

## Other matters raised during the inquiry

### Introduction

- 9.1 As noted earlier in the report, while legislation is important it is insufficient in itself to bring about the level of change required to promote accountability and integrity in public administration through a new public interest disclosure system. For example, it has been noted that cultural change in the public sector will be required to support the objectives of the legislation.
- 9.2 This chapter covers a number of areas that are not directly referred to in the terms of reference but have nonetheless been recurring themes in evidence to the Committee. These other matters include disclosures concerning wrongdoing in the private sector, the need to change workplace culture, and the role of support services. This chapter includes a brief discussion of the relationship between the Committee's preferred model of public interest disclosure provisions and existing Commonwealth laws.

### Disclosures concerning the private sector

- 9.3 In some instances, wrongdoing within the private sector can be just as important to the public interest as wrongdoing in the public sector. Therefore it was argued, legislation should be focused on employment, such as the UK *Public Interest Disclosure Act 1998*, rather than focus on the public sector.<sup>1</sup>

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1 Dr Peter Bowden, *Transcript of Evidence*, 27 October 2008, p 25.

- 9.4 Another argument for including misconduct in the private sector raised with the Committee was based on the principle that anyone should be able to receive protection for any public interest matter. As Whistleblowers Australia told the Committee:
- ... we can see no reason why any person should not be entitled and encouraged to report public sector misconduct or other wrongdoing which is contrary to the public interest. Any person who makes such a report must be protected against any form of reprisal which may arise as a consequence of making the report.<sup>2</sup>
- 9.5 Similarly, Associate Professor Faunce argued:
- ... if you are trying to develop a comprehensive and effective system of whistleblowing protections it is quite an artificial distinction to be simply looking at the public sector service employees as if they operate in isolation from the private sector.<sup>3</sup>
- 9.6 In a 2005 report on Australia's National Integrity Systems, Transparency International Australia recommended a consistent legislative basis to facilitate whistleblowing across the public, private and civil society sectors for current and former employees based on the Australian Standard 8004-2003.<sup>4</sup>
- 9.7 While unable to provide data on the take up rate of Australian Standard 8004-2003, *Whistleblower protection programs for entities*, Standards Australia advised the Committee of anecdotal evidence that the Standard was being used in the private sector:
- ... I know for a fact that it was pushed under the [Corporate Law Economic Reform Program 9] initiatives, and I know, for example, that NAB and a few other big organisations like that have used AS 8004 as their model. I just recently did some work for the Brisbane Airport Corporation, and they have adopted AS 8004 as their model. So AS 8004 certainly does have a profile out in the marketplace.<sup>5</sup>
- 9.8 The 1994 Senate Select Committee Report on Public Interest Whistleblowing noted possible constitutional limitations for Commonwealth legislation to cover disclosures concerning private sector entities. It nonetheless recommended that, to the extent of its legislative
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2 Whistleblowers Australia, *Submission no. 26*, p. 18.

3 Associate Professor Faunce, *Transcript of Evidence*, 18 September 2008, p. 13.

4 Transparency International Australia, *Submission no. 22*, p. 3.

5 Mr Dee, *Transcript of Evidence*, 27 October 2008, p. 12.

competence, Commonwealth whistleblower provisions include the public and private sector, particularly in the education, health care and banking industries.<sup>6</sup>

- 9.9 Ms Kardell submitted that since the 1994 Senate report, public sector outsourcing, privatisation, and major corporate scandals such as HIH, OneTel and AWB there has been a change of attitude towards private sector misconduct:

The public thinking has changed as we have come to fully appreciate just how much an ethical, accountable and properly run public and private sector is in the public interest.<sup>7</sup>

- 9.10 However, since that Senate report, a number of private sector whistleblower protection instruments have been developed in a variety of regulatory regimes including:

- The Australian Standard on Whistleblower Protection Programs for Entities (AS 8004-2003);
- The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* which amended the *Corporations Act 2001* (Cth) providing protection for whistleblowers; and
- Other legislative provisions in relation to financial services, unions and employer associations.<sup>8</sup>

## The need to change workplace culture

### Issues with current workplace culture

- 9.11 The need to change workplace culture to support a pro-disclosure or 'if in doubt, report' ethos was a strong theme in evidence to the Committee. A pro-disclosure culture would support the making of public interest disclosures, encourage management to be responsive to the disclosures made and reduce the risk of adverse action against people who have made

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6 Senate Select Committee on Public Interest Whistleblowing, 1994, *In the public interest*, pp. 152-153.

