

CHAPTER TEN

INVESTIGATION: POWERS AND PROTECTION

Powers of investigating agency

General observations

10.1 The Committee was required by its Terms of Reference to examine the question of powers for the relevant investigating agency. The model envisaged by the Committee places the power of investigation primarily with the employer organisation for internal disclosures and the organisation chosen as the most appropriate by the Agency to refer other disclosures to, in most cases likely to be the Commonwealth Ombudsman in the public sector and with relevant Commonwealth regulatory agencies in the private sector. Nonetheless, the Committee considers it important to discuss this term of reference generally so as to provide guidance and assistance in the formulation of any whistleblower protection scheme.

10.2 The need to discuss the issue of powers of investigation generally is amplified by the various levels at which investigations may take place. Although the Committee recommends that in the public sector the investigation function should primarily be with the employer organisation and Ombudsman, the Committee considers that because of the oversighting role which the Public Interest Disclosures Agency should have in investigations, the Agency itself should be vested with some powers of an investigatory nature. Similarly, where Commonwealth regulatory agencies are constitutionally able to be conferred with powers of investigation into public interest disclosures within the industries they regulate, the Agency should be vested with powers enabling it to perform the requisite supervisory role.

10.3 As with other areas of the whistleblower protection scheme, the Commonwealth Parliament will be unable to legislatively confer powers of investigation on an organisation to facilitate an inquiry into disclosures within some areas of the private sector. Where there are such gaps in the scheme, the Committee encourages

industries within the private sector to develop internal procedures to enable due inquiry of disclosures to proceed. It may be that disclosures in the private sector will usually involve illegality and consequently can be investigated by the relevant police agencies.

10.4 Many submissions contained express references endorsing the conferring of very wide powers on the bodies in the public and private sectors to be charged with the responsibility of undertaking the investigation of public interest disclosures. Des O'Neill suggested:

that no individual or organisation should be above the law and that for this reason alone the powers enacted by any legislation should be wide and as far reaching as possible.¹

Mr Jack King submitted that "The investigating body would need Royal Commission powers".²

10.5 The Committee considers that the powers of any investigatory agency should be determined by the nature of the work involved, and that regard must also be had to fundamental rights, freedoms and civil liberties. This view was reflected in many submissions received by the Committee. The Attorney-General's Department submitted:

Any external agency which is required to investigate allegations of serious misconduct within government agencies should be given the necessary powers (and resources) to ensure that complaints may be comprehensively dealt with in an efficient manner.³

1 Des O'Neill, Submission no. 64, p.9.

2 Jack King, Submission no. 91, p.2.

3 Attorney-General's Department, evidence p.132. See also Alan Barry, Submission no. 2, p.1; Public Sector Union, evidence p.212.

10.6 The Law Council of Australia referred to the need to weigh up the aims of the legislation against the conferring of draconian powers:

In the Law Council's view, a balance must be struck between the desirability of openness, honesty and accountability in government and the price paid for it in the bestowal of coercive powers".⁴

Such broad considerations provided useful parameters for the formulation of the Committee's recommendations.

10.7 **The Committee recommends that any investigating body must be equipped with sufficient powers to enable it to competently and efficiently perform the investigations with which it is charged.**

Powers of the Commonwealth Ombudsman

10.8 The Attorney General's Department listed some specific powers which it considered were necessary to enable an agency to comprehensively deal with complaints: the power to require the production of relevant information, documents and testimony, to examine witnesses on oath or affirmation and to enter premises. The Department noted that the Ombudsman Act 1976 provides the Ombudsman with some of the necessary powers.⁵ However, the placement of part of the investigative function with the Ombudsman's office as the Committee's model envisages, will require amendment to the Ombudsman's Act 1976 to provide for the enlargement of the powers and functions of that office as proposed in paragraphs 7.19 and 7.20.⁶

4 Law Council of Australia, Submission no. 95, p.1.

5 Attorney General's Department, evidence p.132. See Ombudsman Act 1976, sections 9 and 13 to 17.

6 See also Commonwealth Ombudsman, evidence pp. 30-38, which includes the submission of the former Ombudsman, Alan Cameron, to the Elliott Committee's Inquiry into Fraud on the Commonwealth, dated September 1992.

