THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE PUBLIC INTEREST REVISITED

REPORT OF THE SENATE SELECT COMMITTEE ON
UNRESOLVED WHISTLEBLOWER CASES

October 1995

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MEMBERSHIP OF THE COMMITTEE

Members:

Senator Shayne Murphy, Australian Labor Party (Tasmania) - Chair

Senator John Herron, Liberal (Queensland) - Deputy Chair

Senator Eric Abetz, Liberal (Tasmania)

Senator Christabel Chamarette, The Greens (Western Australia)

Senator Kay Denman, Australian Labor Party (Tasmania)

Senator Sandy Macdonald, National Party of Australia (New South Wales)

Senator John Woodley, Australian Democrats (Queensland)

Substitute Member:

Senator Michael Forshaw, Australian Labor Party (New South Wales)
substitute for Senator Denman on 16 March 1995

The Senate
Parliament House
Canberra ACT 2600

TERMS OF REFERENCE

Terms of reference agreed to on 1 December 1994 and amended on 9 December 1994:

That a select committee, to be known as the Select Committee on Unresolved Whistleblower Cases, be appointed to inquire into and report, on or before 26 October 1995*, on the following matters:

So much of those unresolved whistleblower cases arising from the report of the Select Committee on Public Interest Whistleblowing as the committee determines necessary to be taken into account for framing the proposed Commonwealth legislation on whistleblower protection already recommended by the Select Committee on Public Interest Whistleblowing, with particular regard to:

(a) the circumstances relating to the shredding of the Heiner documents, and matters arising therefrom;

(b) the circumstances relating to the alleged protection of an allegedly corrupt senior police officer at the expense of other police, and matters arising therefrom; and

(c) the role and conduct of the Criminal Justice Commission, and of present and former officers of the Commission.

* The reporting date was extended by the Senate on 30 May, 29 August and 26 September 1995.

CONTENTS

CHAPTER 1

INTRODUCTION

Background to the Committee

1.1 As a result of concerns raised by Senator Newman about the adverse impact on individuals who had undertaken whistleblowing activities in the national interest, the Senate Select Committee on Public Interest Whistleblowing (SSCPIW) was established on 2 September 1993. The Committee also considered the Whistleblowers Protection Bill 1993 following its referral by the Senate in October 1993. This was a private Senator's Bill which had been introduced by Senator Chamarette. On 30 August 1994, the Committee tabled its report. The report, *In the Public Interest*, was the culmination of a wide-ranging inquiry into whistleblowing in both the public and private sectors.

1.2 The Committee's recommendations centred around three major areas of concern: first, the need to change attitudes towards whistleblowing activities and the public interest benefits derived by those activities within public and private sector organisations and the community generally; secondly, the need for the establishment or enhancement of internal reporting systems and procedures that deal specifically with whistleblowers and their disclosure of wrongdoing; and thirdly, the need for an independent body (the Public Interest Disclosures Agency) to undertake or oversee the investigation of disclosures of wrongdoing and the protection of whistleblowers and the subjects of whistleblowing in the federal arena. The Committee also recommended that as there were a number of apparently unresolved whistleblower cases in Queensland, that the Queensland Government establish an independent investigation into the unresolved cases within its jurisdiction.

1.3 The Chair of the Committee forwarded the report to all State Premiers and Territory Chief Ministers, requesting them to consider the recommendations of the report and particularly the need for complementary State and federal legislation. The Premier of Queensland, Mr Wayne Goss, responded at length, indicating that comprehensive whistleblower protection legislation would be introduced into the Queensland Parliament in the October sittings 1994. The *Whistleblowers Protection Act 1994* (Qld) was assented to on 1 December 1994. The Premier did not support the Committee's recommendation for an independent investigation into the cases referred to by the Committee, and stated that the more significant cases had been considered by independent review bodies. He also indicated that the whistleblowers protection legislation would extend protections of public officers who make disclosures and that the Criminal Justice Commission (CJC) would be able to investigate alleged reprisals taken against public officers for making disclosures to their own organisations as well as to external bodies such as the CJC. The Premier's response was tabled in the Senate on 19 October 1994 by Senator Newman and has been included in the Committee's supplementary material.

1.4 An interim response to the report was tabled by the Commonwealth Government in the Senate on 29 November 1994. A further response tabled on 22 August 1995 indicated that a final response was expected to be tabled in the spring sittings of 1995. At the time of reporting no final response had been tabled. The Committee understands the complexity of the response required to the report. However, it would have been of considerable assistance to the

Committee's deliberations to have had knowledge of the Government's legislative intentions in response to the recommendations of the SSCPIW.

Establishment of the Committee

1.5 The Senate Select Committee on Unresolved Whistleblower Cases was established by resolution of the Senate, on the motion of Senator Parer, on 1 December 1994. The terms of reference were amended on 9 December 1994 to modify the scope of the Committee's inquiry. Under the amended terms of reference, the Committee's inquiry would not be limited to an inquiry into the unresolved Queensland whistleblower cases, but would also include so much of any of the unresolved cases arising from the previous report as the Committee considered necessary to be taken into account in framing proposed Commonwealth legislation on whistleblower protection.

1.6 On 7 December 1994, Senator Abetz was elected Chairman of the Committee. At the Committee's next meeting, 8 December 1994, the Committee resolved to reconsider the vote taken for the position of Committee Chairman and Senator Murphy was elected Chairman. On the same day, Senator Herron was elected unanimously Deputy Chairman of the Committee.

Conduct of the inquiry

Advices from the Clerk of the Senate

1.7 As many of the cases to be considered in the Committee's inquiry involved matters that fell within State government jurisdiction, advice was sought by Senator Murphy from the Clerk of the Senate as to the rights and/or powers of the Committee to demand documents in the control of a State government and to demand the appearance of persons who might refuse the Committee's invitation to appear before it.

1.8 The Clerk advised Senator Murphy as follows:

> There are no explicit limitations on these powers to require the attendance of witnesses, the giving of evidence and the production of documents. There are probably, however, two relevant implicit limitations on the powers.
>
> First, the powers may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate ...
>
> Secondly, it could well be held that the inquiry powers of the Senate do not extend to members of state parliaments and officers of state governments. There is no authority for this proposition, and the matter has not been litigated, but the High Court could arrive at such a conclusion by reference to the federal nature of the Constitution and the doctrine that the Commonwealth may not impose a requirement inimical to the integrity of the states ...
>
> Whatever the legal situation, it is a parliamentary rule, and a rule of the Senate, that the inquiry powers are not exercised in respect of members of the House of Representatives (standing order 178), and as a matter of first principle the same rule extends to members of state and territory parliaments ...

> If a Senate committee issues a subpoena requiring the attendance of witnesses, the giving of evidence or the production of documents and is met with a refusal, the committee has no power to take any further action, but can only report the matter to the Senate. It is then for the Senate to determine whether it should treat the refusal as a contempt and seek to impose any penalty ...
>
> My advice to all Senate committees is that they should observe the parliamentary rule and the past practice and not seek to summon members of state or territory parliaments or state or territory officers, or to require them to give evidence or to produce documents. Such persons should be invited to appear or submit documents if a committee desires to take evidence from them, and any invitation to state or territory officers should be directed to the relevant state or territory minister. In the event of an invitation being declined, a committee should not take the matter any further.

1.9 Senator Murphy also sought the Clerk's advice as to the Committee's powers to make orders with respect to the cases that it considered in the course of its inquiry. The Clerk's advice was as follows:

> The Committee has no power to order that compensation be paid to persons, to order a judicial inquiry into particular cases or to provide assistance to persons other than making findings in their favour. The Committee can only recommend such steps. The Senate itself, acting alone, would not be able to take any of those steps, as they would require legislation or action by the executive government.

The advices by the Clerk were provided to the Committee by Senator Murphy and are reproduced in full at Appendix 1.

Submissions

1.10 The Committee invited a number of interested people to make submissions and advertised the inquiry in the *Australian* and the *Courier Mail* on 19 December 1994. A closing date for submissions was set at 27 January 1995. However, the Committee agreed to receive additional submissions throughout the course of the inquiry. The Committee received 140 submissions, supplementary submissions and written responses to evidence. A list of submissions and other written material received by the Committee and whose publication it authorised is at Appendix 2.

1.11 Submissions were received from organisations and individuals who had made representations to the previous Select Committee and from individuals identifying new cases. As its terms of reference from the Senate related to cases arising from the previous Select Committee, the Committee resolved to limit the taking of oral evidence to those cases. Nevertheless, a number of individuals who had provided submissions to the SSCPIW also provided submissions to this Committee. Unfortunately, the Committee was not able to consider the submissions in the detail it would have liked to in order to give the level of consideration warranted by each submission. The Committee also welcomed submissions from other organisations and individuals, however, for the light they might shed on whistleblower

problems generally and as pointers towards the issues to be considered in the drafting of proposed Commonwealth whistleblower protection legislation.

1.12 Aside from the two cases specifically mentioned in the Committee's terms of reference (the shredding of the Heiner documents raised by Mr Kevin Lindeberg and the alleged protection of a senior police officer raised by Mr Gordon Harris), the Committee heard evidence relating to the cases of the following people: Mr Peter Jesser, Mr Jack King, Mr Jim Leggate, Mr Greg McMahon, Mr Robin Rothe, former Sale Councillors, Associate Professor Kim Sawyer, Mr Bill Toomer, and Mr Bill Zingelmann.

1.13 The Committee determined that, rather than undertake detailed investigations of any particular cases, it would focus on matters of contention that arose from such cases which would assist in making recommendations for the framing of proposed Commonwealth legislation on whistleblower protection.

Public hearings

1.14 The Committee held public hearings as follows: Brisbane - 23 February 1995; Brisbane - 24 February 1995; Melbourne - 15 March 1995; Brisbane - 16 March 1995; Brisbane - 5 May 1995; and Canberra - 29 May 1995. Where possible at its hearings in Brisbane, the Committee endeavoured to ensure procedural fairness by allowing witnesses a generous amount of time to give evidence. The CJC was then invited to respond to the submissions and comments made in evidence. At the conclusion of each bracket of evidence, each witness was given the opportunity to provide a final comment and the CJC was permitted to address any additional matters.

1.15 In the course of the inquiry, a number of persons in Queensland declined the Committee's invitation to appear and give evidence. The Committee did not pursue the matter of the appearance of government officers who were under instruction not to give evidence to the Committee. However, the Committee decided to summons two persons, Mr John Huey and Mr Cal Farrah, involved in the matters raised by Mr Harris. A summons was served on Mr Huey and he appeared before the Committee on 5 May 1995. However, the Committee was unable to serve the summons on Mr Farrah and it did not pursue this matter further.

1.16 At this point, the Committee notes that a number of persons appeared to have had difficulty in grasping the meaning of evidence in the parliamentary committee context. Committees regard all oral and written submissions to them as 'evidence', irrespective of the legal standing of the persons presenting the submissions and make their own judgment as to the merit, accuracy and veracity of the 'evidence' so presented. As many witnesses chose to have legal support present when they gave evidence, the Committee agreed to allow legal representatives to address it directly, as witnesses in their own right.

1.17 A list of witnesses who gave evidence at the hearings is at Appendix 3.

Commonwealth and State jurisdiction

1.18 As the Committee's terms of reference specifically mentioned two cases from Queensland (the shredding of the Heiner documents and the alleged protection of a senior police officer) and directed the Committee to have regard to the role and conduct of the CJC

and of present and former officers of the CJC, the Committee wrote to the Premier of Queensland, Mr Wayne Goss, and the CJC, inviting them to make submissions to the inquiry.

1.19 On 21 February 1995, the then Queensland Attorney-General, Mr Dean Wells, on behalf of the Government, made a brief statement to the Queensland Parliament and tabled a more detailed statement concerning the Government's position in relation to the inquiry. The statements indicated that the Queensland Government opposed the inquiry in principle, for a number of reasons: the matters raised in parts (a) and (b) of the terms of reference had already been extensively investigated and no wrongdoing had been found; the matters related to the internal affairs of Queensland, and concerned 'alleged offences under Queensland law, and decisions made by State agencies and officials who are accountable to the Queensland Parliament, not the Senate'; considerable costs had already been incurred in investigating the cases; and Queensland had enacted comprehensive whistleblower protection legislation and the CJC was the proper authority for investigating complaints by whistleblowers about official misconduct in Queensland. It concluded that it would be inappropriate to provide any assistance to the inquiry by officers of the executive government in their official capacity; however this did not extend to the CJC which would be expected to determine its own response to the inquiry as an independent authority. [1]

1.20 The statement also included a resume of certain facts concerning the major Queensland cases referred to in the Committee's terms of reference and documents pertaining to the shredding of the Heiner documents. The documents consisted of four advices from the Crown Solicitor in January and February 1990 concerning the inquiry by Mr Noel Heiner into the John Oxley Youth Centre and confidentiality of certain documents related to that inquiry. The Committee notes that three of those advices had not previously been publicly released. Mr Wells' statement was provided to the Committee by the Office of the Premier and is published as part of the Committee's supplementary material.

1.21 The Committee acknowledges that, despite expressing its protest regarding the inquiry, the Queensland Government has been directly and indirectly of considerable assistance to the Committee during the course of the inquiry through the provision of documentation.

1.22 The CJC responded that, while it was willing to cooperate with the Committee in its inquiry, it could only do so to the extent to which it was lawfully entitled, that is, if the Committee 'makes requirements of the Commission which conflict with any duty imposed by positive law upon the Commission, then the Committee would be acting outside the Constitution and therefore acting ultra vires'.[2] The CJC noted that duties imposed by principles such as legal privilege, public interest immunity, receipt of information in confidence and specific provisions of the *Criminal Justice Act 1989* (Qld) and other legislation enjoining secrecy might limit the scope of its submission to the Committee. Despite this, the Committee acknowledges the considerable input provided by the CJC throughout the inquiry.

Access to confidential documents

1.23 During its inquiry, the Committee was provided with access to two relevant documents which were not in the public domain. The first document, a confidential opinion of the

1 Queensland Attorney-General's statement, 21.2.95, p. 4.

2 Correspondence, CJC, 23.12.94.

Queensland Director of Prosecutions dated 27 August 1990, related to the case of Mr Gordon Harris involving the alleged protection of a senior police officer. Only certain sections of this opinion had been made available to Mr Harris, who claimed that the opinion in its entirety was crucial to his case. In his statement to the Queensland Parliament of 21 February 1995, Mr Wells restated the Queensland Government's view that it did not believe that it was necessary for the opinion to be given further release. However, he indicated that the Government had agreed that if the Committee wished to examine the opinion for itself, it could do so on a confidential basis.[3] The Committee accepted the Government's offer and examined the document in Brisbane. The Committee's views relating to the Director's opinion are expressed in Chapter 6.

1.24 The second document concerned the case of Mr Bill Toomer. In both submissions to the Committee and in oral evidence, references were made to the Merit Protection and Review Agency's (MPRA) February 1991 report to the Minister Assisting the Prime Minister for Public Service Matters of an inquiry in relation to Mr Toomer. The report had been made available to the Select Committee on Public Interest Whistleblowing and the present Committee also sought access. The request for access was referred to the Assistant Minister for Industrial Relations, Mr Gary Johns, MP, in his capacity as Minister Assisting the Prime Minister for Public Service Matters. Mr Johns acceded to the Committee's request and made a copy of the report available to the Committee for its private deliberations.

Responses to evidence

1.25 Although the Committee indicated that it was not its intention to reinvestigate individual cases, case histories were used in both submissions and oral evidence to illustrate comments directed at the terms of reference. The submissions in many cases were very detailed and in oral evidence, the Committee allowed witnesses to range widely in the use of case histories to illustrate points. Comments concerning persons, organisations and events were received.

1.26 In dealing with comments which could be regarded as reflecting adversely on the person or persons mentioned, the Committee, in accordance with the Senate privileges resolutions, provided those persons with the opportunity to respond to the evidence. Where differing views on matters mentioned in evidence were received or where matters required clarification, the Committee wrote to those involved inviting them to respond. The responses to adverse comments and responses to general comments which the Committee agreed to publish are to be found in the volumes of submissions and documents tabled with this report and are listed with other submissions in Appendix 2.

Matters of privilege

1.27 The Select Committee on Public Interest Whistleblowing received a submission and heard evidence from Mr Alwyn Johnson. As a result, the Public Interest Whistleblowing Committee sought responses from those persons named in Mr Johnson's evidence.[4] In

3 Attorney-General's statement, 21.2.95, p. 10.

4 Mr Johnson's submissions and the responses thereto were published by the SSCPIW in Volume 1 of it *Submissions and Other Written Material Authorised to be Published.*

February 1995, Mr Johnson wrote to this Committee alleging that the Public Interest Whistleblowing Committee had been 'wilfully and mischievously misled' in those responses. The Committee agreed that the matter might be appropriate for the Committee of Privileges to inquire into and directed the Chairman to write to the President of the Senate under standing order 81 asking that he give a determination to give precedence to the motion to refer the matter to the Committee of Privileges. The Senate was informed of the President's determination on 9 March 1995 and the motion to refer the matter to the Committee of Privileges was passed on 21 March 1995.

1.28 In evidence before the Committee in Brisbane on 16 March 1995, Mr Peter Jesser, a senior lecturer in the Department of Human Resource Management and Employment Relations, Faculty of Business, the University of Southern Queensland, Toowoomba, alleged that he had been intimidated and threatened with a penalty for giving evidence to the Committee. Following the public hearing, the Committee sought responses from those persons mentioned by Mr Jesser. The Committee received a submission from the University of Southern Queensland and from the University's Department of Human Resource Management and Employment Relations. In April, Mr Jesser repeated the allegations of intimidation and forwarded further details in submissions to the Committee. The Committee then sought more detailed responses to the allegations of intimidation from the persons named by Mr Jesser. The Committee concluded that consideration of the material before it disclosed that Mr Jesser may have been subjected to intimidation and threatened with penalty in respect of his evidence to the Committee.

1.29 The Committee tabled a report on the matter in the Senate on 29 June 1995 and recommended to the Senate that the matter be referred to the Committee of Privileges. On the same day the Chairman wrote to the President of the Senate raising the matter under standing order 81 and asking that he give precedence to the motion to refer the matter to the Committee of Privileges. The Acting Deputy President made a statement to the Senate later that day on behalf of the President giving precedence to the motion. Notice of motion was then given and the motion was passed by the Senate on 30 June 1995. At the time of tabling of this report, the two references were still under consideration by the Committee of Privileges.

1.30 The relevant privilege resolutions agreed to by the Senate on 25 February 1988 and standing order 81 are reproduced at Appendix 4.

Consideration of individual cases

1.31 The Committee's terms of reference specifically named two cases to be considered by the Committee, the shredding of the Heiner documents and the alleged protection of a senior police officer. The terms of reference also directed the Committee to take into account any other unresolved cases arising from the previous inquiry which the Committee determined necessary to carry out its inquiry. The Committee therefore decided to consider a limited number of cases arising from the previous Select Committee's inquiry. Those cases were included in the inquiry as they canvassed a range of whistleblowing issues which the Committee believed could be of use in drafting proposals for Commonwealth whistleblower protection legislation and involved individuals and organisations from a number of different areas.

1.32 Among the submissions from other organisations and individuals which provided information on new cases were many from Queensland which raised matters involving the CJC, the Queensland Police Service, local government and the Queensland Corrective Services Commission (CSC). A number of these submissions referred to the CSC's exclusion from the CJC's jurisdiction. Although the Committee agreed that it would not be able to include these specific new cases within its inquiry, it does however note that the PCJC, in its three-yearly review of the CJC, recommended that the CSC be brought within CJC coverage.

1.33 The Committee also intended to consider the case of Mr Mick Skrijel. In September 1993, an independent consultant, Mr David Quick, QC, had been appointed by the Commonwealth to inquire into all aspects of the National Crime Authority's (NCA) dealings with Mr Skrijel and his family. Although due to report by December 1994, Mr Quick produced an interim report in August 1994 which was made available to interested parties for comment and a final report in April 1995. The final report was released by the Attorney-General in late May 1995.

1.34 The Committee agreed not to receive a submission from Mr Skrijel or consider details of his case whilst it was still under investigation by Mr Quick. The delay in finalising and releasing the Quick report was frustrating for Mr Skrijel in being unable to lodge a submission in time for the Committee to consider it.

1.35 The Committee believes that Mr Quick's final report has significant implications in relation to whistleblowing as a result of the alleged actions of a Commonwealth agency in its involvement with Mr Skrijel. In his report Mr Quick advised that:

> In my opinion, there is substantial evidence upon which it is reasonable to base a strong suspicion that evidence was fabricated in order to incriminate Mr Skrijel on serious criminal charges involving drugs and explosives ...
>
> Further investigation of the matter is likely to reveal whether or not the NCA has any legal or moral obligation to make recompense to Mr Skrijel in connection with the matter.[5]

1.36 This advice effectively alleged serious victimisation of a whistleblower involving the National Crime Authority. Mr Quick recommended:

> That a more formal investigation be carried out in relation to some of the allegations made by Mr Skrijel. Such investigations should not proceed until the civil proceedings of Mr Skrijel have been discontinued or finalised by other means ...
>
> That such investigations have coercive powers of investigation and be conducted under the Royal Commissions Act 1902.[6]

1.37 The Government's response has been to refer certain matters to the Victorian Deputy Ombudsman who has powers of investigation relating to police matters. These powers are

5 Report of Mr DM Quick, QC, to the Attorney-General and Minister for Justice with respect to dealing of the National Crime Authority with Mr Mehmed Skrijel and his family, 4 April 1995, p. 183.

6 ibid, p. 185.

discussed in Chapter 7 dealing with the case of the former Sale Councillors. Given the serious nature and implications of the advice and recommendations of Mr Quick, the Committee is concerned that positive action is taken and that the Commonwealth Government implements the recommendations.

Acknowledgements

1.38 The Committee thanks all those who made submissions or gave evidence to the inquiry. The Committee is particularly appreciative of the considerable time and effort involved in the preparation of such detailed submissions and responses to evidence by all concerned. Although the Committee only considered a limited number of cases, it welcomed the contribution made to its inquiry by all.

CHAPTER 2

COMMONWEALTH LEGISLATION ON WHISTLEBLOWER PROTECTION

Introduction

2.1 The Committee was required by its terms of reference to inquire into and report on so much of those unresolved whistleblower cases arising from the report of the Select Committee on Public Interest Whistleblowing (SSCPIW) as the Committee determined necessary to be taken into account for framing proposed Commonwealth legislation on whistleblower protections.

2.2 In considering these cases, which are summarised in Chapters 5 to 7, the Committee found that the conclusions and recommendations of the SSCPIW were reinforced. While the evidence received may have given rise to minor changes in emphasis, this Committee concurs with and strongly supports the conclusions and recommendations reached by the SSCPIW.

2.3 The Committee does not, therefore, wish to canvass the detail of the SSCPIW report. However, it does wish to comment in general terms on a number of matters which have emerged from the Committee's consideration of these cases.

General legislative issues

2.4 Support for the need for protected disclosure or whistleblower protection legislation is widespread.[1] However, the positive view of many whistleblowers to the introduction of legislation may be tempered by unrealistic expectations of what can be achieved through legislation. Legislative protection and powers may not prove to be able to cover all contingencies envisaged by whistleblowers. There needs to be an appreciation and understanding that there may well be limitations as to what can be covered in legislation.

2.5 The CJC has referred to such limitations in respect to victimisation:

> One of the greatest problems facing any agency which sets out to protect whistleblowers is that victimisation can take many forms, some of which it is impossible to legislate against. It is only the most drastic forms of victimisation, such as dismissal or demotion, which can be spelt out in legislation. It is impossible to legislate against everyday slights - not being invited to work functions, not being talked to, not being treated in a friendly manner. These insidious forms of victimisation cannot be addressed in legislation and, in the commission's view, can be dealt with only by a gradual process of education to change the Australian attitude that it is wrong to dob people in to the authorities, even for serious matters.[2]

1 SSCPIW report, pp. 92-8.

2 Evidence, Mr Mark Le Grand, pp. 477-8.

The Committee notes that these 'everyday slights' are examples of workplace harassment, which is a form of employment discrimination. At the Commonwealth level there are guidelines for eliminating workplace harassment that outline procedures for resolving complaints effectively. These guidelines can be seen as part of the gradual process of education to bring about attitudinal change in Australia, leading to a more ethical and harmonious working culture.

2.6 Jurisdictional restrictions within legislation can lead to misunderstandings. In particular, limitations on actions which can be taken by many existing bodies, at State and federal levels, in providing assistance to whistleblowers may not be well understood.

2.7 Similarly, interpretation of statute law is restricted by what is written in an Act. Although argument can take place over narrow or broad interpretations of the law, and some organisations are accused of adopting overly legalistic approaches, the often inflexible nature of the law remains misunderstood by some whistleblowers, whose unrealised expectations of action on their complaints result in disillusionment with the system.

2.8 It was for this reason that the proposals of the SSCPIW were couched in broad terms to encourage legislation to include as great a degree of flexibility as possible.

