

subsequently transferred to another position which he claimed distanced him from his area of expertise and therefore damaged his career.

7.105 Mr McMahon and his union, the Association of Professional Engineers and Scientists, Australia, (APESA) attempted to have the matters resolved. This included representations to the Queensland Public Sector Management Commission (PSMC). In part, Mr McMahon and APESA sought to have certain documents relevant to Mr McMahon's case preserved for three years rather than one year as normally applied to such documents under the Queensland Archives Act. The PSMC refused this request, replying that the application of the provisions of the Archives Act were outside the powers of the Commission and that alleged breaches of Commonwealth legislation were not within the jurisdiction of the Commission.

7.106 Following the failure to have the matters of his grievance resolved, Mr McMahon received legal advice that 'the only practical avenue I have with which to have my allegations investigated is through the courts under the [Defence and Defence Re-establishment] Acts'.⁸⁶ In April 1995, the ACTU wrote to the Federal Attorney-General on behalf of Mr McMahon concerning legal action proposed by Mr McMahon to test Part II of the Defence Re-establishment Act. Part II of the Act contains provisions to protect members of the Reserve Forces from disadvantages in their civilian employment imposed on them because of their obligations for defence service. The ACTU sought from the Attorney-General's Office assistance under the *Judiciary Act 1904* to enable Mr McMahon to test the Defence Re-establishment Act on issues including: determining the scope of the protection given to public sector employees by the Act; ascertaining the rights of the Commonwealth and states for legislating and/or regulating the employment of state public servants who are also members of the Reserve forces; and, establishing what actions by employers constitute disadvantage to public sector employees in their employment under the Act.⁸⁷

The whistleblowing claims

7.107 Mr McMahon claimed that he made a public interest disclosure in bringing to the attention of the Commonwealth and Queensland governments a breach of Commonwealth legislation by the Water Resources Commission. Mr McMahon also claimed that as a result, he was discriminated against in his employment.

Discussion

7.108 In his submission to the Committee, Mr McMahon requested that the Committee make a finding that:

- all reasonable efforts had been made by Mr McMahon, his union and the Senate to have his case resolved through the Queensland State Government;
- the allegations are of substantive public interest and are of direct responsibility of the Commonwealth Parliament under its defence powers; and
- therefore the Attorney-General provide Mr McMahon with legal aid and assistance to take his allegations of discrimination in employment to the courts.

⁸⁶ Submission, Mr Greg McMahon, p. 10.

⁸⁷ Correspondence, Mr J Thompson, Acting General Secretary, ACTU Qld, to the Attorney-General, 27.5.95.

7.109 Mr McMahon indicated that there are no other avenues left for him to seek redress other than by testing the Defence Re-establishment Act through the courts. APESA noted that the Queensland Anti-discrimination and Whistleblowers Protection legislation did not apply as the events occurred before the legislation came into effect; the Industrial Relations Commission could only deal with secondary matters and not matters related to compensation; it was not recommended that Mr McMahon seek redress through the CJC; and, PSMC had not agreed to requests for a fair treatment appeal.⁸⁸

7.110 The Committee finds it is unfortunate that there appears to be no other avenues left open to Mr McMahon, and supports the approach by Mr McMahon to the Attorney-General for assistance.

Implications for proposed Commonwealth whistleblower protection legislation

7.111 Mr McMahon's cases raises two main issues for consideration: the effective protection of a State public sector employee disclosing breaches of Commonwealth law by other State officials; and, legal aid for whistleblowers who have no alternative but to seek intervention through the courts. The issue of the protection of whistleblowers in other jurisdictions is discussed in paragraphs 3.16 to 3.20 and legal aid for whistleblowers is discussed in paragraphs 2.77 to 2.80.

Mr Robin Rothe

Background

7.112 In 1990 Mr Robin Rothe commenced employment as Building Engineer/Deputy Principal Building Surveyor with the Albert Shire. He was in charge of the building department of the Council. During 1990, the CJC received a complaint from Mr Steve Bell alleging corruption in the building department of Albert Shire. Mr Rothe was directed by the Deputy Shire Clerk to assist the CJC in its investigation of the matter.⁸⁹

7.113 On 16 June 1992 Mr Rothe was directed by Mr Terry Moore, General Manager/Shire Clerk, to vacate his office and report for alternate duties, as Project Engineer. The reasons given included that the Council was not happy with Mr Rothe's management style, that complaints had been made and that he had not lifted the morale of the building section. Mr Rothe viewed this move as a demotion, although he maintained the same level of salary and entitlements. Mr Rothe contacted his union's Industrial Officer and meetings were held between the parties involved. The Industrial Officer in his report on the matter noted that Council officers were unable to produce documentation to substantiate generalisations made about Mr Rothe's performance and that the meeting 'disturbed me. It was obvious to me that a decision had been made to remove Mr Rothe ... for some unknown and unspecified reason ... it became apparent that Mr Rothe had upset someone in performing his duties ... that factor

88 Submission, APESA, 13.1.95, p. 4.

89 Evidence, Mr Robin Rothe, p. 429.

influenced whoever made the decision to remove Mr Rothe'.⁹⁰ The matter was not resolved and a notification of dispute was filed with the Industrial Relations Commission.

7.114 On 7 July Mr Rothe was subpoenaed to attend and give evidence at an Arbitration hearing in relation to building work on a residence at Broadbeach Waters. On 24 July, Mr Rothe claims that the Shire Clerk made accusations concerning his conduct as a Council officer. Later that day, Mr Rothe made a request for annual leave and gave the Shire Clerk a document containing allegations of maladministration and official misconduct concerning council staff. The latter referred to matters arising from his attendance at the hearing into the Broadbeach Waters residence.

7.115 On 28 July 1992 Mr Rothe lodged a claim for workers compensation. On 30 July Mr Rothe was served with a letter of termination, dated 27 July 1992. No reason for dismissal was given. The claim for workers compensation was initially rejected but was upheld on appeal by an Industrial Magistrate in November 1993. The matter before the Australian Industrial Relations Commission was heard in August 1992. The parties agreed to private discussion but the matter was not resolved.⁹¹

7.116 In November 1992 Mr Rothe contacted the CJC and indicated that he had been dismissed from the Albert Shire because he had made allegations of misconduct against certain council officers. In December, he supplied the CJC with a detailed statement, including allegations concerning the house at Broadbeach Waters.

7.117 In January 1993, in an interview with a CJC officer, Mr Rothe made further allegations concerning the inconsistent application of building legislation and the improper relationship between a Council officer and a builder. The CJC interviewed two witnesses with respect to the relationship between the council officer and builder. The CJC informed Mr Rothe on 24 February that his general allegations about Council officers did not raise a reasonable suspicion of official misconduct and that the allegation concerning the builder and council official had occurred before the establishment of the CJC and there were no exceptional circumstances justifying further investigation.⁹²

7.118 In August 1993, Mr Rothe contacted the CJC with material that he alleged indicated either misconduct or corruption in the Albert Shire Council. The additional material concerned the Broadbeach Waters residence and he also indicated that a council report and building file had been tampered with.