10.9 Following the recommendation in the F&PA Ombudsman Report, a specialist investigation unit has been established within the Ombudsman's office to investigate major complaints, including whistleblower complaints. However, "it's resources are modest and it remains the case that the [Ombudsman's] office's resource base would need to be augmented"⁷ if it took the role envisaged by the Gibbs Committee.

10.10 The 1994-95 budget provided the Ombudsman's office with a \$1.5 million funding increase. It is proposed that this funding will be used to strengthen the investigation unit allowing more investigations into systemic problems which have emerged from large numbers of complaints being received on the same subject or about the same agency. The Ombudsman will also be enabled to initiate inquiries instead of simply following up individual complaints. It is also proposed to develop a better service to departments, especially those with the majority of complaints, by establishing special liaison officers with policy and investigative responsibilities. Staff will be reallocated to regional offices where the majority of complaints are received.⁸

10.11 The Committee supports these developments within the Ombudsman's Office. However, the investigation of whistleblowers complaints envisaged by this Committee may require additional funding and resources for the Ombudsman's office.

10.12 **The Committee recommends that the Ombudsman's office should be the primary organisation to which the Agency would refer whistleblowers complaints for investigation, but with enhanced legislative powers and functions.**

Production of documents and examination of witnesses

10.13 The Criminal Law Committee of the Law Society of New South Wales, noted that the power to require the production of documents or answer questions

7 Commonwealth Ombudsman, evidence p.31.

8 Senate Estimates Committee A Hansard, 24 May 1994, pp.27-8.

should be tempered by acknowledgment of the principle that the subject of an inquiry should be excused from being required to do so, where it may constitute contravention of a law; it may tend to incriminate that person, and render that person liable to a penalty; or the information is the subject of legal professional privilege.⁹ Clearly the balancing of rights is critical to the question of powers of any investigating body and the Committee's recommendations reflect that process of consideration.

10.14 It is not the Committee's intention to set up an agency with powers which exceed the specific requirements of the work. The Committee considers that the powers to require the production of documents and the summoning of witnesses to give oral testimony are critical to the evidence-gathering task of the investigating agency. In this respect, the Public Interest Disclosure Agency and other investigating agencies, as appropriate, should be empowered to make orders for the production of documents or other evidence and the examination of witnesses. Keith Potter asserted that the powers should be confined to facilitating "exploration of specific complaints" and that the power to access, inspect and copy documents, to examine witnesses, and to enter publicly owned or leased premises should be expressly authorised in each instance by the "Commissioner" (head of the agency).¹⁰

10.15 Additional powers cited by the Attorney-General's Department were the powers to report to relevant agencies and the Prime Minister and Parliament, and to refer matters to other agencies for investigation.¹¹ The power to report to the head of an organisation which is the subject of the whistleblowing, or if not satisfied, to the responsible Minister, Prime Minister or Parliament was supported by the Health Insurance Commission¹². The Committee believes that the powers to report and refer are critical to the functions of the Agency and has recommended in paragraph 7.47

9 Law Society of New South Wales, Submission no. 105, p.2.

10 Keith Potter, evidence p.565.

11 Attorney-General's Department, evidence p.132; See also Geoff Dannock, Submission no. 11, p.5.

12 The Health Insurance Commission, evidence p.1269.

that the Agency should be able to present annual and special reports directly to the Parliament.

10.16 **The Committee recommends that any organisation charged with the investigative function in relation to public interest disclosures should be conferred with powers to require production of documents and evidence, examine witnesses, and to report on and refer matters as relevant and appropriate.**

Power of entry

10.17 The power of entry is one which the Committee cautiously recognises may be required by the investigating agency in particular circumstances. The Committee believes that the situations in which such a power should be utilised must be exceptional and the investigating agency must have reasonable grounds for the belief that the use of the power is necessary.

