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

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

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

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

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

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

a) It signifies to colleagues that management regard the whistleblower as "unbalanced", thus effectively silencing further dissent and/or support for the whistleblower;

b) It refocusses the attention of an inquiry from the whistleblower's allegation onto the mental competency of the whistleblower;

c) It undermines the self confidence of the whistleblower. Not only must the whistleblower deal with the referral itself, but he or she must also deal with the doubts the referral may raise about his or her competency in the minds of colleagues; and

d) It casts a shadow on the whistleblowers integrity, soundness of mind, judgment and reputation, both work wise and personally, which, once cast, is almost impossible to remove.

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

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

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

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

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

Protection for the subjects of whistleblowing

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

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

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

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

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

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

Penalties for false allegations

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

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

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

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

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

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

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

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

36 National Crime Authority, evidence p.439.

Costs recovery - Subjects of whistleblowing

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

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

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

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

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

38 Criminal Justice Commission, evidence p.1170.

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

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

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

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

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

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39 Australian Press Council, evidence p.899.

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

Counselling services

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

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

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

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

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

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

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

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

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42 Queensland Whistleblower Study, evidence p.1026.

43 ibid.

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

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

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

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

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

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

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

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

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

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

Advice Hotline

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

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

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

47 Les Maskel, Submission no. 21, p.2 and Whistleblowers Action Group, evidence p.1090.

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

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

9.103 The proposed hotline should be located within the Agency. If the particular inquiries require further advice or assistance, the Agency should refer the person to the counselling services. The hotline number should be exposed nationally as part of an extensive education campaign, including advertising through publications such as the Commonwealth Gazette and business and union newsletters.

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

Legal aid and assistance

9.105 The Committee empathises with those who incur legal expenses in the course of making, or deciding to make, a public interest disclosure, as well as those who require legal advice after experiencing any form of victimisation for having made such a disclosure. The Committee appreciates, however, that whistleblowers are not alone in deserving assistance to meet legal costs; there are the subjects of whistleblowing, some of whom may be wrongly accused; there are the spouses and others associated with the whistleblower who suffer as a result of the public interest disclosure.

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48 WAG, evidence p.1090.

9.106 It may be argued that there are many other categories of people who deserve special assistance from the public purse. In each category, arguments can be made to support the giving of monetary assistance; for example, all those charged with criminal offences, who, having successfully defended themselves, are unable to secure reimbursement for their necessarily incurred legal expenses. Similarly, there are those litigants who will never recover the full costs actually paid for bringing or defending a legal action. The shortfall between orders for costs and costs actually paid are generally not recoverable.

9.107 The Committee acknowledges suggestions made for assisting whistleblowers with meeting legal expenses. Mr J.G. Starke QC noted:

> I consider it important that a genuine whistleblower should be indemnified for the costs of procuring legal advice as to whether or not a disclosure should be made and as to the manner of making such disclosure if this is justified. Moreover, a kind of appropriate sinking fund should be established by statute, from which fund indemnification should be provided as this becomes legitimate.[49]

9.108 The Committee, whilst of the view that the suggestion of a 'sinking fund' has merit, believes that whistleblowers should make use of some of the services which currently provide legal assistance. In every State there are legal aid initiatives aimed at providing legal services. These services are in addition and supplementary to the provision of legal aid services by the Legal Aid Commissions based in every State and territory.

9.109 The Queensland Justices' and Community Legal Officers' Association provides legal and financial assistance to the Whistleblowers Action Group. The Committee encourages other services to consider contributing to the provision of legal services to whistleblowers and associated persons; for example Community Legal Centres, Public Interest Advocacy Centres, Law Society sponsored legal advice

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49 J.G. Starke QC, Submission no. 119, p.1.

services and organisations formed for the purpose of promoting ethical standards and practices.

9.110 Although representations were made to the Committee concerning the provision of legal aid for whistleblowers, the Committee makes no particular recommendation, other than that Legal Aid Commissions should be informed that whistleblowers and actions arising from a whistleblowing activity ought to be considered as one of the types or categories of actions for which legal aid may be granted, if the applicant is otherwise assessed (means tested) as being eligible. It may be that each Legal Aid Commission will have to formulate specific guidelines for the assessing of eligibility in respect of whistleblower-type matters.