2.9 The State legislation enacted in South Australia, Queensland and New South Wales with apparently the best intentions of the legislators has nevertheless been criticised by some as inadequate or imperfect. The Committee simply makes the point that no legislation is perfect and so there needs to be a realisation and understanding on all sides of the limitations inherent in any legislation.

2.10 These comments do not in any way diminish the Committee's support for the need to introduce legislation. There was recognition, in the evidence, of the jurisdictional and constitutional difficulties requiring separate Commonwealth and State legislation. Some witnesses emphasised the need for complementary State and Commonwealth legislation.[3] The Committee supports the formulation of complementary legislation and the regular meeting of State and Commonwealth ministers and officials responsible for administering whistleblower protection or equivalent legislation.[4]

Defining the terms

2.11 The SSCPIW adopted as broad a definition of 'whistleblower' and 'whistleblowing' as possible to include disclosures by people from within or outside the organisation in which the alleged wrongdoing occurred and embracing a wide range of activities as constituting wrongdoing. This broad approach was adopted to ensure that a degree of flexibility was retained.[5]

2.12 This Committee did not attempt at the outset to define what it meant by 'whistleblowing' but preferred to allow definitions to emerge from participants to the inquiry. The actions of a number of people were questioned in evidence, to determine whether those

3 See, for example, correspondence, Professor Kim Sawyer, 21.4.95.

4 SSCPIW report, p. 96 and p. 98.

5 SSCPIW report, p. 11.

actions constituted 'whistleblowing' and whether those people could be regarded as 'whistleblowers'.

2.13 It was suggested that the staff of the John Oxley Youth Centre who made the initial complaints about management which led to the establishment of the Heiner inquiry were the 'real' whistleblowers and that the eventual destruction of the inquiry records was to protect them.[6] Mr Kevin Lindeberg's subsequent allegations relating to the legality of this destruction was whistleblowing of a different kind. This issue is further addressed below in paragraphs 5.53-5.

2.14 The CJC has questioned whether Mr Gordon Harris could still be regarded as a whistleblower, given that a number of inquiries had determined that no further action should be taken against Mr John Huey, the subject of his allegations. Similarly, the CJC doubted whether Mr Jim Leggate's submission indicated that he was a whistleblower, or that he had been victimised because of whistleblowing; rather, they considered his submission was 'largely a complaint that his disclosures have not been acted upon'.[7]

2.15 The University of Southern Queensland submitted that persons may move from being 'genuine' whistleblowers to being non-whistleblowers because they have 'undermined the moral strength of the original complaint' through activities such as needlessly destabilising an organisation, with 'vexatious querulousness', and by pursuing matters when the original complaint has been properly dealt with, and making inaccurate or untrue statements about an organisation or the individuals within it.[8]

2.16 The CJC also noted that of the many thousands of complaints it has received not all are from whistleblowers:

> The problem is the definition of whistleblower is so imprecise. How do you characterise them? Are they complainants to the CJC about misconduct or public sector employees complaining about misconduct or corruption in the public sector? I am not sure, but I think WAG contends for a very wide definition. Certainly most of the investigations we undertake are undertaken upon complaint by, or at least channelled through, a particular individual.[9]

2.17 The CJC acknowledged that for the purposes of extending its support facilities and all the protection which it can offer 'our working definition is that all complainants are treated as whistleblowers'.[10] The Committee notes, however, that persons such as Gordon Harris and John Reynolds, who first blew the whistle to another agency, were excluded from CJC protection. Although the CJC's approach may be useful as an operational definition, it is, by its nature, limited in its coverage.

2.18 The Committee concedes that there can be grey areas in determining who is a whistleblower and the scope of activities which constitute whistleblowing. The SSCPIW even

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6 Attorney-General's statement, 21.2.95, p. 14; evidence, pp. 101-2.

7 Submission, CJC, March 1995, p. 17.

8 Submission, Mr Jim McDonald, 27.4.95, pp. 3-6.

9 Evidence, Mr Mark Le Grand, p. 472.

10 Evidence, Mr Mark Le Grand, p. 510.

noted comments from some whistleblowers that they did not realise they had become whistleblowers until events overtook them and they suffered detriment by the organisation.[11] However, the Committee has received many views in evidence which indicate that generally speaking, if definitions are too restrictive, they can subsequently be interpreted too narrowly and thus limit the actions which can be pursued.

2.19 The Committee wishes to ensure that no legitimate whistleblowers are excluded from the ambit of proposed Commonwealth whistleblower protection legislation by a too-narrow definition of whistleblowing. The Committee therefore supports a broader definitional approach to 'whistleblower' and 'whistleblowing', such as that adopted by the SSCPIW.

Ethics and attitudinal change

2.20 The SSCPIW emphasised the need to change attitudes towards whistleblowers and to stress the public interest benefits derived from whistleblowing within public and private sector organisations and the community generally.

2.21 That Committee recommended that an education campaign should be conducted at a national level directed at changing corporate and official attitudes towards whistleblowing at all levels within both public and private organisations, and within the community. The SSCPIW believed that recent programs in ethics and accountability, particularly in the public sector, would be a useful base from which to emphasise, in positive terms for the organisation and ultimately the public interest, the benefits of reporting wrongdoing, accepting such reports and taking appropriate investigative and corrective action.[12]

2.22 The consideration of cases by this Committee has reinforced the urgent need for attitudinal change to be addressed. The Committee has noted that progress is being made. Revised guidelines on official conduct of Commonwealth public servants were issued in March 1995. In launching the revised guidelines, the Minister Assisting the Prime Minister for Public Service Matters, Mr Gary Johns MP, emphasised that 'ethics and honesty were a key to modern and effective public service'.[13]

2.23 Mr Johns noted that for the first time the revised guidelines contain a section on whistleblowing. The guidelines deal with the issues of reporting matters internally, external review, reporting matters to the public or to another department, and protective provisions. The limitations and deficiencies of such procedures were discussed in the SSCPIW report. However, the guidelines acknowledge that there is at present no Commonwealth legislation which explicitly provides for public servants to report fraud, waste and mismanagement and which provides protection from victimisation for public servants who do this. The Government's position on these matters is currently under review.[14]

2.24 Following the launch of the revised guidelines, the Public Service Commission has been conducting a national seminar series throughout 1995 on 'Ethics in the APS'. These half-day

11 SSCPIW report, p. 63.

12 SSCPIW report, pp. 83-92.

13 Media release, No. 8/95, 7 March 1995, by Mr Gary Johns MP.

14 *Guidelines on Official Conduct of Commonwealth Public Servants*, Public Service Commission, 1995, Chapter 19-Whistleblowing, pp. 94-96.

seminars are designed to identify the skills and knowledge required to establish and maintain a high standard of ethical behaviour. One of the particular aims is for participants to appreciate the importance of a high standard of ethical behaviour in maintaining and enhancing the credibility and reputation of the APS.

2.25 The Committee believes that in any education or training programs, it is crucial that people understand the rationale for ethical behaviour, in addition to learning what behaviour is expected of them. Dr Noel Preston has argued that at the most basic level, the debate needs to be about institutional purposes. He says:

> A fundamental feature of an institutional ethics program is the clarification and exposition of the particular values justifying an institution's existence. That is the starting point and the ongoing reference point for ethics in public life.[15]

2.26 Queensland enacted a Public Service Ethics Act in 1994 to complement the Whistleblowers Protection Act. The Act spells out for public officials the ethical principles and obligations which are declared to be fundamental to good public administration. The ethics principles are listed as respect for the law and the system of government, respect for persons, integrity, diligence, economy and efficiency. Codes of conduct are to be prepared to provide standards of conduct for public officials consistent with ethical obligations. However, there is scope for significant variation between codes of conduct as individual public sector agencies are responsible for preparing their own code.[16]

2.27 The Committee is concerned to ensure that these developments towards bringing about an ethical culture in the public sector at Commonwealth and State levels can be successfully implemented and not simply remain as rhetoric.

2.28 A recent survey of Senior Executive Service officers conducted for the Public Service Commission found that 50 per cent of those surveyed supported the statement that ethical behaviour was more important than managerial efficiency. There were, however, notable differences by level of seniority: agreement with the statement declined as one moved up the executive levels.[17]

2.29 Obviously, a balance is required. Dr Preston has summed up the dilemmas in pursuing any program of ethics for the public sector in responding to his own question of how one is to build an ethical organisation or work place culture. Dr Preston sees this question as crucial because 'it is axiomatic that ethical behaviour is not improved by education or codes alone'. He continued:

> The desirability of institutionalising ethics in an unsatisfactory, undemocratic, hierarchical work-culture is certainly questionable ...
>
> Attempts to raise the profile of ethics in organisations without supportive regulatory measures and reform of workplace culture, may be futile and

15 Dr Noel Preston, 'Queensland legislates for a new code of ethics', *Directions in Government*, vol. 9, no. 1, February 1995, p. 18.

16 *Public Sector Ethics Act 1994* (Qld), Act No. 67 of 1994.

17 Dr Patty Renfrow, *An Assessment of the Senior Executive Service in the Australian Public Service: A survey of its officers*, Public Service Commission State of the Service Paper No. 9, 1995, p. 15.

> counter-productive, giving credence to the view that codes of ethics and associated measures are but a public relations exercise or that they border on moral authoritarianism.
>
> Without open discussion within an organisation there is a distinct possibility that ethics will become just another managerial tool.[18]

2.30 There have also been further developments with fraud control policy in the Australian Public Service since the tabling of the SSCPIW Report. In late 1994 the Commonwealth Law Enforcement Board published a document entitled *Best Practice for Fraud Control* which outlines a comprehensive approach to fraud control issues by providing a set of policies and directions to assist Commonwealth departments and agencies in carrying out their responsibilities to combat fraud against their programs.

2.31 The document states, inter alia, that:

> Fraud control is concerned ultimately with the effective utilisation of resources and the minimisation of waste, abuse, mismanagement and fraud. Effective accountability mechanisms for the use of agency resources act to bolster the fraud control environment ...
>
> The Government recognises that fraud prevention goes beyond monitoring the effectiveness of financial controls. It also requires the maintenance of an ethical climate which encourages all staff to be active in protecting public money and property, and in reporting any breaches of accepted standards ...
>
> Of course, enhancing a climate of ethical culture must go beyond reminding staff of their legal obligations and the promulgation of codes, useful as they are. The promotion of an ethical culture in an organisation is directly affected by the attitude and behaviour of management. It should also encompass the opportunities provided by training, particularly induction training.[19]

The Committee acknowledges these to be commendable sentiments. However, their value in bringing about ethical and attitudinal change resides in their acceptance and implementation throughout all levels of the public sector. The Committee strongly supports the developments in ethics and fraud control within the Commonwealth and State public sectors and encourages the Public Service Commission to continue to develop and conduct seminars promoting an ethical culture on a Service-wide basis.

Need for an independent agency

2.32 The Committee noted that the SSCPIW discussed a range of options on the subject of whether a new agency should be created to receive and investigate disclosures and to

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18 Dr Noel Preston, op. cit., p. 18.

19 *Best Practice for Fraud Control - Fraud Control Policy of the Commonwealth*, Commonwealth Law Enforcement Board, 1994, pp. 2, 8 and 25.

investigate any discrimination suffered by whistleblowers as a result of those disclosures, or whether an existing Commonwealth agency should have that role.[20]

2.33 An independent, separate whistleblower protection body was strongly advocated by whistleblowers and the Queensland Whistleblowers Action Group. They argued that the problem was not just with existing bodies; rather, it was

> the general tendency of these types of bodies to be the champions of the bureaucracies that establish them. It is this general tendency to defend the system that renders such bodies counterproductive in protecting whistleblowers.[21]

2.34 The major considerations upon which the SSCPIW based its decision on this subject were twofold: a concern that any agency be visibly independent; and an acknowledgement that there already existed organisations with procedures for assisting and protecting whistleblowers. The SSCPIW recognised that many of these organisations and procedures were not operating to the satisfaction of whistleblowers and stressed that they should be made to operate in the manner intended and to the satisfaction of all parties involved.

2.35 The Committee believes that it is particularly important that any legislation provides an initial screening process for complaints, an effective referral and advice service, an oversighting of investigations to ensure they are performed expeditiously and in accordance with correct procedures and a capacity to intervene if investigations are not performed accordingly, and a process to ensure protection for any whistleblower.

2.36 It is essential that the body which undertakes these functions can operate independently so as to gain the support and confidence of whistleblowers for a system which is, and is seen to be, totally open and accountable.

2.37 For these reasons, the Committee supports the recommendation of the SSCPIW for the establishment of a small but powerful independent agency whose primary role would be to receive and register public interest disclosures and arrange for their investigation by an appropriate authority, and to ensure the protection of people making such disclosures including taking action over reprisals against whistleblowers. The establishment of this agency should take place in conjunction with the strengthening through legislative means of the powers and responsibilities of existing organisations in relation to investigations and protection.[22]

2.38 The Committee recognises the resource implication of the SSCPIW's recommendation for the creation of a separate Public Interest Disclosures Agency and Board. The SSCPIW was mindful of the desirability of containing set-up and operating costs. Its intention was for the Agency to provide a lean, efficient, credible and cost-effective method of handling public

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20 SSCPIW report, Ch. 7.

21 Evidence, Mr Greg McMahon, p. 455.

22 SSCPIW report, pp. 112-14.

interest disclosures.[23] The Committee equally understands and endorses the need for the Agency to remain small and essentially non-bureaucratic.

Disclosures and investigations

Definition of 'public interest disclosure'

2.39 The differentiation of what properly comes within the category of a public interest disclosure, as distinct from a frivolous or vexatious allegation or complaint, is important in the drafting of whistleblower or protected disclosure legislation.

2.40 The SSCPIW recommended categories of wrongdoing which would constitute public interest disclosures for the purpose of the proposed legislation. That Committee believed that matters of a trivial or minor nature should not be included in the legislative definition of wrongdoing. Such misdemeanours or trivial matters should still warrant investigation, but not under the auspices of whistleblower protection legislation.[24]

2.41 State legislation enacted to date has varied somewhat in the types of disclosures which attract protection. In South Australia, public interest information covers illegal activities, irregular and unauthorised use of public money, substantial mismanagement of public resources or conduct that causes a substantial risk to public health or safety or to the environment.[25] The New South Wales legislation covers disclosures showing corrupt conduct, maladministration (defined as action or inaction contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, or based on improper motives) or serious and substantial waste of public money.[26] In the ACT, disclosures cover public wastage, unlawful reprisals, and conduct that could constitute a criminal or disciplinary offence.[27] The Queensland legislation broadly covers disclosures of unlawful, negligent or improper conduct affecting the public sector, dangers to public health or safety or to the environment. It specifically excludes 'mere disagreement over policy'.[28]

2.42 In practice, these definitional differences may not limit the types of disclosures which attract protection, as the implied intent of the various statutes is to be inclusive rather than exclusive, with the obvious exceptions being disclosures which are frivolous, vexatious or malicious. Given the observed tendency of investigative agencies to adhere strictly to the letter of the law, however, it is important that in the drafting of Commonwealth whistleblower protection legislation, careful thought be given to the choice of words.

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23 SSCPIW report, p. xxvi.

24 SSCPIW report, pp. 161-2.

25 *Whistleblowers Protection Act 1993* (SA) s.4.

26 *Protected Disclosures Act 1994* (NSW) ss.11-14.

27 *Public Interest Disclosure Act 1994* (ACT) s.3.

28 *Whistleblowers Protection Act 1994* (Qld) ss.3, 17.

Priority given to investigations

2.43 This Committee has received evidence which indicates that many whistleblowers appear to believe that all allegations and disclosures should be investigated with equal rigor. Whistleblowers perceive, rightly or wrongly, that investigating bodies rank complaints by level of importance and handle them accordingly. It can be devastating for complainants to discover that an issue which has assumed for them enormous proportions is treated as trivial by the investigating agency.

2.44 It is vital that whistleblowers, from the outset, are made aware of how their disclosures will be handled, and within what time frame. They also need to be kept informed at regular intervals of progress with their case. This reinforces the importance of the initial screening process, a function recommended by the SSCPIW for a Public Interest Disclosures Agency in the Commonwealth arena.[29] This Committee similarly recognises and agrees with the need to introduce a more comprehensive form of screening than exists at present. This would include performing an initial assessment to determine matters which properly come within the category of public interest disclosures and identifying frivolous and vexatious allegations. This screening process should also be able to identify allegations or disclosures of a minor or trivial nature which would be referred to appropriate counselling facilities and advisory services.

Conduct of investigations

2.45 In evidence to the Committee, many whistleblowers described their dissatisfaction with the way their disclosures had been investigated. They were dissatisfied for a number of reasons: incorrect investigative procedures had been followed; investigations had been unduly delayed or protracted; evidence had been used selectively; relevant persons had not been contacted; and allegedly crucial information had not been followed up.

2.46 In its consideration of investigative procedures, the SSCPIW recommended the formulation or enhancement of internal reporting systems and procedures within organisations to deal specifically with whistleblowers and their disclosures. If whistleblowers were dissatisfied with the outcome, they would have the opportunity of approaching the Public Interest Disclosures Agency which, having assessed the disclosure, would refer it to the appropriate investigative body. The SSCPIW also recommended that investigative bodies, such as the Ombudsman, should have increased powers relating to the receipt and investigation of whistleblower disclosures.

2.47 It appears to the Committee that, no matter to which agency disclosures are made, whistleblowers are not always provided with a sufficiently detailed explanation of how their disclosures will be investigated. Jurisdictional constraints with public sector investigatory procedures combined with inadequate advice or assistance make it difficult for whistleblowers to understand the processes involved and consequently, many inquiries do not achieve the outcome hoped for by the whistleblowers. The Committee believes that with much more informal advice, assistance and counselling being provided to whistleblowers or potential whistleblowers both before and at the time of the initial screening process, unrealistic expectations as to the outcome of inquiries could be reduced.

29 SSCPIW report, pp. 170-3.

Onus of proof and other questions of evidence

2.48 A number of whistleblowers proposed that after a disclosure or allegation of wrongdoing had been made, the onus should be placed upon the named party to prove their innocence. If needs be, this could be through the production of supporting documentation.[30] Allegations are sometimes made with limited supporting evidence. This placement of the onus or burden of proof on the accused constitutes a reversal of the principle that an accused is innocent until proved guilty. The Committee strongly supports the view of the SSCPIW which did not endorse the proposition that the onus of proof be reversed, considering that any such endorsement 'may have serious and deleterious ramifications for the justice system'.[31]

2.49 Mr Peter Jesser developed this proposition further. He advocated a presumption of guilt for those organisations accused (based on the balance of probabilities) as appropriate where a case can be made that identifiable evidence is relevant to the whistleblowing matter and that evidence has been destroyed or 'disappeared' without just cause (see paras 7.46-7). Mr Jesser explained:

> I base this recommendation on the concept of collective responsibility and accountability within organisations, and the belief that a whistleblower should not have to prove misconduct on the part of a particular individual who might [be] supported by the organisation (using taxpayers' funds) mounting a technical defence based on that same concept of collective responsibility and accountability.[32]

2.50 While the Committee appreciates the difficulty presented to whistleblowers when evidence disappears, it does not regard applying the lower legal standard of proof (the balance of probabilities), as well as reversing the onus of proof, as proper. It also demonstrates a confusion about the legal and justice system and ignores the rights of those against whom allegations have been made by whistleblowers. Considerations such as these further support the Committee's proposal for more legal advice and counselling for whistleblowers before or at the time of the initial screening process.

2.51 The admissibility of evidence in Australian courts was a matter which concerned many whistleblowers. As Professor Sawyer pointed out:

> Most whistleblowers encounter a legal system which is antithetical to the truth. The whistleblower is fundamentally interested in the truth; the adversarial legal system currently in place in Australia is concerned only with legal technicalities, legal game theory, legal diversions and of course their associated cost ...
>
> The whistleblowing protection body must adopt procedures which admit all relevant evidence ... rather than the British system of justice.[33]

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30 Evidence, Mr Eric Thorne, p. 61.

31 SSCPIW report, p. 160.

32 Submission, Mr Peter Jesser, 23.1.95, p. 11.

33 Submission, Professor Kim Sawyer, pp. 2-3.

2.52 The question of what is relevant evidence depends entirely on the particular allegations made, but the Committee makes the general point that in some cases what the respective whistleblowers regarded as evidence was more in the nature of further allegations or general opinion (see, for example, the Sale councillors case, paras 7.7 and 7.21). The CJC particularly emphasised the importance of relevance and admissibility of evidence (see Chapter 4).

2.53 Another issue was the question of alleged fabrication of evidence which was of particular concern to Mr Jesser.[34] There is not a great deal that is different with this issue in the whistleblowing arena from any other field of investigation and assessment of conflicting accounts of events. The skill and thoroughness of the particular investigator, and then of the arbiter of fact, is what counts.

2.54 What may fairly be described as a common problem with many of the cases considered by this Committee, is some whistleblowers' unrealistic expectations as to what can be achieved by investigation or review of their cases. In no way does this detract from the very real difficulties with current arrangements for handling whistleblower disclosures. Accordingly, the Committee makes the point that any new regime, such as the proposed independent agency, will not be perfect and will not necessarily overcome the problem of unrealistic expectations.

Rules of natural justice

2.55 The Committee strongly supports the view that whistleblower protection legislation should ensure that the investigation of complaints is in accordance with the rules of natural justice. As Mr Jesser said to the Committee:

> Procedures which do not require investigating officers to establish facts or which do not allow the complainant to address statements invite the type of investigation which turns the matter into an attack upon the complainant. The whistleblower must have the right to know what information has been gathered, the right to question his or her accusers and to challenge any assertions put forward.[35]

2.56 However such rights must apply equally to the subject of a complaint as to the complainant. In relation to the application of natural justice by the CJC, see paras 4.34-40.

Public or private hearings

2.57 The issue of whether investigative hearings should be held in public or in private was discussed at some length with the Committee. As a generalisation, whistleblowers argued that the investigation of disclosures made in the public interest should be conducted openly and in the public domain. Investigations conducted privately are often seen by whistleblowers as having something to hide. The difficulties with this proposition are primarily that many forms of investigative hearing do not provide legal protections and many allegations, which may subsequently prove to be unfounded, reflect adversely upon individuals, with the potential of destroying a person's reputation - in effect character assassination. This argument against open

34 Evidence, Mr Peter Jesser, pp. 398-9.

35 Evidence, p. 400.

hearings in certain cases was strongly advocated by the CJC and supported by the PCJC in its three yearly review of the CJC.[36]

2.58 The Committee believes that balancing the protection of the rights of the subjects of whistleblowing with those of the whistleblower and the possible public interest aspects is crucial for the successful implementation of any protected disclosures or whistleblower protection legislation.

2.59 The SSCPIW recommended that the rights of the subjects of whistleblowing be protected in accordance with the principles of natural justice, investigations should be conducted privately in so far as the public interest is best served, and, where allegations are not substantiated after due and proper investigation, the details of the complaint should not be publicly released.[37]

2.60 However, whistleblowers have their suspicions raised when confronted with closed or private hearings.[38] The Committee considers that public hearings are important for raising public interest issues and believes that whistleblowers' suspicions could be reduced if the investigatory process were more transparent. It therefore prefers a greater emphasis on public hearings, provided that the interests of individuals are protected.

Availability of resources

2.61 Limitations on resources can have a significant impact upon investigations. Resource availability can be a factor when an agency considers whether a particular disclosure or complaint will be investigated, the extent of the investigation which may ensue and the number of appeals which can be pursued. Obviously, such considerations take into account other matters, such as balancing the public interest value of particular disclosures.

2.62 The CJC advised the Committee that, following its establishment in 1989, it was inundated with such a large number of complaints that decisions had to be taken in determining a priority for complaints which could be pursued and those which had to be put aside. Resource questions were influential in making these decisions.[39]

2.63 The CJC also took account of resource considerations during its initial assessment of a complaint. If evidence to support a complaint was weak or difficult to obtain, or insufficient to result in a successful prosecution, then that complaint would not be pursued.

2.64 The statistics provided by the CJC indicate the volume of complaints received in recent years. Over 15,000 matters have been referred to the CJC for investigation since April 1990. Even when non-jurisdictional complaints are excluded, it is apparent that those remaining are too numerous to receive the same level of attention. The CJC has investigated 11,500 of these matters and recommended over 3,500 charges for criminal or disciplinary offences.

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36 Parliamentary Criminal Justice Committee, Report No. 26, 1995, pp. 74-5.

37 SSCPIW report, pp. 185-6.

38 See, for example, submission, WAG, 26.1.95, p. 8.

39 Evidence, Mr Mark Le Grand, p. 90 and p. 471.

2.65 The intensity and priority afforded an investigation can then be influenced by resource questions. The Privacy Commissioner suggested in evidence before the SSCPIW that perceived flaws in investigatory processes could be strongly linked to resources.[40]

2.66 Some of the cases considered by the Committee have involved a number of investigations by differing bodies because the individuals concerned have been dissatisfied with processes and results. It was advanced by a number of these investigating bodies that there has to be a limit to the number of inquiries, often reaching the same conclusion, which could justifiably be publicly funded. Whistleblowers and their support groups do not accept this view.