10.18 Accordingly, the power of entry should be restricted to circumstances where an officer believes that an act of wrongdoing has been committed or suspects on reasonable grounds is about to be committed. If relevant documents or evidence have been the subject of an order for production issued by the Public Interest Disclosures Agency, and that order has not been complied with and the investigating officer believes on reasonable grounds that the documents or evidence of such wrongdoing or anticipated wrongdoing are on certain premises, the officer may make an application to a Judge of the Federal Court of Australia for a warrant authorising the investigating officer to enter those premises. The warrant should specify the purpose of entry, being to procure documents, to take copies of such documents, to seize evidence, or such other purposes as may be necessary in all the circumstances to facilitate the officer's investigation. Such application having been made, the Judge may grant a warrant to enter and search premises if satisfied that an act of "wrongdoing" has been committed, or is suspected on reasonable grounds of having been or is about to be, committed and that the power of entry and search is likely to assist the officer in or in connection with the investigation of that "wrongdoing".

10.19 In conferring a limited power to search and enter premises, the Committee is balancing the civil liberties of individuals and organisations against the need to investigate public interest disclosures. The Committee appreciates the onerous responsibility connected with such a power. Some may argue that the legislative existence of such a power constitutes a denial of civil liberties. However, after hearing the evidence of whistleblowers, and from the accumulated anecdotal information passed to the Committee in the course of their parliamentary duties, the Committee is of the opinion that without such a power, albeit circumscribed, the ability of the agency to pursue matters of public interest would be severely limited.

10.20 The weight of evidence is in favour of the power of search and entry being available to the investigating agency. Whistleblowers generally insisted on the need for such a power:

... in particular the Agency should be able to enter premises without notice in order to either seize documents or evidence, examine witnesses or witness a wrongdoing (e.g. disposal of chemicals affecting public health). The giving of notice could lead to the destruction of or the coverup of evidence ...¹³

10.21 Those groups concerned specifically with civil liberties who made submissions did not oppose the need for the power of entry in whistleblowing matters. The Tasmanian Council for Civil Liberties stated, for example, that the investigative body should have the same powers as the National Crime Authority.¹⁴

10.22 Whistleblowers Australia summarised the position of many whistleblowers with respect to the balancing of rights and the public interest:

13 Alwyn Johnson, evidence p.535. See also Bill Toomer, evidence p.585.

14 Tasmanian Council for Civil Liberties, Submission no. 48, p.1.

The propriety of investigative powers must not be shackled in any respect. Public interest, being truth and accountability, must prevail over secrecy where secrecy for whatever reason, may protect the corrupt.¹⁵

10.23 Whilst many witnesses confined their comments to search and entry of public sector organisations, the need for this power to be available in respect of the private sector was clearly identified to the Committee. For example, in the case of environmental pollution, the Committee was told that the power might be particularly relevant in the private sector.¹⁶ Keith Potter expressed the view that the power to enter private premises, however, should be "invoked under normal processes and implemented by the Australian Federal Police".¹⁷

10.24 The Committee, having determined that a power of entry and search is a necessary power in a whistleblower protection scheme, considered whether any prior notice should be given to the subjects of whistleblowing of the intended exercise of the power to enter premises. There was certainly the suggestion made that early warning might result in the destruction or cover up of evidence,¹⁸ and that to ensure genuine results from investigations, procedures must be carried out with little or no pre-warning. However, the Committee, in weighing these considerations against the civil liberties involved in forcing entry to private property, decided that justice demands that individuals and organisations should be given the opportunity to voluntarily produce evidence and the right to respond to requests and orders for production of documents and evidence.

10.25 The Committee places great emphasis on the principles underpinning the administration of our justice system, in particular, the presumption of innocence. To force entry to premises without warning of the investigation at hand, and without

15 Whistleblowers Australia, evidence p.703.

16 Dr Jennifer McKay, Submission no. 28, p.1.

17 Keith Potter, evidence p.565.

18 Alwyn Johnson, evidence p.535.

the opportunity to voluntarily produce material in accordance with an order from the Agency, strikes at that presumption, and may constitute an infringement of basic civil liberties. Notwithstanding the enormity of the public interest at stake in some whistleblower matters, the Committee is of the view that the wider public interest would not be served by the recommendation of powers which would be at variance with any of the fundamental elements of our justice system.

10.26 The Committee appreciates that the Ombudsman's office has a power of entry under section 14(1) of the Ombudsman Act 1976. That power is to enter "any place occupied by a Department or prescribed authority". That existing power may need to be circumscribed in relation to the investigation of whistleblower complaints requiring the proper application for a warrant to be obtained from a Judge of the Federal Court.