7 Ms Kardell, *Submission no. 65*, p. 7.

8 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 14; Some witnesses raised concerns about whistleblowing in other sectors such as the corporate and financial services sector. For example see, Mr Leonard, *Transcript of Evidence*, 21 August 2008, p. 60. It is recognised that a number of industry sector regulators and Ombudsmen have now been established for oversight of private sector activities particularly where the activity was previously undertaken by government.

disclosures. The Public Service Commissioner noted that change towards a pro-disclosure culture required leadership in the public sector:

Any new system would also need managers and agencies to do more to promote the notion of an employee's duty to report, within a climate of pro-disclosure. This goes to the heart of the issue of cultural change within agencies.<sup>9</sup>

9.12 A number of contributors to the inquiry asserted that current bureaucratic culture is not sufficiently supportive of those who speak out. The CPSU submission noted that the topic of whistleblowing is 'somewhat "taboo", poorly understood by employees and managers alike' in the public service.<sup>10</sup>

9.13 The Chief Executive Officer of the Post Office Agents Association Ltd noted a lack of awareness about whistleblowing among his members:

In researching our submission, I contacted many of our members, both licensed post office operators and mail contractors. None of them knew about the policy. One of them eventually recalled something that he had received a couple of years ago. So I think it would be fair to say that it is not front of mind.<sup>11</sup>

9.14 Ms Dawn Phillips wrote to the Committee to express concerns that there are limited opportunities for people to access legislation, understand it, and apply it in a practical day-to-day setting. She expressed the view that the inability of non-specialists to adequately represent their own best interests is a matter of concern.<sup>12</sup>

9.15 Mr Peter Ellis drew the Committee's attention to what he perceives as a lack of ethical standards owing to a failure of senior management to model ethical behaviour, respond to issues and adequately deal with allegations of misconduct.<sup>13</sup>

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9 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 4.

10 Community and Public Sector Union, *Submission no. 8a*, p. 8.

11 Mr Kerr, *Transcript of Evidence*, 21 August 2008, p. 27.

12 Ms Phillips, *Submission no. 28*, p. 1.

13 Mr Ellis, *Submission no. 33*, p. 3.

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**Case study Culture and processes: Ms Vivian Alvarez**

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**Background**

On 17 July 2001, Vivian Alvarez was listed as a missing person. Three days later, she was unlawfully removed to the Philippines by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). Her family knew nothing of her whereabouts until May 2005. On 14 July 2003, DIMIA officers, responding to a missing persons request, found evidence that tended to identify Vivian as an Australian citizen. These officers advised their supervisor of their discovery but the police missing persons branch was not told.

On 20 August 2003, Vivian was featured on a television show about missing persons. A DIMIA officer saw the program and investigated further. The investigation identified with certainty that Vivian had been illegally removed from Australia. DIMIA then informed the police but did nothing else about the matter, either to rectify the mistake or inform senior management or the Minister's office.

Meanwhile, Ms Alvarez was physically and mentally unwell, languishing in a missionary hospice in the Philippines. Her former husband had been told by the police that Vivian had been illegally removed and it was his persistence that finally stirred DIMIA into action.

**Discussion**

Failure by a public officer to correct an error may be an offence and it would more than likely be a breach of the public service Code of Conduct. All of Vivian's circumstances should have been reported to senior management when they first came to light, and action could then have been taken to establish the facts.

DIMIA lacked systems, and a culture, for reporting middle management's failure to act. Supervisors are a logical first point of reference when an employee identifies a problem. In this case the junior staff did the right thing. But, an individual must have scope to escalate a disclosure when it appears that a problem is not being addressed by a supervisor.

Any disclosure scheme should include a standard against which a person can evaluate whether a matter should be escalated within an agency, or referred to an oversight or integrity agency, when it seems that remedial action has not been taken.

