examinations should be included in clause 7 as a prohibited personnel practice²⁵

12.30 The Privacy Commissioner commented that it seemed appropriate to canvass a range of options in the provision of remedies and forms of assistance, rather than rely on financial remedies alone.²⁶ Also, the NCA suggested that there should be provided "a power to apply to the Federal Court of Australia to determine a question with respect to the exercise of a power of the Agency or the performance or proposed performance of a function by the Agency."²⁷ The Law Society of NSW

22 *ibid.*, p.83.

23 National Crime Authority, evidence p.440.

24 Privacy Commissioner, evidence p.837.

25 Dr Jean Lennane, evidence p.707.

26 Privacy Commissioner, evidence p.837.

27 National Crime Authority, evidence p.440.

recommended that in relation to clause 31, access to the Federal Court for the granting of an injunction should be also available to "the person who is the subject of the prohibited personnel practice or harassment."²⁸

General comments

12.31 Many witnesses, through their submissions and evidence, were heartened that the issue of whistleblowing, including discussion of appropriate legislative cover, protection and remedies for genuine whistleblowers, had been elevated to a broad examination by the Commonwealth through this Committee. Whistleblowers Australia commented in relation to the Whistleblowers Protection Bill that:

If the proposed legislation purports to acknowledge whistleblowing as a civic responsibility, then the title 'Whistleblowers Protection Bill' infers a theme directed towards the security and well being of the whistleblower. The title and theme of the legislation is an acknowledgment that an established need exists to preserve and protect the rights of a person who makes a disclosure in the public interest.²⁹

The Australian Medical Association was also positive and welcomed the bill "as an innovative and timely response to a genuine community need."³⁰ Support for the bill was also expressed in many other submissions.³¹

12.32 The Committee acknowledges the constructive comments and suggestions that it has received relating to the Whistleblowers Protection Bill 1993.

28 Law Society of NSW, Submission no. 105, p.2.

29 Whistleblowers Australia, evidence p.701.

30 Australian Medical Association, Submission no.27, p.1.

31 See for example Greenpeace Australia, evidence p.1292; United Scientists for Environmental Responsibility (USERP), Submission no.62, p.2; Australian Institute of Company Directors, evidence p.882. The institute broadly supported the objective of the bill, but recommended that its application be confined to the public sector only; Christina Schwerin, evidence p.490; Human Rights Commissioner, Submission no. 82, p.23.

The Committee has made recommendations in accordance with its terms of reference that whistleblowing should be the subject of Commonwealth legislation and on the form that the legislation should take. In making its recommendations the Committee considered the model for whistleblower protection proposed in the Whistleblowers Protection Bill, together with the comments on the bill received in evidence. A number of these proposals and comments have been incorporated into the Committee's recommendations.

12.33 For example, the Committee's proposals as to what persons and organisations should be covered by whistleblowing legislation are similar to the extent of cover proposed in the bill and its views on the protection that should be extended to both whistleblowers and the subjects of whistleblowing is in accord with the general thrust of protections proposed in the bill. The Committee agrees with the creation of a new agency, but proposes a different structure and functions for the Agency to those proposed in the bill.

12.34 The Committee acknowledges the valuable contribution that the Whistleblowers Protection Bills of both Senator Vallentine and Senator Chamarette have played in generating debate within the Commonwealth arena on the subject of whistleblowing. In particular the Committee recognises that many aspects of the bill have been adopted and included, in one form or another, in its own recommendations.