10.27 **The Committee recommends that the power of entry should be available to the Public Interest Disclosures Agency and the relevant investigating body in prescribed circumstances on application to a Judge of the Federal Court of Australia for a warrant.**

Engagement of Experts

10.28 The necessity of the Agency or any other investigating agency to be able to consult with or to engage staff and consultants for the purpose of utilising particular expertise demanded by the subject matters of a whistleblower's complaint was recognised by the Committee. Whistleblowers from particular industries noted the need, as did the National Crime Authority.¹⁹

10.29 Expertise and resources are crucial to the Agency and the investigating agency being able to perform their functions. It was even suggested that the use of relevant expertise was so critical to the powers of investigating and determining

¹⁹ Alwyn Johnson, evidence p.535; National Crime Authority, evidence p.438.

complaints that the power to second experts should constitute a "primary" power of the investigating agency.²⁰

10.30 The Committee recommends that the Public Interest Disclosures Agency and the investigating bodies be empowered to utilise expertise as and where it is deemed necessary. Such expertise may be procured by secondment, transfer, contract or by whatever means are necessary to obtain expert services.

Private sector investigations

10.31 The above comments whilst relating generally to the powers of organisations charged with the responsibility of investigating public interest disclosures, are applicable to the private sector. The Committee is of the view that where the Parliament can legislate for the private sector, it should do so by providing relevant regulatory agencies with powers of investigation. Regulatory agencies which could be charged with the responsibility of receiving and investigating public interest disclosures of wrongdoing in the private sector include Austel, Australian Securities Commission, Civil Aviation Authority, Environment Protection Authority, Health Insurance Commission, Insurance and Superannuation Commission and Reserve Bank of Australia.

10.32 As far as it is constitutionally able, Commonwealth regulatory agencies should also be equipped with sufficient powers to enable proper investigation of public interest disclosures. They should be able to require the production of documents and evidence, to examine witnesses and hear oral testimony, to report and refer matters to industrial organisations and Parliament and to procure necessary expertise. The power of entry, however, should be exercised by officers of the relevant police force.

10.33 The Committee appreciates that existing Commonwealth regulatory agencies have powers of varying degree tailored to investigations within the ambit of

20 Colin McKerlie, Submission no. 54, p.5.

their authority. In some cases, the legislation governing these bodies may require amendment.

10.34 **The Committee recommends that Commonwealth regulatory agencies, where applicable, be responsible for the investigation of public interest disclosures in the private sector.**

Secrecy Provisions

10.35 Based upon the evidence of the Privacy Commissioner,²¹ **the Committee recommends that investigating agencies should have power to override secrecy provisions which serve to prevent information being disclosed which might assist the investigators in their task. The Committee has recommended in Chapter 9 that public sector whistleblowers be exempt from sanctions for contravening relevant secrecy or confidentiality provisions in all but a narrow category of cases. The Committee further recommends that the same exemption should also apply to witnesses who are called upon to give evidence relevant to an investigation of a public interest disclosure.**

Protection for investigating body and its members

10.36 The Committee is aware of the sensitive nature of the matters which the Public Interest Disclosures Agency and Board, and the investigating agency will be required to deal with under the proposed legislation. The Committee is therefore concerned to ensure that the Board members, Agency officers and the investigating officers should be adequately protected. Protections are necessary to ensure that members and officers can perform their duties diligently without fear or favour. The public interest aspect of the investigations to be conducted demand freedom from coercion. The independence of the Agency and its aims should not be compromised.

21 Privacy Commissioner, evidence p.835.

10.37 The Committee is of the view that there are two requisite forms of protection needed - protection from civil action and protection from intimidation or harassment in the performance of their duties.

Protection from civil action

10.38 Members of the Public Interest Disclosures Board, officers of the Agency and officers acting under the direction of the investigating agency should not be liable to an action, suit or proceeding for, or in relation to, any action done in good faith in pursuit of the performance of their duties. This protection from civil action is modelled on section 33 of Ombudsman Act 1976:

Ombudsman not to be sued

33. (1) Subject to section 35, neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of any power or authority conferred by this Act.

The Inspector-General of Intelligence and Security Act 1986 provides immunity in similar terms in section 33(1).