7.119 In September 1993, the CJC received a complaint from the builder of the residence alleging misconduct on the part of Mr Rothe and another building inspector in relation to the same building dispute, including that Mr Rothe and the other building inspector had lied in the arbitration hearing about the extent of defects in the residence.

7.120 On 15 February 1994 a statutory declaration made by Mr Rothe concerning the Albert Shire was tabled in the Queensland Parliament by Mr Peter Beattie, MLA. The declaration

90 Submission, Mr Robin Rothe, 5.6.95, Attachment 12.

91 Evidence, Mr Robin Rothe, pp. 434-35.

92 Submission, CJC, March 1995, pp. 6-7.

contained allegations about councillors attendance at a conference and use of council funds at that conference.

7.121 On 22 June 1994 the CJC informed Mr Rothe in writing that, in relation to Mr Rothe's complaint concerning the construction of the Broadbeach Waters residence, it had found that there was no evidence to substantiate the charge of official misconduct on the part of any council employee. However, the CJC recommended that the actions of two officials should be referred to Council for it to consider taking disciplinary proceedings. The CJC also advised Mr Rothe that it was unable to assist him with respect to his dismissal from Albert Shire as the CJC's whistleblowing protection extended only to those who had given information to the CJC and had suffered victimisation as a result. The builder was also advised that his complaint against Mr Rothe and others had not been substantiated.

7.122 On 15 March 1994, Mr Rothe had made a further complaint to the CJC, Queensland Ombudsman and Minister for Housing Local Government and Planning concerning the allegations set out in his statutory declaration. Although the CJC sought to interview Mr Rothe, he declined as he believed that a further investigation by the CJC would be 'wasting my time, given the way the commission had corrupted the previous investigation'.⁹³ The CJC did undertake an inquiry into the matter, including a financial analysis of the material related to the conference, and reported to Mr Rothe on 21 September 1994 that, in the CJC's view, the available evidence was insufficient to substantiate, to the required standard, that improper claims for expenditure had been made.⁹⁴

7.123 In November 1994, as a result of the complaints against the Council, the CJC's Corruption Prevention Division commenced a management systems review. A report containing 91 recommendations for initiatives which could reduce the risk of corruption in the Council. The Council has indicated its willingness to comply immediately with some of the requirements and support for others.⁹⁵

The whistleblowing claim

7.124 Mr Rothe claimed that he made allegations of maladministration and official misconduct by officers of the Albert Shire Council. He was, a short time later, dismissed from the Albert Shire Council.

Discussion

Criminal Justice Commission

7.125 In relation to the CJC, Mr Rothe has made two main allegations. First, that the CJC investigations were conducted in a less than diligent fashion, that the investigation into his complaint concerning the Broadbeach Waters residence was spurious and mistakes were made in letters to him. Secondly, that he should have been offered whistleblower protection by the CJC on the basis that he 'instigated' the 1990 investigation into the Albert Shire Council through Mr Steve Bell.

93 Submission, Mr Robin Rothe, 5.6.95, p. B4.

94 Submission, CJC, March 1995, p. 14.

95 Submission, CJC, March 1995, pp. 14-15.

7.126 The CJC did not accept Mr Rothe's assessment of its response to his complaints. The CJC stated that, in relation to the 1990 complaint concerning the Albert Shire Council, it did not sweep the matter under the carpet: the CJC interviewed 54 witnesses during its investigation.⁹⁶ Concerning the further complaints, the CJC stated that between September 1993 and May 1994 it 'obtained hundreds of pages of records in relation to Rothe's allegations and conducted extensive interviews with all of the relevant witnesses, including Rothe'.⁹⁷

7.127 The CJC also noted that Mr Rothe's complaint of a spurious investigation appeared to be based on a letter he had received from the Queensland Ombudsman. That letter stated that:

From my examination of the material you have submitted, it would appear that the matter complained of by you would, if proven, constitute official misconduct and therefore is a matter which falls within the jurisdiction of the Criminal Justice Commission to investigate.⁹⁸

Ms Hamilton of the CJC noted that 'as you would appreciate, the ombudsman was saying no more than that it could amount to official misconduct, so he would refer it to us. We investigated it and found that it was not official misconduct'.⁹⁹

7.128 As to the alleged mistakes in the CJC's letters to Mr Rothe, Ms Hamilton stated:

I do not think, on any fair assessment, the matters he pointed out could be considered mind-boggling. Some of them were quite unfair in context ... that he had had a conversation with an investigator but it was wrongly categorised as a telephone conversation when it was not a telephone conversation ... in cases like this it is very easy just to write a letter saying, "We have investigated your complaint and it was not substantiated" and probably the commission is not required to do more than that. But the commission gave Mr Rothe a very detailed response ... In a letter of that length, and dealing with a complex issue like building regulations, it is perhaps inevitable there will be some minor mistakes. But I think it was very unfairly categorised by Mr Rothe as being that the commission got it wrong because of those few examples which he brought forward. In fact, the commission conducted a lengthy investigation into the matter. It was unable to find any evidence of official misconduct or criminal offences.¹⁰⁰

7.129 Mr Rothe also noted that in the CJC's letter to him of 22 June 1994, the CJC, as a result of the investigation into the Broadbeach Waters' residence, had referred two matters to Council indicating that Council consider taking disciplinary proceedings against one officer and recommending disciplinary action against another. In the letter to the Albert Shire Council of 19 August 1994 concerning the same matter, only one matter was referred to Council involving the recommendation of disciplinary action against a Council officer.

96 Evidence, Ms Theresa Hamilton, p. 483.

97 Submission, CJC, March 1995, p. 15.

98 Submission, CJC, March 1995, p. 16.

99 Evidence, Ms Theresa Hamilton, p. 489.

100 Evidence, Ms Theresa Hamilton, p. 486.

7.130 In evidence to the Committee, Mr Rothe maintained that he should have been offered whistleblower protection on the basis that he was the originator of, and assisted with, the investigation of the 1990 complaint concerning the Albert Shire building department and that his dismissal was linked to that complaint. Mr Rothe stated:

I would put to you that I was the originator of that complaint. I was concerned about the position that I held with Albert Shire Council ... I was concerned about my position with the council right from the outset. I used the complainant, Mr Steve Bell, who made fairly firm assertions as to what was going on within the department, and he authored the document and I delivered it through the system.¹⁰¹

Mr Rothe also asserted 'as a result of my "making a complaint", which was investigated by the CJC in 1990/91, there was ongoing conflict between myself and some subordinate staff, senior staff and Council'.¹⁰²

7.131 In answer to a question from Senator Abetz concerning whether he, Rothe, had made the allegation about the Council Mr Rothe answered 'I was sufficiently concerned to recognise that the complaint made to me by Mr Steve Bell had prospects of being a genuine complaint, and I dealt with that accordingly'.¹⁰³ Mr Rothe also noted that he did not read Mr Bell's complaint before he handed it to the Shire Clerk.