12.35 **The Committee concludes that with the introduction and passage of whistleblower protection legislation in the form recommended in this report, further parliamentary consideration of the Whistleblowers Protection Bill 1993 should not be required.**

**Senator Jocelyn Newman
Chair
August 1994**

LIST OF PUBLISHED SUBMISSIONS

- 1 Network for Christian Values Inc., ACT
- 2 Mr Alan Barry, NSW
- 3 Dr GF Humphrey, NSW
- 4 Mr Alwyn Johnson, TAS
- 5 Mr RW Allison, NSW
- 6 Commonwealth and Defence Force Ombudsman, ACT
- 7 Public Service Commission, ACT
- 8 Australian Banking Industry Ombudsman, VIC
- 9 Mr John Spencer, VIC
- 10 & 10A Australian Federal Police, ACT
- 11 Mr Geoff Dannock, TAS
- 12 Mr Malcolm MacKellar, NSW
- 13 Attorney-General's Department, ACT
- 14 Public Sector Union, ACT
- 15 Civil Aviation Authority, ACT
- 16 Mr John MacMillan, ACT
- 17 Mr Otto Pelozar, WA
- 18 Ms Teri Lambert, QLD
- 19 Mr Andrew Allan, NSW
- 20 Mr Peter Jesser, QLD
- 21 Mr Les Maskel, QLD
- 22 Australian Education Union, Tasmanian Branch, TAS
- 23 Business Council of Australia, VIC
- 24 Mr RG Webster, VIC
- 25 Dr Paul Maher, VIC
- 26 Ms Joanne Dickenson, TAS
- 27 Australian Medical Association, ACT
- 28 Dr Jennifer McKay, SA
- 29 Whistleblowers Australia, NSW

- 30 Mr Brian Coe, VIC
- 31 Mr James Whiteford, ACT
- 32 Professor Kim Sawyer, VIC
- 33 Mr Peter Raue, NSW
- 34 State Public Services Federation, VIC
- 35 Department of Administrative Services, ACT
- 36 Senator John Coulter
- 37 Australian Nursing Federation, VIC
- 38 & 38A Mr Shann Turnbull, NSW
- 39 Dr Brian Martin, NSW
- 40 & 40A Mr Gordon Harris, QLD
- 41 Mr AE Jackson, SA
- 42 Merit Protection and Review Agency, ACT
- 43 Mr Tom Hardin, QLD
- 44 National Crime Authority, VIC
- 45 Mr Desmond Childs, TAS
- 46 Dr John Pope, QLD
- 47 Department of Defence, ACT
- 48 Tasmanian Council for Civil Liberties, TAS
- 49 & 49A Whistleblowers Action Group, QLD
- 50 Ms Shirley Phillips, VIC
- 52 Mr RC Windsor, VIC
- 53 Ms Kristine Clement, ACT
- 54 Mr Colin McKerlie, WA
- 56 & 56A Mr Bill Toomer, VIC
- 57 & 57A Mr Keith M Shaw, NSW
- 58 Australian Shareholders' Association, VIC
- 59 & 59A Ms Lesley Lyons, SA
- 60 National Tertiary Education Union, VIC
- 61 Mr Kevin O'Connor, Privacy Commissioner, NSW
- 62 United Scientists for Environmental Responsibility and Protection, TAS
- 63 & 63A Mr Keith Potter, VIC

- 64 Mr Des O'Neill, QLD
- 65 & 65A Ms C. Schwerin and other former local govt. councillors, VIC
- 66 Queensland Conservation Council, QLD
- 67 Dr Alden S Klovdahl, ACT
- 68 Australian Institute of Management, VIC
- 70 Ms Mae Green, TAS
- 71 Australian Society of Certified Practising Accountants and
The Institute of Chartered Accountants in Australia, VIC
- 72 AcrossTech, ACT
- 73 Queensland Whistleblower Study, QLD
- 74 Mr Kevin Lindeberg, QLD
- 75 Ms EAG Ballard, NSW
- 76 Mr Len Wylde, SA
- 77 Institute of Internal Auditors - Australia, NSW
- 78 Greenpeace Australia, NSW
- 79 Senator the Hon. Chris Schacht
- 80 Australian Institute of Company Directors, NSW
- 81 Mr Max Minius, ACT
- 82 & 82A Mr Brian Burdekin, Federal Human Rights Commissioner, NSW
- 83 Mr Bruce Hamilton, NSW
- 84 Independent Commission Against Corruption, NSW
- 85 Law Institute of Victoria, VIC
- 86 Australian Press Council, NSW
- 87 Mr Russell L Moffet, WA
- 88 Mr Mehmed Skrijel, VIC
- 89 Mr Ken Smylie, SA
- 90 Commissioner for Equal Opportunity, SA
- 91 & 91A Mr Jack King, SA
- 92 Mr John Little, VIC
- 93 The Health Insurance Commission, ACT
- 94 Australian Conservation Foundation, VIC
- 95 Law Council of Australia, ACT