Protection of whistleblowers

2.67 The SSCPIW outlined the retribution suffered by many whistleblowers in the form of victimisation, harassment and intimidation. It made a number of recommendations relating to the protection of whistleblowers involving the Merit Protection and Review Agency and the Human Rights and Equal Opportunity Commission, and the introduction of a tort of victimisation.[41]

2.68 The Whistleblowers Action Group forcefully suggested that the body undertaking an investigation of a complaint should be separate from any body involved in the protection of a whistleblower and the investigation of any reprisals.[42]

2.69 Independence from executive control was also regarded as an important aspect of whistleblower protection. Dr Noel Preston suggested that:

> any whistleblowing legislation should ensure that there are outlets with protection for a bona fide whistleblower that are not controlled by the government of the day. That seems to me the critical point, an obvious point at one level but one not necessarily observed in the practice of whistleblowing protection legislation.[43]

2.70 The Committee understands and accepts these arguments for separation of roles and independence in protecting the whistleblower and investigating alleged victimisation and harassment. The Committee believes that these concerns have been included in the SSCPIW recommendation that the Public Interest Disclosures Agency should have an oversighting and appeal role in this general area of whistleblower protection.

2.71 The Committee notes the increasing relevance of industrial relations legislation in employee protection, especially relating to unfair dismissals and provision for appeals to industrial commissions and tribunals on employment related matters. These provisions provide further avenues for whistleblower protection.

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40 SSCPIW report, p. 79.

41 SSCPIW report, pp. xx-xxi.

42 Evidence, Mr Eric Thorne, pp. 63-6; and evidence, Mr Greg McMahon, p. 452.

43 Evidence, p. 51.

2.72 The Committee is also aware that Whistleblowers Australia and other whistleblower support groups overseas are involved with an international campaign to have public interest disclosures included under ILO Convention 111, the *Discrimination (Employment and Occupation) Convention, 1958.*

Retrospectivity

2.73 Retrospectivity in whistleblower protection legislation was again considered. The SSCPIW recommended that investigation of disclosures should not be precluded where the wrongdoing occurred before the commencement of the legislation or the disclosure occurred within five years prior to the commencement of the legislation.[44]

2.74 Mr Eric Thorne of the Whistleblowers Action Group acknowledged that there had to be a cut-off point and that five years seemed reasonable.[45] This view was developed in correspondence where he wrote:

> WAG is of the belief that there could be two separate issues involved:
>
> - that of retrospectivity of legislation; and
> - a time limit being imposed, to limit investigations into allegations of substance into any form of official corruption.
>
> In the latter case, WAG is of the opinion that where there is a prima facie case of official misconduct there should be no time limit restriction imposed.[46]

2.75 The Committee recognises the dilemma where a number of whistleblower cases have continued for many years without reaching a resolution satisfactory to all parties. This problem was evident in the cases of Mr Jack King, Mr Bill Toomer and Mr Bill Zingelmann (see Chapter 7). Mr Zingelmann specifically addressed this issue. He wrote:

> Retrospectivity as a principle of the legislative process is generally reviled within the community at large and embraced with apprehension and circumspection within the political process.
>
> However, at law in circumstances involving the absence of prescribed Statutes of Limitations, the community (and political) expectation is that retrospectivity without limit shall be applied to the investigation of and appropriate application of law to any criminal activity of a serious and/or systemic nature ...
>
> I submit ... that any Commonwealth legislation for a "Whistleblower Agency" must include provision for such an agency to fully and fairly investigate any allegation of substance, where prima facie evidence of a reasonable standard has been provided, regardless of the age of the alleged crime or act of official misconduct.[47]

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44 SSCPIW report, pp. 162-3.

45 Evidence, p. 65.

46 Correspondence, Mr Eric Thorne, 11.4.95, p. 1.

47 Submission, Mr Bill Zingelmann, 29.3.95, p. 2.

The Committee acknowledges this argument but is of the opinion that there must be limits to retrospectivity.

2.76 The Committee supports the two-fold approach to retrospectivity recommended by the SSCPIW. Firstly, there should be unlimited retrospectivity for disclosing wrongdoing which occurred before the commencement of the legislation, if information concerning that wrongdoing becomes available after the commencement of the legislation. Secondly, for a wrongdoing which has been disclosed prior to the commencement of the legislation, a five year period is considered to be an appropriate period for retrospectivity.

Legal aid and assistance

2.77 The SSCPIW made only a general recommendation concerning the provisions of legal aid for whistleblowers, namely that Legal Aid Commissions should be informed that whistleblowers and actions arising from whistleblowing ought to be considered as one of the categories of actions for which legal aid may be granted, if the applicant is otherwise assessed as eligible.[48]

2.78 The Committee has received evidence referring to the difficulties encountered by whistleblowers in the legal pursuit of their disclosures. This appears to be demonstrated in two main areas. Firstly, in making a complaint, individual whistleblowers may find themselves up against the strength of an organisation or agency of the state with access to extensive resources which are not available to the whistleblower. Secondly, and this can be seen in the provision of judicial review of the CJC's activities, there are avenues of appeal available through superior courts or tribunals to which a whistleblower may not be able to afford access. This situation was described to the Committee as it being all very well to talk about available avenues of justice but, if whistleblowers do not have the resources to access this legal system, they are 'striking injustice right from the very first point'.[49]

2.79 The Committee believes that whistleblowers should be entitled to legal aid assistance subject to the usual assessment procedures being undertaken. The Committee acknowledges that whistleblowers are not alone in deserving assistance to meet legal costs and that persons who are the subjects of whistleblowing complaints should be similarly covered for any legal action taken in their defence.

2.80 The Committee concurs with and endorses the SSCPIW's encouragement of community oriented legal services to provide legal assistance and advice to whistleblowers and associated persons.

Counselling and advice services

2.81 The Committee has noted the importance of assistance, advice and counselling being made available to whistleblowers and potential whistleblowers. The SSCPIW recommended

48 SSCPIW report, p. 196.

49 Evidence, Mr Eric Thorne, pp. 59-60.

that counselling services should be community based, provided through private or community groups or ethics foundations with both government and corporate financial support.[50]

2.82 The Committee heard of concerns that the Whistleblower Support Program within the CJC was staffed by a single manager and had a heavy case load. Its functions include making appropriate referrals. Although the PCJC three yearly review of the CJC made recommendations concerning the independence and integrity of the Whistleblower Support Program (see para 4.62), some whistleblowers have, rightly or wrongly, a perceived lack of trust in the CJC. They are concerned at confidentiality aspects of a support program run by the CJC. The secretary of the Whistleblowers Action Group noted that private counsellors are the prime resource used by whistleblowers, rather than the program that has been set up by the CJC.[51]

2.83 The Committee believes that whistleblowers would similarly lack confidence in any government agency involvement in confidential counselling and assistance. The Committee therefore supports the recommendation of the SSCPIW in relation to counselling and advice services for whistleblowers.

Whistleblowing and the media

2.84 In the course of the present inquiry, the Committee noted that a considerable number of the cases it chose to investigate further had had considerable media exposure. In the case involving Mr Gordon Harris, it could even be said that the media, in the form of Channel 7 Brisbane, actually became players in their own right. In no instance did the whistleblower take his or her disclosure to the media in the first instance, but only did so when the investigating agency failed to act, failed to act sufficiently promptly, or failed to act in a way which satisfied the whistleblower.

2.85 The Committee understands, and can sympathise with, those whistleblowers who sincerely believe that their legitimate disclosures are being handled inappropriately or too slowly and who, as a result, endeavour to speed up or alter the investigative process by exposing it to the public gaze. There have been, in recent times, examples of spectacularly successful whistleblowing disclosures to the media. One such example was that by Dr Helen James against the Civil Aviation Authority which resulted in action both to counter the problems exposed and to reinstate the whistleblower.[52] The case of the Basil Stafford Centre in Queensland was another.[53] A health worker, who tried for four years through official channels to stop the physical abuse of the intellectually handicapped patients, finally achieved an inquiry by the CJC by exposing the abuse to the media. Such successes are likely to foster even more media involvement in the future in whistleblowing cases, either at the instigation of the whistleblower or of the media.

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50 SSCPIW report, p. 193.

51 Evidence, Mr Eric Thorne, pp. 68-9.

52 Adrian Bradley, 'Whistle While You Work?', *The Australian*, 31.1.95, p. 11.

53 Dr William de Maria, 'Public Interest Disclosure Laws in Australia and New Zealand: Who are they really protecting?', [in press, 1995], p. 12.

2.86 In the Committee's view, recourse to the media is a perfectly legitimate tactic on the part of a whistleblower, though one perhaps more appropriately employed after other avenues have failed. The media are well aware of their legal position with regard to defamation law and there are in the 1990s sufficiently talented and ethical investigative journalists so that both sides can benefit from the exercise.

2.87 The Committee found, as did the SSCPIW, that there were differing views as to whether a person making a public interest disclosure to the media should be provided with whistleblower protection, or whether protection should be limited to disclosures made through 'proper' channels.[54] Of the whistleblower protection legislation enacted in New South Wales, Queensland, South Australia and the Australian Capital Territory in recent years, only the *Protected Disclosures Act 1994* (NSW) specifically provides protection for a disclosure made to a journalist, provided that the disclosure has previously been made to a relevant authority which declined to investigate it, failed to complete the investigation within six months, failed to recommend action or failed to contact the whistleblower within six months of the making of the disclosure.[55]

2.88 The arguments against whistleblower protection for disclosures made to the media centre on the damage that can be done to innocent reputations by unsubstantiated allegations. The Committee shares the view of its predecessor (the SSCPIW) that the principle of freedom of speech overrides any such argument, particularly when buttressed by Australia's defamation laws. For the protection of whistleblowers, however, and to guard against exploitative journalism, the Committee would not wish to see disclosures aired publicly without some preliminary screening process.

2.89 Again, the Committee endorses the views of the Gibbs Committee and that of the SSCPIW, that whistleblowers be protected when they make a disclosure of wrongdoing to the media, where to do so is excusable in all the circumstances. The factors to be taken account of, in determining whether it is excusable, include the seriousness of the allegations, a reasonable belief in their accuracy, a reasonable belief that making a disclosure along other channels might be futile or result in victimisation of the whistleblower.[56]

2.90 As Dr Bill de Maria has noted, the whistleblower-media relationship is virtually unresearched but the little that is known suggests that it is highly complex and virtually reinvented on each occasion. He suggested:

> Sensationalism v. investigative journalism; snapshot coverage v. sustained reporting; victim focussed v. system focussed - these conflicting items swim below the surface, usually out of sight to the whistleblower. These conflicts get resolved by media management against the public interest more times than is realized.[57]

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54 See discussion in SSCPIW report, pp. 197-203.

55 *Protected Disclosures Act 1994* (NSW), clause 19, (1)-(3).

56 SSCPIW report, p. 203.

57 Dr William de Maria, 'Public Interest Disclosure Laws in Australia and New Zealand', [in press, 1995], p. 12.

As the whistleblowers did not, for the most part, provide details of their interactions with the media, the Committee is unable to comment definitively on these issues, but recognises their significance.

2.91 The Committee notes, however, the many instances, in cases which it has examined and which have come to its attention by other means, in which media management has chosen to run a whistleblower's story. A recent, much-publicised example was the case of two former ASIS officers, whose disclosures on the ABC *Four Corners* program resulted in a judicial inquiry conducted by Mr Justice Samuels and, later, in offers of monetary compensation for at least one of the persons involved.[58] Such a result would have been unlikely in the extreme without the media exposure.

58 *Canberra Times*, 23 August 1995, p. 2.

CHAPTER 3

GENERAL ISSUES

3.1 During the course of its inquiry, the Committee received evidence which not only highlighted the problems of whistleblowing but also identified concerns which the Committee believes require remedies in addition to those offered by whistleblower protection legislation. Areas where these concerns arise are: higher education, Commonwealth/State jurisdiction, and environmental protection.

Higher education

3.2 In its report, the Select Committee on Public Interest Whistleblowing (SSCPIW) addressed the issues of intellectual suppression and whistleblowing in academic institutions. The SSCPIW also raised the issue of accountability of academic institutions. While acknowledging the importance of academic freedom and the 'self-regulation' of the education industry as far as practicable, the SSCPIW pointed to instances where the pursuit of self-determination had undermined the concept of academic freedom, resulted in the operation of 'isolated pockets of tyranny' and caused the serious interruption of the careers of those who exposed administrative or academic wrongdoing.[1]

3.3 Evidence to this Committee also canvassed academic freedom and the need to address serious problems that have arisen with accountability in some institutions. The Committee recognises that academic institutions are faced with a potential conflict: a desire by institutions to maintain self determination, and in so doing, ensure intellectual freedom, while at the same time having to fulfil external requirements, including accountability requirements and academic standard mechanisms, to ensure continued funding of the institution.

3.4 External requirements that impact on the funding of universities are not only imposed by government. Significant changes have been occurring in the higher education sector as government has demanded that institutions change financial and management practices to reflect changes in the wider public sector including the sourcing of income from the non-government sector and changing staff tenure. While there is still a major commitment by the Commonwealth, ($16.5 billion was allocated to higher education over the 1996-98 fundings triennium in the 1995-96 Budget), its contribution has fallen from over 90 per cent of funds to about 56 per cent of funds received by universities.[2] The remaining funds are raised from full fee-paying students and the commercial arms of institutions. Therefore the need to satisfy private commercial interests and to attract fee-paying students is also an important consideration for higher education institutions.

3.5 The Committee recognises that these changes to funding and management arrangements are, in part, an outcome of changing budgetary circumstances. The reforms will allow institutions to have access to private sector funds and to gain commercially from research conducted within universities at a time when access to government funds is becoming more restricted. While recognising the benefits of such reforms, the Committee believes that

1 SSCPIW report, 1994, pp. 141-46.

2 Media Release, Minister for Employment, Education and Training, 5 June 1995.

there are potential dangers arising from too great an emphasis on financial imperatives. First, the increase in competition for funds, both from the government and non-government sectors, and the need to attract and hold full fee-paying students, may foster a culture that actively seeks to dissuade members of the institution from serving the public interest and disclosing particular kinds of information. It is in an institution's vested interest to maintain a problem-free public image. Secondly, the changes in management practices, such as the greater use of contract employment rather than tenured employment, may also create an environment where staff are less willing to make public interest disclosures and thereby risk interruption to their careers.

3.6 The Committee has received evidence that there can be grave employment consequences arising from whistleblowing activities. Professor Kim Sawyer indicated that 12 of the 16 Royal Melbourne Institute of Technology academics who originally reported maladministration within their Department at RMIT had left the Department. Some left through resignation and transfer, while others did not have their contracts renewed or departed because of legal action.[3] The Committee also notes a recent article in the *Australian Financial Review* which highlighted the cases of an academic at the University of Wollongong 'who failed to have her contract renewed when she publicised the fact that students who had clearly failed in her courses were being allowed to graduate' and an academic at the Curtin University in Western Australia who was suspended and charged with discrediting the University after similarly speaking out about incidents involving plagiarism.[4]

3.7 The Committee heard further evidence on accountability in higher education institutions from Professor Sawyer:

> There is a decided lack of accountability within academic institutions at the present time in all respects; not only financial with academic standards. It is really up to us. It is a self-regulating market, and there is a veneer there. We have seen the quality assurance grants and the rankings come through in the last few days, but that is a very superficial mechanism. It is not getting to the truth, and that is the unfortunate situation.[5]

3.8 The Committee notes that higher education institutions receive significant amounts of public monies and as organisations operating under a policy of self determination, have the ability to allocate those monies as they see fit. However, it must be recognised that the great autonomy enjoyed by higher education institutions imposes an increased requirement for accountability. This accountability is not limited to traditional issues of compliance for the expenditure of public monies. Accountability includes issues of probity, fairness and ethical behaviour within the risk management approach currently adopted by the public sector.

3.9 The Committee notes that the Commonwealth Government has established the Higher Education Management Review. The Review is to report in December 1995 on the management and accountability requirements for ensuring Australia has a high quality, efficient and effective higher education sector. The Committee believes that the establishment of the review is timely, and will serve an important function in examining accountability issues,

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

4 *Australian Financial Review*, 18.7.95, p. 41.

5 Evidence, Professor Kim Sawyer, p. 388.

particularly those related to institutions which, while receiving large amounts of Commonwealth funds, are established under State legislation.

3.10 A further matter brought to the Committee's attention relates to access to external agencies for review of decisions taken by academic institutions. In the cases considered by the Committee, whistleblowers sought assistance from the Ombudsman (Queensland), the Information Commissioner (Queensland), Industrial Relations Commission (Queensland), Queensland Criminal Justice Commission, Auditor-General (Victoria), University Visitor (Victoria) and Supreme Court of Victoria.[6] The whistleblowers resorted to external agencies not only for the disclosure of the wrongdoing but also for assistance arising from alleged harassment and other matters as a result of making a public interest disclosure. The latter included appeals from decisions of a university Vice-Chancellor, lack of action on grievance issues, tampering with documents and lack of action on reported fraud.

3.11 The outcomes arising from contact with external agencies by whistleblowers in academic institutions highlight a number of general issues. First, there is often a general lack of understanding of the role of agencies and the limits of the jurisdiction of those agencies. For example, Mr Jesser complained that neither he nor his wife were able to get their complaints investigated by the Criminal Justice Commission because they had been led to believe that the CJC's role was limited to investigation of corruption related to financial matters only.[7] Professor Sawyer sought a Supreme Court order to overturn decisions of the Vice-Chancellor of RMIT. However, this avenue was not available as an administrative decision is defined as one altering the rights of a person and, although Professor Sawyer saw the charge of serious misconduct as altering his right through the damage to his reputation, this was not within the definition of 'right' accepted at law.[8]

3.12 Professor Sawyer and his colleagues also sought assistance by petitioning the Visitor to RMIT, the Governor of Victoria. The matter was referred by the Visitor to the Chief Justice of the Supreme Court. The substantial matters of the petition were never considered by the Visitor as in the first instance, a ruling was sought as to the jurisdiction of the Visitor to hear the petition. On the ruling of the Chief Justice, the Visitor dismissed the application to have the petition heard because RMIT had not, after two years, taken action to prescribe staff at the university as members of the university. Professor Sawyer and his colleagues were therefore denied access to the Visitor.

3.13 The Committee is concerned that an academic institution should be found to not have in place appropriate statutes two years after being established. Organisations have a responsibility to ensure that all appropriate mechanisms are in place, and this is particularly important where the rights of students and staff are involved. By not having recourse to the Visitor, staff of RMIT were unable to have their complaint heard.

3.14 Professor Sawyer also made a further comment concerning Visitor law:

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6 Correspondence, Mr Peter Jesser, 23.1.95, p. 2; submission, Mr Peter Jesser, 23.1.95, p. 17; evidence, pp. 399, 409, 383, 381-82, 384.

7 Evidence, Mr Mark Le Grand, p. 494.

8 Evidence, Professor Kim Sawyer, p. 384.

> We are not the only problem, in a sense, New South Wales is doing away with visitor law soon - or at least it is foreshadowed - and, in Western Australia, the University of Western Australia has moved to do away with visitor law. The issue then is how you then regulate academic standards within universities.[9]

While recognising that staff and students have access to other agencies, for example the Ombudsman, the Committee believes that any attempt to remove an avenue of review of decisions taken by academic institutions should be undertaken cautiously and only after full consultation with those involved.

3.15 A second issue raised was the institutional response to the whistleblower and investigation by outside agencies. The Committee heard allegations of destruction of documents, alteration of documents, fabricated complaints concerning work performance and harassment of the individuals concerned.[10] Such allegations raise concerns about the ethical standards within institutions and attitudes to outside review. The Committee concedes that there is a need for outside review to be balanced against the autonomy of academic institutions. However, autonomy cannot be allowed to override responsibility to academic staff as well as students.

Commonwealth/State jurisdiction

3.16 The SSCPIW recommended that whistleblower protection through Commonwealth legislation be given the widest coverage constitutionally possible in both the public and private sectors. In formulating this recommendation, the SSCPIW canvassed jurisdictional issues and policy considerations which included changes to the nature of public administration.[11] This Committee has not dealt specifically with jurisdictional issues during this inquiry. However, matters involving the jurisdiction of the Commonwealth where public interest disclosures are associated with Commonwealth assets or functions which are not the direct responsibility of the Commonwealth public sector have been raised.

3.17 The Committee is concerned as to the degree to which Commonwealth legislation could extend to protect whistleblowers who, while making a disclosure concerning Commonwealth functions, assets or funds, are not employed as Commonwealth officers. Such a situation could arise either through Commonwealth/State arrangements whereby Commonwealth funds are granted to States for program delivery or as a result of changing administrative practices in the Commonwealth public sector; that is, the use of private companies and contractors to provide services on behalf of the Commonwealth.

3.18 The Committee recognises the jurisdictional problems arising from any proposal to extend Commonwealth whistleblower legislation to include State public sector employees making public interest disclosures related to Commonwealth funds or programs which are controlled by a State department, statutory authority or organisation. However, cases have come to the attention of the Committee which have involved public interest disclosures of the administration of Commonwealth functions by a State public sector. For example, Mr Greg

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9 Evidence, Professor Kim Sawyer, pp. 387-88.

10 Evidence, pp. 394, 382, 396, 379.

11 SSCPIW Report, 1994, pp. 115-18.

McMahon reported an attempt by the Queensland Water Resources Commission to reduce leave entitlements for Army Reservists under the Defence Act and Defence Re-establishment Act.[12] Mr McMahon's union, the Association of Professional Engineers and Scientists (APESA) outlined its concern with this situation as:

> that a public servant, rendering lawful service to the Crown in two separate capacities, one with the Queensland State Government and one with the Commonwealth, appears to us to have been disadvantaged in his employment with the first because of his lawful obligation to the second and because ... he reported the alleged breach of State and Commonwealth legislation to the proper State and Commonwealth authorities.[13]

3.19 The Committee acknowledges that some States do have whistleblower protection legislation. However, the Committee is concerned to ensure that there is no 'gap' in protection afforded to whistleblowers making disclosures involving Commonwealth assets, notwithstanding that the Commonwealth does not have direct administrative control of the asset. APESA, commenting in relation to Mr Greg McMahon, pointed to such a situation:

> The worst situation would be where:
>
> - The State Administration washed its hands of the matter because the laws breached were Commonwealth laws.
>
> - The Commonwealth Administration remained uninvolved in the matter because the officials involved were State Officials.[14]

APESA went on to recommend that Commonwealth legislation provide effective protections to State government officials who disclose breaches of Commonwealth legislation or fraudulent misuse of Commonwealth funds by other State government officials.

3.20 The SSCPIW noted that government is using the private sector to provide a wide range of services which were in the past carried out by public sector employees.[15] Public interest disclosures in this circumstance could either involve the wrongdoing within a private sector organisation providing a service on behalf of the government, or wrongdoing by public employees, the knowledge of which was gained by a service provider's contact with the public sector. Again, the Committee is concerned that all possible protections are afforded to those private sector employees making public interest disclosures about Commonwealth matters.

3.21 Since the tabling of the SSCPIW report, the general issue of accountability for Commonwealth funds expended by a State, or other non-Commonwealth controlled organisation, has been considered by a number of bodies. The Joint Committee of Public Accounts is at the present time conducting an inquiry into the administration of Commonwealth-State agreements for specific purpose payments. At the same time the Auditor-General has produced reports related to Commonwealth funding to the States,

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12 Submission, Mr Greg McMahon, 23.1.95, pp. 9-10.

13 Submission, APESA, 13.1.94, p. 1.

14 Submission, APESA, 13.1.95, p. 2.

15 SSCPIW Report, 1994, p. 118.

including reports on recurrent funding in higher education, specific purpose payments to and through the States and territories, and an audit commentary on aspects of Commonwealth-State agreements. In the report on specific purpose payments, the Auditor-General noted that 'for many programs accountability to the Commonwealth is poor'.[16]

3.22 Service delivery by non-Commonwealth controlled organisations has also been highlighted by the Senate Finance and Public Administration References Committee's (SSCFPA) inquiry into service delivery by the Australian Public Service. The SSCFPA received evidence from the President of the Law Reform Commission, Mr Alan Rose, concerning the impact of contracting out or tendering of services:

> I refer to the impact that it can have if it is not handled carefully on accountability, particularly on the individual service recipient's ability to exercise what have become extremely valuable rights of administrative review.

And:

> Most of those circumstances result in what would otherwise have been a reviewable decision, an appellable situation, and access to information and protection of privacy is no longer legislatively covered; it is no longer legally guaranteed.[17]

3.23 Mr Rose went on to say that in circumstances where a Commonwealth department has contracted out a service, 'what that provider has been contracted to provide to the service recipient should be in no way different in quantity, quality, form or whatever from what the department would have provided directly'.[18] Mr Rose went on to outline briefly the Administrative Review Council's recommendations in its report, *Administrative Review and Funding Programs*, relating to review of complaints concerning providers' activities by an independent agency.

