

## CHAPTER 7

### OTHER CASES CONSIDERED BY THE COMMITTEE

#### Introduction

7.1 The following discussion covers the other cases considered by the Committee. The Committee reiterates that it neither sought input from every individual involved in the cases discussed nor did it attempt to provide a solution for each case.

#### Former Sale Councillors

7.2 Ms Christina Schwerin, former Sale councillor, and two other former councillors, Ms Carolyn Crossley and Mr John Smith, appeared before the Committee in Melbourne on 15 March 1995. Ms Schwerin had in a submission to the Committee outlined her experiences while a councillor at Sale from February 1989 to August 1991. Ms Schwerin stated that on taking her place on council she was confronted by:

- violations of law;
- subversion of the democratic process;
- gross mismanagement and waste of public funds;
- abuse of authority;
- coverup of dangers to public health;
- council endorsement of submission to government of false statistics and information; and
- conflicts of interest through persons holding more than one office.<sup>1</sup>

7.3 Ms Schwerin also stated that she and other independent councillors were the subject of harassment and intimidation as a result of not acceding to the influence of certain interest groups with links to the council. The harassment and intimidation included personal attacks in council, victimisation, smear campaigns in the local media, the use of unnecessary litigation, and death threats. Ms Schwerin alleged that the harassment was instigated by an interest group and was undertaken by shire officials and local police.

7.4 At the Committee's public hearing, the former councillors gave evidence concerning other incidents involving residents of Sale, shire officials and police. Documentary evidence was also tendered.

#### *Investigations of the matters*

7.5 The former councillors raised their problems with the council with a number of government bodies:

- a) Victorian Minister for Local Government: Ms Schwerin reported to the Committee that the former councillors had been advised that the Local Government Act had been

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1 Submission, Ms Christina Schwerin, 25.1.95, p. 1.

amended to allow greater autonomy to local government and that complaints should therefore be dealt with by the local council concerned.

b) Victorian Ombudsman: Ms Schwerin stated that the Ombudsman advised the former councillors that their complaints were 'too prolific' for him to undertake an investigation.<sup>2</sup>

c) Victorian Deputy Ombudsman (Police Complaints): Ms Schwerin submitted that an officer of the Deputy Ombudsman's office stated that he viewed the complaints by the former councillors as 'a situation where "a group of Sale citizens were harassing the local Police"'.<sup>3</sup>

d) Police Internal Investigations: Ms Schwerin alleged that Internal Investigations overlooked 'blatant' discrepancies in police reports and untrue statements made by police.

e) Victorian Director-General of Planning and Urban Growth: It is alleged by Ms Schwerin that the Director-General did not act on complaints concerning the submission of false information to his Department by the City Engineer thereby allowing the City Engineer to take on the dual role of City Engineer/Building Surveyor.

f) National Crime Authority (NCA): An interview took place with the NCA and documents were supplied by former councillors. However, the NCA declined to carry out an investigation and although it is alleged the NCA indicated that a written response giving reasons for this decision would be supplied, no correspondence was received by the former councillors.<sup>4</sup>

### *The whistleblowing claims*

7.6 Ms Schwerin's principal whistleblowing claim is that the then Sale Council was not controlled by elected councillors but by the City Engineer 'with whatever support this required of a local business mens' group, which by arrangement with the City Engineer, had their interests favoured and protected, by any means that it took'.<sup>5</sup>

### *Responses to evidence*

7.7 As a result of evidence given at its public hearing, the Committee wrote to the acting Victorian Ombudsman and the Secretary of the Department of Planning and Development inviting them to comment on matters raised by Ms Schwerin. The Acting Ombudsman replied that there appeared to be a misunderstanding of the powers of both the Ombudsman and Deputy Ombudsman (Police Complaints) and made the following observations:

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2 Submission, Ms Christina Schwerin, 25.1.95, p. 3.

3 Submission, Ms Christina Schwerin,, 25.1.95, p. 3.

4 Evidence, Ms Christina Schwerin, p. 312.

5 Submission, Ms Christina Schwerin, 25.1.95, p. 1.

- the Ombudsman and the Deputy Ombudsman have the powers of a Royal Commissioner, therefore they have investigatory powers;
- the Deputy Ombudsman is able to conduct his own investigations and it is mandatory for the Deputy Ombudsman to carry out the investigation of any complaint made against the senior members of police command;
- the Ombudsman's power in relation to local government is not limited to whether there is a breach of an Act as asserted by Ms Schwerin;<sup>6</sup> he may also determine that such action complained of was unreasonable, unjust, oppressive or improperly discriminatory along with a range of other conclusions;
- the Ombudsman does not have the power to investigate the actions of the elected council or the actions of individual councillors, but he does have the power to investigate the administrative actions of council officers and 'in any event in most cases the restriction has little impact as most actions taken by councils are the result of recommendations or reports made to Council by its officers and the Ombudsman may investigate those recommendations and reports';<sup>7</sup> and
- the Ombudsman and Deputy Ombudsman can, following an investigation, make recommendations only; they do not have the power to make binding judgements.

The Acting Ombudsman concluded that:

one comment I would like to make on the evidence given to your Committee by the witnesses is that some statements are just plain nonsense and, in particular, the reference to the Ombudsman or Deputy Ombudsman being a "feel good" department. The fact of the matter is that in respect to a number of issues which were raised with them there was a problem of a lack of evidence.<sup>8</sup>

7.8 The Director of the Office of Local Government replied that in relation to the *Local Government Act 1989*, the Minister for Local Government may appoint inspectors of municipal administration who are able to investigate certain matters associated with the operation of a council within the province of the legislation. With respect to the indemnity of Ms Crossley under the Act in relation to a defamation action, the Director stated that advice from the Victorian Government Solicitor indicated that the Act gives some legal protection to persons acting in their capacity as councillor but does not provide a blanket indemnity from all actions including the defamation of an individual.<sup>9</sup>

7.9 In evidence Ms Crossley suggested that information concerning meetings with officials was released to other Sale councillors and officials.<sup>10</sup> The Director responded that it was not the policy of the Office of Local Government to release the names of those who lodge complaints however, 'this policy cannot be enforced when complainants publicly state that they had lodged complaints with the Office'.<sup>11</sup>

6 Evidence, Ms Christina Schwerin, p. 315.

7 Correspondence, Acting Ombudsman, 6.4.95.

8 Correspondence, Acting Ombudsman, 6.4.95.

9 Correspondence, Director, Office of Local Government, 1.5.95.

10 Evidence, Ms Carolyn Crossley, p. 310.

11 Correspondence, Director, Office of Local Government, 1.5.95.

7.10 The Committee also wrote to Senior Sergeant Peter Mann inviting him to respond to comments which may have been construed as reflecting adversely upon him. Sergeant Mann replied that the allegations made about him were 'totally false and without foundation'. He noted that he had been a former councillor and that he and Ms Schwerin, Ms Crossley and Mr Smith had 'disagreed on most issues, and on many occasions the debate became extremely heated'. He concluded that 'if any of the allegations have been proved to be true, I would no longer be a Police Officer, and would have been removed from my civic duties. Neither took place'.<sup>12</sup>

### *Discussion*

7.11 The Committee notes that the former councillors have made complaints to, and sought assistance from, a large number of government agencies, with, it must be noted, varying outcomes. The Committee acknowledges the difficulties faced by the former councillors in having their complaints dealt with in piecemeal fashion. Ms Crossley described the difficulties to the Committee:

The fact that there was not one body that could deal with the whole picture. That the issues that we raised were by [their] nature complex and cross departmental. That actions in one area had consequences in another. The full picture could never be looked at as it had to be compartmentalised for each sphere of influence. Each issue was taken in isolation. We felt isolated and abandoned suffering death threats, public vilification in the press, threatening and offensive anonymous mail and general harassment. When all we were doing was raising allegations with the appropriate authorities.<sup>13</sup>

7.12 While the former councillors may have perceived that their allegations, seen in totality, indicated a wide degree of corruption and malfeasance, the agencies approached could only act within the bounds of their jurisdiction. And while the former councillors did make allegations that the investigations carried out by some of these agencies were less than satisfactory,<sup>14</sup> the Committee notes the Acting Ombudsman's response:

A large number of allegations were made with very little evidence on which to base any firm conclusions. There is, as you would be aware, a vast difference between assertions or allegations and evidence'.<sup>15</sup>

7.13 The Committee believes that the former councillors have acted in good faith in trying to have public officials made accountable for their actions. The Committee is not in a position to say that the matters raised in evidence by the former councillors amounts to corruption or organised crime. It should also be noted that the City of Sale Council no longer exists. Following changes to local government arrangements in Victoria, Sale Council has now been incorporated into the Shire of Wellington.

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12 Correspondence, Sergeant Peter Mann, 8.5.95.

13 Correspondence, Ms Carolyn Crossley, 24.5.95.

14 Evidence, Ms Christina Schwerin, p. 308.

15 Correspondence, Acting Ombudsman, 6.4.95.

7.14 The Committee does, however, believe that there may be a case indicating that those involved in the former Sale Council should have exhibited a greater degree of ethical behaviour in carrying out their civic duties. The Committee notes the comments of Keep Australia Beautiful Council after visiting Sale as part of its Tidy Towns program:

In all our years of association with committees and municipal councils in arranging Tidy Towns Presentations we cannot remember one other committee which has left all the staff feeling as disappointed as yours ... we feel that the [Sale Council] Committee were only involved for what they could gain financially and not for what they could do for Sale.<sup>16</sup>

7.15 The Committee also notes that some persons connected with the Sale Council appear to have been less than careful in recalling the facts of various incidents. This has added to the distress suffered by the former councillors. Ms Schwerin has, for example, alleged that there was the continued misrepresentation of her departure from her position as Executive Secretary to the City Engineer in 1988. Ms Schwerin was dismissed in 1988 but following union and legal action, the Sale Council withdrew the notice of termination, accepted her resignation, paid compensation, provided a reference and a written apology. Ms Schwerin has commenced defamation action in regard to the continuing allegation that she had been dismissed.

7.16 Ms Schwerin also noted that in Sergeant Mann's response to the Committee he stated that complaints made to the Equal Opportunity Board 'resulted in two writs being issued which were fully litigated in court with a result that they were both dismissed with costs ordered against the plaintiffs'.<sup>17</sup> Ms Schwerin responded that one complaint resulted in no costs being awarded against the complainant and the other is yet to be heard.

7.17 The Committee notes with concern the allegations made with respect to some members of the Sale police force. This Committee cannot condone any acts involving intimidation, favouritism, and unethical behaviour by a member of a police force and the use of government officials or government mechanisms as a means of harassment. However, most of the matters raised were brought to the attention of the appropriate agency and where an allegation was proven, action was taken. Agencies cannot act on allegations alone, evidence must be available to establish proof of wrongdoing to a standard sufficient for an agency to bring criminal or disciplinary charges. In this regard the Committee notes the response from Chief Superintendent PF Ryan, Victorian Police Internal Investigations Department, to Ms Schwerin concerning investigation of alleged death threats made to her by Sergeant Mann. The Chief Superintendent stated that 'the evidence does not enable the allegation to be determined one way or another'. However, it was found that Sergeant Mann had committed a breach of Departmental discipline and he had been formally admonished.<sup>18</sup>

7.18 A further matter raised by Ms Schwerin was the use of members of the police by the Sale Council in official capacities. The employment of police as council prosecutor occurs in

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16 Evidence, Ms Christina Schwerin, p. 318.

17 Correspondence, Sergeant Peter Mann, 8.5.95, p. 1.

18 Submission, Ms Christina Schwerin, 15.8.95, Enclosure 1.

other shires.<sup>19</sup> While this may be efficient for council, it does raise questions of conflict of interest, especially when the officer involved is, or has been, a member of council.

7.19 The Committee believes that elected officials should be able to carry out their duties and to put their views without harassment, vilification or threats. The Committee also recognises that politics at local level does involve many interest groups within small communities. As noted by Senator Macdonald:

We all understand very well the problem with the situation of community involvement that you have, because we all come from reasonably small communities ... I suggest that, unfortunately - and perhaps that is the wrong word - this sort of community interaction is the way it operates in small communities and regional cities. As senators, we fly over them and we look down and say, 'We don't know that city, but we know how it operates.'<sup>20</sup>

### *Implications for proposed Commonwealth whistleblower protection legislation*

#### **Counselling**

7.20 In her reply to the Acting Ombudsman's response, Ms Schwerin noted that she was not advised by the Ombudsman's office how to deal with ongoing harassment, death threats and intimidation. These comments reinforce the view taken by the SSCPIW on the importance of counselling services for whistleblowers. Counselling would not only help whistleblowers to cope with events after blowing the whistle but would also provide guidance and information about courses of action and such matters as common law and statutory rights and obligations.

#### **Standard of proof**

7.21 The Committee has already noted the response of the Acting Ombudsman who indicated that a number of the issues raised by the former councillors could not be pursued because of a lack of evidence. The councillors also provided this Committee with a large amount of documentation, some based on hearsay information. While the councillors may believe that a major wrongdoing has occurred it is difficult to clearly identify any links between persons and incidents from the evidence presented. The Committee acknowledges that an investigation may establish the proof required, however, agencies can only act where there is proof of wrongdoing to a standard sufficient to bring criminal or disciplinary charges.

#### **Mr Peter Jesser**

#### *Background*

7.22 In the summer semester 1990-91 Mr Peter Jesser, then a Lecturer in the Department of Human Resource Management and Employment Relations at the University of Southern Queensland (USQ), acted as moderator for Unit 51379 offered by the Department. A number of students complained to the Interim Dean, Ms Deborah Ralston, concerning the grades awarded for the Unit. The Interim Dean instructed the examiner to review all the examination

<sup>19</sup> Evidence, Ms Christina Schwerin, p. 305.

<sup>20</sup> Evidence, Senator Sandy Macdonald, p. 309.

papers. Mr Jesser also investigated the matter. He alleged that there was evidence of arbitrary marking, a high number of failing grades, errors in recording and adding up of grades, the examination required detailed answers to very narrow questions (contrary to information given to students) and not all students sat the same paper.

7.23 In March 1991, Mr Jesser drew his concerns to the attention of the Dean of the Faculty, Professor AM Barnett. The Dean passed the matter on to Professor Craig Littler who subsequently passed the matter on to Associate Professor Hede. According to Mr Jesser, Associate Professor Hede dismissed the complaints concerning the Unit.