- 96 Australian Nuclear Science & Technology Organisation, NSW
- 97 Mr John Falconer, NSW
- 98 Australian Customs Service, ACT
- 99 Mr Michael Susic, QLD
- 100 Mr Tony Paynter, NSW
- 101 Mr Peter C Sims, TAS
- 102 Customs Officers Association of Australia, NSW
- 104 Mr SI Buchanan, ACT
- 105 The Law Society of New South Wales, NSW
- 106 & 106A Criminal Justice Commission, QLD
- 107 Dr Breck McKay, (Consumer Help Against Malpractice), QLD
- 108 Mr Robert Osmak, QLD
- 110 Mr Greg McMahon, QLD
- 111 Mr Bill Wodrow, ACT
- 112 Mr Eric Thorne, QLD
- 113 Dr Johan Kamminga, ACT
- 115 Mr Frank Ryder, QLD
- 116 Ms Dianne Barr, SA
- 118 St James Ethics Centre, Dr Simon Longstaff, NSW
- 119 Mr JG Starke, QC, ACT
- 120 Mr Richard Blake, NSW
- 121 Mr N. and Mrs A. Shulver, QLD
- 123 Mr Bill Zinglemann, QLD
- 124 Mr Fritz Schroeder, NSW
- 125 Victorian Bar Council, VIC

INDIVIDUALS WHO APPEARED BEFORE THE COMMITTEE AT PUBLIC HEARINGS

Monday, 29 November 1993, Canberra

Human Rights Commission -

Mr Brian Burdekin, Human Rights Commissioner
Mr Kieran Fitzpatrick, Senior Policy Officer

Commonwealth and Defence Force Ombudsman -

Ms Philippa Smith, Ombudsman
Ms Lindsay Shaw, Deputy Ombudsman

Professor Paul Finn, Research School of Social Sciences, Australian National University

Australian Federal Police -

Assistant Commissioner Alan Mills, Investigations Department
Commander Arthur Brown, Headquarters Fraud and General Crime Division

Attorney-General's Department -

Mr Norman Reaburn, Deputy Secretary
Mr Peter Ford, Assistant Secretary, National Security Branch
Mr Steven Marshall, Principal Government Lawyer, National Security Branch
Mr Peter Roberts, Head, Fraud Policy and Prevention Branch,
Federal Justice Office
Ms Joan Sheedy, Senior Government Counsel, Human Rights Branch

Tuesday, 30 November 1993, Canberra

Professor Dennis Pearce, Faculty of Law, Australian National University

Public Service Commission

Mr Denis Ives, Public Service Commissioner
Mr Richard Harding, Assistant Commissioner, Redeployment and Ethics Branch
Ms Mary Reid, Director, Ethics and Conduct Policy Section

Ms Julie Pagonis, National Industrial Officer, Public Sector Union

Civil Aviation Authority -

Mr Doug Roser, Chief Executive
Mr Tom Grant, General Manager, Corporate Employee Relations
Mr Colin Torkington, Acting Director of Aviation Safety Regulation

Mr John McMillan, Faculty of Law, Australian National University

Thursday, 27 January 1994, Adelaide

Mr Matthew Goode, Senior Legal Officer, South Australian
Attorney-General's Department

Mr Graham Foreman, Commissioner for Public Employment

Mr Eugene Biganovski, State Ombudsman

Mr Peter Boyce, Head, Office of Police Complaints Authority

Superintendent Paul Schramm, Officer in Charge,
Investigations Unit, Anti-Corruption Branch, South Australian Police