7.132 Mr Rothe stated that in interviews with CJC officers he had advised them of 'how that particular complaint came into existence'.¹⁰⁴ However, Mr Rothe was unable to state categorically that during the 1990 investigation that he had indicated to CJC investigators that his employment was at risk because of his involvement with the investigation.¹⁰⁵ However, in a CJC memorandum dated 17 September 1993, it is noted that Mr Rothe told a CJC officer that his dismissal had 'something to do with [Rothe's 1992 memo to the Shire Clerk] and other co-operation he has provided to the Commission'.¹⁰⁶

7.133 The CJC made the following observations concerning Mr Rothe's contact with the Commission and its whistleblower protection program. In relation to the 1990 investigation, Mr Rothe was not the complainant, but he acted as a conduit for information to be placed before the Commission and was interviewed by the Commission during the investigation. The CJC stated that Mr Rothe did not specifically suggest to it that the investigation was the cause of his dismissal and such a connection was therefore never investigated.¹⁰⁷ Ms Hamilton also suggested that 'it would be very difficult to show any connection between the fact that he was

101 Evidence, Mr Robin Rothe, p. 429.

102 Submission, Mr Robin Rothe, 5.6.95, p. A3.

103 Evidence, Mr Robin Rothe, p. 430.

104 Evidence, Mr Robin Rothe, p. 430.

105 Evidence, Ms Theresa Hamilton, pp. 431-32.

106 Submission, Mr Robin Rothe, 5.6.95, Attachment 11.

107 Evidence, Ms Theresa Hamilton, p. 483

interviewed as one of 18 witnesses at the council and that he was dismissed two years later', particularly in view of his record of employment with the council.¹⁰⁸

7.134 In relation to Mr Rothe's dismissal, Ms Hamilton stated that although it is true that he was dismissed a short time after submitting a memorandum outlining misconduct, there were memoranda on council files noting dissatisfaction with Mr Rothe's performance and on-going problems with the building department, as well as concerns over his private dealings with the Robina Land Corporation, 'the council's dissatisfaction with him clearly predated his putting in the memorandum [of July 1992]'.¹⁰⁹ Ms Hamilton went on to note that if he had been dismissed because of his memorandum concerning misconduct, then 'it was clearly not within the provisions of the then whistleblower protection in the Criminal Justice Act which required that he be victimised for giving information to the commission. There was no such connection between his dismissal and information he had given the Commission'.¹¹⁰

Albert Shire Council

7.135 The Committee invited and received responses to Mr Rothe's evidence from Mr Terry Moore, Interim Chief Executive Officer, and Mr Peter Shepherd, Interim Director of Development & Environment Planning Services, Gold Coast City Council, which now incorporates the Albert Shire Council. Both responses indicated that there were problems within the building department of the Council because of personality clashes and differences in management style, such as Mr Rothe's more detailed approach to compliance with regulations. Mr Shepherd noted that 'It was only after exhausting all opportunities for Mr Rothe to remedy the situation that the reluctant recommendation was made to find alternate duties as Special Project Engineer'. The reasons for Mr Rothe's dismissal were given as, principally, complaints from Robina Land Corporation as well as 'his continued insistence to encourage divisiveness within the department and interfere with activities' after being moved.¹¹¹

7.136 The Committee notes the views of Mr Moore and Mr Shepherd with respect to the management approach adopted by them, that is, 'a more practical approach to building regulation ... compliance with every fine technical detail is not viewed as an end in itself'. Mr Rothe obviously did not share this view of a 'more practical approach' to interpretation of building regulations and this must have been the source of a great deal of the friction within the building department. The Committee is not in a position to determine whether or not this 'more practical approach' was appropriate in the circumstances. However, the Committee notes the comments of Mr and Mrs Bowd, the owners of the Broadbeach Waters residence, in a letter to the CJC:

From our position, Mr Rothe has been an excellent servant of the public - who gave no favours - certainly not to us. For the benefit of the safety of the public, he has done his job well. The building faults he insisted be made [to] comply with building standards may have averted a tragedy which could have resulted in a human death.¹¹²

108 Evidence, Ms Theresa Hamilton, p. 484.

109 Evidence, Ms Theresa Hamilton, p. 485.

110 Evidence, Ms Theresa Hamilton, p. 485.

111 Correspondence, Mr Peter Shepherd, 3.5.95.

112 Submission, Mr Robin Rothe, 5.6.95, Attachment 6.

Associate Professor Kim Sawyer

Background

7.137 While employed by the Royal Melbourne Institute of Technology (RMIT), Professor Kim Sawyer reported mismanagement within the Department of Economics and Finance, including that monies allocated for academic purposes were used for other purposes.¹¹³ Following a perceived lack of action on the matters reported, in October 1992 a petition was submitted to the University by 15 members of the Department. The petition called for an audit of the Department and an inquiry into management procedures. Another member of the Department complained under separate cover.

7.138 On 9 April 1993, a formal academic complaint was submitted by nine of the original 16 petitioners. The academic complaint concerned the submission of a paper to a journal, the *Economic Record*, by a colleague. On 3 June, the complaint was dismissed by the Vice-Chancellor of RMIT. According to Professor Sawyer, the Vice-Chancellor asked for a response from the person complained of but did not interview the complainants or ask them for evidence concerning their allegations. The person complained of denied submitting the paper to the journal and the complainants were not given an opportunity to submit their written evidence from a referee and the editor of the *Economic Record*.¹¹⁴

7.139 The Vice-Chancellor then requested that the complainants forward the names of persons who had been informed of the allegations forming the basis of the academic complaint. The complainants responded that 'the allegations had not been communicated to persons who had no interest or duty in receiving them'.¹¹⁵ Seven of the complainants were subsequently charged with serious misconduct by the Vice-Chancellor because, Professor Sawyer stated, 'we had not responded to the vice-chancellor in the way we should'.¹¹⁶ The Vice-Chancellor also advised one of the complainants, who had left RMIT, that he risked prosecution if he did not provide the names as requested.

7.140 On 16 November 1993, four of those charged with serious misconduct appealed to the Governor of Victoria in his role as Visitor to RMIT. The appeal was directed at both the decision with respect to the complaint of academic misconduct and the decision on the serious misconduct charge. The Chief Justice of Victoria was appointed by the Governor at the beginning of 1994 to hear the appeal. During 1994 argument was heard as to the jurisdiction of the Governor, as Visitor, to determine the dispute between the petitioners and the University, the subject of the petition.

7.141 On 1 February 1995, the Visitor determined that the complainants did not have the right of recourse to the Visitor as they were not members of the University at the time the petition was presented. This situation arose because RMIT had not taken the necessary steps to prescribe staff as members of the University under *Royal Melbourne Institute of*

113 Evidence, Professor Kim Sawyer, p. 380.

114 Evidence, Professor Kim Sawyer, pp. 384-85.

115 Submission, Professor Kim Sawyer, 28.2.95, p. 2.

116 Evidence, Professor Kim Sawyer, p. 381.

Technology Act 1992. The applications of the petitioners were therefore dismissed without the matters of the academic complaint or charge of serious misconduct being heard.