7.24 In April 1991, Mr Jesser took the matter to the School of Management Board. Mr Jesser alleged that action on the matter was obstructed by the Dean (Professor Barnett) and so he referred the matter to the University Council. The Council asked the Interim Vice-Chancellor, Professor Tom Ledwidge, to investigate. His findings were handed down in December 1991. He concluded:

- that there were irregularities in the way the exam had been set and that Mr Jesser had performed the duties of moderator by bringing the matter to the attention of the Dean;
- that Mr Jesser's contribution to the clarification of the role of moderator was acknowledged by the School and endorsed by the Interim Vice-Chancellor; and
- that the cut-off mark for eligibility for a supplementary exam was lowered to 35 per cent and that he was reasonably satisfied that this would result in no deserving student being disadvantaged.

Professor Ledwidge therefore decided that all students who scored less than 35 per cent in the Unit and felt that they were unfairly assessed could appeal to the Deputy Vice-Chancellor for a supplementary examination.

7.25 The then Deputy Vice-Chancellor, the Dean and Mr Jesser were informed on 9 December 1991 of the Interim Vice-Chancellor's direction to give students the opportunity to sit a supplementary examination. Mr Jesser noted that the exam did not take place until November 1992 after further intervention from himself. On 19 February 1992, Ms Ralston, former Interim Dean, supplied Professor Barnett with a statement of her recollection of the facts surrounding Unit 51379. In that statement she noted that the staff member concerned had been reprimanded, the role of the moderator in the appeal process clarified and that there were no students who had outstanding appeals.<sup>21</sup>

7.26 Mr Jesser also alleged that an allegation of non-performance was made against him in June 1992 by Professor Barnett. The allegation was in a confidential memorandum from Professor Barnett to the Vice-Chancellor using a performance review of Mr Jesser carried out by Ms Ralston in February 1991. In August 1992, Mr Jesser submitted a grievance to the then Vice-Chancellor which related, in part, to the allegations of non-performance by the Dean of the School of Management, to the appointment of a reviewer other than Professor Barnett to undertake Mr Jesser's performance reviews and to the non-confirmation of tenure. In October

1992, the tenure aspect of the grievance was dealt with by the new Deputy Vice-Chancellor, Professor KL Goodwin, and tenure was granted.<sup>22</sup>

7.27 In mid-1993 Mr Jesser sought assistance from the National Tertiary Education Union to try to resolve the outstanding matters. A meeting with the Union industrial officer, the Deputy Vice-Chancellor and Mr Jesser was held in June 1993. Mr Jesser believed that at this meeting an agreement was reached that included Mr Jesser commencing 12 months study leave after five weeks notice. Mr Jesser was eventually granted 6 months leave commencing at the end of the academic year. Following further attempts to resolve the matter, Mr Jesser requested that the Deputy Vice-Chancellor honour the June agreement or deal with the outstanding matters of the grievance.

7.28 The Deputy Vice-Chancellor denied that any agreement had been reached and he maintained that a memorandum had been sent to Mr Jesser in July stating that Mr Jesser should apply for leave under the standard rules and he, the Deputy Vice-Chancellor, would ask the Dean to give the application immediate consideration. The leave was to be for 6 months, the standard period. Mr Jesser denied having received the memorandum.

7.29 On 9 September 1993, the Deputy Vice-Chancellor handed down his report on the grievance. He found, in part, that:

- Ms Ralston was dissatisfied with Mr Jesser's performance as head of Program (Postgraduate Studies), but the Deputy Vice-Chancellor was uncertain that this dissatisfaction could be called 'non-performance';
- in Professor Barnett's document of 4 June 1992, he did not take sides; his statement was one of report, not judgment; and
- there was no evidence that Professor Barnett had circulated unfavourable opinions of Mr Jesser, or that Mr Jesser's reputation had suffered.

The Deputy Vice-Chancellor offered to close and seal that part of Mr Jesser's personal file referred to in the grievance procedures and all documents associated with the grievance. These documents could then not be used in the future without the express consent of both parties and would have the effect of 'providing a new start for all parties'.<sup>23</sup> Mr Jesser claimed that this document contained a statement which he considered defamatory and a gross misrepresentation of the situation.<sup>24</sup>

7.30 Following further meetings with University officials, Mr Jesser's Union took the allegations of non-performance to the Industrial Relations Commission as an industrial dispute. The matter was heard in January 1994. The University argued that the allegation of non-performance against Mr Jesser was 'illusory' and that it had not been unduly tardy in handling the grievance. The parties were directed to engage in further consultation with a view to resolving the issues.

7.31 At the same time that Mr Jesser was involved with the matter of Unit 51379, a further matter arose concerning research work within the Department of Human Resource

22 Submission, Mr Peter Jesser, 23.1.95, p. 14.

23 Submission to CJC, Mr Peter Jesser, Attachment E.

24 Submission to CJC, Mr Peter Jesser, p. 5.

Management. In March 1993, Mr Jesser and a masters student volunteered to prepare a research proposal. Mr Jesser stated that the proposal was revised in conjunction with Professor Craig Littler and included a literature review.<sup>25</sup>

7.32 During 1993 the Department submitted a research proposal to the Faculty of Business in order to obtain funding. The Department also submitted a proposal to the Australian Research Council (ARC) under its Small Grant Scheme.

7.33 In mid-1994 Mr Jesser secured a copy of the proposal for the Faculty grant and noticed that his literature review had not been used. Shortly after, Mr Jesser came across a published article 'which contained a tabulated analysis of published articles ... almost identical to that reproduced in the research proposal which had won Faculty funding and - apparently - in the ARC Small Grant proposal'.<sup>26</sup> Mr Jesser claimed that the ARC Small Grant proposal did not cite the article as the source of the table while the Faculty proposal showed the table as being partly adapted from the published article.<sup>27</sup>

7.34 Mr Jesser wrote to the Deputy Vice-Chancellor on 7 September 1994 claiming that the ARC proposal did not acknowledge the work of Mr Jesser or the masters student involved, that a portion of the proposal appeared to have been taken from another published article and the same proposal was used to gain funding from two sources. He asked that the matters be investigated. The Deputy Vice-Chancellor found, in part, that the use of 'truncated references' was not unusual and concluded 'it seems that, granted the cooperative, collegial and open nature of the procedures, no individual's intellectual property rights were appropriated; due process was maintained at an acceptable level; and a range of potential funding sources for the interlocked projects was always openly discussed'.<sup>28</sup>

7.35 During March 1995, Mr Jesser received memoranda from the Head of the Department, Mr Jim McDonald, concerning the research project and the impact of Mr Jesser's allegations on the Department. On 10 March a departmental meeting was held and a report on the research project prepared by the Head of Department was discussed. Mr Jesser left the meeting after this Committee's inquiry was raised.

7.36 On 13 March 1995, Mr Jesser received a memorandum from the Head of the Department concerning an allegation made about Mr Jesser's authorship of a thesis guide. Mr Jesser had amended the guide in 1990 and he was requested to explain why his name appeared as author even though he had made only a small number of amendments to an earlier guide and why it took a number of years before his name was removed by other staff.