Senator John Coulter

Mr Chris Nicholls

Equal Opportunity Commission

Mrs Josephine Tiddy, Chief Executive

Ms Elizabeth Lajos, Assistant Commissioner - Legal

Mr Len Wylde, Organiser, Whistleblowers Australia, SA Branch

Mr Jack King

Mr Kenneth Smylie

Friday, 28 January 1994, Melbourne

National Crime Authority

Mr John Buxton, General Manager, Policy and Information

Mr Brian Dargan, Director, Law Reform

Australian Shareholders Association

Dr Doug Hawley, Chairman (Victorian Branch), Director, National Council

Mr Thomas Rado, Councillor (Victorian Branch)

Australian Nursing Federation

Ms Marea Vidovich, Assistant Federal Secretary

Ms Robyn Parkes, Nurse Advisor

Ms Christina Schwerin

Ms Carolyn Crossley

Mr John Smith

Mr Neil Kewish

Mr Terry Monagle, Federal Industrial Officer, State Public Services Federation

Mr Alwyn Johnson

Mr Keith Potter, Chairman, Whistleblowers Australia, Victorian Branch
Mr Bill Toomer

National Tertiary Education Industry Union
Ms Jane Nicholls, Senior Research Officer
Ms Julie Wells, National Research Officer

Dr Kim Sawyer

Ms Shirley Phillips

Mr Graham McDonald, Australian Banking Industry Ombudsman

Ms Joan Ansell

Monday, 7 March 1994, Sydney

Whistleblowers Australia

Dr Jean Lennane, National President
Mr David Roper, National Director
Mr Vince Neary, Vice-President
Mr Alan Barry
Detective-Sergeant Kimbal Cook
Mr Anthony Katsoulas

Independent Commission Against Corruption

Mr Peter Gifford, Director
Mr Craig Sahlin, Principal Corruption Prevention Officer

Mr David Landa, NSW State Ombudsman

Dr Brian Martin

Office of the Privacy Commissioner

Mr Kevin O'Connor, Privacy Commissioner
Mr David Thorpe, Manager, Privacy Complaints

Ms Chris Cowper, Senior Policy Officer, Human Rights and
Equal Opportunity Commission

Mr Armando Amato

Mr John Lynas, National Auditing Standards Committee, Institute
of Internal Auditors - Australia

Dr Robert Austin, Chairman, Corporations Law Committee,
Australian Institute of Company Directors

Professor David Flint, Chairman, Australian Press Council

Mr James Guthrie
Mr Shann Turnbull

Tuesday, 8 March 1994, Brisbane

Queensland Whistleblower Study
Dr William De Maria, Principal Investigator
Ms Cyrelle Jan, Research Assistant
Mr Antony Keyes, Senior Research Assistant

Whistleblowers Action Group
Mr Gordon Harris, Secretary
Mr Denis Grove
Mr Tom Hardin
Mr Robert Osmak
Mr Peter Jesser
Mr Gregory McMahon
Mr Robin Rothe

Mr Kevin Lindeberg
Mr Des O'Neill

Mr Gregory Sorensen

Criminal Justice Commission
Mr Robert Hailstone, Director, Corruption Prevention Division
Mr Pierre Le Grand, Director, Official Misconduct Division

Dr John Pope

Friday, 25 March 1994, Canberra

Merit Protection and Review Agency
Ms Ann Forward, Director
Mr Boris Budak, Legal Adviser
Mr Geoffrey Cameron, Policy Adviser
Mr Alan Doolan, Associate Director, Corporate and Policy Services

Health Insurance Commission
Mr John Brewer, Secretary
Mr Neil Wareham, Manager, Legal Services

Dr Mark Diesendorf, National Campaign Convenor, Energy and Transport,
Australian Conservation Foundation

Mr Ian Fry, National Liaison Officer, Greenpeace Australia

Mr Leslie Austin, Assistant Governor, Financial Institutions, Reserve Bank of Australia

Department of Defence

Mr Frank Harvey, Inspector General

Dr Vern Kronenberg, Assistant Secretary, General Investigations and Review

Mr Bill Wodrow

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