3.24 The Committee also notes the comments of the Commonwealth Ombudsman in her 1993-94 annual report, concerning accountability issues involving changes in service delivery arrangements in the public sector: 'It is important that, while the public sector strives for greater efficiency and effectiveness, the important principles of accountability are retained'.[19] The Ombudsman found that in circumstances where a service is delivered by a contractor, 'there can ... be differing levels of accountability and service depending on who finally provides the service, even where such contracts involve the delivery of statutory, and monopoly, services'.[20]

3.25 The Ombudsman also voiced concern with respect to limits to the Ombudsman's power:

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16 Auditor-General, *Audit Report No. 21, 1994-95, Specific Purpose Payments to and through the States and Territories*, AGPS, 1995.

17 SSCFPA, Service delivery in the Australian Public Service, evidence, Mr Alan Rose, p. 84.

18 SSCFPA, Service delivery in the Australian Public Service, evidence, Mr Alan Rose, p. 90.

19 Commonwealth Ombudsman, *Annual Report 1993-94*, AGPS, p. 5.

20 Commonwealth Ombudsman, *Annual Report 1993-94*, AGPS, pp. 6-7.

> I question why the Commonwealth Ombudsman's powers should always be limited to functions *owned* by the government. Other factors such as the level of funding by government, the functions themselves, and the status or circumstances of the clientele may be equally relevant.[21]

3.26 The Committee recognises the difficulty of the Commonwealth effectively controlling programs or funds when they are expended by the executive and bureaucracy of another level of government or a private service provider employed by government. While there may be accountability to a State parliament or entity, the Commonwealth, although a major provider of funds, is often invisible in the accountability process.

Environmental protection

3.27 The Committee considered two cases which were directly related to environmental concerns - those of Mr Jim Leggate and Mr Jack King. However, the Committee believes these cases raised some general concerns relating to environmental protection which need highlighting.

3.28 Mr Leggate raised what he described as a 'very dangerous regulatory loop', that is capturing the government in a circular argument and circumventing the law. Mr Leggate's experience was with the mining industry so that his description involves that industry. Basically his argument is that the mining industry persuades government to keep open access to minerals, saying 'impose strict rules but do not close the door'. With a foot in the door, the industry persuades government to trust it to self regulate, arguing that this is more efficient and flexible. When problems from mining arise, the industry proclaims it is up to government to enforce the rules.[22]

3.29 In the specific case of mining, Mr Leggate noted that the Australasian Institute of Mining and Metallurgy produced a code of ethics in 1993, but when he made detailed complaints to the Institute, was advised that it was up to government to set standards. However, his attempts to get technical standards in place for the purpose of the mining industry was thwarted by the Institute's members.[23]

3.30 A significant problem in the mining industry is timelag, whereby it may be some decades before the environmental consequence of the mismanagement of mine sites is revealed. Mr Leggate asserted that:

> Neglecting to act to control a runaway industry likely to cost taxpayers millions - millions more than it has already cost taxpayers cleaning up after mining companies - amounts, in my mind, to a breach of public trust.[24]

3.31 While Mr Leggate's evidence concerned whistleblowing problems for a public sector employee in dealing with private sector companies, the Committee's attention was also drawn

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21 Commonwealth Ombudsman, *Annual Report 1993-94*, AGPS, p. 3.

22 Evidence, Mr Jim Leggate, pp. 440-41.

23 Evidence, Mr Jim Leggate, p. 441.

24 Evidence, Mr Jim Leggate, p. 441.

to difficulties with private sector employees in dealing with their companies. The ABC's *7.30 Report* ran a story on 6 April 1995 alleging a major pollution problem at BHP's site on Groote Eylandt involving contamination from leaking storage tanks. An extensive cleaning up and environmental remediation program was in operation. Apparently the leak problem had been reported to management by the company's environment co-ordinator some twelve months earlier, however there had been no effective response by the company to the problem. The employee involved in making the report was subsequently dismissed. A cost of $50 million to clean up and rehabilitate the site was suggested on the program.[25]

3.32 The cost involved, in financial terms, was raised in correspondence to the Committee which stated:

> it does appear that a very large amount of money will need to be spent that should be available to shareholders as dividends or for measures to improve the company's efficiency and competitiveness - an expenditure that would have been averted had the whistleblower been heeded.[26]

3.33 The Committee believes that this evidence and information not only strongly supports the recommendation by the SSCPIW to include danger to the environment as a category of wrongdoing within public disclosure legislation[27] but also raises issues of general concern for environmental protection legislation within Australia.

25 Transcript, *7.30 Report*, 6.4.95.

26 Correspondence, Mr Brian Coe, 4.5.95.

27 SSCPIW report, 1994, p. 163.

CHAPTER 4

CRIMINAL JUSTICE COMMISSION

Introduction

4.1 The Committee's terms of reference required it to inquire into the role and conduct of the Criminal Justice Commission (CJC). The CJC is an independent statutory authority established by the *Criminal Justice Act 1989* of Queensland. The CJC indicated to the Committee that:

> it does not regard the Senate's inquiry as displacing or substituting for the system of review of the Commission's activities provided for by the law of Queensland as embodied by the *Criminal Justice Act 1989*, namely review by the Queensland Supreme Court and by the PCJC.[1]

4.2 The Committee was cognisant of its limitations in examining an authority established by an enactment of a State Parliament. In interpreting its terms of reference, the Committee focused on the role and conduct of the CJC only in relation to the whistleblower cases under consideration.

Establishment

4.3 The Criminal Justice Act of Queensland provides for the establishment and maintenance of a permanent body -

- to advise on the administration of the criminal justice system in Queensland with a view to ensuring its efficiency and impartiality;
- to continue investigations commenced by the Fitzgerald Commission of Inquiry;
- to investigate the incidence of organised or major crime;
- to take measures to combat organised or major crime for an interim period;
- to investigate complaints of official misconduct referred to the body and to secure the taking of appropriate action in respect of official misconduct;
- to hear and determine disciplinary charges of official misconduct in prescribed circumstances.[2]

4.4 The Act also details the functions and responsibilities of the CJC. The primary functions are to continually monitor, review, coordinate and initiate reform of the administration of criminal justice and to discharge such functions in the administration of criminal justice which in the CJC's opinion are not appropriate or cannot be effectively discharged by the Queensland Police Service or other agencies of the State.[3]

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1 Submission, CJC, February 1995, p. 6.

2 *Criminal Justice Act 1989* (Qld), s.3.

3 Criminal Justice Act, ss. 21 and 23.

4.5 The CJC consists of five operations divisions - Official Misconduct, Intelligence, Witness Protection, Corruption Prevention, and Research and Coordination.

4.6 The Official Misconduct Division is the investigative unit within the CJC constituting approximately 60 per cent of the CJC's staffing and resources. Its function is to investigate the incidence of official misconduct generally in the State, including allegations of misconduct against members of the Queensland Police Force and of official misconduct by officers in other units of public administration. Within the Division is a Complaints Section which receives all complaints or information from any person concerning conduct that is perceived as, or may be, official misconduct. The Section has the power to decide not to investigate certain complaints including those which are frivolous or vexatious; it may also discontinue investigations.[4]

4.7 The CJC's establishment, role, functions and structure reflect recommendations made by the Fitzgerald Commission of Inquiry.[5] The Fitzgerald report highlighted the difficulties *of* balancing accountability with the need for independence. It was concerned at the potential abuse of power in a body which may have a quasi-adjudicative function and was not confined to investigations.

4.8 The Fitzgerald report concluded:

> The idea of an autonomous body [to combat corruption] can at first be comforting, because it is beyond the control of those in power who may be corrupt. However, just as such a body is (theoretically at least) beyond the reach of illegitimate power, it is also beyond the reach of practical proper control. If accountability is to be effective, it must be related to the exercise of power in specific cases, not just overall explanations. Accountability in the political sense is different from the necessary every day accountability when investigative powers are being exercised.
>
> It is necessary that an independent body exist with the resources and powers to investigate official misconduct. It should not be autonomous.
>
> For Queensland the preferable solution is that such an independent body exist as part of a wider structure which not only addresses official misconduct but which operates an integrated cohesive criminal justice administration.[6]

4.9 The Criminal Justice Commission, as established, closely reflects the conclusions and recommendations of the Fitzgerald report.

Accountability

4.10 Accountability of the CJC is provided for in the Criminal Justice Act through judicial and parliamentary review.

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4 Criminal Justice Act, Part 2, Divisions 4 and 5.

5 Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report,* GE Fitzgerald (Chairman), 1989 (Fitzgerald report). See especially Chapters 10, 11.3 and Recommendations B.

6 Fitzgerald report., pp. 302-03.

Judicial review

4.11 The Act provides that a person who claims an investigation is being conducted unfairly or is not warranted in the first instance may make application to the Supreme Court for an order in the nature of a mandatory or restrictive injunction.[7] The Committee acknowledges that judicial review is an appropriate form of accountability. However, the Committee also recognises that a Supreme Court action can be an expensive proposition and may effectively be a prohibitive form of action for many citizens. The question of whistleblowers' entitlement to legal aid and assistance is discussed in paras 2.77-2.80.

Parliamentary review

4.12 The Fitzgerald Commission recommended that a standing parliamentary committee, not charged with any other responsibility and known as the 'Criminal Justice Committee', should oversee the operations of the CJC. The Criminal Justice Act provides for this level of accountability of the CJC through a Parliamentary Committee known until recently as the Parliamentary Criminal Justice Committee (PCJC). The primary functions of the PCJC were to monitor and review the discharge of the functions of the CJC and to report to the Legislative Assembly on any matters pertinent to the CJC, the discharge of the CJC's functions or the exercise of its powers which in the PCJC's opinion the Assembly's attention should be directed.[8]

4.13 The powers and functions of the PCJC as it was established were not as strong or effective as those envisaged by the Fitzgerald Commission. The Commission had also suggested that the proposed Criminal Justice Committee should have the power to formulate policies and guidelines to be obeyed by the CJC, and to direct the CJC to initiate and pursue investigations or to report to Parliament.[9] These two recommendations were not incorporated within the Criminal Justice Act.

4.14 However, the Criminal Justice Act specifically provided for the PCJC to undertake a review of the activities of the CJC after three years of operation and to report to the Legislative Assembly and to the Minister as to action that should be taken in relation to the Act or the functions, powers and operations of the CJC. The PCJC produced a comprehensive report in February 1995 pursuant to this statutory requirement. The report covered the structure of the CJC, reviewed its operating Divisions, the role and operation of the PCJC, and covered issues including whistleblowers, accountability of the CJC, the role of the Chairman and Commissioners and the investigation of elected officials.[10] The Committee notes that the PCJC three yearly review also considered the non-implementation of the two Fitzgerald report recommendations and recommended that the Criminal Justice Act be amended to include them.[11]

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7 Criminal Justice Act, s. 34.

8 Criminal Justice Act, Part 4, ss. 111-118.

9 Fitzgerald, op. cit., p. 309.

10 PCJC, *A report of a review of the activities of the Criminal Justice Commission pursuant to s.118 (1)(f) of the Criminal Justice Act 1989*, Report No. 26, 6 February 1995 (PCJC Report No. 26).

11 PCJC Report No. 26, pp. 13-16.

4.15 In September 1995, the Queensland Parliament enacted the Parliamentary Committees Act. This Act established a Legal, Constitutional and Administrative Review Committee which subsumed the functions of the PCJC including responsibility for monitoring the CJC. This new Parliamentary Committee will exercise all the statutory functions and powers of the former PCJC, which remain under the Criminal Justice Act. However, the new Committee will have the additional responsibility for the areas of administrative review, constitutional, electoral and legal reform. The Queensland Opposition strongly opposed this proposal, arguing on accountability terms that the CJC with its wide-ranging powers warranted the continuation of a separate parliamentary committee to monitor the CJC and its operations.[12]

Investigations

4.16 The Committee received in evidence many opinions critical of the CJC. The CJC indicated that many of the criticisms were based on a misunderstanding or lack of appreciation of the legal constraints of the Criminal Justice Act and the milieu within which it operates. Much of the criticism of the CJC related to its investigation of complaints - from an overly-legalistic interpretation of its jurisdiction in the determination of whether and to what extent a complaint should be investigated, to the conduct of proceedings and outcomes of investigations which have been undertaken.

4.17 The Criminal Justice Act provides the CJC with a limited jurisdiction to investigate. The CJC acknowledges 'this is one of the problems that vexes the general public and the persons who approach us'.[13] While the CJC may have a limited jurisdiction to investigate, it does have significant powers with which to carry out its investigations.

Jurisdiction - official misconduct

4.18 As has been noted, a major role of the CJC is to investigate complaints of official misconduct. The CJC has explained that in so far as it relates to the investigation of misconduct by public officials:

> the jurisdiction of the Commission is limited to matters which reasonably raise a suspicion of "official misconduct" as defined in the Act. Essentially, that limits the investigative jurisdiction of the Commission to instances in which the conduct complained of:
>
> - is not honest or impartial;
> - involves a breach of the trust placed in a person by reason of their holding a position in a unit of public administration; or
> - involves the misuse by any persons of information or material acquired in, or in connection with, the discharge of their functions or exercise of their powers [or] authority.[14]

12 Queensland Legislative Assembly, *Hansard*, 14.9.95, pp. 212-93.

13 Evidence, Mr Mark Le Grand, p. 89.

14 Submission, CJC, February 1995, pp. 2-3; evidence, Mr Mark Le Grand, pp. 89-90.

Furthermore the conduct will not amount to official misconduct unless it constitutes or could constitute a criminal offence or a disciplinary breach that provides reasonable grounds for termination of that person's services.[15]

4.19 The Act enables the CJC to investigate alleged misconduct by elected officials, including members of the Legislative Assembly and of local authorities. However, within the definition of official misconduct there is uncertainty as to whether the CJC has jurisdiction to investigate conduct which does not constitute a criminal offence. This is because in the case of elected members, there exists no code of discipline that prescribes standards of conduct.

4.20 In undertaking the investigation of elected officials, the CJC has advised the Committee that:

> the conduct of elected officials will attract the Commission's jurisdiction only if the alleged conduct constitutes or could constitute a criminal offence. Therefore, there will be cases involving conduct by elected officials constituting an abuse or misuse of the powers of office which will not be subject to investigation by the Commission as the conduct falls short of criminal conduct.[16]

4.21 This difference in the investigation by the CJC of official misconduct between elected and non-elected officials appears to create an anomaly in the operation of the legislation. An action which could constitute official misconduct if undertaken by a public servant, for example, could be 'legitimised' if the decision to take the action were passed to a Minister of the Crown to be made. The CJC confirmed that if non-elected public servants acted in accordance with lawful directions given by their political (elected) masters, then those public servants could not be prosecuted for official misconduct by the CJC.[17]

4.22 This difference between elected and non-elected public officials as to what constitutes official misconduct was also discussed in general terms in reference to the destruction of evidence likely to be used in a court case. In reference to the limited application to parliamentarians, Mr Le Grand noted:

> the extent to which parliament should regulate its own behaviour, short of criminal offences, is a very vexed question. [The CJC has] recommended that there should be a regime in place that would provide at least some level of external scrutiny where there was clear mens rea dishonesty, but really it is ultimately a matter for parliament to determine whether it will take that matter up or not ... a very strong argument can be made for the fact that parliament should not have visited upon it the disciplinary processes of unelected external bodies.[18]

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15 Criminal Justice Act ss. 31 and 32 define official misconduct. This definition is similar to the definition of corrupt conduct in s. 8 of the *Independent Commission Against Corruption Act 1988* (NSW), although there are some variations; see PCJC Report No. 26, pp. 227-28.

16 Submission, CJC, February 1995, pp. 3-4.

17 Evidence, Mr Michael Barnes, p. 697.

18 Evidence, p. 698.

4.23 The Committee notes that the PCJC three yearly review of the CJC discussed the scope of the jurisdiction of the CJC to investigate suspected official misconduct on the part of elected officials. The PCJC particularly addressed the questions 'Does the Commission have jurisdiction to investigate elected officials?' and 'Should the Commission have jurisdiction to investigate elected officials for disciplinary matters?'. The PCJC made a number of recommendations including a strengthening of the CJC's jurisdiction in conjunction with the development of codes of conduct and associated ethics measures for members of the Legislative Assembly and local government councillors.[19]

4.24 The Committee considers that the CJC's inability to pursue the investigation of elected officials, who may have high public profiles, for possible misconduct reinforces an impression of a double standard operating for elected officials (including politicians and others) in the minds of the general public. The Committee therefore believes that the PCJC recommendations have merit.

4.25 The CJC was criticised for using the jurisdictional limitation argument to suit its own purposes and in general using legal technicalities to hide behind and not undertake appropriate or intensive investigations.[20] The interpretation of the CJC's jurisdiction and powers is clearly important in understanding how and why the CJC undertakes investigations in the manner in which it does.

4.26 The CJC is sensitive to this criticism, indicating to the Committee that:

> It is all very well to say that that is a very narrow interpretation of our function, as some have sought to say, but a commission such as our own already has a very rocky road to travel. If we start to set our own agenda, make our own laws, go our own way, regardless of the parameters of the law of the land, the rule of law, where are we going to end up? Clearly, you would be looking perhaps at complaints from another point of view and you would be rightly scathing to say, 'Here is this organisation having the audacity and presumption to act well beyond its lawful authority to do so.' We cannot do that.[21]

4.27 The CJC continually emphasised to the Committee that the rule of law is paramount. The CJC is established under an Act of Parliament which defines its functions, responsibilities and powers. Officers may:

> understand the situation of, and [they] sympathise with, those who feel frustrated by the CJC's inability to act when they believe sincerely that there are matters of injustice, matters of miscarriage of justice and matters of abuse of justice occurring or have occurred. But there is simply nothing we can do about that ...
>
> For us to step outside our legislation to undertake functions that we have not been given through the parliament by the people of this state, to exercise powers we do not have and to exercise jurisdiction we do not have, would

19 PCJC Report No. 26, Chapter 14, pp. 225-32.

20 For example, evidence, Mr Bill Zingelmann, p. 254 and Mr Matthew Ready, p. 575.

21 Evidence, Mr Mark Le Grand, p. 676.

> clearly be acting ultra vires and it would be an abuse of power. It may well open the officers of the commission who knowingly engaged in going beyond their functions and beyond their responsibilities to an action against themselves. Certainly, they would stand outside the protection of the Criminal Justice Act for their own personal and civil liability and a case could be mounted that a deliberated abuse of power puts them in breach of section 138 of the Criminal Justice Act.
>
> It is fine to say that the CJC is taking a narrow view, but that is the view it is required to take of its function by the law of this state. It has no choice in that matter.[22]

4.28 The Committee is concerned that this approach, while being a correct statement of the legal situation, has the effect of leaving jurisdictional gaps through which many people are falling. The Committee notes that both the CJC and PCJC have recommended many amendments to the Criminal Justice Act. However, the CJC has expressed concern that a number of these recommendations are yet to be implemented, although they are under consideration by an Interdepartmental Working Group.[23]

Assessment of complaints

4.29 As noted in paragraph 4.6, the Criminal Justice Act provides that the Complaints Section may decide not to investigate complaints, including those which are frivolous or vexatious or, if from an anonymous source, lack substance or credibility. It may also discontinue the investigation of a complaint.[24] Thus the CJC is provided with a degree of discretion in the undertaking of investigations.

4.30 The CJC has indicated that all complaints are assessed via a preliminary investigation with a view to determining whether the material available to support the complaint raised 'a reasonable suspicion of official misconduct so as to justify full investigation'.[25]

4.31 Similarly, if complaints are received from persons who believe that as a result of providing information, they have been subjected to reprisals, victimisation or other adverse or prejudicial treatment, the CJC will undertake a preliminary inquiry. This may involve seeking a report on the matter, interviewing persons against whom the allegations have been made and examining files. However, unless this preliminary inquiry indicates some substance to the allegation, the CJC does not pursue the matter to a full investigation.[26]

4.32 The CJC emphasises that investigations necessarily impact adversely upon the persons subject to investigations and that these persons also have rights. In addition, investigations involve the commitment of resources at substantial public expense.

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22 Evidence, Mr Mark Le Grand, pp. 200-01.

23 CJC submission to PCJC Review of the Commission's Activities, Chapters 11 & 12; reproduced in CJC submission, 15.8.95.

24 Criminal Justice Act, s. 38.

25 Submission, CJC, February 1995, p. 4.

26 Evidence, Mr Mark Le Grand, pp. 672-3.

4.33 The question of resources has been raised by many people who wished to challenge the procedure or conduct of certain investigations. They indicated they were unable to compete with the legal and financial resources available to the CJC or other instrumentalities of the state.

Conduct of proceedings

4.34 The CJC's conduct of its investigative proceedings was commented upon in a number of cases considered by the Committee.[27] Most notably was Mr Gordon Harris' recourse to the Supreme Court to ensure he received procedural fairness in a CJC investigation. The settlement reached provided Mr Harris with certain rights of cross-examination and access to documents.

4.35 The CJC has responded that at all times it strives to apply procedural fairness and that its greatest application is to the CJC's hearings and reports. The High Court ruled in 1992 in *Ainsworth v Criminal Justice Commission* that the CJC was required to observe procedural fairness in all proceedings conducted in the discharge of any of its functions and responsibilities. The CJC indicated that procedures had been formulated to ensure that procedural fairness was afforded. These procedures were detailed in the CJC's submission to the Committee.[28]

4.36 However, these procedures which govern the conduct of public hearings have been challenged in the Gordon Harris case. In relisting the hearing date for 12 December 1991 following the Supreme Court settlement, the CJC sought information from Mr Harris' solicitors concerning the witnesses they proposed to call and the particulars of matters to be canvassed in evidence. Mr Harris' counsel did not provide this information on the grounds that it was unnecessarily detailed and when the hearing resumed objected to who should preside over the hearing. This led to the matter being adjourned indefinitely (see paras 6.34-6).

4.37 The CJC has argued that it does not allow witnesses to be called to public hearings without its having been given some indication of the matters to be canvassed with them, or a copy of a statement setting out the evidence which is to be obtained from the witnesses, 'in the interests of procedural fairness and in conformity with its procedures'.[29] In relation to the Harris hearing, the CJC asserted that 'it was in fact to **avoid** a denial of natural justice that the Commission was obliged to adjourn the hearing'.[30]

4.38 Mr Harris used the alleged denial of natural justice by the CJC during this hearing process at his trial before Mr Gribbin, SM. Although Mr Gribbin rejected this submission, he was critical of some of the CJC's procedural requirements. In particular, Mr Gribbin discussed the questions of bias, disclosing evidence of prospective witnesses and cross-examination (see para 6.35).

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27 For example, evidence, Mr Robin Rothe, p. 426; submission, Mr Kevin Lindeberg, 25.1.95, p. 4; submission, WAG, 26.1.95, p. 11.

28 Submission, CJC, February 1995, pp. 88-91; see also submission, Mr Robert Butler, 25.5.95, pp. 143-5, for discussion of impact of Ainsworth case on CJC.

29 Submission, CJC, February 1995, p. 94.

30 Submission, CJC, February 1995, pp. 95-6.

4.39 The CJC referred to Mr Gribbin's comments as follows:

> The effect of the Magistrate's ruling in this matter was that, although he did not agree with the procedure which the Commission had adopted during its hearing, he did not think that Harris had suffered any detriment as a result of being refused the opportunity to call and cross-examine Huey.[31]

4.40 Although the Criminal Justice Act enables the CJC to conduct its proceedings as it considers proper,[32] the CJC's wide discretionary powers were circumscribed by the decision in the Ainsworth case. It appears that these court criticisms have influenced the apparently rigid procedures adopted by the CJC to govern the holding of public hearings. The Committee believes the CJC should give consideration to allowing a degree of flexibility in the operation of their procedures for public hearings without reducing their commitment to procedural fairness.

4.41 The Committee also notes that the PCJC three yearly review of the CJC reached a number of conclusions and made recommendations relating to investigative hearing powers and conduct.[33]

4.42 A further area of contention which arose in the Committee's consideration of the cases involving the CJC was in relation to the suggestion that people who had complained to the CJC were victimised by becoming the subject of official misconduct hearings.

4.43 A number of claims were made concerning alleged investigations which involved people from organisations not within the definition of a 'unit of public administration' or that certain procedures had not been followed in the conduct of the investigations. The Butler/Channel 7 and Kerin/Ready submissions stated that Mr Matthew Ready, Mr Robert Butler and Channel 7 were the subject of official misconduct hearings.[34]

4.44 The CJC responded that these claims were not correct as these people had never been the subject of official misconduct hearings but had merely been summoned to give evidence at hearings in which they were relevant witnesses.[35] The practice of describing these people as 'relevant witnesses' does not take into account the detriment these people appear to have suffered as a result of their appearance at the various CJC hearings. For example, both Mr Butler and Mr Ready were criticised in CJC reports and discredited as a result. Based on evidence it received, it is the Committee's view that the CJC has argued technicalities which may be legally correct but which do not appreciate the significant concerns of the people involved nor the impact events had on their personal lives.

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31 Submission, CJC, February 1995, p. 97.

32 Criminal Justice Act, s. 92.

33 PCJC Report No. 26, pp. 53-75.

34 Submission, Butler/Channel 7, 3.2.95, pp. 6-7; submission, Kerin/Ready, 8.2.95, p. 4.

35 Evidence, Ms Theresa Hamilton, pp. 221-4 ; responses by the Criminal Justice Commission to Channel 7 submission and to the submission and evidence of Mr Matthew John Ready, August 1995.