7.37 Mr Jesser indicated that his name had been added to the guide by the University 'because the University's policy at the time was to place authorship on all external study material'.<sup>29</sup> He stated that he was unaware that it was on the guide until approached some time

25 Submission, Mr Peter Jesser, 6.4.95, p. 2.

26 Submission, Mr Peter Jesser, 6.4.95, pp. 3-4.

27 Submission, Mr Peter Jesser, 6.4.95, p. 3.

28 Submission, Mr Peter Jesser, 6.4.95, Attachment J.

29 Submission, Mr Peter Jesser, 6.4.95, p. 10.

later and he agreed that it should be removed. Mr McDonald responded that authorship was only included when specifically requested by the author.<sup>30</sup>

### *The whistleblowing claims*

7.38 Mr Jesser's principal whistleblowing claim is that he reported academic malpractice at the University of Southern Queensland in 1991 relating to the examination of an academic unit in the Faculty of Business.

7.39 Mr Jesser alleged that as a result of his whistleblowing activities, he and his wife were subject to harassment. The harassment suffered by Mrs Jesser included not being treated on merit in selection processes for promotion, selection processes being halted so that her application could not be included and grievances being dismissed. Mrs Jesser subsequently resigned from her position at the University of Southern Queensland and she has since found alternative employment.

7.40 Mr Jesser maintained reprisals taken against him included: a secret reinvestigation of the charge of academic malpractice which ignored the Interim Vice-Chancellor's findings, 'presented outright fabrications and gross distortions, questioned [Mr Jesser's] motives and grossly defamed [him]'<sup>31</sup> and a secret allegation of 'non-performance' made against him with the reinvestigation of the charge of academic malpractice being used as evidence of non-performance.

### *Discussion*

7.41 The Committee's consideration of the matters raised by Mr Jesser is limited to general issues and those concerning the initial whistleblowing incident involving Unit 51379. Mr Jesser raised the matters concerning the Department's research proposals and the allegation over authorship of the thesis guide as reprisals as a result of the giving of evidence to the Committee. The Committee has reported to the Senate that Mr Jesser may have been intimidated and the Senate has referred the matter to the Committee of Privileges. These allegations are now the subject of an inquiry by the Committee of Privileges.

### *University of Southern Queensland response*

7.42 Although submissions were received from the Department of Human Resource Management and Employment Relations, the University of Southern Queensland (USQ) chose not to provide a detailed response to Mr Jesser's submission as 'there appears to be nothing to add to Peter Jesser's statement as he has, as could be expected, preempted the only submissions that could be made'. The University noted that many investigations had already been undertaken and 'all avenues have been exhausted'.<sup>32</sup> However, the University submitted the following statement:

The University finds fault with almost the totality of the case as stated by Peter Jesser.

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30 Submission, Mr Jim McDonald, 7.6.95, p. 12.

31 Submission, Mr Peter Jesser, 23.1.95, p. 13.

32 Submission, University of Southern Queensland, 10.5.95, p. 1.

Further, the University finds fault with almost every aspect of the interpretation of the matter as stated by Peter Jesser.

The University retains utmost faith in the staff of the University who have been named by Peter Jesser as being implicated in any alleged cover-up and any alleged maladministration.<sup>33</sup>

7.43 While the Committee notes that the University has conducted investigations into Mr Jesser's complaints and that significant resources have been expended, the Committee believes that it should be recognised that public interest benefits are derived from whistleblowing within public and private sector organisations and the community generally. However, the Committee, as a general principle, recognises the rights of the subjects of whistleblowing to protection in accordance with the principles of natural justice.

#### Definition of whistleblowing

7.44 The University also disagreed that Mr Jesser had made a public interest disclosure and 'consequently, under the terms of the [Queensland Whistleblowers Protection] Act, no reprisals can have been taken by the University'.<sup>34</sup> The Department of Human Resource Management and Employment Relations submitted that a whistleblower was 'an altruistic complainant who raises maladministration, malpractice and fraudulent behaviour with a view to seeking the rectification of wrongdoing and the establishment of justice' and that a person could move from being a genuine whistleblower to being non-genuine whistleblower through behaviour antithetical to the altruism of a whistleblower.<sup>35</sup> The Committee has discussed the definition of whistleblower in Chapter 2.

7.45 The SSCPIW recommended that the proposed Public Interest Disclosures Agency should act as a 'clearing house' for complaints and allegation so as to identify matters which could properly be considered as public interest disclosures.<sup>36</sup> The Committee supports the recommendation of the SSCPIW that there is a need to establish whether an allegation is a public interest disclosure. It is for the appropriate external agency to make this decision, not the organisation or individual the subject of the complaint. Further, while the Committee supports the SSCPIW's recommendation that a penalty be imposed where a person knowingly makes a false allegation, no allegation should be excluded under whistleblower protection legislation because it is made for other than altruistic motives, so long as it meets the other criteria.

#### Evidence and documents

7.46 The Committee is concerned at the allegations made by Mr Jesser relating to destruction of documents and falsification of documents. Mr Jesser stated 'I have good reason to believe that information has disappeared because of its direct relevance to the reprisals taken by the University against myself and my wife'.<sup>37</sup> The matter is being investigated by the

33 Submission, University of Southern Queensland, 10.5.95, pp.1-2.

34 Submission, University of Southern Queensland, 10.5.95, p. 2.

35 Submission, Department of Human Resource Management, 27.4.95, pp. 5,25

36 SSCPIW report, p.173.

37 Submission, Mr Peter Jesser, 23.1.95, p.18

Queensland Information Commissioner. However, as a general comment, the Committee believes that any allegations of tampering with documents are serious if proven.

7.47 Another matter raised by Mr Jesser was that USQ had complained in the hearing before the Industrial Relations Commission 'that I had been using freedom of information to gather the documents about my case and suggested that this was an unnecessary burden on the university, resources wise. The inference was that it was a vexatious use of FOI'.<sup>38</sup> The Committee found it useful to have access to additional documentation in cases where conflicting interpretations have been presented. It is also important for both sides that as full a picture as possible is obtained. It is unfortunate that Mr Jesser had to resort to such an extensive use of FOI procedures to obtain documents to present his case.

#### Unit 51379

7.48 The Committee notes that people who make public interest disclosures which lead to unfavourable outcomes have often interpreted subsequent events in a negative manner. Mr Jesser noted that:

In the end, it is no longer a matter of who was right and who was wrong or who did what to whom and why. The treatment meted out to whistleblowers sensitises them to the reprisals and the whistleblower reacts accordingly. Similarly, the organisation becomes sensitised to the whistleblower and acts towards him or her in the same way.<sup>39</sup>

7.49 It appears to the Committee that this is an apt statement in the view of the situation that arose from Mr Jesser's endeavours to have what he saw as an injustice to students rectified. Mr Jesser sought what he thought was the rightful outcome for the students and complained when this was not achieved. The Interim Dean, on the other hand, was satisfied that the matter had been concluded: the examination results were reassessed so that, she believed, apparently no students were disadvantaged, and the examiner had been reprimanded. As endeavours to have the matter brought to a satisfactory conclusion failed, the problems compounded. Mr Jesser apparently saw actions which the Department maintained were normal staff practices, such as his performance appraisal, as a reprisal for blowing the whistle. Again, the statement provided to Professor Barnett by Ms Ralston was seen by Mr Jesser as a 'secret reinvestigation' of the charge of academic malpractice.

7.50 The Department and University response to Mr Jesser included many of the elements reported by the SSCPIW as typical organisational responses to whistleblowers.<sup>40</sup> The Department sought to lay some of the blame for the problems that occurred on Mr Jesser: 'Mr Jesser had clearly failed in his duty as moderator, and therefore, should be held equally [responsible] with [the examiner] for the error'.<sup>41</sup> The Department also questioned Mr Jesser's motivations and mental stability and attempted to contain dissent within the Department. The Committee concurs with the SSCPIW's conclusion that 'it is the problem raised by the

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38 Evidence, Mr Peter Jesser, p. 407.