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**Suggestions for improving workplace culture**

- 9.16 Some optimism was expressed about the prospect of transforming the traditional closed bureaucratic culture to one that is more receptive to those who speak out. One witness related the process of cultural change in the public sector to the process of changing community attitudes about drink driving. The key to the successful drink driving strategy, it was argued, was that it involved redefining the behaviour as unacceptable and actively enforcing to law:

Thirty years ago many of my friends would brag that they were so drunk the night before they could not remember driving home. This was a source of pride. Of course there were laws against drink driving, but nobody took them seriously. Now, 30 years later, drink drivers are condemned, and I frequently hear comments like: 'I can only have two drinks because I have to drive home.' This is an amazing turnaround which demonstrates how social values and human behaviours can be changed.<sup>14</sup>

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14 Dr Ahern, *Transcript of Evidence*, 28 October 2008, p. 28.

- 9.17 The Community and Public Sector Union National Secretary suggested that new legislation should be accompanied by seminars and training for public servants on their role in the new public interest disclosure system.<sup>15</sup>
- 9.18 The Confidant Network of the Australian Federal Police (AFP) was suggested to the Committee as an example of a system designed to ‘build a culture of accountability that is “pro-disclosure” and which seeks to extinguish any stigma associated with reporting’.<sup>16</sup> The Confidant Network aims to provide secure and confidential advice and support to AFP members through experienced colleagues trained in handling ethical dilemmas.<sup>17</sup>
- 9.19 The AFP noted several factors contributing to the success of the Confidant Network including:
- the use of the independent database. Employees have more trust in the confidentiality of the program;
  - continued support from the Senior Executive of the AFP, a number of which are Confidants. The Commissioner is a Confidant and regularly refers to the functional capability and purpose of the Confidant network in staff messages;
  - the Confidants themselves and their commitment to the role and the independence of the Confidant Network external to the Professional Standards Portfolio; and
  - the reporting by the Coordinator of the Confidant Network directly to the National Manager, Human Resources.<sup>18</sup>
- 9.20 The WWTW project findings suggest that promoting awareness of legislation and procedure can have the effect of reinforcing a positive culture in relation to the making of disclosures:
- ... higher levels of reporting can and do appear to flow logically from a greater willingness by employees to speak up, based on a more positive culture in the organisation, encouraged by direct awareness raising. The reverse, however, also appears true: specific factors can be identified that correlate with reduced reporting rates and higher inaction rates.<sup>19</sup>

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15 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 7.

16 Australian Commission for Law Enforcement Integrity, *Submission no. 13*, p. 5.

17 Australian Federal Police, *Submission no. 38*, p. 9.

18 Australian Federal Police, *Submission no. 38*, p. 11.

19 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 50.

- 9.21 The Secretary to the Department of Immigration and Citizenship considered that legislation or ‘hard law’ can drive values and behaviour or what he calls ‘soft law’. For example, legislative obligations for agencies to report on the use of public interest disclosure provisions would strengthen perceptions about the importance of the system:

If departments were obliged to report about those arrangements to some external body, there would be some ability for confidence that each of the numerous agencies has proper arrangements in place. That, to me, would seem to be a substantial embedding of this as a key cultural issue, the so-called ‘soft law’: ‘This is the way we do things around here. You never cover up.’ You do raise issues and you are supported when you raise issues as opposed to a perception of the opposite.<sup>20</sup>

### The role of support services

- 9.22 Research undertaken by the WWTW study showed that systems for supporting whistleblowers were not well established:

... about 1.3 per cent of all public interest whistleblowers in our agencies had received organised internal witness support of some kind, but that was actually 6.5 per cent of all those public interest whistleblowers who said they had been treated badly ...<sup>21</sup>

- 9.23 Professor Sampford pointed to the need to have a facility where potential whistleblowers could access confidential advice:

... the whole point is to engage them in advice like this: ‘Here is your dilemma; I understand it. If you do this you are in the clear.’ ... there can be genuine uncertainty in these matters and people of goodwill, even whistleblowers, might say ‘Should I do it?’ or ‘Shouldn’t I do it?’ It is very valuable to have that advice, and very valuable then when they go along the process to know their rights and what things they have to be careful of – for example, ‘If you are lying about these ... matters then do not expect protection.’<sup>22</sup>

- 9.24 The Executive Director (Public Sector Practice) of the Office of Public Sector Standards Commission WA emphasised the importance of recognising the need for support of not only whistleblowers, but those against whom allegations have been made:

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20 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 7.