9.111 The Committee encourages whistleblowers and those associated with a whistleblowing activity, to make proper use of the counselling facilities established as part of the scheme. The counselling service should be able to advise as to rights and obligations under the legislation, as well as providing general guidance and emotional support. Where a whistleblower decides to obtain legal advice privately, the Committee agrees that the optimum situation would be for the genuine whistleblower to be able to obtain reimbursement for costs. However, the determination of whether a particular claim should be allowed might itself constitute an action. Whether a "sinking fund" or other means should be established to provide for such reimbursement, and in what circumstances such reimbursement should occur, would require further inquiry. The Committee is not of the view that it should make any such recommendation at this time.

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

Whistleblowing to the Media

9.113 The Committee suspects that there is a perception held by the general public that whistleblowing always involves 'leaking' to the media. This is a misconception. Most of the whistleblowers who gave evidence had not regarded it as necessary to take their case to the media, although a number had sought action through the media. Many of the whistleblowers had initially attempted to use 'the system' by reporting wrongdoing through internal or existing channels, before finally going to the media.

9.114 Whistleblowers who have approached the media have done so for a variety of reasons. Some whistleblowers have been so disillusioned with "the system" and have such a lack of faith in "the system", that they have felt that there was no other avenue available to them. Some felt that going public was the only means by which they could ensure protection. Some whistleblowers have tried and tested the conventional means of reporting wrongdoing and been dissatisfied with the action, if any, taken. Other whistleblowers, weighed down by the enormity of the public interest involved, have felt an onerous responsibility to society and approached the media as the only medium through which the public could be informed, the wrongdoers brought to justice and the process of reform instigated. The Committee believes that in many cases, whistleblowers have not chosen to make public interest disclosures through the media, but rather they have been morally compelled to do so.

9.115 An issue with many arguments for and against, is whether the whistleblower protection scheme should provide protection for those whistleblowers who disclose matters of public interest to the media. This raises a number of questions. For example, is it in the public's interest for the public to be informed of disclosures concerning matters of public interest? Should a whistleblower be denied protection under the legislation for informing the public of wrongdoing within organisations which ultimately affects them either in their capacity as taxpayers, consumers or ordinary citizens?

9.116 The Gibbs Committee recommended that where information concerning wrongdoing:

> was such that its disclosure without authority would not be a breach of the penal provisions proposed in [Chapter 31 of the Gibbs Report] or any special penal provision, the person would be exempted from any disciplinary sanction for publishing it to any person including the media if -
>
> (i) he or she reasonably believed the allegation was accurate; and
>
> (ii) notwithstanding his or her failure to avail of the alternative procedures, the course taken was excusable in the circumstances, which would of course include the seriousness of the allegations and the existence of circumstances suggesting that use of alternative procedures would be fruitless or result in victimisation,
>
> but such a person would not be given any special protection as regards the law of defamation or any other law of general application.[50]

After due consideration of the evidence, the Committee is of the same view that whistleblowers should have access to the media in particular circumstances which would entitle them to the protections under the legislation.

9.117 Under the Gibbs Committee recommendations, access to the media by whistleblowers would not be restricted on the basis that there exist other avenues available for the whistleblower to make the disclosure. Senator Chris Schacht disagreed with the media access envisaged by the Gibbs Committee. Senator Schacht submitted that the risk of damage to reputations made by unsubstantiated public allegations outweighed the need for protected media access. He asserted that:

> The legislation should require any whistleblowing allegations to be made through official channels.[51]

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50 Gibbs Report, p.354.