39 Evidence, Mr Peter Jesser, p. 400.

40 SSCPIW report, pp. 67-69.

41 Statement, Ms Deborah Ralston, p. 2.

complaint which needs to be objectively assessed, not the whistleblowers who raised the problem in the first instance'.<sup>42</sup>

7.51 The Committee makes no further comment on the issues raised by Mr Jesser as matters reported to the Senate by the Committee are still before the Senate Committee of Privileges.

### **Mr Jack King**

#### *Background*

7.52 Mr King was appointed to a position in the South Australian Department of Environment in 1984 to produce legislation on marine pollution and to 'look after marine pollution matters generally for that department'.<sup>43</sup> In 1987 Mr King produced a Cabinet submission to accompany draft legislation for marine pollution controls. It included a summary of pollution problems in South Australia and sought approval to proceed with the development of legislation. Mr King stated that he was instructed by directors of his Department to delete references in the Cabinet submission to the large amount of heavy metals being discharged to Spencers Gulf from lead smelters at Port Pirie.<sup>44</sup>

7.53 According to Mr King, that direction constituted censorship, and he raised objections to it. Mr King also claimed:

Victimisation started around that stage (all of which I opposed) and I finally got concerned enough about the Directors motives and behaviour to write to the Minister for Environment and Planning (in June 1988) pointing out what was going on and what was frustrating and preventing proper marine pollution controls.<sup>45</sup>

7.54 In July 1988, Mr King wrote to the Commissioner for Public Employment about non-compliance with reasonable management standards and with the South Australian Government Management and Employment Act (GME Act). He requested that the situation be rectified.

7.55 Mr King also forwarded the letter he wrote to the Minister for Environment and Planning to the media and spoke on ABC radio. As a result, Mr King was charged under the GME Act for making public statements to the media without permission. Mr King claimed 'that initiated a whole chain of events designed to try to get rid of me'.<sup>46</sup> Briefly, these events included: the appointment of a disciplinary inquiry as a result of his media statements; not being included in the Department of Environment and Planning following a reorganisation; being directed to have a psychological assessment; being dismissed from the Department of State Development; and, being denied a position in the Department of Labour.

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42 SSCPIW report, p. 69.

43 SSCPIW, Submissions and Other Written Material, Vol. 5, No. 91, p. 2.

44 SSCPIW, Submissions and Other Written Material, Vol. 5, No. 91, p. 3.

45 SSCPIW, Submissions and Other Written Material, Vol. 5, No. 91, p. 3.

46 Evidence, Mr Jack King, p. 289.

7.56 Mr King responded to these events in a variety of ways. He applied to the Supreme Court firstly, to have the person appointed to conduct the disciplinary inquiry removed and secondly, to prevent his dismissal from the South Australian public service. He also commenced a number of grievance appeals and wrote to the Psychological Board of South Australia, the Premier of South Australia and the Ombudsman complaining about the misuse of psychiatry by the public sector. In January 1990, Mr King wrote to the South Australian Ombudsman complaining about general non-compliance with the GME Act and victimisation. Mr King claimed that he took no action. Mr King retired in 1993 from the South Australian Water Board.

7.57 Following the introduction in South Australia of the *Whistleblowers Protection Act 1993*, Mr King made three representations under the Act. Firstly, Mr King wrote to the Ombudsman disclosing alleged corruption, maladministration, illegal behaviour by certain public officers and the misuse of psychiatry. Secondly, Mr King made a complaint to the Police Commissioner alleging corruption by Santos and others. Finally, he made a complaint to the Commissioner for Equal Opportunity alleging victimisation by Santos following his revelation of alleged corruption and operations that risked employee health and safety.

7.58 Mr King claimed that little action was taken by the Ombudsman in relation to his disclosures. Mr King stated:

I consider the current reluctance of the ombudsman to be a continuation of the victimisation that occurred prior to me leaving the public service, in that he is still endeavouring to protect the devious public servants who discriminated against me illegally, against the Act, for so many years.<sup>47</sup>

7.59 The Commissioner of Police replied to Mr King that:

In view of the circumstances, particularly the age of the information and the inability of the key witness to corroborate any of the allegations, I would not be justified in committing substantial investigational resources to enquire further into your allegations.<sup>48</sup>

In evidence, Mr King noted that the matter had been taken up with the Trade Practices Commission.<sup>49</sup>

7.60 Mr King stated that the Commissioner for Equal Opportunity had written to Santos and had received a reply but he was unaware of the contents of the correspondence.

### *The whistleblowing claims*

7.61 In evidence to this Committee Mr King indicated that his experiences of victimisation as a whistleblower date back to 1976 with respect to a company operating in South Australia, and since then he has been endeavouring to 'get something done about it'.<sup>50</sup> He also claimed

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47 Evidence, Mr Jack King, p. 282.

48 Submission, Mr Jack King, 13.13.95, p. 5.

49 Evidence, Mr Jack King, p. 284.

50 Evidence, Mr Jack King, p. 279.

that he made public interest disclosures in relation to South Australian marine pollution legislation, corruption and maladministration and misuse of psychiatry in the South Australian public sector.

### *Responses to evidence*

7.62 As a result of Mr King's evidence, the Committee wrote to the Attorney-General's Department and the South Australian Ombudsman in relation to the Whistleblowers Protection Act and to the Psychological Board of South Australia. The Registrar of the Psychological Board advised the Committee that Mr King had renewed his complaint with the Board and the Board had directed the Registrar to carry out an investigation.

7.63 Both the Ombudsman and Mr K Kelly, the Chief Executive Officer of the Attorney-General's Department, replied to the Committee commenting on Mr King's whistleblowing claims and the Act. Their comments are discussed below.

### *Discussion*

#### The whistleblowing claims

7.64 The Ombudsman responded to Mr King's claims by stating that Mr King's concerns were submitted in very general form, and that such concerns were beyond the time limitation imposed by the Ombudsman Act. Section 16(1) of the Ombudsman Act prohibits the Ombudsman from acting on a complaint made after twelve months from the day the complainant first had notice of the matters alleged, unless the Ombudsman chooses to exercise a discretion open to him based on all the circumstances of the case. Various factors are taken into consideration prior to exercising the discretion to extend the time period. These factors include:

the age of the complaint and the ability to gather corroborative and reliable evidence from witnesses; the availability and or exercise by the complainant of other avenues to address the grievance; and most importantly the availability of a tangible remedy.<sup>51</sup>

7.65 The Ombudsman stated that his Office had been conducting an informal preliminary inquiry into Mr King's claims 'in order to examine whether I should embark on a "full" investigation pursuant to ... the Ombudsman Act. I propose to advise Mr King of the outcome of my enquiry by the beginning of next month'.<sup>52</sup>

7.66 However the Ombudsman went on to make the following comment:

Mr King's concerns regarding the alleged maladministration in senior levels of the SA Public Service lack appropriate specificity at this stage for the purposes of an Ombudsman investigation, and they are now somewhat dated.<sup>53</sup>

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51 Correspondence, Ombudsman, 20.4.95, pp. 2-3.