Appointment of investigators

4.45 A particular criticism of the CJC was in relation to the appointment of people from both within or outside of their permanent staff, who may have or have had in the past known political affiliations, to undertake investigations. In some instances such people conducted what were regarded as politically sensitive investigations. Examples referred to in evidence were the appointments of Mr Noel Nunan to examine matters relating to the Heiner documents case and of Mr Michael Barnes to conduct the Cape Melville investigation.[36]

4.46 The CJC responded in relation to the Noel Nunan appointment that:

> Such an allegation smacks of McCarthyism. In a democratic, pluralist society, the Commission finds such criticism abhorrent. The Commission is unconcerned with a person's political preferences; it is only concerned with his or her integrity and professional competence.[37]

4.47 In this context the Committee notes the response by Mr Barnes to questions about political affiliations which, while being accurate, was less than helpful for the Committee's understanding of the issue.[38]

4.48 The Committee makes no assessment of the manner in which such appointees have conducted themselves. However, the Committee believes that greater sensitivity could be exercised in making such appointments to ensure that not only will justice be done but will be perceived to be undertaken in a totally independent manner. As one witness declared:

> in any investigatory process, we need to understand that the basic principles of natural justice are observed and that those persons who have a conflict of interest, in any shape or form, should not be appointed to conduct any investigation or any hearing into any matter.[39]

Investigative outcomes

4.49 The CJC was criticised for inaccuracies in reports or material following up their investigations or inquiries (see for example, Robin Rothe case, para 7.125-8). It was submitted that if the CJC got the details of a particular issue or case wrong, no credibility could be given to the outcome of the inquiry. The worse case scenario was that the inaccuracies could be a deliberate falsification of evidence leading to conspiracy or cover-up theories.

4.50 The CJC indicated that there was nothing sinister behind such errors and pointed to its heavy workload which resulted in typographical errors which, although regrettable, are inevitable. Similarly the detailed responses provided on complex issues would perhaps inevitably contain some minor mistakes. The CJC regards it as unfair to suggest that it got an

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36 Submission, Mr Kevin Lindeberg, 25.1.95, p. 29; evidence, p. 49; submission, Mr Doug Slack, MLA, 27.1.95, p. 5.

37 Submission, CJC, February 1995, p. 39.

38 Evidence, Mr Michael Barnes, p. 520.

39 Evidence, Mr Eric Thorne, p. 60.

investigation wrong due to some minor errors in a response, given that a lengthy investigation undertaken by them may not have found evidence of official misconduct or criminal offence. The CJC noted 'we are ultimately human beings under incredible pressure'.[40]

4.51 However, the CJC was equally critical of witnesses who may have made honest mistakes in their evidence or in their understanding of questions. The Committee accepts that people will place different interpretations on events and does not believe that such people should be so severely criticised for making, probably unwittingly, errors of a minor nature.

4.52 There appears to be a general expectation that the CJC will initiate action over those cases where an investigation indicates a basis for legal action. However, the CJC has no prosecutorial function. The Criminal Justice Act provides for the CJC to investigate a complaint and report to a prosecuting authority. The report may contain a recommendation in relation to prosecution proceedings. It must be accompanied by all relevant information that supports a charge that may be brought against any person in consequence of the report or supports a defence that may be available to any person liable to be charged. The prosecuting authority then determines whether prosecution proceedings are warranted.[41]

4.53 The CJC emphasised that once the prosecuting authority 'determines that prosecution proceedings are not warranted the CJC is functus officio, that is, it cannot proceed further'.[42] The CJC, for example, stressed that in Mr Huey's case charges had been dismissed at committal. It was then determined by relevant authorities, the Director of Prosecutions and the Attorney-General, without any contribution from the CJC, that proceedings would not be renewed. Mr Huey resigned from the Police Service shortly thereafter. Under s. 33 of the Criminal Justice Act the CJC's role was at an end.[43]

4.54 With respect to misconduct tribunals, the CJC does not determine whether a matter is to be pursued in a misconduct tribunal. Such a matter is referred to an independent counsel, who determines whether the evidence gathered by the CJC is properly the subject of such proceedings, and such proceedings are conducted by persons independent of the CJC.[44]

4.55 The CJC has recognised that formal investigation leads to a low rate of complainant satisfaction. It attributes this to the adversarial nature of the criminal justice system and the fact that it is based upon the presentation of admissible evidence. There will likely be a proportion of complaints which cannot be substantiated through the accumulation of sufficient admissible evidence to place a person before the courts or a disciplinary tribunal, no matter how efficient the investigation.[45] The Committee believes that additional factors such as delays in investigations and perceived procedural difficulties such as those referred to in paragraph 2.45 also contribute to these low satisfaction levels.

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40 Evidence, Mr Mark Le Grand, p. 471.

41 Criminal Justice Act, s.33.

42 Submission, CJC, February 1995, p. 5.

43 Evidence, Mr Mark Le Grand, pp. 204-05.

44 Evidence, Mr Rob O'Regan, p. 198.

45 Evidence, Mr Mark Le Grand, pp. 471-72.

Whistleblower protection

4.56 The CJC has been criticised for its apparent inaction in protecting whistleblowers. Only one legal action had been commenced under the statutory provisions in a four year period.

4.57 Again much of this criticism appeared to be based upon a lack of understanding of the statutory provisions that existed at the time. The provision of whistleblower protection was limited to those who were victimised for providing information to the CJC. It could not be used to protect a person who had provided information to any other body, including the police. The CJC conceded these limitations in the protection it could offer, noting in a response to Mr Robin Rothe, 'in view of the wording of these sections of the [Criminal Justice Act] the jurisdiction of the Commission is quite limited and unfortunately the Commission is unable to assist you'.[46]

4.58 Undertaking legal action to protect whistleblowers generates its own problems. Speaking from its own experience the CJC warned that legal action was a response of last resort and not necessarily the best response to victimisation. To take legal action to force an employer to reinstate an employee could be expensive, time consuming and uncertain in addition to creating an atmosphere of hostility and resentment in the workplace.

4.59 The CJC referred to the legal action it had taken under the Act and the complications arising from the court action. These included delays, mounting costs and argument as to whether the person involved was a whistleblower entitled to the protection afforded by the Act.[47]

4.60 If there is to be a likelihood of success with any legal action for protection, there needs to be evidence of victimisation. The CJC described the dilemma as that existing between an employee who claims to have been dismissed or otherwise prejudiced for blowing the whistle and should therefore be protected, and employers who maintain they should have the right to dismiss or demote employees who are not working satisfactorily without having to rebut claims of whistleblowing. Most employers are astute enough to be able to attribute a plausible reason for an employee's dismissal or demotion. To obtain evidence that a dismissal was for more sinister reasons takes intensive investigation. The CJC concluded:

> we have to accept that the ultimate truth is that nobody will ever be able to help everybody who believes they have been victimised for being a whistleblower. That is the real world. In many cases, the supporting evidence will simply not be there.[48]

4.61 The Committee accepts that evidentiary concerns are relevant in the legal protection afforded to whistleblowers. In the Queensland jurisdiction the *Whistleblowers Protection Act 1994* considerably strengthens the legal privilege, protection and rights of compensation given to a person who makes a public interest disclosure.[49] The CJC acknowledged that the Act has

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46 Submission, Mr Robin Rothe, 22.6.94, Attachment 9, p. 7.

47 Evidence, Mr Mark Le Grand, pp. 475-76.

48 Evidence, Mr Mark Le Grand, p. 477.

49 *Whistleblowers Protection Act 1994* (Qld), Part 5.

drastically widened the area of protection and provided the CJC with greater power to protect whistleblowers. The CJC advised the Committee that it was in the process of redrawing its literature and advices to witnesses in view of the expanded protection it can now provide whistleblowers.[50]

4.62 The Committee also notes that the PCJC three yearly review of the CJC considered whether the CJC was an appropriate authority to protect whistleblowers and the role and function of the Whistleblower Support Program.[51] The PCJC concluded that the Whistleblower Support Program was an important function of the CJC which should be recognised by its constitution as a separate organisational unit within the CJC. The PCJC made recommendations on the accountability of whistleblower support within the CJC to ensure the independence and integrity of the scheme.

Debriefings and surveys of clients

4.63 As noted in paragraph 4.55, the CJC has acknowledged the low rate of complainant satisfaction with the outcome of investigations. The CJC has attempted to lessen the dissatisfaction of people who have gone to the CJC with a complaint which appears to have some substance but over which the CJC can take no further action due to lack of substantiating evidence. The CJC indicated that it provides a personal debriefing for every complainant, taking them through the case and explaining why the CJC could not reach the point of substantiation of evidence.[52]

4.64 The whistleblowers support program is also intended to assist people dissatisfied with the process which they believe has let them down. The CJC is introducing processes such as mediation as alternatives to formal investigations. While informal resolution processes lead to higher rates of satisfaction, they are useful mainly for lesser matters.

4.65 The CJC has attempted to monitor the operation of its complaint investigation procedures in order to establish whether the procedures can be improved by asking people to complete a complaint investigation questionnaire. This questionnaire was referred to rather disparagingly in evidence.[53]

4.66 The CJC responded that the procedure was commenced in mid-1994 on an ad hoc basis. However, with only a few people having responded, the procedure was suspended until early 1995 when more questionnaires were distributed. [54]

4.67 This process appears to have been conducted somewhat haphazardly. The limited response could indicate, as suggested at the hearing, that people were completely satisfied with the investigation or alternatively that they believed it would be a waste of time for them to respond. The Committee believes that the information which could be gained by the CJC

50 Evidence, Mr Mark Le Grand, p. 511.

51 The Whistleblower Support Program was established by the CJC in June 1994 and is described in the CJC's submission, February 1995, Annexure A, pp. 114-6.

52 Evidence, Mr Mark Le Grand, pp. 236, 479.

53 Evidence, Mr Robin Rothe, pp. 423-24.

54 Evidence, Mr Michael Barnes, p. 508.

through an effective survey and debriefing program would be particularly useful in identifying concerns and problems held by people as a result of their involvement with the CJC. To be visibly seen to be seeking, acknowledging and responding to people's concerns could only assist in diminishing the perceived or real concerns which have been expressed over the CJC's existing complaint investigation procedures. The Committee notes Mr Le Grand's undertaking that 'we are trying again and will continue to refine the process'.[55]

General comments

4.68 Based on the evidence received, there appears to the Committee to be a considerable lack of understanding of certain powers and procedures governing the CJC and its operations. While the CJC possesses extensive powers in many areas - such as in investigations - it is limited in other areas of its operations. The Committee suspects that both the CJC and certain whistleblowers may on occasions interpret the wording of the Act to suit their own purposes. These are impressions the Committee has formed and, as is the situation with much of the material placed before it during the inquiry, it is difficult to be conclusive.

4.69 Stemming from these misunderstandings and/or interpretations of powers there appears to have developed a considerable animosity at a personal level between a number of people involved in certain cases and officers of the CJC. The officers of the CJC claim to have been defamed through unsubstantiated allegations of being politically influenced, incompetent and corrupt. Whistleblowers claim that allegations are not properly considered and are rejected through a process of personal vilification.

4.70 The Committee has witnessed aspects of both claims during the course of its inquiry. Obviously, the existence of such a situation in a handful of cases is not conducive to sound administration of justice. Moderation is a difficult quality to retain in many of these situations. Mr Robert Butler suggested that people have been so personal and emotive because they genuinely believe in what they are fighting for. The CJC has referred to these people as 'obsessive'. Mr Butler prefers to refer to them as 'tenacious'.[56]

55 Evidence, Mr Mark Le Grand, p. 508.

56 Evidence, Mr Robert Butler, p. 180.

CHAPTER 5

THE SHREDDING OF THE HEINER DOCUMENTS

Introduction

5.1 Term of reference (a) requires the Committee to give particular regard to 'the circumstances relating to the shredding of the Heiner documents, and matters arising therefrom'. The Heiner documents were the records of interview and related material gathered by retired stipendiary magistrate Noel Heiner in the course of an aborted inquiry into the John Oxley Youth Centre, Wacol, and its manager, Mr Peter Coyne, in late 1989 and early 1990; they were shredded on the order of the Queensland Cabinet on 23 March 1990.

5.2 The Committee's powers to inquire into the matter were outlined in advice provided by the Clerk of the Senate, as shown in full in Appendix 1. Briefly, they should be confined to subjects in which the Commonwealth has the power to legislate, and should not be exercised in respect of members of State parliaments or officers of State governments. In its attempt to distill the essence of the whistleblowing and related events presented to it, the Committee therefore concentrated on what it could learn to assist in the formulation of Commonwealth whistleblower protection legislation. The Committee received claim and counterclaim by protagonists in this and the other 'cases' on which it took evidence. It was never the intention of the Committee, and nor was it within its powers, to adjudicate on those cases or to bring redress to those the Committee believed had suffered unfairly. For that reason, the Committee did not seek input from every individual involved in each case. It presents the following assessments in Chapters 5 to 7 to background the lessons which it has drawn from them.

Background

5.3 On 14 September 1989, the then Director-General of the Queensland Department of Family Services, Mr Alan Pettigrew, and four of his senior officers held a meeting with Ms Janine Walker, Industrial Relations Director of the State Services Union, to discuss concerns of union members about the management of the John Oxley Youth Centre, an adolescent detention and remand facility in Wacol.[1] Those complaints by certain staff members were subsequently put in writing.[2] Such concerns would not have come as a surprise to the Department: five months beforehand, a consultant's report on the effectiveness and efficiency of youth detention centres had been highly critical of the behaviour management system at the John Oxley Centre.[3] The level of staff turnover (30 resignations in two years) was high by departmental standards and suggests that there may have been serious problems in the staff-management relationship.[4]

5.4 The departmental response was to set up an inquiry into the validity of the complaints about the management of the John Oxley Centre, and related matters. Retired stipendiary

1 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 1.

2 Submission, CJC, 15.8.95, Attachment H.

3 Submission, Cabinet Office, 31.7. 95, Document 11.

4 Submission, CJC, 15.8.95, [p. 2].

magistrate, Mr Noel Heiner, was appointed to conduct the inquiry, which commenced on 22 November 1989.

5.5 Shortly after the inquiry commenced, a State election was held on 2 December 1989 and the Goss Government came to power. The Department of Family Services was enlarged to become the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA); Ms Anne Warner was appointed its minister and Ms Ruth Matchett was appointed Acting Director-General.

5.6 As the inquiry progressed, doubts arose as to the manner in which the inquiry had been established and, in consequence, Mr Heiner's powers and indemnities. Ms Matchett sought the advice of the Crown Solicitor, Mr Ken O'Shea, concerning Mr Heiner's appointment and whether the inquiry should continue. Mr O'Shea's advices, dated 18, 19 and 23 January 1990, indicated that it was his view that Mr Heiner had been lawfully appointed, but pursuant to section 12 of the *Public Service Management and Employment Act 1988* and not the *Commissions of Inquiry Act 1954-1989.*[5] As a result, neither he nor his informants had statutory immunity from legal action for defamation. Mr O'Shea went on to recommend that, if Ms Matchett decided to terminate the inquiry, documentation gathered by Mr Heiner should be destroyed. Mr O'Shea noted, however:

> This advice is predicated on the fact that no legal action has been commenced which requires the production of those files ...[6]

5.7 Following discussions with Ms Matchett on 19 January 1990, Mr Heiner wrote to her, indicating that he was not prepared to continue with the investigation, because of his concerns about his appointment and his authority to act. Ms Matchett's response was to ask him to send the documentation he had gathered to the department, where it was sealed in his presence, without being read by Ms Matchett or departmental staff. It appears that the decision to terminate the inquiry was taken at this time, in view of the discussions Ms Matchett had with the union representatives on that day, although Ms Matchett did not formally write to Mr Heiner until 7 February 1990, indicating she did not want the inquiry to continue. In a somewhat unusual development, the sealed material was transferred to the Cabinet secretariat,[7] rather than remaining with the responsible department.

5.8 In the meantime, the Acting Director of the John Oxley Youth Centre, Mr Peter Coyne, was becoming increasingly concerned over the conduct of the inquiry and the refusal of Mr Heiner to provide him with specific details of the allegations against him.

5.9 Mr Coyne gave evidence to Mr Heiner on 11 January 1990, without legal representation and without knowing the exact details of the complaints against him, although he did have the benefit of a summary page of allegations which a member of the inquiry staff had inadvertently given him.[8] He wrote twice to Ms Matchett, on 15 and 18 January 1990, seeking copies of the documentation associated with the Heiner inquiry and relating to himself,

5 Attorney-General's statement, 21.2.95, Attachments [1-3].

6 Attorney-General's statement, 21.2.95, Attachment [3], p. 2.

7 Attorney-General's statement, 21.2.95, p. 16.

8 Submission, Mr Peter Coyne, p. 3.

but this was refused.[9] It appears that his initial concerns were twofold: the possibly defamatory nature of the allegations against him; and a fear for his future within the Department.[10] He approached his union, the Queensland Professional Officers' Association (QPOA), for assistance. QPOA industrial officer, Mr Kevin Lindeberg, initially handled the case. Mr Lindeberg asserts that on 19 January 1990 he, with the State Services Union representative, Ms Janine Walker, attended a meeting with Ms Matchett at which she informed them that the Heiner inquiry had been terminated and that she had taken possession of the inquiry records. Mr Lindeberg told the Committee that at that meeting, he indicated that his member, Mr Coyne, still wanted to see the allegations made against him. A letter from the QPOA to Ms Matchett, dated 29 January 1990, complained that Mr Coyne was being denied natural justice in the matter.[11]

5.10 Mr Coyne's concerns were such that he approached a firm of solicitors, Rose Berry and Jensen, to seek access to the original complaints against him and to the evidence pertaining to those complaints taken by Mr Heiner. Mr Ian Berry first wrote to Ms Matchett on 17 January 1990, complaining of a denial of natural justice. Mr Coyne's understanding was that Ms Matchett's Executive Officer, Mr Trevor Walsh, responded by telephone, indicating that the Acting Director-General was seeking legal advice.[12] Some three weeks later, on 8 February 1990, Mr Berry again wrote to Ms Matchett on the matter, citing Regulation 65 of the *Public Service Management and Employment Act 1988* as Mr Coyne's authority to access the documents. Mr Berry followed up with a phone call to Mr Walsh, on 14 February 1990, in which he conveyed his client's intention to commence court proceedings to gain access to the documents; he confirmed this in writing to her on 15 February 1990. The court proceedings were envisaged, at this stage, 'in view of the fact that against the wishes of our client [Mr Coyne] he has been seconded to another section'.[13]

5.11 On 13 February 1990, Ms Matchett visited the John Oxley Youth Centre, informed the staff that the Heiner inquiry had been terminated, and of the reasons for that termination. She also informed Mr Coyne that he was to be transferred henceforth to Head Office for a special project, and suggested that any staff who wished to have any unresolved issues considered should do so through standard grievance procedures.[14] The Committee notes that no staff availed themselves of this opportunity.

5.12 Administratively speaking, the problem of what to do with the Heiner documents remained. On 13 February 1990, Mr Stuart Tait, then Acting Cabinet Secretary, sought advice from the Crown Solicitor on 'what options are open to Cabinet so far as retention or disposal of these documents is concerned and could they be obtained by way of subpoena or third party discovery should a writ be issued touching or concerning them'.[15] Mr O'Shea's reply, dated 16 February 1990, advised that, as the documents were public records and that the provisions

9 Submission, Mr Peter Coyne, p. 7.

10 Submission, CJC, 15.8.95, p. 4.

11 Submission, Mr Kevin Lindeberg, 25.1.95, Attachment 3.

12 Submission, Mr Peter Coyne, p. 8.

13 Submission, CJC, 15.8.95, Attachment B.

14 Attorney-General's statement, 21.2.95, p. 16.

15 Attorney-General's statement, 21.2.95, Attachment [4], p. 1.

of the *Libraries and Archives Act 1988* would therefore be invoked, the documents would need to be deposited in the State Archives, or the permission of the State Archivist sought before they could be destroyed. His reply further suggests that the documents would probably not attract Crown privilege.

5.13 On the basis of this advice, Cabinet decided that the better course was to dispose of the records. Mr Tait sought the advice of the Crown Solicitor on the suitability of a draft letter to the State Archivist, Ms Lee McGregor, specifically because the Government did not wish to be seen to be pressuring her.[16] The letter, as sent on 23 February 1990, informed the Archivist that 'The Government is of the view that the material, which I understand includes tape recordings, computer discs and hand-written notes, is no longer required or pertinent to the public record' and sought her urgent advice as to whether the records could be destroyed.[17] Mr Tait did not mention that there had been a specific threat of legal action based on the documents; he did, however, acknowledge that:

> During the course of the investigation, questions were raised concerning the possibility of legal action against Mr Heiner and informants to the investigation because of the possibly defamatory nature of the material gathered.[18]

5.14 Ms McGregor replied on the same day, stating that she and another staff member had examined the records and were satisfied that they were not required for permanent retention; she gave approval for their destruction.[19]

5.15 On 5 March 1990, armed with advices from the Crown Solicitor and the State Archivist, the Cabinet determined that the Heiner documents should be destroyed; on 23 March 1990, this was done.[20]

5.16 Mr Coyne, meanwhile, had been seconded to Head Office to the Division of Protective Services and Juvenile Justice and tasked to assess the department's response to children in need. On paper at least, this appears to have been a serious project: by the beginning of April, Mr Coyne had produced an elaborate five-stage project plan proposal;[21] by the end of June, when Ms Matchett inquired on progress, a discussion paper on stage one had been completed.[22] In August, Mr Coyne's secondment was extended for a further six months.

5.17 Mr Coyne asserted to the Committee that the 'special project' on which he was working was not a serious task and that he spent his days travelling for three hours to do nothing in the Brisbane office.

5.18 The position of manager of the John Oxley Youth Centre was upgraded and advertised. Mr Coyne applied, was interviewed, was chosen by the selection panel but was

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16 Submission, Cabinet Office, 31.7.95, Document 9.

17 Submission, Cabinet Office, 31.7.95, Document 9, Attachment, p. 2.

18 Submission, Cabinet Office, 31.7.95, Document 9, Attachment, p. 1.

19 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 9.

20 Attorney-General's statement, 21.2.95, p. 17.

21 Submission, Cabinet Office, 31.7.95, Document 19.

22 Submission, Cabinet Office, 31.7.95, Document 21.

rejected by Ms Matchett. In so doing, she outlined the other factors she had had to take into account when considering the appointment: matters of departmental convenience and efficiency; the best interests of all concerned; the composition of staff at a particular work location and the workability of such a staff team.[23]

5.19 Some discussions took place between the Director-General and the union concerning Mr Coyne's future but no job materialised, despite Mr Coyne's written agreement not to pursue any issues relating to his previous employment at the John Oxley Centre.[24] Events took their toll on Mr Coyne, who became very stressed and accepted what he described as an involuntary redundancy package plus a payment sought by the QPOA on his behalf for 'various unpaid work-related matters', which amounted to $27,190.[25]

5.20 In another twist in the Heiner documents saga, Mr Lindeberg, the QPOA officer who had initially represented Mr Coyne's case to Ms Matchett and the minister, was dismissed on 30 May 1990, reinstated, then dismissed again on 7 August 1990. One of the numerous reasons given by the QPOA for Mr Lindeberg's dismissal was his handling of the Coyne case. According to Mr Lindeberg, the then General Secretary of the union, Mr Don Martindale, removed Mr Lindeberg from the case in mid-March 1990 because Minister Warner refused to deal with him, claiming he was threatening her career.[26]

Investigations of the matter

5.21 Mr Lindeberg has raised the matter of the shredding of the Heiner documents with a number of agencies, including the Criminal Justice Commission (CJC) (twice), the Electoral and Administrative Review Commission, the Commission of Inquiry into the Activities of Particular Queensland Unions (the Cooke Inquiry) and the Queensland Police Service.[27]

The whistleblowing claims

5.22 Mr Lindeberg makes two principal allegations with regard to the Heiner documents case:

- that the decision of the Queensland Cabinet to order the shredding of the Heiner documents was illegal; and
- that the redundancy payment to Mr Peter Coyne was illegal.

Mr Lindeberg also alleges that his activities in support of Mr Coyne were one of the factors which contributed to his dismissal by the QPOA.

23 Submission, Cabinet Office, 31.7.95, Document 23.

24 Submission, Mr Peter Coyne, p. 14.

25 Submission, Mr Peter Coyne, p. 15.

26 Submission, Mr Kevin Lindeberg, 25.1.95, p. 13.

27 Submission, Mr Kevin Lindeberg, 25.1.95, pp. 4-7.

Discussion

5.23 The difficulties with the Heiner inquiry stem from the way in which it was set up. Had Mr Heiner been appointed by the Governor in Council under the terms of the *Commissions of Inquiry Act 1954-1989*, he would have had the power to subpoena witnesses and examine them under oath and absolute privilege would have applied to anything said or tendered. It appears, however, that Mr Heiner was appointed pursuant to s. 12 of the *Public Service Management and Employment Act 1988*, and thus his informants had no statutory immunity from suit or action for defamation.