21 Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 16.

22 Professor Sampford, *Transcript of Evidence*, 28 October 2008, p. 7.

There is quite an array of things in there that require sensitive management. Behind all of that is appropriate support for the person who is making the disclosure and appropriate support for the person or group of people that the disclosure is being made against, as well as the whole workplace itself. So they are complex matters in terms of trying to tease out what the best systems are that support the ultimate goal of ensuring that there is a culture within an organisation that says 'If in doubt, report,' because reporting any suspected wrongdoing is the best way of getting things out in the open and dealt with and improvements made.<sup>23</sup>

9.25 Ms Deborah Ralston of the Queensland Council of Unions commented that, often, support for whistleblowers will be available under other legislation of more general application. She observed to the Committee that:

Perhaps how we view the legislation is that other assistance is provided in additional pieces of legislation which enable the whistleblower protection legislation to operate more robustly. So, in gauging its success, we also have to draw our attention to those other areas and say that, intrinsically, they all mould in together.<sup>24</sup>

9.26 In the Commonwealth setting, s. 16(2)(d) of the *Occupational Health and Safety Act 1991* states that the employer must take all reasonably practicable steps to:

- develop, in consultation with any involved unions, a policy relating to health and safety that will:
  - ⇒ enable effective cooperation between the employer and the employees in promoting and developing measures to ensure the employees' health, safety and welfare at work; and
  - ⇒ provide adequate mechanisms for reviewing the effectiveness of the measures.

9.27 Some contributors to the inquiry called for greater support for whistleblowers including counselling through workplace schemes such as Employee Assistance Programs.<sup>25</sup> The implementation of Employee Assistance Programs is a response to the requirements of the *Occupational Health and Safety Act 1991*.

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23 Ms Bird, *Transcript of Evidence*, 9 September 2008, p. 5.

24 Ms Ralston, *Transcript of Evidence*, 28 October 2008, p. 26.

25 Australian Lawyers for Human Rights, *Submission no. 9*, p. 7; Mr Ellis, *Submission no. 33*, p. 4.

- 9.28 Other support mechanisms through family, friends, unions and organisations such as Whistleblowers Australia provide valuable forms of assistance and advice.

## Relationships with existing laws

- 9.29 The Committee was asked to consider the relationship between the Committee's preferred model of public interest disclosure legislation and existing Commonwealth laws. Appendix E provides an overview of some of the specific legislation that may have some bearing on the provisions proposed by the Committee. Some of the more notable legislative relationships are discussed below.
- Existing whistleblower protection provisions for public servants under s. 16 of the *Public Service Act 1999* and for parliamentary officers under s. 16 of the *Parliamentary Service Act 1999* are to be repealed.
  - The legislation should note that its provisions have no effect on the immunity of proceedings in Parliament under s. 49 of the Constitution and the *Parliamentary Privileges Act 1987*.
  - The offence for the unauthorised disclosure of information by Commonwealth officers under s. 70 *Crimes Act 1914* is unaffected. The Australian Law Reform Commission is currently undertaking a review of secrecy provisions and any possible changes to this provision will be handled through that process.
  - There is no effect on current freedom of information laws. The Government has announced that there will be reform of the *Freedom of Information Act 1982*.
  - Protection under new public interest disclosure legislation will be available when the disclosure meets the threshold test set out in this Report. To ensure that public interest disclosure legislation adds to, and does not detract from, existing complaint, investigative and oversight arrangements, the following general principles on the relationship between public interest disclosure legislation and other Acts should apply:
    - Where there are powers under another Act to investigate or deal with a matter reported as a public interest disclosure, the matter should be dealt with using those powers notwithstanding that the disclosure may not have been expressly made under that Act.
    - Where there are powers or requirements to take action under another Act in relation to the investigation of any matter

contained in a public interest disclosure, the provisions of the public interest disclosure legislation are to be taken as also applying to the investigation of the disclosure unless there is an inconsistency, in which case the provisions of the other Act will prevail.