52 Correspondence, Ombudsman, 20.4.95.

53 Correspondence, Ombudsman, 20.4.95.

He also noted that most of the witnesses had moved positions. With regard to remedy, he stated that it appeared that Mr King expected the Ombudsman's Office to 'establish the truth of his allegations to initiate disciplinary action against the public servants in question and then to publicise the matter to deter others'. The Ombudsman pointed out that his Office was not able to be an arbiter of fact in the same manner as a court and his role was not to penalise wrongdoers or publish his findings 'without compelling public interest reasons for doing so'.

7.67 Mr Kelly of the Attorney-General's Department responded briefly to Mr King's claims, in terms highly critical of Mr King:

I am at a loss to understand why it is that the Committee seems to believe that Mr King is a whistleblower and, if that is the case, what criteria it is using (if any) to make that determination.<sup>54</sup>

#### Whistleblowers Protection Act

7.68 In relation to the South Australian Whistleblowers Protection Act, Mr King made a number of claims. Firstly, that the Act was 'specious and it just does not work' and Mr King called for an independent commission against corruption to receive and process disclosures and protect whistleblowers.<sup>55</sup> He stated that such a body should have royal commission type powers and report to parliament. He went on to state that there was a need for the Commonwealth legislation to: 'allow it to take over and investigate disclosures where the State authorities have irresponsibly failed to meet their responsibilities' and the legislation should:

- (i) encourage disclosures of corruption, maladministration etc
- (ii) ensure proper investigation of all disclosures
- (iii) penalise the guilty parties
- (iv) publicise the proven corruption and maladministration (to discourage others from similar malpractices)
- (v) protect whistleblowers from victimisation
- (vi) compensate whistleblowers for victimisation (by no-cost means) and penalise the victimiser.<sup>56</sup>

7.69 Secondly, Mr King commented on the retrospectivity provisions of the Act. He noted that 'Most unresolved Whistleblower issues (including continued victimisation) still being fought ... have been going on for many years and it would be most unjust to exclude them'.<sup>57</sup> He argued that there should be no limitations or at the very least, 20 years retrospectivity.

7.70 Thirdly, Mr King noted that the retrospectivity provisions in the legislation did not relate to victimisation:

even though the legislation caters for retrospectivity for disclosures of malpractice it does not cater for retrospectivity for victimisation - and that is a problem. It is very important. That is claimed by the Commission of Equal

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54 Correspondence, Chief Executive Officer, Attorney-General's Department, 12.4.95.

55 Evidence, Mr Jack King, pp. 276-77.

56 Submission, Mr Jack King, 15.1.95, pp. 2-3.

57 Submission, Mr Jack King, 15.1.95, p. 1.

Opportunity. They said that for any consideration to be given to victimisation I would have to have made a disclosure or complaint since the date of introduction of the legislation. Whatever happened before does not matter, but I have to lodge a complaint from after the date of introduction of the legislation. Then, having lodged that complaint, it had to be a complaint of malpractice and victimisation and so on.

Then I had to have had victimisation following that disclosure before they would do anything about it.<sup>58</sup>

7.71 Finally, Mr King was also concerned with the problems, delays and criticisms associated with his taking action under the South Australian legislation. For example, Mr King stated that the Commissioner of Police appeared not to address his complaint properly 'mainly because the Commissioner of Police appears not to have the powers necessary to investigate the matters I raised'.<sup>59</sup> Mr King also stated that the Police Anti-Corruption Branch interviewed only one person, a retired Minister for Mines and Energy who denied any involvement. Subsequently the Commissioner advised Mr King that, due to the lack of corroboration, he could not justify further inquiries. From discussions with the police, Mr King concluded they do not have the appropriate powers for investigation of such disclosures and therefore cites this as a weakness in the legislation under which the matter went to the Police Commissioner. He claims that the matter should instead have gone to the Ombudsman, 'since evidence in inquiries by the Ombudsman is given under oath and, under those circumstances, conveniently forgetful memories can be prodded to rejuvenation'.<sup>60</sup>

7.72 The Ombudsman and Mr Kelly of the Attorney-General's Department responded to Mr King's comments in relation to the Act. Mr Kelly stated that Mr King's comments concerning the effectiveness of the Act were 'unsupported' and noted:

One of the principal functions of policy and legislation in this area must be to sort the genuine whistleblower from the vexatious complainer, and it appears, in the case of Mr King, that the legislation has functioned accurately.<sup>61</sup>

7.73 The Ombudsman made the following comments in relation to the Whistleblowers Protection Act: the Act gives no additional investigative powers to the Ombudsman or to any other authority; the Ombudsman's investigative powers are provided for within the Ombudsman Act; and the Act is only designed to protect a person who 'genuinely discloses public interest information to an appropriate authority for legal action'. He went on to note 'while the Act does seem to anticipate an official investigation subsequent to a disclosure', it does not compel any authority to inquire into the subject of a disclosure made by any person. He commented 'I am unsure whether Mr King has grasped this notion in registering his concerns with my Office'.<sup>62</sup>

58 Evidence, Mr Jack King, p. 279.

59 Evidence, Mr Jack King, p. 283.

60 Evidence, Mr Jack King, p. 284.

61 Correspondence, Attorney-General's Department, 12.4.95.

62 Correspondence, Ombudsman, 20.4.95, p. 3.

7.74 The Ombudsman also informed the Committee that as Mr King made his disclosures to the Ombudsman after the commencement of the operation of the Whistleblowers Protection Act he is protected from any resulting future criminal or civil liability, if such disclosures are 'appropriate' and relate to 'public interest information' as defined in the Act. The Ombudsman was of the opinion that:

the Whistleblowers Protection Act arguably does not confer protection for disclosures made prior to the commencement of the Act; and of course, it would be illogical to suggest that the Act could grant retrospective protection to Mr King or another in his situation.<sup>63</sup>

7.75 In relation to Mr King's claims that the Act is 'specious', the Ombudsman made the following comments:

I consider the Whistleblowers Protection Act is quite clear and unequivocal in its terms and provisions, and in my view, any alleged or apparent lack of overt commitment on my Office's part to investigate Mr King's concerns is more reflective of the nature of his disclosures ... the provisions of the Ombudsman Act, and my Office's resources rather than any inherent deficiency within the Whistleblowers Protection Act. I should also add at this point that my Office has been equipped with no additional funds or resources for the purposes of exercising my role under the Act.<sup>64</sup>

#### *Implications for proposed Commonwealth whistleblower protection legislation*

##### *Need for an independent body*

7.76 The South Australian experience, and this case in particular, lends support to the establishment of a body as proposed by the Select Committee on Public Interest Whistleblowing. The South Australian legislation did not create a separate body, nor did it confer additional investigative powers on the Ombudsman or any other authority given responsibilities under the Act. It appears from Mr King's experiences that frustration's have arisen in handling the case for both sides, regardless of the particular views on its merits. In the case of the Ombudsman at least, insufficient resources generally was at least implied in the evidence.

##### *Definition of whistleblower*

7.77 From this case arises the question of when does whistleblowing activity lose its character of disclosure and when do allegations of victimisation become confused with irrelevant and unhelpful criticism. This Committee supports the view of the SSCPIW Committee that the definition should be as wide as possible and discussed this at paras. 2.11 to 2.19.