7.142 Following this decision, three of the complainants wrote to the Visitor requesting that the Visitor intervene on his own initiative so that the substantive matters of the petition could be heard. The Visitor replied that as the applications had been dismissed, no further action would be taken.

7.143 As a result of the decision on the jurisdiction of the Visitor, Professor Sawyer sought an administrative order through the Supreme Court to overturn the decisions of the Vice-Chancellor. However, this avenue was denied because 'a decision is defined as that which alters the rights of a person' and being charged with serious misconduct was not defined as altering any right held by Professor Sawyer.¹¹⁷ Further action is currently being taken by Professor Sawyer in the Victorian Supreme Court.

Investigations of the matter

7.144 Professor Sawyer has approached outside agencies in his endeavour to have the alleged mismanagement in the Department of Economics investigated. In 1993 meetings were held with the Victorian Auditor-General and the Commonwealth Department of Education and Training. Professor Sawyer stated that he had been unable to obtain a copy of the Auditor-General's report and that Department of Education and Training 'did not know what to do'.¹¹⁸

The whistleblowing claims

7.145 Professor Sawyer alleges first, that as a result of reporting mismanagement in the Department of Economics he was harassed; his office was burgled, he was investigated by a private detective; he was given only limited access to secretarial services; attempts were made to move his office away from his research staff and he was directed not to speak to the media.¹¹⁹ He also informed the Committee that 12 of the 16 academics, including himself, who had originally signed the petition had left the Department of Economics and two more were expected to leave. Those who had left had done so through resignation, termination of contract, transfer or legal action.¹²⁰ Secondly, as a result of making an academic complaint, he and others were charged with academic misconduct.

Discussion

7.146 The Committee notes that Professor Sawyer acknowledges that some management procedures within the Department of Economics had changed as a result of his and his colleagues actions. However, any changes made in management procedures of the Department of Economics were at a great cost to those who brought the alleged mismanagement to the attention of RMIT and the Committee notes with concern that 12 of the original 16 petitioners are not longer employed in the Department of Economics.

117 Evidence, Professor Kim Sawyer, p. 384.

118 Evidence, Professor Kim Sawyer, p. 383.

119 Evidence, Professor Kim Sawyer, p. 380.

120 Submission, Professor Kim Sawyer, 28.2.95, p. 2.

7.147 The Committee considers that the responses to both the petition of October 1992 and the formal academic complaint of April 1993 by the University and the Vice-Chancellor to be inappropriate. With regard to the petition, the Committee believes that it is the responsibility of any organisation that receives information concerning the mismanagement of public funds to conduct an open and timely inquiry into such allegations. It appears, on the evidence received by the Committee, that RMIT did not respond in such a manner and indeed acted to close ranks, to disregard the misuse of public funds and actively to harass those who brought the mismanagement to notice. As Professor Sawyer stated, such actions would indicate an environment 'which is inimical to good practice'.¹²¹

7.148 The Committee notes Professor Sawyer's comments concerning the investigation of the academic complaint and that evidence was not sought from the complainants.¹²² Any investigation of such a serious matter could have been expected to involve both the subject of the complaint and the complainants, the taking of evidence, including the production of relevant documents if necessary, and the reporting of the decision to those involved together with the reasons for that decision. Whilst it is reasonable that an investigation of a serious academic complaint may be undertaken on a confidential basis, it is not reasonable to charge members of an academic institution with serious misconduct because they did not respond in the way the person investigating the complaint thought they should.

7.149 The Committee notes that Professor Sawyer and his colleagues attempted to have their initial complaints dealt with within their organisation. The lack of response forced Professor Sawyer to attempt to acquaint other agencies of the problems within the Department: the Victorian Auditor-General's Office and Commonwealth Department of Employment, Education and Training and the Visitor. These agencies could not assist Professor Sawyer. He stated that none of these bodies has 'sufficiently well-defined regulatory authority to inquire into the matters myself and my colleagues have raised'.¹²³

7.150 The Committee is concerned that the facts of the case were not open to independent assessment by RMIT's Visitor. RMIT had failed to prescribe staff as members of the university and therefore the Visitor did not have jurisdiction to hear the complainants appeal. The Visitor's ruling on the dispute regarding jurisdiction is clearly correct given that the complainants were not corporators of the University at that time. However, it does not reflect well on RMIT that it had not fulfilled its obligations and ensured that it had made the necessary arrangements under its Act to prescribe staff as corporators of the University. By not doing so, it denied a right of appeal to the Visitor by its staff and by coincidence, prevented an independent investigation of the matters complained of.

7.151 The Committee notes that matters are still before the courts and in such circumstances chooses not to make further comments on the matter. However, the Committee supports Professor Sawyer's request 'that an independent consultant look at the matters we have raised, and suggest regulatory changes to the education system so that these events cannot reoccur'.¹²⁴

121 Evidence, Professor Kim Sawyer, p. 380.

122 Evidence, Professor Kim Sawyer, p. 384.

123 Correspondence, Professor Kim Sawyer, 25.7.95.

124 Correspondence, Professor Kim Sawyer, 25.7.95.

Mr Bill Toomer

Introduction

7.152 Mr Toomer's case covers a 20 year period and the Committee received a considerable amount of detailed information of events primarily in submissions and evidence from Mr Keith Potter and Mr Bill Toomer. These are reproduced in the Committee's published volumes. The background to the case provided below is an attempt to summarise this very detailed information. The Committee also benefited, during its private deliberations, from access to the Merit Protection and Review Agency's confidential 1991 report of an inquiry in relation to Mr Toomer.

Background

7.153 Mr Toomer began work with the Commonwealth Department of Health as Quarantine Assistant in Melbourne in 1968. He was given extensive on-the-job training, including in the non-numerical classification of the degree of rodent infestation in grain ships.¹²⁵ In 1969 Mr Toomer took up duty as the first resident inspector at Geelong. In July 1972, he was promoted to Quarantine Inspector in Fremantle assuming responsibilities under the Quarantine Act which was administered by the Department of Health and the duties of designated senior grain inspector for the Department of Primary Industries.

7.154 The purpose of quarantine legislation was to prevent the importation of exotic diseases; the objective of the Export Regulations was to ensure shipments of grain from Australia were not infested by insects or otherwise contaminated. Wheat shipments found to be insect contaminated at their destination could attract compensation claims on the Australian Wheat Board. As Quarantine Inspector, Mr Toomer had power to issue fumigation orders on grain ships pursuant to the *Export (Grain) Regulations*.