51 Senator the Hon. Chris Schacht, Submission no. 79, p.1.

9.118 The scheme recommended by EARC does not provide protection to a person disclosing information to the media, with one exception:

> Protection would be available for a disclosure to the media of the existence of a serious, specific and immediate danger to the health or safety of the public where the whistleblower has an honest belief, reasonably based, as to the existence of such danger. This exception is a recognition of the fact that in cases of serious and immediate danger, the use of the media to reach the largest number of people as quickly as possible should be permitted. In any other cases where a whistleblower takes a matter to the medial no special protection would be available.[52]

9.119 The Committee considered the option of making protection conditional upon the whistleblower adhering to specified reporting channels which do not include access to the media. There are several issues associated with adopting this course which are relevant:

- The communities right to know about matters affecting the public interest;
- The familiar complaint by whistleblowers about the futility of reporting matters to existing agencies;
- The appreciation of the Committee of the fear of retaliation or victimisation engendered in some whistleblowers.
- The Committee's appreciation of the subtlety with which organisations and individuals retaliate.
- The concern that, if whistleblowers lose protection for making disclosures to the media, there will be instances of wrongdoing which will go unreported and unchecked and consequently cost the taxpayer vast amounts of resources.

9.120 The difficulty is that if a whistleblower bypasses the Public Interest Disclosures Agency by going directly to the media, then he or she loses the

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52 EARC Report, p.232. The Australian Federal Police also believed complaints should not be made directly to the media "unless there were pressing public interest reasons for doing so", evidence p.84.

opportunity of having the allegation "screened" for the purpose of determining whether it is one which should appropriately be investigated under the legislation. Whilst this may not necessarily disqualify the whistleblower from protection, it may lead to loss of protection should the allegation subsequently be proven to not fall within the coverage of the legislation.

9.121 This being so, the Committee encourages those who consider making a media disclosure, to avail themselves of the counselling facilities under the whistleblowers protection scheme. Part of the counselling function will be to advise potential whistleblowers in relation to the options for disclosure which are available. Whistleblowers who are considering a media-disclosure would need to be informed that in the event that the allegations are later proven to be unsubstantiated, the whistleblower may not be protected under the legislation and could also be sued for defamation by the subject of the whistleblowing. There may be a range of civil actions to which the whistleblower would be vulnerable, if public disclosure is made of false or inaccurate information concerning an individual or organisation.

9.122 The Australian Press Council's views went further than the recommendations of the Gibbs Committee. The APC submitted that disclosure to a journalist, or to the media generally, should be a protected disclosure "where the whistleblower, in good faith, believes in the truth of the matter and that it is, in the public interest, for example, to disclose corrupt conduct, maladministration or substantial waste."[53]

9.123 In considering whether whistleblowers should have recourse to the media without suffering a consequential loss of protection under the scheme, the Committee was concerned to acknowledge the implications for the principle of freedom of speech. The Australian Press Council described whistleblowing as "based on the principle of freedom of expression which is expressly protected under international law

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53 Australian Press Council, evidence p.896.

and accepted by all liberal democracies".[54] As the APC points out, freedom of speech is not guaranteed in any specific enactment in Australia, but, as a democracy, such freedoms are implied as being fundamental human rights of Australians.[55]

9.124 The Committee considers that the proper balance is achieved by the Gibbs Committee's recommendations concerning whistleblowers' recourse to the media. Indeed, the Committee believes that limiting the circumstances in which recourse may be had without losing protection under the legislation, will preserve the rights of all parties to a disclosure. In a practical sense, the Committee believes that generally whistleblowers have exercised discretion when deciding to approach the media and that journalists have given careful consideration to the publication of material.

9.125 Whilst promoting disclosures of wrongdoing in the public interest, the Committee discourages the use of the media as a "sounding board" for potential informers. With the cultural and attitudinal change towards whistleblowers which the Committee believes that whistleblower protection legislation will help facilitate there should be a decline in the number of whistleblowers needing to resort to the media. The whistleblowers protection scheme should provide whistleblowers with the opportunity to report wrongdoing, and to have the matter properly investigated. There should be a corresponding decrease in the number of cases where whistleblowers are, or fear they will be victimised.

9.126 The Committee is mindful, too, of the right of government to inform itself, first and foremost, of wrongdoing within its ranks, to enable government to reform, re-educate and correct, as and where necessary, without undue and unnecessary interference. The right to be informed is not limited to government. Private sector organisations should also be allowed, wherever possible, the opportunity to correct

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54 ibid., evidence p.897.