##### *Retrospectivity*

7.78 Mr King has made a strong representation on this matter. The Ombudsman also commented on the position as it applied to Mr King under the South Australian Act. The Committee has discussed in paras. 2.73 to 2.76 that it considers the five year period proposed by the SSCPIW as appropriate.

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63 Correspondence, Ombudsman, 20.4.95, p. 3.

64 Correspondence, Ombudsman, 20.4.95, p. 3.

## Mr Jim Leggate

### Background

7.79 Mr Leggate was employed between 1986 and 1992 by the Queensland Department of Minerals and Energy (DME) and its predecessor, the Department of Resource Industries (DRI). During this period he raised with his superiors concerns about non-compliance with official procedures. He claimed his concerns were ignored.<sup>65</sup>

7.80 Mr Leggate maintained he was instructed by his section head that an 'administration arrangement' existed where authorised officers were not using the directions powers as prescribed in the *Mining Act 1968*, a practice which continued under the *Mineral Resources Act 1989*. Mr Leggate alleged this constituted official misconduct by allowing illegal mining, by showing reluctance to enforce non-compliance provisions and by providing insufficient resources to enforce the Act. He pointed to a substantial liability arising for cleaning up and rehabilitation of mining sites.

7.81 In 1991 Mr Leggate lodged a grievance statement with his Department, as a result of being passed over for promotion. He stated that the initial response was 'that I had been too legalistic in reporting what I considered was lessee non compliance with mining leases and related conditions'.<sup>66</sup> Mr Leggate then set out to substantiate his grievance by compiling a list of operations throughout Queensland not complying with relevant operational and lease conditions. He also wanted to show that there was 'evidence of systematic collusion between industry and the Department, over more than a decade'.<sup>67</sup> This grievance statement was also lodged with the Department. Mr Leggate noted that his grievances were investigated independently by officers appointed by the Director-General from outside the Department, but 'each investigation concentrated solely on the procedures for the appointment of new staff and avoided the "core issue" of maladministration and non-compliance'.<sup>68</sup>

7.82 Subsequently Mr Leggate went to the Queensland Ombudsman with his allegations of improper administration of mining legislation. The Ombudsman later informed him that he was unable to investigate the matters raised. Mr Leggate stated to the Committee:

The Ombudsman, after lengthy deliberation, I think, suggested that I did not have personal involvement - did not have standing, perhaps - to lodge a complaint against the mining industry: I was not being affected by the wrongdoing.<sup>69</sup>

7.83 In 1991 Mr Leggate also approached the Electoral and Administrative Review Commission (EARC). The Chairman suggested he lodge a submission with the Public Sector

65 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 4.

66 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 6.

67 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 7.

68 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 11.

69 Evidence, Mr Jim Leggate, p. 443.

Management Commission Review Team. Such a submission was made and later returned to Mr Leggate without comment.<sup>70</sup>

7.84 In 1991 a second grievance statement was lodged with the DME after again failing to be promoted. Mr Leggate believed that failure of the Director-General to respond to his first grievance, as required by Public Service Management and Employment Regulations, had left him seriously disadvantaged. The independent investigator in this case concluded that the unresolved first grievance should be finalised.

7.85 Finally in 1991, Mr Leggate lodged an appeal under the *Public Sector Management Commission Act 1990* against the "capricious and arbitrary administration" of the mineral resources legislation'.<sup>71</sup> He claimed to have been unfairly treated and was being punished for doing his job. At a hearing into the matter the convenor stated that 'it was not good enough' that the department had not responded to the non-compliance issue. The departmental representative conceded that there was a problem of non-compliance but that it was being managed using a new 'policy and planning framework'.<sup>72</sup>

7.86 Mr Leggate claimed that in the first half of 1992, he was isolated within the department and he was counselled to try 'to get me to support the government's new policy'. Mr Leggate expressed concern with a number of aspects of the new policy including that securities lodged by companies under the policy were in fact company based guarantees, not a cash bond or bank guarantee, and there were no agreed technical standards only a set of technical guidelines which were in any case, advisory only.<sup>73</sup>

7.87 In August 1992 Mr Leggate lodged a complaint to the CJC by telephone. He alleged negligence or incompetence by senior staff of DRI, in the enforcement of legislation on the rehabilitation of mining sites. He also alleged the Minister had made inaccurate statements about the DRI's enforcement of such legislation and other related matters. On 28 August 1992 the CJC advised Mr Leggate that his complaint:

did not raise any suspicion of official misconduct and the alleged maladministration by the Director-General and the department did not constitute official misconduct and were properly matters for determination by the department's relevant Minister.<sup>74</sup>

Mr Leggate was interviewed by the CJC in 1992 after making further contact with the CJC. He raised again his complaint relating to alleged negligence or inaction by the DME in relation to non-compliance, accused the Minister of dishonesty in making misleading statements in the media and alleged he was victimised as a result of his standing regarding enforcement of mining legislation.

7.88 The CJC replied in November 1992, advising Mr Leggate that its investigative jurisdiction did not extend to the allegation of negligence or incompetence on the part of

70 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 12.

71 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 13.

72 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 13.

73 Evidence, Mr Jim Leggate, pp. 445-46.

74 Submission, CJC, March 1995, p. 18.

departmental staff. In relation to the Minister, he was advised that the CJC's jurisdiction with respect to public officers was restricted to conduct which could constitute a criminal offence. The conduct complained of did not reasonably raise such a suspicion. Further, the CJC had been advised that his transfer was because 'the mining industry had lost confidence in him' and not because of his approaches to the CJC.<sup>75</sup>

7.89 Also in late August 1992 press articles appeared based on the material Mr Leggate had provided to the DRI and other bodies. Mr Leggate denied he leaked the information.<sup>76</sup> He subsequently accepted a transfer to the Forestry Service. He finished with the Service in October 1992.

7.90 Mr Leggate wrote to the Commonwealth Attorney-General in 1993 about the validation of mining grants by the Native Title Bill 1993, and the environmental performance of mining companies in Queensland. In reply the Office of General Counsel advised that the matter of principal concern to Mr Leggate, that of adherence by mining companies to environmental standards imposed by the Queensland Government, was in the jurisdiction of that Government and was 'not a matter within the direct jurisdiction of the Commonwealth Government'.<sup>77</sup>

7.91 In 1994, as a result of a complaint, the CJC conducted an inquiry into the improper disposal of liquid waste in South East Queensland. Mr Leggate appeared before the inquiry and described his experience with mining operations and regulation in Queensland since 1973. The report on that inquiry noted that Mr Leggate had been concerned:

1. That non-compliance by mines with relevant operating conditions was rife resulting inevitably in the systemic discharge of water borne pollutants into the waterways;
2. A resultant legacy for the state of rehabilitation of mines which he spoke of being \$1B but which was disputed by the Department;
3. The disrespect for the legislative provisions which bear upon the Department's regulation of the industry, e.g. authorised officers not being permitted to act on their statutory power to issue notices.<sup>78</sup>

7.92 The inquiry found no evidence of official misconduct or breach of other legislation, or that the CJC should conduct further investigation into mismanagement. However, the Commission pressed strongly for further investigation on a range of matters concerning the impact of mining in Queensland:

This investigation should ... examine a range of matters concerning the impact of mining in Queensland, the rehabilitation of mines, the adequacy of securities held by DME and the departmental policies and oversight exercised by DME, DEH, Water Resources Commission and other bodies which may have authority in mining related issues; and finally, to establish appropriate

75 Submission, CJC, March 1995, p. 18.

76 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 15.