7.155 In Fremantle, Mr Toomer found the inspection services to be ineffective and staff morale poor. Staff safety equipment was unsafe and inadequate. Only one quarantine fumigation had been performed in the previous six years and it had ramifications.¹²⁶

7.156 It was an incident connected with the vessel *Cedarbank*, which arrived in Fremantle on 19 May 1973, that led to Mr Toomer's dispute with departmental administration and the long appeal and inquiry process which ensued. On 24 May 1973, Mr Toomer boarded this vessel and assessed the Master's deratting documentation as invalid. The documentation comprised a deratting certificate which had expired, but which had been endorsed with a one month extension before departing the United States for Sydney. When it arrived in Sydney another one month extension was issued. Mr Keith Potter,¹²⁷ who appeared before the Committee with and on behalf of Mr Toomer, commented that the United States certification indicated an

125 Correspondence, Mr Keith Potter, 12.3.95, Statement of Walsh, para 19.

126 Evidence, Mr Keith Potter, pp. 334-35.

127 Mr Potter was a former Chairman of Promotions Appeals Committees with the Australian Public Service and became involved with the Toomer case in 1978. He was subsequently active in an executive capacity with Whistleblowers Australia, but is now retired from that involvement and appeared in a private capacity.

unsatisfactory condition of *Cedarbank*. If satisfactory 'it would have been issued either with de-ratisation certification or with de-ratisation exemption certification'. The Sydney extension also indicated an unsatisfactory condition as there was no provision in law for a second extension.¹²⁸

7.157 Mr Toomer's view was that this second extension was inconsistent with quarantine requirements and international health regulations. He therefore issued a fumigation order signed by himself. Subsequently Mr Toomer made an inspection of the vessel which revealed heavy infestation of mice and some rats. He then served a second fumigation order signed by a quarantine medical officer to 'make sure it was valid'.¹²⁹ The master or agent indicated that his cargo of muriate of potash could react dangerously to a hydrogen cyanide fumigation, so Mr Toomer agreed the *Cedarbank* could go to Bunbury where its cargo could be discharged and the fumigation could be carried out.

7.158 On 25 May 1973, Mr Toomer requested transport to Bunbury to carry out the fumigation from the Assistant Director (Executive Services), Mr Dienhoff. After discussing the proposal with Dr Mathieson, the Director Department of Health, Western Australia, Mr Dienhoff advised Mr Toomer that there would be no travel to Bunbury and to withdraw the fumigation order on the *Cedarbank*. The only explanation given to Mr Toomer was that it was Dr Mathieson's instructions. That was the key for Mr Toomer to blow the whistle internally which he did by writing to Dr Mathieson on 28 May 1973 stating his objection to 'lay interference in his professional endeavours'.¹³⁰

7.159 On 29 May 1973 Mr Haley, Health Surveyor of the Bunbury City Council, advised Mr Toomer that the fumigation order on the *Cedarbank* was to be carried out. Mr Toomer posted another fumigation order signed by a Quarantine Medical Officer (Dr Mogyorosy) to Mr Haley. Mr Toomer had refused to withdraw the earlier order as instructed, claiming that it had been signed by a Quarantine Officer and therefore he was not competent to withdraw it. On the same day, Dr Mathieson and Mr Dienhoff visited Mr Toomer in his Fremantle office and were critical of his judgment in ordering fumigations on two Taiwanese fishing vessels. These vessels had been arrested for illegal fishing by the Royal Australian Navy which reported that they were rat infested.¹³¹

7.160 Finally, in relation to the *Cedarbank* exercise, on 31 May 1973, the Harbourmaster at Bunbury advised Mr Toomer that fumigation would no longer be possible. On 2 June 1973 Mr Haley conducted an inspection and reported that the *Cedarbank* was heavily infested with mice and refused the request for the issue of a deratisation exemption certificate. Accordingly the vessel returned to Sydney without certification and without being fumigated.

7.161 On 27 July 1973 Mr Toomer was transferred to the Perth office of the Department. There he sought advice on action taken in relation to proposed prosecutions of the *Cedarbank*

128 Evidence, Mr Keith Potter, p. 337.

129 Evidence, Mr Keith Potter, p. 338.

130 Evidence, Mr Keith Potter, p. 338.

131 Evidence, Mr Keith Potter, pp. 338-39.

and another vessel. Mr Dienhoff refused to approve the prosecutions. Dr Mathieson issued directions that fumigation orders were to require his personal approval.¹³²

Investigations of the matter

7.162 On 19 July 1973, Dr Mathieson disallowed Mr Toomer's May appeal to him regarding lay interference in technical matters. He pointed out that Mr Toomer had not complied with regulation 33 and expressed doubts about Mr Toomer's technical competence. However, he also pointed out that under regulation 33 the matter could be referred to the Director-General.¹³³ Mr Toomer requested that this be done, despite Dr Mathieson's suggestion during a personal discussion that such a move was unwise and could prejudice Mr Toomer's career.¹³⁴

7.163 Dr Howells, the Director-General of the Department of Health, sent his Assistant Director-General, Mr West, to Perth on 19 and 20 September 1973 to carry out an investigation of matters raised in Mr Toomer's appeal. Mr West reported to Dr Howells on 2 October 1973, recommending Mr Toomer's appeal be disallowed and, in accordance with Public Service regulation 33, the documents be forwarded to the Public Service Board for determination.

7.164 Also on 2 October 1973, Mr Toomer wrote to Dr Howells, complaining that his duty statement made him 'responsible for quarantine activities'. However, he had no control over these activities because of unwritten instructions that he was not to leave the Perth office, to board ships, or interfere with the Trainee Quarantine Inspector (Mr Gaunt) or activities at Fremantle. Mr Toomer requested clarification of his duties by the Public Service Board, and requested that his minute, and one of 14 August in relation to unofficial suspension, be forwarded to the Public Service Board under the provisions of Public Service regulation 33.

7.165 On 5 October 1973, Dr Howells wrote to the Secretary of the Public Service Board and to both Dr Mathieson and Mr Toomer, advising he had disallowed Mr Toomer's regulation 33 appeals; the Public Service Board also disallowed the appeal in January 1974. In that year, Mr Toomer attracted disciplinary action over a television appearance, absences and failure to obey instructions. He was fined, demoted and transferred to Port Hedland. The Director of Health in Western Australia proposed that Mr Toomer be retired on invalidity grounds in July 1976; two psychiatric assessments followed; and the Department then proposed to transfer Mr Toomer to Victoria, a proposal which he appealed against.¹³⁵

7.166 Mr Toomer's case was examined in 1976 as a case study by the Coombs Royal Commission into Australian Government Administration, which recommended an independent inquiry. An inquiry took place the following year, but was conducted by officers from the public service, Robert Perriman and Gordon Temme. During the course of the inquiry, the Department recommended Mr Toomer's dismissal for again conveying to the media information obtained during the course of his duties. Messrs Perriman and Temme found fault on both sides, failed to address the *Cedarbank* incident or disclose Dr Mathieson's assurance

132 Evidence, Mr Keith Potter, p. 341.

133 Evidence, Mr Keith Potter, p. 341.

134 Evidence, Mr Keith Potter, p. 353.

135 Evidence, Mr Keith Potter, pp. 355-62..

to remove Mr Toomer from involvement. They recommended that Mr Toomer's future duties should not involve ship inspection, that his appeal against transfer to Victoria be disallowed and that he be transferred in the public interest.¹³⁶ The Public Service Board dismissed Mr Toomer's appeal against a transfer to Victoria; the Disciplinary Appeal Board varied the penalty of dismissal to a reduction of salary and Mr Toomer was transferred to Victoria as instructed by the Department in January 1978.