5.24 Ms Matchett was clearly within her legal rights to halt the Heiner inquiry and to transfer Mr Coyne, whatever the merits of those decisions may have been. The decision to transfer the Heiner documents to the Cabinet Office appears unusual, but was not illegal. It must be remembered that the Goss Government had been in office for approximately two months at this stage, after some 32 years in Opposition, and there would not have existed amongst the new ministers any residual experience of certain Cabinet and ministerial procedures. In addition, the Crown Solicitor had recommended that Cabinet consider whether to indemnify Mr Heiner, were legal action to be brought against him.

5.25 Given that the Crown Solicitor had deemed the Heiner documents to be public records, the preconditions for their shredding to be legal were that they were not required for pending legal action and that the State Archivist had given her approval.

5.26 The question of when the course of justice begins, and when, therefore, legal action could be said to be pending was one which was hotly debated by various witnesses before the Committee. Mr Lindeberg alleged that, because a firm of solicitors had served notice of foreshadowed court proceedings in which the Heiner documents would have been required, the destruction of those records obstructed justice.[28] The CJC responded that no course of justice had been interfered with, because none was underway.[29] Mr Ian Callinan QC, for Mr Lindeberg, contributed to the debate:

> I am not suggesting or making any submission as to any final view which should be taken of the law with respect to perversion of the course of justice ... Let me assume for present purposes in favour of the CJC that the commission got the law right on the matter ... It is not the end of it whether Mr Lindeberg's allegation in legal terms is precisely correct. What is also critically important is whether there may have been some official misconduct, falling short of criminal conduct, and that is not even explored.[30]

5.27 In a memorandum to the Queensland Attorney-General by the Crown Solicitor, subsequently tabled in the Queensland Parliament and provided to the Committee, the legal aspects of the matter were outlined. In his memorandum, Mr O'Shea stated:

> There is an abundance of authority to show that a civil action or proceeding is not pending until the originating proceeding (Writ, Summons or Motion) has

28 Submission, Mr Kevin Lindeberg, 25.1.95, p. 3.

29 Submission, CJC, February 1995, p. 27.

30 Evidence, p. 40.

> been filed in the Court ... All the threats in the world to commence a Civil proceeding (or a Criminal one) do not make it pending, for the purposes of Section 129 of the Criminal Code.[31]

5.28 Mr O'Shea further stated that, in his view, there was no basis for any allegation of criminal conspiracy under section 132 of the Queensland Criminal Code:

> I can only wonder how it can be seriously suggested that a Government's destruction of its own property, in accordance with a Statutory regime which permitted its destruction (the *Libraries and Archives Act 1988*), in order to keep faith with and protect a retired Magistrate and witnesses misled by the actions of a Minister or her Department in a previous Government, is capable of constituting a case of Conspiracy.[32]

In Mr O'Shea's opinion, the shredding of the documents 'represented a reasonable, fair and commonsense approach to a difficult problem, which was not of the Government's making'.[33]

5.29 Messrs Callinan and Peterson propounded the model litigant argument:

> The simple fact is that, by seeking to destroy these [Heiner] documents, the Crown has removed a prospective litigant of his rights. This cannot in any true sense of the word be in accordance with our democratic principles.[34]

5.30 When the Queensland Cabinet took its decision to order the shredding of the Heiner documents on 5 March 1990, it did so knowing that the documents were being sought by Mr Coyne with legal action in mind, even though no writ had been served. Both Ms Matchett and Mr Trevor Walsh, her executive assistant, were aware of Mr Coyne's desire to obtain the documents. In his advice to Ms Matchett dated 23 January 1990, the Crown Solicitor stated:

> in a letter of 17 January 1990 Messrs Rose, Berry and Jensen, solicitors for Mr Coyne and Mrs Dutney request that they be allowed to have copies of all allegations and evidence taken to date. However, such request is related to the continuation of the inquiry which is now to be halted, therefore it is my recommendation that the solicitors for Mr. Coyne and Mrs. Dutney be advised that the inquiry has been terminated, no report has been prepared, and that all documentation related to the material collected by Mr Heiner has been destroyed.[35]

In correspondence to Ms Matchett dated 15 February, Mr Ian Berry stated that in his telephone conversation with Mr Walsh of the previous day, Mr Walsh indicated his intention of advising Ms Matchett of Mr Coyne's intention to commence Court proceedings.[36] It could

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31 Attorney-General's statement, 31.3.95, Attachment, p. 2.

32 Attorney-General's statement, 31.3.95, Attachment, p. 5.

33 Submission, Cabinet Office, Document 24, p. 10.

34 Submission, Mr RD Peterson, 8.5.95, [p. 2] .

35 Attorney-General's statement, Attachment [3], p. 2.

36 Submission, Mr Peter Coyne, Attachment 15.

be expected that Ms Matchett would brief her minister on the matter before the Cabinet discussion and that Minister Warner would convey the information to her Cabinet colleagues.

5.31 The Attorney-General's statement in the Queensland Parliament confirmed that the decision to shred the Heiner documents was taken by the Cabinet in the knowledge that they were being sought by Mr Coyne with legal action in mind.

> Before making its decision on 5 March 1990, Cabinet was informed that representations had been received from a solicitor representing certain staff at the Centre. However, while these representations had sought production of the material, no legal action had been instituted (nor was any legal action subsequently instituted).[37]

5.32 Mr Michael Barnes, of the CJC, posited the following explanation for the Cabinet decision to shred the documents:

> It is clear that cabinet made the decision to destroy the documents knowing full well that Coyne wished access to them. It may be that cabinet made that decision to destroy the documents on the basis that, in its view, the public interest in protecting the people who gave evidence before Heiner outweighed Coyne's private interest in having access to them. As it raises no issue of official misconduct, we can only speculate.[38]

5.33 The Government view, as stated by the Attorney-General, was that 'Cabinet acted properly and in good faith to rectify a very difficult situation for Mr Heiner, and the staff of the Centre who had provided information to Mr Heiner in confidence'.[39] He went on to say:

> The prevention of the 'publication' of material which had been improperly gathered had to be addressed.
>
> All reasonable steps were taken to ensure that the material could not be used detrimentally or otherwise regarding the future work prospects of all participants. This included Mr Coyne. The interests of natural justice had been served.[40]

5.34 A more pragmatic explanation for the destruction of the documents can be inferred from the Crown Solicitor's advice of 23 January 1990 to Ms Matchett:

> Naturally Mr Heiner is concerned about any risk of legal action which may be instituted against him for his part in the inquiry and it would appear appropriate for cabinet to be approached for an indication that should any proceedings be commenced against Mr Heiner because of his involvement in this inquiry, the

37 Attorney-General's statement, 21.2.95, p. 7.

38 Evidence, p. 655.

39 Attorney-General's statement, 21.2.95, pp. 6-7.

40 Attorney-General's statement, 21.2.95, p. 17.

> government will stand behind him in relation to his legal costs and also in the unlikely event of any order for damages against him.[41]

5.35 The most plausible explanation for the shredding of the documents was to protect the public purse from the expenses of litigation. If in so doing, the rights of an individual (Mr Coyne) were negated, as he and others assert, some would argue that they were sacrificed for a reason.

5.36 Given that the Crown Solicitor had indicated that the Heiner documents were public records,[42] the other precondition for their legal shredding was that the approval of the State Archivist was sought and obtained. As indicated above, this was met, though it must be stated that aspects of the process are open to question. In correspondence to the State Archivist in which her approval to shred the documents was sought, the Acting Cabinet Secretary did not specifically mention that the documents were being sought for possible legal action. He did, however, allude to the fact that legal action was a possibility, given the nature of the material gathered.[43] As the State Archivist followed the Government approach that it was inappropriate for officers of the executive government to provide any assistance to the Committee and declined its invitation to give evidence, the Committee is unable to determine whether her decision to approve the shredding might have been varied, had she been specifically informed that one potential litigant did in fact exist. Her decision was apparently made within a few hours of receiving the voluminous material on 23 February 1990, which suggests that her examination of it must have been cursory indeed. The shredding itself was not performed with undue haste: Cabinet approved the shredding on 5 March 1990; the shredding took place on 23 March 1990.

5.37 The CJC's inquiry into the shredding was specifically to determine whether any official misconduct had occurred. Mr Le Grand summed up the CJC's position as follows:

> it is clear on the face of the legal advices and the correspondence that the Crown Solicitor was engaged in a bona fide attempt to resolve a difficult legal and practical problem. It is not for the Commission to arbitrate between competing legal claims. What the Commission had to determine was whether the advices were properly derived. In our submission, there is not a scintilla of evidence to indicate that when the Queensland Government decided to shred the documents it had any reason to believe that it was acting unlawfully. It had cognisance of, and was acting in accordance with, legal advice provided to it by the Crown Solicitor.
>
> In those circumstances, there was no possibility of establishing that the members of the Cabinet had committed a criminal offence, nor as a consequence could they be guilty of official misconduct. At this point the Commission had discharged its function.[44]

41 Attorney-General's statement, 21.2.95, Attachment [3], p. 2.

42 Attorney-General's statement, 21.2.95, Attachment [4], p. 4.

43 Submission, Cabinet Office, 31.7.95, Document 9.

44 Submission, CJC, 13.8.95, pp. 2-3.

5.38 The Committee concludes that the Heiner inquiry, as constituted, was an inappropriate method to deal with the situation that pertained at the John Oxley Youth Centre. It agrees with the Crown Solicitor's opinion that the matter was one 'that should be dealt with departmentally by a senior, experienced officer'.[45] Given that the inquiry did take place, albeit with unclear powers and diffuse aims, it appears to have been conducted without the usual regard to notions of natural justice for all participants. In the circumstances, and without commenting on the merits or otherwise of his conduct as manager of the John Oxley Youth Centre, the Committee acknowledges that Mr Coyne was placed in an extremely difficult situation.

5.39 The Heiner inquiry took place during a period of considerable change in Queensland. The Committee notes that, regardless of its motives, the newly-elected Labor Government consistently sought advice from its chief law officer on aspects of the inquiry and its related documentation, and generally followed that advice. The Committee believes it is not appropriate to comment on the merit of that advice. It notes, however, that the shredding appears to have been a pragmatic solution to a difficult problem. With the benefit of hindsight, the Committee considers that the shredding of the Heiner documents may have been an exercise in poor judgment. Greater consideration ought to have been given to alternative approaches to resolving the problems associated with the inquiry. In particular, the Committee considers more heed should have been given to the 'Crown as model litigant' notion: it might have been more appropriate for the Queensland Government to have retained the documents for a certain period to allow for their production, if required, in legal action.

5.40 Whether the shredding was inappropriate or not, one aspect of the matter certainly was. The decision to shred the documents was taken by Cabinet on 5 March 1990;[46] on 19 March 1990 Ms Matchett was still writing to Mr Coyne stating that 'the matters [Mr Berry, Mr Coyne's solicitor] has raised are still the subject of ongoing legal advice'.[47] It was not until 22 May, and some six weeks after the destruction of the documents had been blazoned across the front page of *The Sun* newspaper,[48] that Ms Matchett formally advised Mr Coyne's solicitors that the Heiner documents the solicitors were seeking on Mr Coyne's behalf had been destroyed.[49] In her 19 March memorandum to Mr Coyne, Ms Matchett did not indicate the specific matters which were the subject of ongoing legal advice. She did, however, go on to indicate that as the Heiner inquiry had ceased and as no report was to be prepared, she considered that 'a number of the issues raised in your memoranda are no longer current'. Mr Coyne's solicitor had based his request for access to allegations against his client on Regulation 65 of the *Public Service Management and Employment Act 1988*, which relates to an officer's right to peruse any departmental file or record held on the officer. In so far as the Committee has been able to determine, no advice was received from the Crown Solicitor on the interpretation of regulation 65 and it is plausible to conclude that after the documents had been destroyed, Ms Matchett decided that such advice was no longer required.

45 Attorney-General's statement, 21.2.95, Attachment [1].

46 Attorney-General's statement, 21.2.95, p. 17.

47 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 12.

48 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 15.

49 Submission, Mr Peter Coyne, Attachment 18.

5.41 Nevertheless, at 19 March, Ms Matchett was in possession of sufficient information to have responded more helpfully to Mr Coyne and to his solicitors. The Committee regards her final advice to the solicitors as late as 22 May 1990 as unacceptable and reflecting bureaucratic ineptitude at best or deliberate deceit at worst.

5.42 Some witnesses before the Committee have questioned the legality of the payment to Mr Coyne of $27,190 over and above what he was entitled to receive as a termination settlement. The Department advised the CJC that Mr Coyne and the QPOA jointly raised the issue of Mr Coyne's entitlement to reimbursement of the additional costs incurred by him as a result of his secondment; and after many meetings, a negotiated settlement for a special payment to Mr Coyne was reached.[50] The amount of $27,190 included payment for the following: compensation for unpaid overtime; cost of changing telephone number; additional train travel expenses; payment for work performed during leave; reimbursement for additional travelling time; loss of on-call allowance; loss of extra week's leave; and telephone rental call reimbursement.[51]

5.43 Current and former union representatives criticised such a payment, with Mr Lindeberg claiming it was a fraud concocted to get rid of Mr Coyne.[52] That it was an unusual payment is possibly supported by the fact that Mr Coyne was required to sign a deed of settlement. Mr Barnes of the CJC argued, however, that such deeds were normal commercial practice.[53] In any event, Mr Coyne accepted the payment as settlement of all claims against the department arising out of his relocation from the John Oxley Youth Centre to Brisbane; and he agreed to a confidentiality clause.

5.44 During its public hearing in Brisbane on 5 May 1990, the Committee questioned Mr Coyne at length about the special termination payment. He indicated that he had given the broad details to his union, which undertook the negotiations with the department on his behalf. He described the resulting $27,190 as 'pretty generous' but also added:

> One thing with this was that ... it was not really the money; it was the fact that I had been treated so badly, and I was going, and I wanted to dig my toes in and make it difficult and at least make them pay in some respect.[54]

5.45 With the benefit of hindsight, the Committee believes that the 'Coyne case' could have been better handled. Whether or not Mr Coyne was responsible for the staff unrest at John Oxley Youth Centre, the setting up and the conduct of the inquiry into the Centre resulted in a great deal of stress for all concerned. The fact that Ms Matchett announced the sudden removal of Mr Coyne to a special project at the same time as she informed staff of the termination of the inquiry was particularly unfortunate. Ms Matchett's stated reasons for moving Mr Coyne, according to her speech notes for the occasion, were that it was in his own best interests, and in the interests of the Centre and the Department.[55] Despite this, the

50 Submission, CJC, 15.8.95, Attachment H (letter Matchett-Bingham 30.11.92)

51 Submission, CJC, February 1995, p.33.

52 Evidence, p. 21.

53 Evidence, p. 661.

54 Evidence, p. 542.

55 Submission, Cabinet Office, 31.7.95, Document 16.

temporal link between the cessation of the Heiner inquiry and Mr Coyne's removal from the John Oxley Centre was such that, whether or not there was a causal relationship in fact, one would be perceived. As Mr Coyne put it, 'people believed that, underneath it, I had done something wrong'.[56] In the circumstances, it might have been expected that the Department would feel obliged to ensure that Mr Coyne received ongoing counselling and supervisory support. This apparently did not occur. Whether or not a financial payout by way of compensation was appropriate is questionable; its legality, however, is another matter.

5.46 It does appear, and the CJC acknowledges it to be the case, that the payment was technically illegal.[57] The CJC outlined the matter as follows. Minister Warner had approved the payment on 7 February 1991 as a special payment under section 77 of the *Financial Administration and Audit Act 1977*. The relevant regulation authorised ministers to make special payments up to $50,000. While such a delegation had been agreed by Cabinet in late 1990, it did not receive the approval of the Governor-in-Council until 13 June 1991 and hence the payment to Mr Coyne was illegal. When the department discovered this, it sought Crown Law advice as to its options; the option the department elected to follow was to treat the payment as a loss.[58]

5.47 The matter of Mr Lindeberg's dismissal from his position with the Queensland Professional Officers' Association is addressed by the Committee within the context of the Heiner documents study because Mr Lindeberg asserts that it was his handling of the Coyne case that was used as one reason to dismiss him.[59] Briefly, Mr Lindeberg represented Mr Coyne's interests in the initial stages, when the latter was seeking access to the complaints against him. Mr Lindeberg points out that his involvement was not to assist Mr Coyne in any private defamation action but out of a union concern to clarify the interpretation of Regulation 65 of the *Public Service Management and Employment Act 1988*.[60]

5.48 In so far as it has been able to determine, the Committee believes that the department was being somewhat disingenuous in replying to Mr Coyne's solicitor that there was no 'departmental file or record' held on Mr Coyne. The QSSU written complaints to the department about Mr Coyne were generated before the Heiner inquiry began. Even if the Heiner material could be classified as not belonging to the department, it is unlikely that Mr Heiner received the originals of documents, therefore some material should have been available for perusal.

5.49 Mr Lindeberg was, he alleges, removed from the Coyne case by the union general secretary Mr Don Martindale because Minister Warner complained about Mr Lindeberg's handling of it. He alleges he was removed because he 'knew too much' when he inadvertently found out from Ms Matchett's private secretary that the documents were going to be shredded; his assertion to the Committee was that the union was trying to ingratiate itself with the new Government and was prepared to turn a blind eye to the shredding so long as

56 Evidence, p. 536.

57 Submission, CJC, February 1995, pp. 33-4.

58 Submission, CJC, February 1995, pp. 33-4.

59 Evidence, p.10.

60 Evidence, p. 13.

Mr Coyne was 'looked after'.[61] However, the Committee recognises the right of a union to replace a more junior officer with a more senior one, for the purposes of negotiations.

5.50 Mr Lindeberg's dismissal from his union position shortly thereafter has the appearance of victimisation. Mr Martindale advanced seven reasons for it, including the complaint from Minister Warner that Lindeberg's handling of the Coyne case was 'inappropriate and overconfrontationalist'.[62] The other six matters ranged from the relatively trivial to the highly significant, if true: that Mr Lindeberg lacked basic industrial knowledge, for example. Mr Martindale also alluded to Mr Lindeberg's employment history with the QPOA, some aspects of which have come to the attention of the Committee. Mr Lindeberg alleged to the police that a credit union ballot had been rigged; he further alleged that superannuation payments had been inappropriately made. The Committee is not in a position to reach a conclusion on Mr Lindeberg's dismissal and notes that other bodies have investigated this matter.[63]

5.51 As so often seems to be the case in whistleblower 'retribution' matters, the employer can, as the QPOA did,[64] generally point to past instances of unsatisfactory conduct on the part of the employee, which cumulatively might warrant dismissal. Most employers in the 1990s are not naive and have ready access to legal advice. They are unlikely to fall into the trap of linking a dismissal to a specific whistleblowing act or group of acts, particularly so if their motives are improper. Proving the contrary to the satisfaction of an investigatory body is extremely difficult.

5.52 The Committee believes that Mr Lindeberg raised the allegations that he did in good faith. Mr Lindeberg is to be commended for bringing to the attention of authorities the matter of the Heiner documents.

Implications for proposed Commonwealth whistleblower protection legislation

Definition of whistleblower/whistleblowing

5.53 The definition of 'whistleblower' at the outset is not easy to frame. In the course of the Heiner documents matter, the Government statement suggested that the 'real' whistleblowers in the case were the John Oxley Youth Centre workers who had complained about their manager, Mr Coyne. Mr Coyne did not regard himself as a whistleblower, and hence eligible for 'protection', even though he clearly regarded the shredding as wrongdoing. He nominated Mr Lindeberg as the 'real whistleblower in the case'.

5.54 As discussed in Chapter 2, the SSCPIW favoured a broad definition of 'whistleblowing'. In analysing the Heiner documents case, it is useful to consider how the definition of whistleblowing would need to be framed in order to bring the players under whistleblower protection. If a whistleblowing disclosure must be motivated by notions of

61 Evidence, pp. 15-16.

62 Submission, CJC, February 1995, pp. 15-16.

63 See, for example, *Fourth Report of the Commissioner Appointed to inquire into the activities of particular Queensland Unions*, and submission, CJC, February 1995, pp. 17-18.

64 Submission, CJC, February 1995, pp. 15-16.

public interest, then in this case the complaint that Mr Coyne chastised a member of staff for coming to work in pyjamas,[65] would probably not qualify as whistleblowing. Whether the actions complained of constituted 'significant' wrongdoing is difficult to determine.

5.55 Even Mr Lindeberg's motives could perhaps be called into question by a strictly legalistic interpretation of 'predominantly motivated by the public interest', as it could, for example, be asserted that he was merely seeking revenge on an organisation - the QPOA - which had dispensed with his services. It could be argued that the shredding of improperly obtained information was not an act of significant wrongdoing but, indeed, a public service. If the shredding were deemed to be a wrongdoing, it is hard to see how, once done, it could be undone.

5.56 Another definitional problem centres on the words 'official misconduct' which is so often the 'significant wrongdoing' complained of. In evidence to the Committee, the CJC outlined how 'official misconduct' was defined in s.32 of the Criminal Justice Act and in paragraphs 4.18-4.22 above, the Committee considered the implications of such a definition. As Mr Barnes pointed out, elected office-holders cannot readily be disciplined, so to be found guilty of official misconduct, the conduct in question must be capable of amounting to a criminal offence.[66]

Standard of proof

5.57 If we accept that Mr Lindeberg's complaints were made in good faith, the next question to consider is the standard of proof required both to uphold his complaint and to show that he was victimised by his employer for blowing the whistle. In neither case was it likely that the accepted standard of 'beyond reasonable doubt' could be met. Even if circumstantial evidence were to be accepted to show victimisation, it is unlikely that the employer's countervailing argument that Mr Lindeberg was an unsatifactory employee in other respects could be totally discounted. As the CJC has pointed out after five years of experience with whistleblower protection, 'the reality [is] that it is very difficult to show that dismissal or demotion (which are commonly complained about forms of victimisation) have occurred because of whistleblowing'.[67]

5.58 Mr Coyne's case also highlights the difficulty of proving causality in 'punitive transfer' cases. While neither the Committee nor Mr Coyne regard him as a whistleblower, he was inextricably involved in a whistleblowing case and was transferred to an employment situation not of his seeking and which ultimately so distressed him that he left the Service. Mr Coyne believes he was punitively transferred;[68] the CJC does not.[69] The temporal sequence of events - Ms Matchett transfers Mr Coyne to Head Office on the very day she announces to staff at the John Oxley Centre that the Heiner inquiry is terminated - inevitably suggests an association between the two events and one which is not favourable to Mr Coyne. However, proving causality is difficult.

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65 Evidence, p. 532.

66 Evidence, p. 657.

67 Correspondence, CJC, 14.3.95, p. [2].

68 Evidence, pp. 531-2.

69 Evidence, p. 650.

Coverage of the private sector

5.59 Mr Lindeberg's initial complaints about his dismissal were not investigated by the CJC on the grounds that the QPOA was not a 'unit of public administration' in terms of the CJC Act. His case highlights the question as to whether Commonwealth whistleblower protection legislation should cover private sector employees, given the differing legislative obligations on employees in the public and private sectors.

Investigative delays and multiple investigative fora

5.60 Following the CJC's refusal to investigate his complaint about his dismissal by the QPOA, Mr Lindeberg took that matter up with the Cooke inquiry. He continued to pursue with the CJC the one strand of his complaint that was within jurisdiction, namely Minister Warner's involvement with the Heiner documents. He also took his complaints to the Electoral and Administrative Review Commission and, later, to various Senate committees. When advised that in the CJC's view, no official misconduct was involved, he complained to the PCJC about the investigation and continues to debate with the Commision its findings. None of the various investigative segments was particularly protracted: the CJC's first assessment took five and a half months, for example. But by taking aspects of his complaints to different agencies simultaneously, Mr Lindeberg probably lessened his chances of a speedy resolution, or indeed any resolution at all.

5.61 No investigative agency likes to 'share jurisdiction', with good reason. Where more than one agency is involved, there can be no assurance that each is operating from the same informational base and there is an understandable tendency on the part of agencies to wait for one to conclude its investigation before another reports, to reduce the possibility of contradictory findings. The Committee understands and to some extent sympathises with Mr Lindeberg's desire to have the differing strands of his complaints handled expeditiously. However the very real problem remains that overlapping jurisdictions present major difficulties, not to mention the cost to the public purse of multiple fora investigations.

Confidentiality of complainants/complaints

5.62 The Committee notes that the original complainants in the Heiner documents case, whether or not they could be described as whistleblowers, made their complaints in confidence. Yet, as the John Oxley Youth Centre was not a large workplace, and as, apparently, unrest had been simmering for some time, it could be assumed that everyone involved was well aware of who was making complaints, and of the tenor of those complaints. In paras 2.57-2.60 above, the Committee considered the ramifications for Commonwealth whistleblower protection legislation of open or closed hearings. If, on the one hand, proceedings had been conducted more openly, it is unlikely that the shredding would ever have taken place. On the other hand, if the complainants had been required to make their complaints more openly, it is unlikely that some of them would have done so and thus any hint of defamation would have been avoided.

