CHAPTER EIGHT

COVERAGE BY LEGISLATION

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

Jurisdiction

General observations

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

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

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

Public and Private sectors - Indistinct concepts

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

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

"Public monies", privatisation, and contractual arrangements

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

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

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

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

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

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

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2 Civil Aviation Authority, evidence p.238.

3 Department of Defence, evidence p.1339.

4 ibid.

5 State Public Services Federation, evidence p.513.

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

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

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

Public Sector Coverage

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

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6 Bill Toomer, evidence p.578.

7 ibid.

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

9 Department of Defence, evidence p.1339.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 ibid.

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

Public and private sector duty

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

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

Public sector secrecy provisions

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

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

19 Public Service Commission, evidence p.183.

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

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

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

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

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

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

> 16(2) Subject to sub-sections (3) and (4), a person to whom this section applies shall not, except when required or permitted by law or for the purposes of the performance of the person's duties, disclose any information or produce a document to another person if the disclosure of the information or the production of the document would constitute a breach of confidence.
> Penalty:$5,000 or imprisonment for 2 years, or both.[21]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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25 ibid., p.148.

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

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

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

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

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

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27 Greenpeace Australia, evidence p.1292.

28 ibid.

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

30 Gibbs Report, pp.349-350.

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

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

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

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

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

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

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

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

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

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32 The Health Insurance Commission, evidence p.1266.

33 Public Service Commission, evidence p.182.

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

intelligence which might warrant special treatment to ensure that whistleblowing does not prejudice the national interest[35]. Further discussion and recommendations on this issue are in Chapter 9.

Public v private sector workplace regulation

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

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

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

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

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

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

Internal reporting systems in the public sector

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

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

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37 Civil Aviation Authority, evidence p.238.

38 ibid.

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

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

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

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

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

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39 ibid.

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

International legal obligations

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

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

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

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

Article 19

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

Private Sector

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

Constitutional restrictions

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

> Section 51(xx), the corporations power, would support a law which empowered a Commonwealth body to investigate and report on the activities of a foreign, trading or financial corporation;
> Section 61, the executive power, would support a law in respect of whistleblowing which relates to breaches of a Commonwealth law, and
> Section 51(xx), the express incidental power, would support laws giving

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

the Commonwealth body the requisite investigative and reporting powers.

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

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

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

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

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

45 ibid., p.131.

46 ibid., p.128.

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

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

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

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

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47 Gibbs Report, p.350.

48 Gibbs Report, p.351.

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

Wrongdoing in the private sector

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

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

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

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49 Keith Potter, evidence p.560.