7.167 For much of late 1978 and 1979, Mr Toomer appealed against promotions to quarantine officer positions in Western Australia, all of which were disallowed. On 1 February 1980, Mr Toomer was invalided out of the public service. He endeavoured to have documentation which reflected adversely on his competence amended, without success, so took the matter to the Administrative Appeals Tribunal (AAT). The AAT ruled against the Department and, on 12 April 1990, ordered that the documents be amended. In its reasons for decision, the AAT said that Mr Toomer's evidence on the estimation of rat numbers was supported by all the quarantine inspectors who gave evidence, including the respondent Department's two expert witnesses, and that any direction to Mr Toomer to estimate rat populations numerically was a direction to perform his duties in a way which conflicted with his training and with accepted practice at the relevant time. The AAT was highly critical of the Department of Health and the respondent department (DPIE) for allowing Mr Toomer to be criticised and punished for refusing to obey an out of date instruction which other officers were simply ignoring, and for failing to amend an outdated and inefficient practice.¹³⁷ Mr AR Castan QC commented on the AAT findings that:

The whole basis upon which Mr Toomer was transferred, then removed from his post, and ultimately removed from the public service was utterly tainted. The facts as found by the Administrative Appeals Tribunal reveal disgraceful and improper conduct on the part of relevant officers.¹³⁸

7.168 The AAT also referred to the following action by the department as 'poor administration':

allowing a case to be contested before the Tribunal at great expense to the Commonwealth when it could have been much shortened if it had been conceded right from the start, that the standards applied by Mr Toomer in estimating the degree of rat infestation, rather than numbers of rats, were indicative of competence and consistent with the practice of other inspectors and the policy favoured by the Principal Executive Officer responsible for the inspection and quarantine services.¹³⁹

7.169 In the meantime, the Minister Assisting the Prime Minister for Public Service Matters, the Hon. Peter Morris, had requested that the Merit Protection and Review Agency (MPRA) conduct an inquiry into the Toomer case. It reported in 1991, finding that although the standard of personnel management exhibited in the Department's dealings with Mr Toomer

¹³⁶ Evidence, Mr Keith Potter, pp. 364-66.

¹³⁷ Submission, Mr Keith Potter, 9.1.95, p. 7; evidence, Mr Keith Potter, p. 15.

¹³⁸ Memorandum of Advice, Mr AR Castan QC, 26.6.91, attached to submission, Mr Keith Potter, 24.7.95.

¹³⁹ Submission, Mr Keith Potter, 9.1.95, p. 7, quoting from AAT decision.

had deficiencies, he had not been victimised. The report was quite critical of Mr Toomer's conduct, finding that he responded inappropriately to aspersions cast on his competence and to operational policy issues where he disagreed with management.

7.170 The findings of the MPRA were at variance to those of the AAT in that the MPRA presented the requirement for numerical estimation as though it was a legitimate alternative at the time. It presented the practice of non-numerical assessment, the departmentally and internationally accepted practice, as nothing more than a method preferred by Mr Toomer. Mr Keith Potter has been highly critical of the MPRA Report because it was based on an incorrect understanding of inspection procedures at the time and that it chose to ignore expert advice provided to it or to seek the advice of other experts. He has also criticised the MPRA for saying Mr Toomer was not victimised and that he was not a whistleblower.¹⁴⁰ Mr Potter and Mr Toomer contend that the MPRA's conclusions:

could not be reasonably reached by reasonable persons and that it reached those conclusions for the purpose of protecting the numerous administrators who were party to appeasement of influential shipping interests which threatened to withdraw export grain shipping services if fumigations were not curbed.¹⁴¹

7.171 The Director of the MPRA, Ms Ann Forward, responded to the allegations made by Mr Potter and Mr Toomer by saying that:

I do not wish to address any of the historical issues relating to that inquiry or the events it investigated. The MPRA's research and findings in relation to the matters investigated are set out in its report ...

[I] emphatically deny that this Agency, any of its statutory members (including myself) or any of its staff, is now or has been associated with organised crime and/or subjected to "undue political influence", or in any other way acted improperly in relation to the Toomer/Potter case, or any other.

I am concerned that the Committee is being used in an attempt to give credibility to unsubstantiated allegations of criminality against anyone who does not share the Toomer/Potter view of the world.¹⁴²

The whistleblowing claims

7.172 The initial whistleblowing claim in this case was that the quarantine procedures operated by the Department of Health in Western Australia in 1973 were deficient. At the heart of the claim was the issue of the appropriate method of estimating rat infestation on ships. Essentially, the Department of Health administration at the time, through Dr Mathieson, was requiring its quarantine inspectors to use a numerical estimation technique which Mr Toomer claimed was long out of date and inconsistent with international standards.

140 Evidence, Mr Keith Potter, pp. 323-5; submission, Mr Keith Potter, 9.1.95, p. 8.

141 Evidence, Mr Keith Potter, p. 325.

142 Correspondence, Ms Ann Forward, 1.5.95.

7.173 In evidence to the Committee, Mr Toomer¹⁴³ and Mr Walsh¹⁴⁴ stated another area of concern to them, was that of bribery of quarantine officials by shipping agents and fumigation contractors.

Discussion

7.174 The Committee finds this case a complex and comprehensive example of an administrative and professional dispute which escalated unnecessarily. Based on the evidence the Committee prefers to give weight to the findings of the AAT. Had the original dispute been better managed by the responsible department it is most probable that less distress in terms of his employment and general well-being would have been incurred by Mr Toomer. It is undeniable that Mr Toomer has suffered significantly through this process. The range of investigations which followed could have been narrowed and more focused on the issue essentially in dispute, that is the appropriate method and practice of ship inspections for quarantine purposes.

7.175 The costs associated with this case, and all the inquiries, appeals and other investigations it attracted, have been massive for all parties involved, including Mr Toomer. The approximate cost of the MPRA inquiry alone was \$240,000, whilst the overall cost to taxpayers of the long conflict has been put in the millions of dollars.¹⁴⁵ Both the AAT and MPRA have been critical of the great expense to the Commonwealth and that resources could have been used more equitably for other purposes.

Implications for proposed Commonwealth whistleblower protection legislation

Retrospectivity

7.176 It is clear to the Committee that once Mr Toomer's dispute over quarantine-related work directions given to him could not be resolved directly with his departmental superiors, the situation became one of whistleblowing and the mechanisms then available for appeal and subsequent inquiry did nothing to resolve the situation. The fact that Mr Toomer's complaint remained effectively unresolved for such a long time merely served to deepen the problems for Mr Toomer and his work situation. However, in the time that has elapsed since Mr Toomer's troubles began, there have been significant changes in social attitudes, legislative requirements and administrative practices.

7.177 The experience of this case demonstrates that old cases do not make for good whistleblowing resolutions, even should a new and efficient whistleblowing support agency be established. The five year limit advocated by the Select Committee on Public Interest Whistleblowing is seen by this Committee as appropriate.