10.39 The abovementioned Acts also provide that where a complaint is made or a document produced or evidence given to the Ombudsman or the Inspector-General as the case may be, a person will not be liable for any loss, damage or injury suffered by reason only of the making of the complaint or production of the document on giving of evidence.²² Any investigating agency and its officers entrusted with the function of investigating public interest disclosures, will require protection couched in terms similar to these provisions. Together, such provisions would sufficiently protect the investigating officers from civil suit. Given that the Public Interest Disclosures Agency will be overseeing the investigation process, the same protections should be expressly conferred on the members and officers of the Agency. The Committee is

²² See Ombudsman Act 1976 section 37; Inspector-General of Intelligence and Security Act 1986, section 33(2).

of the view that protections of this nature should be available to all officers who are involved, either directly or in a supervisory capacity, in the investigation of disclosures.

Protection from intimidation or harassment

10.40 The members of the Public Interest Disclosures Board and officers of the Agency should also be protected from acts of intimidation encountered in the course of their duties. In this respect the Committee is of the view that the whistleblower protection legislation should make it an offence to interfere with, harass, intimidate or obstruct members or officers of the Board, Agency or investigating agency in the performance of their duties. The Ombudsman Act provides penalties for wilfully obstructing, hindering or resisting the Ombudsman and officers in the performance of their duties. Given the serious ramifications of some of the work of the Agency and the investigating agency, it was proposed that there may be a need to increase penalties to ensure that investigations are undertaken without obstruction.²³ Increasing the range of penalty which may be imposed to include community work orders would indicate the diversity of categories of wrongdoing which may be investigated under whistleblower protection legislation.

10.41 Not only does the evidence to the Committee support the enactment of self-protection provisions,²⁴ but so too, does legislative experience. Organisations charged with special responsibilities typically have the in-built legislative protection mechanisms which accord members and officers immunity from civil or criminal processes. Examples of such protections are contained in:

- . The National Crime Authority Act 1984, section 36
- . Ombudsman Act 1976, section 33
- . Inspector-General of Intelligence and Security Act 1986, section 33

23 Geoff Dannock, Submission no. 11, p.6.

24 See State Public Services Federation, evidence p.513A; National Crime Authority, evidence p.439.

- . Human Rights and Equal Opportunity Commission Act 1986, section 48(1) and
- . Independent Commission Against Corruption Act 1988 (NSW), section 109 (1)
- . Criminal Justice Act 1989 (QLD), sections 100 and 101

The Privacy Commissioner noted that no special privacy issues appeared to be raised by the consideration of protections that should be extended to any investigating agency and its members.²⁵

10.42 The formulation of self-protective mechanisms for the agency must not be such as to compromise the accountability of the agency. A proper balance must be achieved so that such mechanisms do not enable members and officers to operate in a manner inconsistent with the objectives of whistleblowers protection legislation. In this context the use of phrases such as "in good faith" should be carefully considered. Whistleblowers submitted that "there should be very clear guidelines as [to] what constitutes "good faith" in the performance of that function".²⁶

10.43 The difficulties which may confront the Public Interest Disclosures Agency and investigating officers were described as being equivalent to the pressures placed upon whistleblowers themselves:

Any investigating body and its members can expect to be subjected to the very same strategies of attack, intimidation and reduction of standing and status as has faced any whistleblower to date.²⁷

It was asserted that in all levels of government and management there are those who will attempt to "stamp out anyone who questions them or attempts to remove the

25 Privacy Commissioner, evidence p.836.

26 Keith Potter, evidence p.565; See also Bill Toomer, evidence p.585.

27 Christina Schwerin, evidence p.493.

network of control they have established".²⁸ The Committee considers that the two types of protection recommended are proportionate to the risk of retaliatory action and harassment associated with the performance of duty under a Whistleblowers Protection(or public interest disclosures) scheme.

10.44 The Committee recommends that the Public Interest Disclosures Agency and Board, their members and officers and the investigating agency and its officers should, in the least, be protected from:

1. Harassment, intimidation and obstruction in the performance of their duties; and
2. Civil action arising from the performance of their duties, in terms similar to that protection contained in Sections 33 (1) and 37 of the Ombudsman Act 1976.