- Where it is decided not to investigate, or discontinue the investigation of a matter under public interest disclosure legislation, nothing in the public interest disclosure legislation prevents an investigation of the same matter under any other Act.<sup>26</sup>

## **View of the Committee**

9.30 Australian legislation on protection for disclosures concerning misconduct within the private sector appears piecemeal. In view of the concerns raised on the issue during the course of this inquiry, the Committee considers that protections for the disclosure of wrongdoing within the private sector could usefully be reviewed in the future.

9.31 The Committee accepts that existing workplace culture, in addition to the lack of protection currently available, is a major disincentive for people to speak out about suspected wrongdoing. The development of a culture that is more accepting and responsive to people who raise concerns will be an important factor in the success of new public interest disclosure legislation.

9.32 Ideally, people should feel free to raise their concerns through both informal and formal channels, about a range of matters regardless of their ability to substantiate an issue. It should be considered part of normal business activity to speak up when in doubt. As discussed in Chapter 7, appropriate support mechanisms should be available to whistleblowers.

9.33 Some of the recommendations made by the Committee are made with the intention to help drive cultural change from the top down by, for example, imposing an obligation on agencies to ensure disclosures are investigated in accordance with the legislation and notify those who make disclosures of the outcome and the reasons for any decisions taken.

9.34 However, driving cultural change from the top down is only part of the challenge. Public sector leaders need to model the values of transparency and accountability and initiate a dialogue with staff about the importance of open communication within organisations.

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26 See clause 16. Public Interest Disclosure Bill 2007.

- 9.35 It is intended that part of the extended role of the Commonwealth Ombudsman will be to conduct education and awareness raising activities in the sector and establish confidential and anonymous avenues for people to seek advice or make a disclosure.

## Conclusions

- 9.36 The Committee has made recommendations on what it considers to be priorities for model provisions for public interest disclosure legislation for the Australian Government public sector. The overarching purpose of the legislation is to promote accountability and integrity in public administration. The recommendations are guided by the following principles:
- it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
  - people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
  - people have a responsibility to raise those concerns in good faith;
  - governments have a right to consider policy in private; and
  - government and the public sector have a responsibility to be receptive to concerns which are raised.
- 9.37 Evidence to the inquiry from integrity bodies, whistleblowers, academics and other public sector agencies indicates that Commonwealth public interest disclosure legislation should address four main features: comprehensive coverage; clear guidance for participants; flexibility; and workplace culture issues.
- 9.38 The recommendations in this report provide for a comprehensive public interest disclosure system that includes not only current Australian Public Service employees, but current and former members of the broader public service including agencies under the *Commonwealth Authorities and Companies Act 1997*, contractors, consultants and the employees, persons overseas and Parliamentary staff. The scope of statutory protection available has been expanded to include protection against detrimental action, immunity from criminal liability and from liability for civil penalties, and immunity from civil actions such as defamation and breach of confidence.

- 9.39 Clear guidance for participants in public interest disclosures is provided for in recommendations that, in plain language, describe the range of matters that can attract protection and the circumstances in which protection would still apply where a disclosure is reported publicly or to third parties.
- 9.40 The recommendations outline a public interest disclosure system that is appropriately flexible by providing discretion for decision makers in accepting a disclosure where procedures are not strictly adhered to, prescribing more than one pathway for making a disclosure, enabling the range of disclosable conduct to be reported to a variety of authorised external recipients without penalty, and establishing processes for finalising disclosures
- 9.41 Finally, the report recognises the limits of legislation in achieving the desired outcome of accountability and integrity in public administration. Some of the recommendations note where procedures and obligations can assist in shaping organisational culture. The report acknowledges the role of policy, the administration and leadership within the public sector to facilitate and support those who speak out and ensure appropriate action is taken on disclosures. This requires fostering a culture of disclosure where people feel comfortable to speak out about their doubts.

Mark Dreyfus QC MP

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