Multiple investigative fora

7.178 At several points in the long-running saga of Mr Toomer's public interest disclosure, more than one agency at a time was investigating some aspect of the case. While the Coombs

143 Evidence, Mr Bill Toomer, pp. 352-53.

144 Evidence, Mr Walsh, pp. 372-73.

145 Submission, Mr Keith Potter, 9.1.95, p. 7.

Royal Commission was conducting its case study, public service appeals were under consideration; while the Perriman-Temme inquiry was underway, the Public Service Board was considering Mr Toomer's appeal against his transfer; and the AAT and MPRA inquiries also operated contemporaneously. Quite apart from the cost factor of such multiple investigations, they are not, in the Committee's view, helpful in handling whistleblowing disclosures. Even when the issues under review are discrete, there is always the possibility that the work of the separate agencies will be unduly protracted as each waits for the other to reach its conclusions. There is also the risk of inconsistent findings, as was the case with the MPRA and AAT reviews, which merely serve to increase uncertainty as to the 'truth' and where to apportion blame and add further frustration for the whistleblower.

Mr Bill Zingelmann

Background

7.179 Mr Bill Zingelmann was a Queensland police officer from 1967 to 1985. Following his refusal of a bribe relating to a fauna matter from a fellow police officer, Mr Zingelmann alleges that he was harassed by police to such an extent that he developed acute anxiety and was discharged from the police force on medical grounds.

7.180 Mr Zingelmann made a submission to the Fitzgerald Commission of Inquiry covering cases of alleged corruption: they included a grocery racket, homicide, and flora and fauna smuggling. In 1989, the Fitzgerald inquiry declined to investigate his allegations, because of resource constraints.

7.181 In 1990 Mr Zingelmann contacted the Criminal Justice Commission by telephone about police failure to investigate a perjury matter. He was asked to put the matter in writing, and to include all materials, no matter how trivial.¹⁴⁶ In a 25-page document, dated 3 August 1990, he outlined allegations about nine matters to the CJC: a police grocery racket; the death of Peter Matt Kelly; traffic offence prosecutions; attempted bribery; a watchhouse escape; the 'Dixon drama'; wilful damage; fauna activities; and suspected child molestation.

7.182 The CJC replied on 22 October 1990, indicating that the matters raised had been considered in depth, along with Mr Zingelmann's previous complaints to the Fitzgerald Commission of Inquiry, but that resource constraints prevented the Commission from considering the matters further at that stage.¹⁴⁷ The handwritten initial assessment by the CJC of the complaints came to Mr Zingelmann's attention, presumably inadvertently, with correspondence from Mr Barnes in February 1994. It found that in most cases, there were no specific allegations, the matter did not constitute official misconduct, or the offence was too old, thus warranting no further action.¹⁴⁸

7.183 In evidence to the Committee, Ms Hamilton explained why those initial assessments were reached:

146 SSCPIW Submissions and Other Written Material, Vol. 5, [p. 2].

147 Submission, Mr Bill Zingelmann, 4.1.95, Attachment D.

148 Submission, Mr Bill Zingelmann, 4.1.95, Attachment H.

when the Commission commenced it received an avalanche of complaints. For that reason, we made a policy that we would not investigate matters that predated April of 1990 unless there were exceptional circumstances.

Mr Zingelmann's complaint was assessed at that time as not amounting to such exceptional circumstances.¹⁴⁹

7.184 Mr Zingelmann did not follow up on his claim that he could supply the CJC with reliable evidence relating to illicit fauna-related activities.

7.185 In 1994, the CJC investigated and reported on the Cape Melville incident, in which it was alleged that the Director-General of the Queensland Department of Environment and Heritage (DEH) and the private secretary of the Premier interfered in a prosecution to protect the private secretary's brother. Because the brother's vehicle was discovered in an area noted for its foxtail palms, which were seeding at the time, many people seem to have assumed that the CJC investigation was primarily to do with foxtail palm seed smuggling. Mr Barnes, of the CJC, asserts that this was not the case.¹⁵⁰ The Committee notes that the CJC report into the incident bears out Mr Barnes' assertion, although one small chapter was devoted to the response by the DEH to the foxtail palm problem.¹⁵¹ Some 44 witnesses were interviewed on the Cape Melville incident. At the suggestion of Mr Doug Slack, MLA, the Member for Burnett and opposition spokesman on environmental matters, Mr Zingelmann was approached but declined to be interviewed. The reasons he gave indicated a deep suspicion of the CJC and its operations: he would have been prepared to give evidence to an open inquiry.¹⁵²

7.186 In the meantime more information had come Mr Zingelmann's way and in late 1993 he contacted Herberton Police about fauna and flora smuggling and drug and gun running from Cape Melville National Park. He states he was interviewed on 21 December 1993 by officers of the Department of Environment and Heritage. 'Operation Birdman', a joint DEH-Customs project targeting flora and fauna smugglers in far north Queensland, was launched at about this time. The DEH subsequently reported to the CJC that it had successfully prosecuted ten persons as a result of the operation, with further charges pending and investigations continuing; it also reported that it had passed on relevant allegations to the Australian Customs Service.¹⁵³

7.187 The fauna and flora smuggling issue on Cape York achieved a deal of media publicity in the course of 1994. Mr Zingelmann was interviewed on ABC radio and numerous newspapers and magazines ran stories. Yet despite the activities of 'Operation Birdman', Mr Zingelmann believed that official corruption was still being covered up. He wrote to the then Environment and Heritage Minister, the Hon. Molly Robson, telling her so on 22 August 1994.¹⁵⁴ He also wrote to the CJC along similar lines. Mr Barnes replied for the CJC, pointing

149 Evidence, Ms Theresa Hamilton, p. 266.

150 Evidence, Mr Michael Barnes, p. 265.

151 Criminal Justice Commission, *A Report of an Investigation into the Cape Melville Incident*, 1994, Ch. 12.

152 Submission, Mr Bill Zingelmann, 28.2.95, Annexure C.

153 Correspondence, CJC (Barnes) to Zingelmann dated 14 February 1995.

154 Submission, Mr Bill Zingelmann, 4.1.95, Attachment X.

out that federal agencies such as Customs were not subject to investigation by the CJC and restating the Commission's earlier decision not to investigate Mr Zingelmann's earlier allegations of official misconduct against DEH staff and police on the grounds that the allegations were too old and lacked specificity.¹⁵⁵

7.188 Mr Zingelmann subsequently provided the Committee with a tape-recorded interview between himself and Adrian Walker, an eco-tourism guide and habitue of Cape York, in which further allegations of corrupt conduct and illegal activities on the Cape were made.