77 Submission, Mr Jim Leggate, 22.1.95, Attachment C.

78 CJC, *Report by the Criminal Justice Commission on its Public Hearings conducted by the Honourable R H Matthews QC into the improper disposal of liquid waste in South-East Queensland*, Vol. 1, p. 6.

legislation to produce a clear basis for the policies now applied to the mining industry.<sup>79</sup>

7.93 The Committee understands that whilst no further investigation has been formally undertaken, the departments concerned are having their legislation revamped and are producing new protocols for the mining industry to take account of concerns expressed in the CJC report.

#### *Investigations of the matter*

7.94 Apart from his employer department, Mr Leggate raised his allegations with the Department of Environment and Heritage, Queensland Ombudsman, EARC, Public Sector Management Commission (PSMC), CJC and the Commonwealth Attorney-General. He received a variety of responses to his submissions. The Queensland Ombudsman ruled that Mr Leggate did not have standing, the Commonwealth stated it did not have jurisdiction, the CJC found no official misconduct had occurred, the PSMC did not interfere with the Department's recruitment and selection process and EARC directed Mr Leggate to the CJC's liquid waste disposal inquiry.

7.95 The Committee also notes the media's involvement in this matter. In 1992 articles were published based on material Mr Leggate had submitted to his department, the Department of Environment and Heritage and the PSMC. Mr Leggate asserted 'he was not the leak'. Wide media coverage was given to Mr Leggate's evidence in 1994 to the inquiry into the liquid waste disposal. The matter died away until the report of the inquiry was tabled in the Queensland Parliament on 5 August 1994 which rekindled media interest for a short time before petering out.<sup>80</sup>

#### *The whistleblowing claims*

7.96 Mr Leggate's whistleblowing claims centre on his allegations of non-compliance with Queensland mining legislation resulting in environmental damage and a potential liability for taxpayers. He claims he was victimised and pointed to his failure to gain promotion and his transfer to the Forestry Service.

#### *Discussion*

7.97 The Queensland Government has acknowledged the backlog of environmental rehabilitation and stated that policies have been implemented to address this matter.

In 1990 the Government and the DME adopted a clear and deliberate strategy to address poor environmental performance in the mining industry. A comprehensive planning framework for environmental management was developed in consultation with the mining industry and DME. This framework is embodied in the Environmental Policy for mining in Queensland and supported by the Minerals Resources Act 1989. This approach has

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79 CJC, Liquid waste inquiry report, p. 26.

80 Submission, CJC, March 1995, p. 22.

progressively led to a fundamental change in attitude and commitment to environmental management by the mining industry.<sup>81</sup>

Part of this policy of reform is a recognition of a legacy of non-compliance by the mining industry and a need to fully address past and future compliance matters.

A process of public consultation will be conducted to develop an Environmental Protection Policy for Mining under the Environmental Protection Act 1994.<sup>82</sup>

7.98 The Committee acknowledges the endeavours by the Queensland Government to address the environmental problems caused by mining. Further, the Committee considers that the implementation of this policy did play a major part in the problems experienced by Mr Leggate. It appears that Mr Leggate had difficulty reconciling his personal views with this policy or its rate of implementation. As well, according to the Government, it was Mr Leggate himself who initiated the question of his transferring to another section.<sup>83</sup> Mr Leggate was also offered and accepted a position in the Forestry Division of the Department of Primary Industries, suitable to his experience and qualifications and with no loss of remuneration or conditions.<sup>84</sup> However it appears that these problems arose because Mr Leggate attempted to implement the provisions of mining legislation as enacted by the Queensland Parliament and attempted to bring breaches of legislation to the attention of the relevant authorities. The Committee believes that Mr Leggate was acting only as required to do so as a responsible public sector employee. Legislation, as enacted by Parliament, should be implemented at least to the letter of the law. If problems arise with legislation it is the role of Parliament to amend the legislation; it is not the role of the public sector to implement 'administrative arrangements' to circumvent the letter of the law or to ignore alleged breaches of legislation.

7.99 The Committee also notes Mr Leggate's wide experience in the mining sector and considers him to be an honourable and credible witness. It may well be that the attention drawn to the matters by Mr Leggate has assisted in changes to policy relating to mining and environmental concerns.

### *Implications for proposed Commonwealth whistleblower protection legislation*

#### *Need for an independent body*

7.100 The Committee considers most, if not all, of Mr Leggate's frustration and difficulties stemmed from his difficulty in receiving any satisfaction from his initial disclosures of improper practices in his department. In order to take his claims further it was necessary for Mr Leggate to link his personal issues of victimisation to his broader allegations. The issues of improper practices which he raised would seem to be of an almost text-book quality for consideration by an independent body dedicated to public interest disclosures. Once his department refused to take action on his claims, those bodies to which he then appealed were either not suitable or lacked jurisdiction.

81 Attorney-General's statement, 21.2.95, p. 11.

82 Attorney-General's statement, 21.2.95, p. 12.

83 Attorney-General's statement, 21.2.95, p. 11.

84 Evidence, Mr Jim Leggate, p. 449.

### Whistleblowing counselling

7.101 It was understandable that Mr Leggate became increasingly agitated and frustrated as the process of making his claims extended further into different jurisdictions. The resulting antagonism is not helpful to either the efficiency or to the standing of the authorities to which such allegations are being made. However, this case may be an example where the sort of independent assistance and advice counselling as envisaged by the SSCPIW could have been usefully employed.

### Legislative protection and powers

7.102 This case raised significant questions of government policy and practice, and the difficulties particular individuals may have with those policies and practices. As the CJC clearly said, and it relates to other independent agencies as well:

It is not for the CJC to come along and say that anyone who follows the policy of the government is committing official misconduct. It is not for the CJC to dictate to the government what the policy should be. That is for electors, ultimately and for other forums to explore such as this and debate in parliament, to bring it to public notice. The CJC does not control policy by prosecution.<sup>85</sup>

The Committee believes there is an important role for the independent body in explaining to whistleblowers, where necessary, that what they are objecting to is a matter of government policy and needs action of a different kind to affect any change. However, as already noted by the Committee, it is a very different matter where the application of legislation is involved. Public sector employees must implement the law as enacted by parliament and expect that they will be supported in their endeavours to do so.

### Mr Greg McMahon

#### *Background*

7.103 In 1988 the Queensland Cabinet attempted to reduce the pay of public sector officers while those officers were engaged in military activities. Lobbying by the Army resulted in this proposal not being implemented. In December 1988, the Queensland Water Resources Commission issued a written direction concerning entitlements for Army Reserve activities. The direction limited staff to two weeks special leave per year, contradicting Governor-in-Council determinations for special leave for army reserve activities. Mr Greg McMahon, a serving reserve officer and employee of the Commission, disclosed this action to the unions and the Commonwealth Government. As a result, representations were made to the Minister for Water Resources and Commissioner for Water Resources. The Commission's instruction concerning special leave was subsequently withdrawn.

7.104 In 1991, Mr McMahon instituted grievance procedures after being passed over for a Senior Executive Service (SES) position in the Department of Environment and Heritage. He alleged discrimination in his employment because of his union and army reserve activities, the latter, if proven, constituting breaches of the *Defence Re-establishment Act 1965*. He was

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85 Evidence, Mr Barry Thomas, p. 503.