Media involvement

5.63 Compared with some whistleblowing cases, the protagonists have not involved the media to any great extent. Articles broadly critical of the shredding of the Heiner documents have appeared in the print media from time to time. Most publicity on the Heiner documents issue has been generated by questions and statements in both the federal and the Queensland Parliaments. This of course is a legitimate way for whistleblowers to draw attention to their cause, though rarely is a politician provided with sufficient hard facts to enable him or her to reach a conclusion on the objectivity of the information supplied.

CHAPTER 6

ALLEGED PROTECTION OF POLICE

Introduction

6.1 Term of reference (b) requires the Committee to give particular regard to 'the circumstances relating to the alleged protection of an allegedly corrupt senior police officer at the expense of other police, and matters arising therefrom'. These relate to allegations made by Gordon Harris,[1] a former police officer, and others concerning the alleged protection of a former police superintendent John Huey and actions, including the bringing of criminal charges, subsequently taken against Harris.

6.2 Gordon Harris' involvement in this matter dates from June 1990 although issues involved in the case commenced with a police investigation in June 1981. Intertwined into the fabric of this case, with differing levels of involvement, are many people, organisations and events.

6.3 The Committee received submissions and oral evidence from a number of the people involved in aspects of this case. Much of this evidence was extremely detailed and argued points of law. As has been indicated earlier, the Committee did not have the powers nor the intention to adjudicate on particular cases or bring redress to those it believed had suffered unfairly. Rather it attempted to focus on the actions of the various participants and the implications for whistleblowing legislation.

Background

6.4 In June 1981 then Detective Senior Sergeant John Huey and Inspector Cal Farrah interviewed a tow truck operator and former police officer Matthew Ready concerning a suspected attempt to defraud an insurance company. Ready had been alerted by police from the CIB that Huey was involved in the investigation and took the precaution of secretly tape recording the interview.[2] Ready was later charged and in February 1983, he and his co-accused were tried before Judge Pratt of the District Court. Huey and Farrah gave evidence for the prosecution relating to the Ready interview. They supported their evidence by notes which they asserted had been made during the interview. The accuracy of this evidence was challenged when the tape recording was produced. Judge Pratt subsequently ruled as inadmissible all the conversations had by Huey and Farrah with Ready, saying, in part, that he 'believed very little of what either [Huey or Farrah] said'.[3] The Crown subsequently entered a nolle prosequi in respect of all the accused.

6.5 The differences between Huey's supposedly contemporaneous notes of the Ready interview and the secretly made tape recording subsequently became the subject of a number

1 In this chapter, the Committee has elected to dispense with its customary practice of using titles with surnames. It has done so primarily to avoid repetition of police titles. No discourtesy is intended.

2 Evidence, Mr Matthew Ready, pp. 572-3.

3 Evidence, Mr Mark Le Grand, p. 203.

of court proceedings and investigations. In December 1991 the tape and notes were analysed by Professor Miles Moody, who concluded:

> Huey's contemporaneous notes cannot be reconciled with the authentic tape record of the meetings on the 29 June 1981. The magnitude of the discrepancies indicates that the notes are not contemporaneous notes as claimed by Huey. Huey's notes are a fabrication of events and conversation which did not occur at the time the recordings were made.[4]

6.6 The Police Complaints Tribunal conducted an investigation into the conduct of Huey and Farrah and referred the matter to the Attorney-General. On the advice of a team including the then Crown Counsel and Solicitor-General, Huey and Farrah were charged with conspiracy to pervert the course of justice. At committal proceedings concluded in October 1983, the presiding magistrate determined that there was not a prima facie case to commit Huey and Farrah to trial and dismissed the charges. The CJC was of the opinion that this decision was central to the whole case, as alleged by Harris and others, and that it was not the case 'that Huey has got away scot-free'.[5]

6.7 In May 1988 John Huey was seconded to the Fitzgerald Inquiry to command Task Force 'A'.

6.8 In June 1989 Huey gave evidence at the Judges Commission of Inquiry into Judge Pratt. The inquiry found that Huey was 'untruthful, disingenuous, inclined to disregard evidence that tended to show exculpation and inclined to try and find evidence that will fit his view'.[6]

6.9 In August 1989 William Rapp, a former police officer, made a formal complaint to the Fitzgerald Inquiry about the attachment to the Inquiry of Huey, who had a reputation for fabricating evidence. The Inquiry simply noted the information and made no further response to the Rapp complaint.[7]

6.10 On 2 November the Queensland Parliament enacted legislation to establish the Criminal Justice Commission. The election which resulted in the change of government in Queensland was held a month later.

6.11 William Rapp sought legal advice about instituting a private prosecution against Huey, but was advised that the most appropriate course of action was to lodge a complaint with the Attorney-General. On 12 February 1990, Rapp's solicitors Bailey and Bailey wrote to the Attorney-General outlining the allegations against Huey and requesting that an independent investigation be conducted.[8] The Attorney responded that he had received advice from the Acting Director of Prosecutions and that it was not his intention at that time to present an ex

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4 Submission, Butler/Channel 7, 3.2.95, Annexure 7 [the Moody Report], p. 4.

5 Evidence, Mr Mark Le Grand, p. 203.

6 Evidence, Mr Robert Butler, pp. 156-8; submission, Butler/Channel 7, Annexure 1, pp. 2, 5-6, which summarises findings of the Commission relevant to Mr Huey.

7 Submission, Butler/Channel 7, pp. 10-11.

8 A copy of this letter is Annexure 1, submission, Butler/Channel 7.

officio indictment in relation to the allegations against Huey. He added that the correct body to investigate claims of misconduct by Huey was the Criminal Justice Commission.[9]

6.12 Robert Butler was at the time an articled clerk with the law firm Bailey and Bailey. On 18 June 1990 in the office of Bailey and Bailey, and on the instructions of Rapp, Butler lodged with Senior Constable Gordon Harris and Detective Sergeant John Reynolds the complaint relating to Huey and Farrah. Harris and Reynolds were provided with the material which had previously been forwarded to the Attorney-General, alleging that Huey and Farrah had fabricated evidence, committed perjury, interfered with Crown witnesses, and other offences. Huey was at the time their Detective Superintendent.

6.13 Harris and Reynolds, believing there to be prima facie evidence that offences had been committed, commenced an investigation codenamed 'Operation Medusa'. They believed they had found sufficient evidence for charges of fabricating evidence and perjury. They also believed they had found evidence that similar offences may have been committed by the Task Force of the Fitzgerald Inquiry of which Huey was in charge during 1988-89. This related to two police officers, Charlie Melloy and Clarrie Williams, who had been charged with official corruption. Harris believed that witnesses at the trial of these officers committed perjury. With the evidence they had in their possession, Harris and Reynolds took three actions:

- they provided the evidence to Robert Schwarten MLA, a member of the Parliamentary Criminal Justice Committee;
- on 2 July, Reynolds swore out five summonses against Huey for fabricating notes of a purported interview between Huey, Farrah and Ready with the intent that the notes be used and accepted as evidence by the Magistrates Court, and
- also on 2 July, Harris, Reynolds and Butler provided the CJC with a report of their investigation and seeking its help to continue the investigation.[10]

6.14 The extent of the investigation undertaken by Harris and Reynolds has been questioned as it is claimed that neither Harris nor Reynolds interviewed potential witnesses or conducted any actual investigation other than accepting and relying upon the material provided by Butler.[11] However, John Reynolds indicated to the Committee that he did interview Matthew Ready. Reynolds also noted that police may charge people without necessarily interviewing all relevant witnesses, if they are satisfied that there is sufficient evidence to lay charges.[12]

6.15 Harris and Reynolds have also indicated that before they started to investigate the complaint from Bailey and Bailey they sought independent advice from Angelo Vasta, QC, concerning the allegations. Vasta has confirmed that he had lengthy discussions with Harris and Reynolds concerning the sufficiency of evidence, the possible charges that the evidence would support and the wording of the charges. He stated:

> I had read numerous statements and other documents and I was satisfied that a strong prima facie case existed against Huey for perjury and fabricating evidence. I recommended proceeding only in respect of the fabricating evidence

9 Submission, Butler/Channel 7, Annexure 3, Exhibit A.

10 Submission, Mr Gordon Harris, 24.1.95, Part 1, pp. 3-4.

11 Evidence, p. 202, referring to Clamp/Cox inquiry for PCJC.

12 Evidence, Mr John Reynolds, p. 245.

> charge because of difficulties associated with the charge of perjury including the necessity to obtain the consent of a Crown Law Officer.[13]

Harris and Reynolds did not assert that their investigation was complete and that was one of the reasons why they sought the CJC's assistance in its continuation.

6.16 After Harris and Reynolds had provided the report of their investigation to the CJC on 2 July, they were directed to provide all the evidence in their possession to senior officers of the Police Service.[14] On 3 July, a request to the CJC for witness protection under the Criminal Justice Act was declined. The CJC indicated that the section of the Act could not be invoked at that stage because the Commission could not anticipate if a misconduct tribunal or investigative hearing would be established before which Harris and Reynolds might give evidence.[15]

6.17 Harris and Reynolds were thwarted in serving the summonses on Huey. Instead they were served on Assistant Commissioner Neil Comrie, who directed Harris and Reynolds to cease their investigation of Huey.[16]

6.18 The Director of Prosecutions, Royce Miller, QC, at the request of the Commissioner of Police, withdrew the summonses on 6 July, undertaking to examine the Huey case and institute fresh charges if sufficient evidence existed to justify further prosecution. As part of his inquiry, the Director of Prosecutions requested Harris and Reynolds to provide a written report on the reasons why they charged Huey. They complied with this request on 20 August 1990.[17]

6.19 The Director subsequently provided his report in the form of an opinion to the Attorney-General on 27 August 1990 and also to the Commissioner of Police. This opinion, other than a few short extracts, has remained confidential and not been provided to Harris or his legal representatives.

6.20 Harris and Butler assert that the opinion is highly critical of Huey.[18] The sections that have been released indicate that, in the Director's opinion, the allegations against Huey were investigated at the time and that no further action could now properly be taken. No fresh charges would be laid.[19]

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13 Statement by A. Vasta, 14.6.95 in submission, Mr Gordon Harris, 23.6.95.

14 Submission, Butler/Channel 7, Annexure 3, Exhibit B.

15 Evidence, p. 179; submission, Butler/Channel 7, Annexure 20, pp. 6-7; and submission, CJC, February 1995, pp. 101-6.

16 Submission, Mr Gordon Harris, 24.1.95, Part 3, pp. 3-5; evidence, p. 142.

17 Submission, Mr Gordon Harris, 24.1.95, Part 4, p. 5. A copy of this report is in submission, Butler/Channel 7, Annexure 3, Exhibit N.

18 Submission, Mr Robert Butler, 25.5.95, p. 17.

19 The sections of the Director of Prosecutions' advice which have been released have been quoted in submissions from Mr Gordon Harris, 24.1.95, Part 4, p. 6 and 6.2.95, Part 12, p. 2; PCJC report 1991 (Clamp/Cox), p. 15 and Annexure 38; and Report No. 21, p. 14; Attorney-General's statement, February 1995, p. 3; and submission, CJC, February 1995, pp. 61 and 64.

6.21 Harris alleges that Terry Mackenroth, then Police Minister, after reading the Director of Prosecutions' opinion, instructed the Deputy Commissioner of Police to present an option to Huey to resign from the Police Service on the basis of a judgement made on the content of the Director's report. John Huey advised the Committee that he had been considering retirement since turning 55, but delayed a decision following the issuing of the summons, its withdrawal and the subsequent inquiry undertaken by the Director of Prosecutions. Huey indicated that after the Director concluded his inquiry, Commissioner Newnham had told him that the Director had decided that no charge should be bought against him although he had made some adverse comments in his report. Huey stated that 'all Mr Newnham said was, "[The Director said] that the charge against you in 1983, even though it had been dismissed, had been justified" and he said, "It is not very good for your future."'[20] Huey decided after discussions with his wife that it would 'be a good time to retire' and did so on 19 September 1990, retaining full superannuation benefits. Upon retirement his police diaries and notebooks were placed, as was the usual practice, with the Headquarters Property Section.

6.22 On 12 July 1990, only ten days after taking out the summonses against Huey, Harris and Reynolds were transferred from Task Force (CIB) to Police Service Reserve (uniform). The transfers were signed by Huey as their commanding officer.[21] Although the official attitude is that there is no formal action of 'punitive transfer' to uniform within the Police Service, the CJC agreed in evidence with the proposition that there is a culture or view within the Service that a person in the CIB or plain clothes has a certain status and a transfer back to uniform, without promotion, is regarded as a demotion.[22]

6.23 In January 1991 Harris, who was by then working in the Headquarters Property Section, located the Huey diaries and, after obtaining legal advice from his solicitors that he could properly and lawfully take the diaries and use them as exhibits in future court trials,[23] seized the diaries and photocopied them. The originals were placed in an exhibit room. Copies of sections of the diaries were given to his solicitor, Robert Butler.

6.24 On 8 March 1991 Harris and Reynolds commenced a Supreme Court action against their transfers, attaching extracts from the diaries to their affidavits. Three days later Channel 7 (Brisbane) telecast a program showing the CJC had failed to investigate complaints against Huey. The program used extracts from the Huey diaries which had been provided by Butler, with Harris' authority.

6.25 Assistant Commissioner Comrie complained to the CJC that he believed that Harris' action in copying the diaries and giving the copies to Butler provided cause to suspect that an act of official misconduct had been committed.[24] This complaint resulted in the investigation of Harris by the CJC.

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20 Evidence, Mr John Huey, pp. 588-9, and 599.

21 Submission, Mr Gordon Harris, 24.1.95, Part 6, pp. 1-4.

22 Evidence, Mr Mark Le Grand, p. 749.

23 Submission, Mr Gordon Harris, 24.1.95, Part 6, pp. 5-7; evidence, p. 143.

24 Evidence, Mr Mark Le Grand, p. 209.

6.26 On 27 March official complaints were made by Butler and Channel 7 to the Parliamentary Criminal Justice Committee (PCJC) concerning alleged criminal offences and misconduct by senior officers of the CJC and Police Service.[25] The principal allegations were:

- that the CJC had not carried out its statutory functions by its failure to properly investigate, if at all, complaints against former Inspector John William Huey; and
- that Sir Max Bingham QC had misused his position as Chairman of the CJC to gain a benefit for another, namely John William Huey, by convening a public hearing to answer allegations against the CJC.

6.27 After hearing both Butler and Channel 7 and claims that they were in possession of new evidence, the PCJC considered that an investigation independent of the CJC was justified. This course of action was taken for a number of reasons, chiefly 'to ensure that justice was not only done but seen to be done'.[26]

6.28 The PCJC requested the NSW Police Commissioner to appoint investigators. Superintendent Peter Clamp and Detective Inspector Malcolm Cox were appointed to conduct the investigation. The Chairman of the PCJC at that time, Peter Beattie MLA, advised the Committee that the PCJC had sought officers from New South Wales:

> because they were not involved with the Queensland Police Service, and nobody could say that they had a vested interest or any interest in the outcome other than to do their job.[27]

6.29 Clamp and Cox reported to the PCJC on 16 July 1991.[28] The report found that the complaints by Butler and Channel 7 were not sustained. Clamp and Cox were, however, critical of Harris and Reynolds, commenting that:

> Their actions were, in our view, **unwarranted**, **unreasonable**, and **provocative**, and given the age of the matters and the fact that Huey had faced criminal proceedings relating to the same circumstances, **tantamount to abuse of process** - but most of all - their actions were **unfair**.[29]

6.30 Allegations have been made that this investigation was neither thorough nor independent and that it was undertaken under the auspices of the CJC and paid for by the CJC.[30] Peter Beattie has confirmed that Clamp and Cox were accountable directly to the PCJC

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25 Butler's letter of complaint to the PCJC is reproduced in submission, Butler/Channel 7, Annexure 2.

26 PCJC, *Report of the Independent Investigation into the Allegations made by Robert David Butler and Channel 7 regarding former Inspector John William Huey and the Queensland Criminal Justice Commission*, 16 July 1991, (PCJC Report 1991 (Clamp/Cox)), Chairman's Forward, p. 2.

27 Evidence, Mr Peter Beattie, p. 634.

28 PCJC Report 1991 (Clamp/Cox).

29 PCJC Report 1991 (Clamp/Cox), p. 33.

30 Evidence, Messrs Ready and Kerin, pp. 568-70; submission, Butler/Channel 7, p. 26.

and that they had been directed 'to do a full investigation without any limitation at all'.[31] They operated from independent accommodation.[32]

6.31 The CJC has similarly emphasised that Clamp and Cox were not seconded to or employed by the CJC and reported directly to the PCJC. The CJC did not pay the salaries of Clamp and Cox although it did pay travelling allowance and accommodation costs of $8,334.[33]

6.32 The CJC hearing into the use of the Huey diaries commenced on 15 March 1991 and continued on 18 March and 8 April. On 13 June the CJC successfully applied ex parte (OS544/91) for an order requiring the attendance of Maxwell Mead, Harris' principal solicitor, to give evidence and produce any copies of the Huey diaries then in his possession. When the hearing recommenced on 9 July Harris' counsel argued that there had been an unfairness in procedure and indicated that there would be Supreme Court applications to set aside the order for Mead's attendance and to have the particular inquiry set aside.[34]

6.33 In July 1991 Harris commenced further Supreme Court action (OS718/91) in relation to the CJC's investigation into him and the release of the Huey diaries. A settlement was reached on 14 November 1991[35] whereby the CJC would resume its inquiry into the alleged misappropriation of the Huey diaries and Harris was given certain rights of cross-examination and access to documents.

6.34 On 12 December 1991 the CJC recommenced the hearing. Immediately there was debate about the proposed conduct of the hearing. Harris and Butler have claimed that the CJC 'wanted to know what questions we were going to put to witnesses'.[36] The CJC has claimed 'we never sought an indication of questions to be asked. Clearly we want to know the witnesses to be called, the general areas to be covered in cross-examination, the statements of persons to be called, and the evidence that would be led in examination.'[37]

6.35 The argument over the proposed conduct of this hearing was subsequently commented upon by Mr Gribbin, SM, who found that:

> The question of bias, for example, appears to have been approached on an entirely erroneous basis.
>
> The question of disclosing evidence of prospective witnesses on any reasonable view surely would not have arisen till after all witnesses intended to be called by the Commission itself had given evidence and been cross-examined. As to the question of cross-examination, even bearing in mind the Commission's unfettered powers to receive evidence as it sees fit, surely an even rudimentary

31 Evidence, p. 634.

32 Evidence, p. 634; see also PCJC Report 1991 (Clamp/Cox), Chairman's Forward, p. 2.

33 Evidence, Mr Mark Le Grand, pp. 205-6; submission, CJC, 15.8.95.

34 Submission, Mr Gordon Harris, 24.1.95, Part 8, pp. 3-4; submission, Mr Robert Butler, 25.5.95, pp. 162-4.

35 The terms of settlement are reproduced in submission, Butler/Channel 7, Annexure 16.

36 Evidence, p. 243.

37 Evidence, p. 216.

> understanding of the nature and object of cross-examination would indicate the impracticality of what was being sought.
>
> And further and probably more importantly, the correct place for such issues to be canvassed was in the open forum before the tribunal rather than in some back room.[38]

6.36 After objection by Harris' counsel over Mark Le Grand constituting the Commission, the matter was adjourned indefinitely. The responsibility for the adjournment of the proceedings has been disputed by the parties concerned. Harris and Butler have argued that Le Grand disqualified himself, whereas Le Grand has argued that it was the objection of Harris' legal representatives to his, or any other commissioner's, sitting in the hearing that led to the matter being adjourned.[39] Mr Gribbin, SM, subsequently considered that it was 'not accurate to say that the grounds for the termination of the inquiry were through no fault of the CJC'.[40]

6.37 On 20 December 1991 the CJC wrote to Harris' solicitor and the Police Commissioner. Harris alleges these letters contain conflicting comments that the investigation was adjourned to a date to be fixed and that the investigation was completed.[41]

6.38 On 17 December the CJC commenced a separate investigative hearing into a complaint by Harry Kruse against Harris for possession and misuse of a concealable firearm. David Bevan, constituting the Commission for the hearing, determined that the hearing should be conducted as a closed hearing and that Harris should not be permitted to appear personally or by his legal representative.[42] This hearing was then adjourned till 9 January 1992.

6.39 By the end of December 1991 Gordon Harris was the subject of two investigative hearings by the CJC which were running at the same time.

6.40 On 3 January 1992 Harris was charged by the Queensland Police Service with seven counts of disclosing confidential or privileged information, the disclosure of which was not authorised or made under due process of law.[43] The charges were based on recommendations from the CJC contained in a brief of evidence it had prepared and provided to the Commissioner of Police after the adjournment of the case on 12 December 1991. Harris and Butler allege that this brief of evidence resulted from a secret investigation conducted by the CJC and supported by an opinion it obtained from an independent counsel, Mark O'Sullivan.[44]

6.41 Harris was suspended without pay on 16 January 1992 following his appearance in the Magistrates Court and the setting of a date for hearing.

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38 Quoted in submission, Mr Robert Butler, 25.5.95, pp. 141-2.

39 Submission, Mr Gordon Harris, 24.1.95, Part 8, pp. 8-9; evidence, pp. 151-4 and pp. 216-19; and submission, CJC, February 1995, p. 87.

40 Quoted in submission, Mr Robert Butler, 25.5.95, p. 142.

41 Submission, Mr Gordon Harris, 11.1.95, Ch. 10, pp. 1-2.

42 Submission, Mr Gordon Harris, 24.1.95, Part 8, p. 10; evidence, pp. 160-1.

43 Submission, CJC, February 1995, pp. 74-5.

44 Evidence, Mr Gordon Harris, pp. 149, 168; submission, Mr Bob Butler, 25.5.95, p. 136.

6.42 The trial of Gordon Harris was conducted in a Magistrates Court before Mr Gribbin, SM, during March 1992. The Director of Prosecutions' opinion of 27 August 1990 was subpoenaed, but only two paragraphs were supplied. Sections of the opinion had been previously included in the report prepared by Clamp and Cox for the PCJC. Harris was found guilty of disobeying a directive by a senior police officer when he recommenced investigation of Huey by handing copies of the diaries to Robert Butler, thus disclosing information contrary to s.10.1 of the Police Service Administration Act. Mr Gribbin found that Harris had acted with integrity and that the matter was trivial. He discharged Harris without recording a conviction or awarding costs against him.

6.43 Mr Gribbin's decision was appealed by the prosecution on the ground of penalty and costs. Harris cross-appealed the guilty verdict. The Appeal Court judgement delivered in November 1992 upheld the magistrate's original decision.[45] In view of the Appeal Court decision, there appears little justification for the appeal launched by the Crown other than to pursue a conviction against Harris, which would have resulted in his dismissal from the Police Service. The appeal appears to have been a vindictive action.

6.44 Following the finalisation of the charges against Harris and the appeals, Robert Butler and Christopher Adams (Channel 7) made further complaints to the PCJC on 14 December 1992 and 11 March 1993. These complaints were essentially that their earlier complaints had not been properly investigated by Clamp and Cox in July 1991, and that their report was based on unfounded assumptions or overlooked inconsistencies in the facts and the evidence. They further complained that the police and the CJC had abrogated their statutory responsibility by allowing John Huey to retire and by giving clearances for him to do so when complaints of official misconduct were alive against him, and that they had fresh evidence to suggest that the 1981 investigation conducted by Huey was improper.[46]

6.45 There were two pieces of fresh evidence referred to by Butler and Adams and which had not been available to the Director of Prosecutions: the diaries and notebooks of John Huey, which had been located by Gordon Harris; and the analysis of the Ready tape by Professor Moody (see para 6.5). Professor Moody was also critical of the Clamp and Cox investigation, concluding that:

> The conclusions of the Parliamentary CJC report by Clamp and Cox are incorrectly based on unfounded assumptions and uninvestigated or overlooked inconsistencies in the facts and evidence.[47]

The PCJC was assisted in its deliberations by John Jerrard, QC, a member of the Criminal Bar, who provided an independent opinion in relation to the material supplied to the PCJC by Butler and Adams, and on related matters. The PCJC was also provided with access to the Director of Prosecutions' opinion of 27 August 1990.

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45 Submission, Mr Gordon Harris, 6.2.95, Part 12, pp. 3-4.

46 PCJC Report No. 21, 1992, pp. 5-7. Copies of the letters of complaint are in submission, Butler/Channel 7, Annexures 6 and 8.