Discussion

Jurisdictional issues and conduct of the CJC

7.189 Mr Zingelmann has raised his concerns over what he believes to be significant wrongdoing on Cape York with a number of agencies and individuals, including the Criminal Justice Commission. He seems to have assumed that his concerns would be passed on to the appropriate investigating agency, a reasonable assumption, given, for example, that his allegations to the Fitzgerald inquiry were transferred to the CJC when it was established. The CJC, however, made it clear that it had no jurisdiction over seed smuggling, which was a matter for the Australian Customs Service, a federal body.¹⁵⁶ Nor would it extend its terms of reference over the Cape Melville incident to investigate claims of flora and fauna smuggling and drug and gun running because there was no basis on which to suspect that persons holding positions in units of public administration were involved and because it had no reason to believe that investigations could not be undertaken by the police service or other state agencies.¹⁵⁷

7.190 Mr Zingelmann was by no means alone in raising matters of concern with agencies which had no jurisdiction over those matters. The Committee notes that the CJC debriefs complainants, generally by telephone, and points them in the direction of other agencies which may be able to assist, but this appears to be insufficient for persons who have dwelt for some time over matters and expended considerable amounts of energy in the process. Investigative agencies such as the CJC clearly cannot exceed the powers given to them by statute. Nor can they fully investigate every complaint within jurisdiction. As the CJC pointed out to Mr Zingelmann in 1990 'it is not possible for every single matter which is brought to this Commission's attention to be fully investigated' as it had been overwhelmed with more than 1000 complaints in its first six months of existence and 'this Commission must concentrate its resources on current events and issues'.¹⁵⁸ The very existence of investigative agencies, however, may be seen by some as a panacea for all wrongs and the resultant disillusionment, if the wrongs are not righted to the liking of the complainant, is particularly bitter.

7.191 It must be said that aspects of the CJC's handling of Mr Zingelmann's allegations have been unfortunate. Mr Zingelmann was asked to include all material, irrespective of how trivial it might appear to be, in his written statement to the CJC.¹⁵⁹ He did so, then when

155 Submission, Mr Bill Zingelmann, 13.3.95, attachment (letter from Barnes dated 14 Feb 1995).

156 Evidence, p. 267.

157 CJC, *A Report of an Investigation into the Cape Melville Incident*, 1994, p. 5.

158 Submission, Mr Bill Zingelmann, 4.1.95, Attachment D.

159 Submission, Mr Bill Zingelmann, 4.1.95, Attachment Z.

inadvertently the CJC initial assessment of his allegations was sent to him, he was understandably irritated to see some matters assessed as 'trivial'. The Commission's inability to locate all of the Zingelmann material that had been transferred to it from the Fitzgerald inquiry was also unfortunate, with Mr Zingelmann not unnaturally reading sinister connotations into the loss of the material.¹⁶⁰

7.192 The Committee notes in passing that Mr Zingelmann also supplied it with originals of certain correspondence between him and other parties. Given the importance which such correspondence represents to Mr Zingelmann, and the cost of photocopying to individuals, the Committee believes that it would be helpful if all investigative agencies adopted the practice of copying documentation and returning the originals immediately, thus reducing the likelihood that administrative oversight be misinterpreted as conspiracy.

Standard of proof

7.193 The CJC's initial assessment of Mr Zingelmann's allegations included 'lacks detail', 'suspicion only', 'unlikely to get anyone to admit it', and similar comments. The Fitzgerald Commission of Inquiry also noted, in correspondence to Mr Zingelmann, that:

[t]he material you have provided has been closely looked at, however, as you would realise from your service as a police officer, its admissibility in a court would be extremely doubtful.¹⁶¹

Unfortunately, much of the material Mr Zingelmann provided to the Committee was of a similar nature, and relied heavily on hearsay information.¹⁶²

7.194 The Committee does not doubt that Mr Zingelmann sincerely believes his informants, and that they may have knowledge of major wrongdoing on Cape York. Whether investigation would establish proof of wrongdoing to a standard sufficient to bring criminal or disciplinary charges is another matter entirely. The Committee notes that the CJC itself commented in its report on the Cape Melville incident that it believed witnesses had lied to the Commission, but that it could not prove it to the requisite standard to consider charges.¹⁶³

Age of complaint

7.195 Mr Zingelmann's original complaints referred to matters which had occurred in the 1970s and 1980s. The Committee concurs with the recommendation of its predecessor committee regarding limited retrospectivity - five years - for the investigation of public interest disclosures.¹⁶⁴ After that time, the trail is too cold; memories are uncertain; reliable evidence may be hard to come by or may have been tampered with. In concluding that a time limit needs to be set, for practical reasons, the Committee realises that many whistleblowers will be disappointed and many worthwhile disclosures will remain uninvestigated. Nevertheless, the likelihood that any investigation of an 'old' complaint could be completed satisfactorily is, in the Committee's view, remote and should not, therefore, be attempted.

160 Submission, Mr Bill Zingelmann, 4.1.95, p. 3.

161 Submission, Mr Bill Zingelmann, Attachment A.

162 See, for example, Zingelmann submission, 8 Feb 95, p. 1.

163 CJC, op. cit., pp. 323-4.

164 SSCPIW report, p. 163.

Confidentiality of complainant/complaint

7.196 Mr Zingelmann made his disclosures openly to the Fitzgerald inquiry, to the CJC and to the police. He refused to give evidence to the Cape Melville incident inquiry because it was not held in public. The CJC explained that the hearings were 'closed' for a number of reasons: it would be unfair to witnesses alleged to have committed criminal offences, as their answers could incriminate them and prejudice a fair trial; the evidence might be widely publicised and might influence the recollections of later witnesses; it was expected that evidence reflecting adversely on the character of persons about whom allegations of impropriety had been made would be heard, with no opportunity being afforded for cross-examination; and persons reluctant for whatever reason to come forward to give evidence would be less likely to do so when faced with the prospect of being publicly identified and examined by counsel representing those they accused of misconduct.¹⁶⁵ The Committee sympathises with the viewpoint of Mr Zingelmann that less than open hearings provide scope for suspicion.

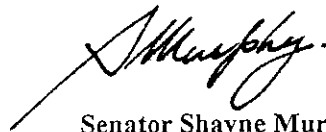
7.197 The Committee takes exception to the CJC's comments about anonymity in the Cape Melville report:

Suspicious about the motives of the anonymous complainant also arise as a result of the complainant choosing to bring the matter to the attention of a member of the Opposition rather than reporting the allegations to the Commission, the Police Service, the Ombudsman or the Minister for the Environment and Heritage.¹⁶⁶

The Committee believes that such a course is entirely proper. Any citizen should have the right to take such concerns to a member of parliament of any political persuasion, without the conclusion being drawn that the concern was politically motivated.

Media involvement

7.198 As so many other whistleblowers have done, Mr Zingelmann ultimately took some of his disclosures to the media after the CJC's Cape Melville inquiry failed to investigate the matters which so concerned him. The Committee is unable in this instance to determine whether the publicity so generated has been instrumental in helping to bring about desired change. As a matter of right, however, the Committee believes that, should the investigative agencies 'fail' the whistleblower, the latter's recourse to the media should be accepted and that it should have no bearing on his or her eligibility for whistleblower protection.



Senator Shayne Murphy
Chairman
October 1995

¹⁶⁵ CJC, op. cit., p. 10.

¹⁶⁶ CJC, op. cit., p. 3.