CHAPTER FOUR

AUSTRALIAN CONTEXT: FEDERAL, STATE AND TERRITORY ACTIVITY

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

Recent parliamentary and government reports

Review of Commonwealth Criminal Law (The Gibbs Committee)

4.2 The Gibbs Committee was set up in February 1987 as part of a major review of Commonwealth Criminal Law. Its final report was released in December 1991.[1] Part of the report examines suggested legal reforms on the disclosure of official information and examines whistleblowing in relation to reforms to laws on official secrecy. The evaluation of secrecy laws with respect to the issue of whistleblowing was deemed necessary as "provisions which limit disclosure of official information may in themselves prevent the disclosure of information on wrongful activities in public administration, and thereby prevent such activities from being reported and dealt with".[2] Indeed, Professor Paul Finn has observed that there is no appropriate law

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

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

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

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

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

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

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

4 Gibbs Report, p.330.

5 ibid., p.335.

6 ibid., p.338.

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

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

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

(a) an indictable offence against a law of the Commonwealth, State or Territory;

(b) a gross mismanagement or gross waste of funds; or

(c) a substantial and specific danger to public health or safety.

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

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7 ibid., pp. 347-348.

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

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

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

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

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

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

10 Gibbs Report, p.351.

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

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

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

4.12 The F&PA Committee also had the benefit of Professor Finn's research and supported Professor Finn's model for dealing with whistleblowing. This model[14] recommends as a first step, that an employee or officer of a government agency should seek internal resolution of any non-compliance with legislative, governmental or administrative policy, maladministration or misconduct that they observe, by making a confidential report to the officer within the agency designated to hear such complaints. In its capacity as an independent external agency, the Ombudsman is nominated as a second avenue of referral for receiving and/or investigating as appropriate, confidential reports about wrongdoing from any person. Lastly, the Finn model provides for a public officer or employee or an officer or employee of a state owned enterprise to "go public" to a parliamentary committee with any matter that

12 ibid., p.67.

13 ibid., p.68.

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

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

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

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

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

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15 F & PA Ombudsman Report, p.69.

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

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

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

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

(a) there needs to be a conclusive result in the handling of a whistleblower complaint;

(b) whistleblowers can be wrong and it is necessary to balance different interests in a whistleblowing case;

(c) a proper process for dealing with whistleblowing is required; and

(d) even whistleblowing which is misconceived or where specific claims are incorrect can expose flaws in management systems.[19]

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

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

18 ibid., p.41.

19 ibid., pp.53-55.

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

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

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

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

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

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20 ibid., p.57-58.

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

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

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

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

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

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

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

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

(a) the officer in charge designated to receive such complaints;

(b) the Inspector-General of Intelligence and Security; or

(c) the Commonwealth and Defence Force Ombudsman in the case of other persons.

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

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

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

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

Summary

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

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

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

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

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

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

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

Legislative activity

South Australia - Whistleblowers Protection Act 1993

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

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

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

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23 ibid.

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

25 ibid.

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

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

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

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

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

to keep some matters confidential while serving the government of the day."[26] The drafting committee was also mindful of implications for the private sector where inappropriate disclosure to the media risked the undermining of corporate values and important commercial and industrial confidentiality.

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

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

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

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

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26 ibid., p.17.

27 John McMillan, evidence p.265.

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

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

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

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

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

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28 ibid., p.7.

29 Len Wylde, evidence p.414.

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

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

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

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

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

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31 ibid.

32 Police Complaints Authority, evidence p.333.

33 ibid., p.336-337.

34 National Crime Authority, evidence p.448.

4.53 This concern was commented upon in evidence:

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

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

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

New South Wales - Whistleblowers protection bills 1992-94

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

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35 Alwyn Johnson, evidence p.545.

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

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

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

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

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

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

39 ibid., p.299.

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

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

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

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

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

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

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

Queensland - EARC draft Whistleblowers Protection Bill 1992

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

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

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

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

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

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

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

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

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42 Queensland Whistleblower Study, evidence p.1028.

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

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

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

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

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

(a) conduct which breaches an Act of Queensland;

(b) a substantial and specific danger to the health or safety of the public or environment;

(c) official misconduct as defined in the Criminal Justice Act 1989;

(d) misconduct by a public official punishable as a disciplinary breach; and

(e) negligent, incompetent or inefficient management within the public sector involving a substantial waste of public funds.

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

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45 Whistleblowers Action Group, evidence p.1085.

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

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

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

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

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

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

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

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

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

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46 Criminal Justice Commission, evidence p.1169.

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

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

Australian Capital Territory - Legislative status on Whistleblowing

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

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

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48 PEARC report, p.7.

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

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

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

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

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

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

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

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

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

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

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50 ibid., p.21.

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

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