55 See Australian Press Council, evidence p.897, citing Nationwide News Pty Ltd v. Wills [1992]. The APC further acknowledges the balance that must be struck between the liberties of individuals and the public or State - freedom of speech not being an "absolute right".

wrongdoing, to improve operations and generally implement reform within their own ranks.

9.127 The Committee appreciates, that the issue of whistleblowing to the media exemplifies the differences between the situations of the private and public sector whistleblowers. Public sector whistleblowers seek exemption from secrecy provisions and disciplinary sanction for making public interest disclosures to the media. This, the Committee believes, they should have, in appropriate circumstances. Whistleblowers in the private sector who make disclosures to the media, may be in breach of the common law in contract, equity, tort or property. By recommending that the private sector formulate procedures to accommodate whistleblowers the Committee believes that the existence of such procedures would reduce the need for private sector whistleblowers to resort to the media.

9.128 In making it's recommendation concerning protection for whistleblowers who make disclosures through the media the Committee considers that such persons should not be exempt from the laws of defamation.

9.129 In this section the Committee has discussed whistleblowing to the media. The Committee received evidence which indicated concerns over whistleblowing within the media and the reaction to disclosures of wrongdoing involving the media. Witnesses referred to 'unscrupulous activities' going on within the media and to examples of media manipulation and the important role the media plays in government and ministerial accountability.[56] The Committee makes no judgment as to the comments received in evidence, but is concerned at the lack of response to this Inquiry from the media. The Committee believes that further parliamentary scrutiny of this area could be warranted. The Committee is concerned that if the media is not open and accountable itself then the openness and accountability of government could be jeopardised.

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56 Chris Nicholls, evidence p.387 and Des O'Neill and Kevin Lindeberg, evidence pp.1137-9.

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

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

Defamation laws

9.131 The Committee is concerned to promote uniformity of the defamation laws within Australia. At present, different State and territory jurisdictions have different laws. Those laws are notoriously complex and conflicting. One whistleblower asserted that it was by the virtue of these laws that "the legal monopoly keep Australia a closed society".[57] The ramifications of such laws may be far-ranging and difficult to quantify. As a matter of principle, where the public interest is involved, plaintiffs should not be able to pick and choose jurisdictions.

9.132 The Committee considers that having conflicting laws between States and territories for the same subject matter is an undesirable state of affairs. Uniformity in legislation would increase certainty for litigants. Litigants and their legal representatives would also benefit by reducing the complexity of the laws. Similarly, there would be one less variable in the whistleblower's equation. Uniformity of defamation laws would enable legal advisers and counsellors to more precisely assist

57 John Little, Submission no. 92, page 2.

a potential whistleblower. The Committee received evidence from a number of witnesses supporting reform of defamation laws in Australia.[58]

9.133 PEARC also recommended that the issue of liability for defamation for public interest disclosures other than to proper authorities should be referred to the Queensland Attorney-General for consideration in the context of the development of a uniform law of defamation among the Australian States.[59]

9.134 The Committee is of the view that at present, whistleblowers and the subjects of whistleblowing, are able to place little if any reliance on the remedies for defamation available at common law or through the various pieces of legislation governing such actions. Not only is the complexity of the laws a bar to the defamation laws being of use to whistleblowers, but it also contributes to the high costs associated with initiating or defending such an action. Dr Brian Martin, referred to earlier in the discussion of the doctrine of the suppression of intellectual dissent, submitted that the media, as well as personal friends and supporters, is one of the most important aids for public interest whistleblowers. He stated that:

> ... the government can help to oppose suppression of dissent by giving untied support to autonomous whistleblower organisations and by changing the draconian defamation laws.[60]

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

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58 See for example Privacy Commissioner, evidence pp.850-851, Australian Conservation Foundation, evidence pp.1298-99 and Tasmanian Council for Civil Liberties, Submission no. 48, p.1.

59 PEARC report, op. cit., p.18.

60 Dr Brian Martin, evidence p.766.