47 Submission, Butler/Channel 7, 3.2.95, Annexure 7 - The Moody Report, p. 4.

6.46 The PCJC reported in November 1993, with the majority of members concluding that:

> the Committee is of the firm view that none of the complaints raised by Messrs Adams and Butler can be substantiated or sustained. The Committee believes that the report of the New South Wales investigators was thorough, independent and professional.[48]

In relation to Gordon Harris, it was the PCJC's view that 'the Magistrate's decision not to record a conviction accurately reflects the degree of wrongdoing by Harris in photocopying the diaries of Mr Huey and supplying them to Mr Butler'.[49]

6.47 The Deputy Chairman, Neil Turner MLA, attached a dissenting report. Mr Turner believed:

> serious questions should be raised in respect to allegations made to the Criminal Justice Commission so far as they relate to former Superintendent John Huey

and perceived

> that there has been an injustice committed upon the former Police Officers, Constable Harris and Detective Sergeant Reynolds ... These people have been vilified, castigated and subjected to harsh and unnecessary criticism for what I perceive to be people who are acting as "whistleblowers". [50]

6.48 Harris believes the two PCJC reports were used to obtain a result without any in depth examination of the evidence and the facts, and that their decisions were political, rather than honest and impartial. The CJC can see no basis for the claims that the PCJC reports were 'political' or that the examination of evidence was deficient.[51]

6.49 Gordon Harris remained suspended without pay from 16 January until 22 December 1992 when he was reinstated and received full back pay. He took recreation leave from 22 December 1992 to 1 May 1993 and resigned from the Police Service on 5 June 1993.

Discussion

Responses to Harris allegations being considered by Committee

6.50 The number of inquiries which have been held into the allegations made by Gordon Harris and others and the conclusions of these inquires were referred to in responses to the matters under consideration by the Committee.

6.51 Premier Goss wrote in response to the report of the Select Committee on Public Interest Whistleblowing that:

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48 PCJC Report No. 21, 1992, p. 24.

49 PCJC Report No. 21, 1992, p. 22.

50 PCJC Report No. 21, 1992, Dissenting Report by Neil Turner MLA, p. 1.

51 Submission, CJC, February 1995, p. 110.

> in respect of complaints concerning the handling of allegations against Mr Huey, various matters have been subject to inquiries by the CJC and two separate inquiries by the Parliamentary Criminal Justice Committee.[52]

6.52 The then Queensland Attorney-General, Dean Wells, in a statement to the Queensland Parliament, also referred to the fact that the Huey case had already been subject to very considerable examination by the CJC and PCJC. Mr Wells also noted that in addition to these inquiries, aspects of the case had been before the courts on four separate occasions.[53]

6.53 The Criminal Justice Commission similarly noted that the allegations had 'led to inquiry after inquiry [and that] in undertaking its present inquiry the Senate is treading a well worn path'.[54]

6.54 The Committee appreciates that a number of inquiries has taken place. These inquiries have not been studies of the totality of the issues but have each focused on differing aspects. As a result, the thoroughness with which the issues have been treated by the various examinations, inquiries and investigations has been questioned. Participants in the Committee's inquiry, into this and other cases, have indicated that, irrespective of outcomes, the inquiry has brought to light fresh documentation. The inquiry has also proved a valuable exercise in enabling whistleblowers to raise and debate their concerns in public.

Director of Prosecutions' opinion of 27 August 1990

6.55 The Director of Prosecutions' opinion is central to Harris' claims. This has been acknowledged by the Queensland Government and by Harris. The importance of the document can be seen in Mr Wells' statement that:

> In the Government's view, it may have been reasonable for Mr Harris to have undertaken his initial investigations into the allegations made against Mr Huey, and possibly also to have initially referred his concerns to the CJC. What is quite misplaced is Mr Harris' continued pursuit of the case when, following the independent determination of the Director of Prosecutions, the decision was taken that Huey should not be prosecuted.[55]

6.56 The complete opinion has remained confidential, although limited sections have been publicly released. Gordon Harris and Robert Butler have claimed that the opinion was used against Harris in his prosecution before the Magistrates Court and at his appeal. The released sections contained in the PCJC report by Clamp and Cox were used by the prosecution to support Huey's credibility and discredit that of Harris.[56] Efforts by Harris' counsel to have the opinion produced have been unsuccessful, despite counsel's arguments that it was wrong to use an extract from a document which misrepresented the totality of that document and therefore unfair to deny Harris the opportunity of examining the document.

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52 Correspondence, Premier Goss to Senator Newman, 10 October 1994, p. 6.

53 Attorney-General's statement, 21.2.95, pp. 4-5.

54 Submission, CJC, February 1995, p. 57.

55 Attorney-General's statement, 21.2.95, p. 9.

56 Submission, Mr Gordon Harris, 6.2.95, Part 12, p. 3; submission, Mr Robert Butler, 25.5.95, pp. 65-7.

6.57 The reasons for keeping the opinion confidential were stated in correspondence from the former Attorney-General, Dean Wells, to Ken Davies MP, then Chairman of the PCJC. Mr Wells wrote:

> It is a matter of fundamental principle that if a person is the beneficiary of a determination by a prosecutor not to prosecute that such a person should not subsequently have the contents of such a document aired to their detriment in public. A prosecutor's opinion is a unique document. It is a document which concentrates into a small compass everything negative to the person which can be found in order to make an assessment as to whether legal action should be commenced against that person. The mustering of all the adverse facts about a person's life makes almost every opinion as to whether a prosecution should be brought highly defamatory if it were not covered by legal professional privilege. It would be an oppressive detriment to place on any person who was innocent unless proven guilty to release any prosecutorial opinion about them.
>
> I say any person, and my remarks do not apply particularly to Huey, although they encompass him by encompassing everyone. The principle of equal justice requires that all citizens should be treated equally by the law. If I were to release the Huey Opinion or allow multiple copies of it to be made I would have to do that with respect to every prosecutorial opinion and thus put the reputations and peace of mind of every citizen whose affairs had ever been considered by a prosecutor in jeopardy ...
>
> Without putting too fine a point on it, the Director of Prosecutions in his capacity as such and in his capacity as Special Prosecutor holds a large number of Opinions as to whether to bring prosecutions against a large number of public figures. If I were to release one I should release them all. If I were to give multiple currency to one, I should give multiple currency to all. I have no intention of releasing any.[57]

6.58 Harris' counsel, Ken Fleming, QC, has conceded that in relation to the privilege claim in respect of the opinion, there was 'some substance in that claim'.[58] Butler has also acknowledged that 'in general, this principle is correct but each case must be viewed upon its own facts'.[59] Although efforts to obtain the full opinion as part of the proceedings commenced by Harris in July 1991 were unsuccessful, two paragraphs were made available to Harris.

6.59 The opinion has, however, been made fully available on a confidential basis to the Minister of Police, Commissioner of Police, the CJC, the PCJC, Clamp and Cox, independent counsel to the PCJC and this Committee. It is argued that the principle in question is fundamental, rather than the need to protect the content of the particular opinion. The Premier's Cabinet submission, which was intended to remain confidential, indicates that:

> It is *not* proposed to release the Director of Prosecutions' opinion of 27 August 1990 at the centre of this case, even though to do so would support the

57 PCJC Report No. 21, 1993, pp. iv-v.

58 Submission, Mr Gordon Harris, 24.1.95, Part 8, p. 7.

59 Submission, Mr Robert Butler, 25.5.95, p. 64.

> Government's position. It is considered that the principle of confidentiality applying to prosecutorial opinions does not permit the document's release.[60]

6.60 The CJC also noted that:

> Although the Commission would have no concern for its own part about the publication of this advice, it understands that this course is strongly opposed by the Attorney-General and the Director of Prosecutions who regard the confidence of such advices as vital to the due administration of criminal justice.[61]

6.61 As has been indicated, limited sections of the opinion have been approved for public release. In addition to the paragraphs made available to Harris, the Clamp/Cox report for the PCJC also quotes sections and appends the concluding page from the opinion.

6.62 These publicly released sections (see footnote 19 this chapter) cover two areas - the actions taken by Harris and Reynolds and the decision not to lay charges against Huey. In relation to Harris and Reynolds, the Director of Prosecutions wrote:

> The two police officers who took out the five complaints and summonses against Mr Huey at my request provided me with a report dated 20 August, 1990. In that report the officers set forth the reasons why the complaints and summonses were taken out.
>
> I think it would be most unfair to impute improper motives to those officers. Indeed I think any right minded person should commend them for their persistence they have shown. However I think that they have misconceived the law.[62]

6.63 Harris compares these comments with those from the Clamp/Cox conclusions (see paragraph 6.29) believing they are 'at opposite ends of the spectrum'. The CJC has suggested that there is a good deal of similarity in the conclusions. In evidence Ms Hamilton, CJC, said:

> The Director of Prosecutions certainly agreed with Cox and Clamp that bringing charges against Huey was unwarranted, unfair, and an abuse of process. He said as much in his opinion. He was not willing to impute improper motives to Harris and Reynolds and, indeed, Cox and Clamp themselves spoke only about the unfairness of the actions of Harris and Reynolds, not about their motives.[63]

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60 Cabinet submission by Premier Goss, February 1995, p. 13. The document was tabled in the Queensland Parliament on 21.2.95 and provided as an exhibit to the submission from Kevin Lindeberg.

61 Submission, CJC, February 1995, p. 61.

62 Submission, Mr Gordon Harris, 6.2.95, Part 12, p. 2.

63 Evidence, p. 724.

6.64 On the matter of bringing charges against Huey, the Director concluded:

> I have now thoroughly examined not only the charges laid by Reynolds, but also the other charges suggested by Rapp's solicitors and a further charge which no one hitherto had suggested.
>
> My firm view is that no further action can properly be taken and I propose to take none by way of having charges laid ...
>
> I hold the view that to bring any charge now, seven years later, against Huey relating to any allegation of false evidence would be unconscionable and oppressive ... I think it would be a shameful exercise of the Crown's discretion ... if in 1990 a decision were taken to lay charges which might have been laid in 1983.[64]

6.65 In support of his opinion the Director referred to the decisions of the High Court in *Jago v. District Court* (NSW) 1989 63 ALJR 640 in which Justice Deane said that delaying proceedings could be so unfairly oppressive as to amount to an abuse of the court's process which could be remedied by the court exercising its inherent power to order that the proceedings be permanently stayed.

6.66 The Director confirmed the view expressed in the 1990 opinion in a memorandum to the Attorney-General on 16 November 1994. Mr Miller, QC, wrote:

> It was my view then, and I still adhere to it, that where the Crown has available to it a number of options regarding the charges that can be laid and chooses amongst them and charges only one or some, then thereafter, many years later, to prosecute other charges that might have been laid in the first place would be oppressive.[65]

6.67 The CJC has stated that in reaching his conclusions, the Director of Prosecutions examined not only the charges laid by Reynolds and all relevant material, but also other charges suggested by William Rapp's solicitors in an earlier letter to the Attorney-General. The Director also had access to all relevant material held by the CJC and the Police Service.[66]

6.68 Gordon Harris' action of not accepting the Director's opinion that no further action could properly be taken and, by undertaking further investigation of Huey contrary to instruction, resulted in the course of events which led to his prosecution. Nevertheless, the magistrate found that the action undertaken by Harris of providing copies of the Huey diaries to Butler was of such a trivial nature that no conviction was recorded. The Court of Appeal following the Harris prosecution case noted:

> that even on the rather limited material available there is no reason for supposing that the direction or order given to Reynolds or Harris was either improper, illegal or invalid as being contrary to law or in conflict with their

64 These sections of the opinion have been quoted in a number of sources. See footnote 19.

65 Director of Prosecutions, Mr R.N.Miller QC, Memorandum of Advice re: Prosecution or not of John William Huey, 16 November 1994, Annexure 11(a) to submission, Butler/Channel 7.

66 Evidence, p. 204.

> duties as members of the Police Service. [The disclosure of information by Harris to Butler] could not have served any such purpose to go on with a prosecution that was in law bound to fail, or with an investigation that would bring no offender to justice.[67]

6.69 The Director's decision not to take further action, supported by reference to the Jago case, has been challenged by some witnesses in relation to legal interpretation of delayed prosecutions. Butler, in particular, disputes the Director's opinion, quoting sections 16 and 17 of the Queensland Criminal Code which show that a person may not be twice punished for the same offence and that it is 'a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment'. He argues that as Huey and Farrah did not come to trial, were not convicted or acquitted and were not punished, there was no lawful reason to prevent them being charged again. Butler also believes Huey and Farrah could have been tried and the delay would not have prevented them from obtaining a fair trial. Butler supports his argument by reference to a number of Queensland cases, including those involving police officers Sergeant Hall and Detective Senior Sergeant Freier, where prosecutions were instituted concerning offences which allegedly occurred many years earlier.[68]

6.70 Freier was charged in late 1990 with perjury and fabrication of evidence as a result of evidence given by Jack Herbert to the Fitzgerald Commission. The offences related to a trial which had been conducted in 1976. Freier applied for a stay of prosecution, arguing that it would be oppressive and unfair to him to stand trial on events alleged to have occurred so many years earlier. The law concerning prosecutorial discretion and the stay of criminal proceedings, including Jago's case, was argued in full. The judge refused the application for a stay of proceedings. Freier was subsequently prosecuted and found not guilty. Hall was interviewed in relation to allegations of indecent assault in November 1978. It was determined at that time that there was insufficient evidence to commence criminal or disciplinary proceedings against Hall. The case was later re-opened and disciplinary charges of official misconduct were heard by the CJC in May 1991. The charges were proved and Hall was dismissed from the Police Service.

6.71 In response, the Director of Public Prosecutions, Royce Miller, QC, wrote:

> Let me at the outset make my position clear. In August, 1990 I took the view that it would be a shameful exercise of discretion if then a decision were to be taken to lay charges that might have been laid in 1983, but were not, when the Crown was in a position to determine what charges, if any, should be laid. In 1983 a decision was taken not to put either Huey or Farrah in jeopardy on perjury and fabrication charges and a decision was taken not to put them in further jeopardy on a conspiracy charge upon which a Magistrate had refused to commit them for trial. No new evidence had become available before August, 1990 which could properly be regarded as justifying a complete reversal of an attitude adopted in 1983.

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67 Court of Appeal, Heffernan -v- Harris, in submission, CJC, February 1995, p. 78.

68 Submission, Mr Robert Butler, 25.5.95, pp. 29-35. Submission, Messrs Ready and Kerin, 8.2.95, p. 17, and evidence, pp. 562-5, also refer to the Hall and Freier cases.

> Mr Kerin in his evidence suggests that the Freier Case was prosecuted by me and I adopted standards different from those applied in the Huey matter. The truth is that Freier was prosecuted by the Special Prosecutor, not by me. There are differences between the two cases. In Freier, the evidence to put him upon his trial became available from Herbert who gave evidence before the Fitzgerald Inquiry, whereas in 1983, the Crown had adopted a position with regard to Huey which in 1990 was sought to be reversed.[69]

6.72 The CJC argued that the Hall and Freier cases were quite different from Huey's, because Hall and Freier had not previously been charged and discharged, and any claimed comparison was misleading.[70]

6.73 The Committee notes that the Director's opinion has already been made widely available to many people and organisations and that limited sections have been publicly released. Further, the Committee acknowledges the former Attorney-General's view that the principle of equal justice requires that all citizens be treated equally by the law and that the contents of prosecutorial opinions should not be published to a person's detriment. However, the publicly released sections of this opinion have been detrimental to Gordon Harris. John Huey has also acknowledged that the opinion was not helpful to his cause. The Committee, having read the Director's opinion, considers that in this particular case and for the above reasons, the public interest would be best served if the Director of Prosecutions' opinion of 27 August 1990 were publicly released in its entirety.

Transfer of Harris and Reynolds

6.74 Gordon Harris believes that the transfers of John Reynolds and himself in July 1990 was an 'abuse of the Police Service transfer system'. Harris notes that a number of reports and internal memorandums critical of Reynolds and himself were written shortly after the summonses were presented on 2 July 1990. These adverse reports were allegedly crucial in their transfers which were executed by Mr Huey as their commanding officer on 12 July 1990.[71]

6.75 Robert Butler has also suggested that Reynolds and Harris were punitively transferred on the basis of their failure to comply with the instruction not to pursue an investigation of the complaints against Huey.[72] Butler has referred to documentation which indicates that the Police Commissioner said on 23 July 1990 that the transfers were not necessarily a 'punitive action' but rather a 'corrective action'.[73] However, after Harris and Reynolds appealed their transfers, the Commissioner for Police Service Reviews was advised by the Police Commissioner's Office on 20 November 1990 that Harris and Reynolds had been transferred:

> in the interests of the discipline and the maintenance of proper standards of the Queensland Police Service ... It was considered that [Harris and Reynolds]

69 Correspondence, Mr RN Miller, QC, 22.5.95; evidence, p. 701.

70 Evidence, pp. 714-720; submission, CJC, August 1995.

71 Submissions, Mr Gordon Harris, 24.1.95 Part 6, pp. 1-4, and 6.2.95, Introduction, pp. 3-4.

72 Submission, Butler/Channel 7, p. 19.

73 Submission, Mr Robert Butler, 16.6.95, p. 6.

> during the investigations of a complaint preferred against Superintendent J. Huey, had not complied with the Commissioner's directions and policies when initiating and investigating such complaints. It was considered that [Harris' and Reynolds'] conduct warranted disciplinary action by way of transfer.[74]

6.76 Harris and Reynolds commenced Supreme Court proceedings against their transfers. This led to a review of the Police Service files relating to the matter.As a result of the review the Police Commissioner's Office again wrote to the Commissioner for Police Service Reviews on 25 March 1991 indicating that the letter of 20 November was inaccurate and that:

> the transfer was an administrative decision pursuant to the Police Service Administration Act and in the interests of the Queensland Police Service and not punitive or the result of any disciplinary action.[75]

Robert Butler has argued that, based upon this correspondence, 'it appears the stated reasons from the authorities changed whenever it was necessary for them to avoid the consequences of illegal conduct'.[76]

6.77 The CJC asserted that 'no disciplinary action was taken against Harris and Reynolds because of their part in charging Huey'.[77] The CJC further indicated that 'we can only go by what we have seen on the police file which is that [the transfers were] for administrative purposes, for the good discipline of the force'.[78] The Committee is concerned that the CJC has apparently made its judgment on the transfers based upon a single letter and without acknowledging the earlier correspondence linking the transfers to disciplinary action over the investigation of John Huey.

6.78 John Reynolds was formally demoted from Sergeant first class to third class on 8 October 1990 after a disciplinary hearing on another matter. The CJC indicated that the demotion was not related to the investigation of John Huey and that Reynolds had been served with a notice on 25 April 1990 (prior to raising the Huey matter) that he was to be charged with disciplinary offences in relation to taking on an investigation without reporting to his superior officer or following proper procedure to record the investigation.[79] Butler has contended that the demotion resulted from a disciplinary hearing 'which failed to recognise the most basic fundamentals of law'.[80]

6.79 This case, like that of Peter Coyne referred to in para 5.58, clearly highlights the difficulty of proving causality in 'punitive transfers' in cases involving whistleblowers. At least with Harris and Reynolds, there was an early acknowledgement of a link to disciplinary action although this link was subsequently denied.

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74 Submission, Butler/Channel 7, Annexure 3, Exhibit C.

75 Submission, Mr Robert Butler, 25.5.95, Annexure 63.

76 Submission, Mr Robert Butler, 16.6.95, p. 7.

77 Evidence, p. 712.

78 Evidence, p. 750.

79 Evidence, Ms Theresa Hamilton, p. 223; submission, CJC, August 1995.

80 Submission, Mr Robert Butler, 25.5.95, p. 6.

CJC investigation and laying of charges against Harris

6.80 The CJC indicated that a constant assertion by Harris was that his investigation by the CJC and subsequent prosecution on charges laid by the Police Service was 'a vindictive retribution for Harris' temerity in investigating and laying charges against Huey'.[81]

6.81 Mark Le Grand noted that in accordance with the provisions of the Criminal Justice Act the CJC was obliged to investigate all complaints of misconduct made against police officers. It was therefore under a statutory obligation to pursue the complaint against Harris made by Assistant Commissioner Comrie on 13 March 1991.[82] Butler argued that it was this statutory requirement which also obliged the CJC to pursue an investigation into the allegations made against Huey.[83] The CJC advised the Committee that it had not investigated Huey or the Channel 7 allegations.[84] The CJC was also mindful that at the time the investigation into Harris commenced, the leaking of confidential information from the Police Service was endemic. Indeed, the CJC 'considered it a priority to bring about an understanding within the police service that the abuse of official information is a serious matter and should be actively discouraged'.[85]

6.82 The investigation being undertaken by the CJC into the alleged misappropriation and disclosure of the Huey diaries by Harris was interrupted by Harris' Supreme Court action alleging denial of natural justice. This action resulted in the settlement on 14 November 1991 to allow Harris certain rights of cross-examination and access to documents (see paras 4.34-5 and 6.33).

6.83 The investigative hearing into this matter was resumed on 12 December 1991 and adjourned indefinitely on the same day. Harris and Butler have emphasised the importance of this indefinite adjournment of the CJC hearing. Immediately after the adjournment the CJC prepared a brief including a recommendation to charge Harris with an offence, even though the CJC had written to Harris' solicitors on 20 December indicating the investigation was adjourned to a date to be fixed. At no point after 12 December was Harris given an opportunity to put his case in the proceedings before charges were laid by the Police Service on 3 January 1992.[86] Butler has argued that in completing the investigation whilst the matter was adjourned,

> [n]ot only were the terms of settlement abandoned, but natural justice was again denied, by disallowing Harris the opportunity to present his case. In fact Harris was unaware that the CJC completed its investigation in secret and then reported their outcome to the Police Service.[87]

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81 Submission, CJC, February 1995, p. 70.

82 Evidence, Mr Mark Le Grand, p. 209.

83 Submission, Mr Robert Butler, 25.5.95, p. 14.

84 Evidence, CJC, pp. 204, 711.

85 Evidence, Mr Mark Le Grand, p. 213.

86 Evidence, Mr Robert Butler, p. 169.

87 Submission, Mr Robert Butler, 25.5.95, p. 136.

This alleged denial of natural justice was raised during Harris' trial. Mr Gribbin, SM, wrote in his judgment:

> The actions of the CJC, in completing the inquiry as it did in secret with no notification to the defendent, I consider a clear breach, at least of the spirit of the terms of settlement. However, I would also consider that there has been no breach of any statutory duty.[88]

6.84 The CJC has confirmed that after 12 December 1991 it obtained written advice from an independent counsel prior to referring the matter to the Police Service. The independent counsel was Mark O'Sullivan who had previously signed the November terms of settlement as counsel for the CJC. This example of the regular use by the CJC of the same persons as independent counsel or as providers of independent opinions has led to concerns being expressed about the level of independence of these persons.[89]

6.85 The CJC compiled the brief of evidence as a result of its investigations and referred that brief, together with the opinion obtained from Mark O'Sullivan, to the police for its consideration as to whether a prosecution should be laid. The CJC expressed a view in favour of prosecution in the brief of evidence. The decision to lay charges was taken by the Police Service.[90]

6.86 The Committee notes that the CJC has a discretion as to whether it makes recommendations favouring prosecution as a result of its investigations. It was proposed during the hearings that given the decision in the Harris trial and by the Court of Appeal that the offence was trivial with a number of mitigating circumstances which resulted in no conviction being recorded against Harris, the CJC could have reached a similar view in relation to the evidence arising from their investigation and exercised its discretion not to recommend laying charges.[91]

6.87 The charges against Harris were formally laid by Inspector Heffernan. The degree of independence displayed by Heffernan in laying these charges has been disputed. Butler has alleged that a statement by Heffernan obtained under FOI indicates that he had not acted independently, but rather that he acted under the direction of Acting Commissioner Blizzard. Heffernan's statement says 'This direction was in writing and authorised me to institute proceedings against the defendant.'[92]

6.88 Mark Le Grand has argued that a distinction needs to be made that this statement directly authorised Heffernan to lay charges; it did not direct him to lay charges. Heffernan studied the brief of evidence and, after satisfying himself that there was sufficient evidence, laid charges.[93] The Court of Appeal supported this view, finding 'it is obvious from the testimony of Heffernan himself that there was evidence to support the conclusion that, in

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88 Quoted in submission, Mr Robert Butler, 25.5.95, p. 142.

89 See, for example, submission, Mr Robert Butler, 25.5.95, pp. 134-5.

90 Evidence, Mr Mark Le Grand, p. 211; submission, CJC, February 95, p. 76.

91 Evidence, Senator Abetz and Mr Mark Le Grand, pp. 230-2.

92 Evidence, p. 170; submission, Mr Robert Butler, 25.5.95, pp. 148-53.

93 Evidence, Mr Mark Le Grand, 24.2.95, p. 212.

deciding to lay the charge against Harris, Heffernan exercised an independent judgment'.[94] Butler 'respectfully submitted' that it would be naive to expect that a commissioned police officer would, or in reality could, go against a CJC recommendation and counsel's advice.[95]

Detective Superintendent John Huey

6.89 The Committee received considerable evidence from a number of witnesses which, it was argued, supported the allegations made in relation to John Huey. It was argued that this evidence justified the continued actions by Harris and others in having Huey investigated and that, in allegedly covering up this information, corrupt and conspiratorial behaviour had been demonstrated by various public officials and organisations. Much debate centred around the various investigations, inquiries and hearings undertaken by and within the CJC, PCJC and Court structures.

6.90 As has been indicated, the Committee is not adjudicating on particular cases and therefore it is not within its scope to make any form of legal determination in respect of the evidence that has been provided, including an assessment of the evidence relating to John Huey's actions as a member of the Queensland Police Service.

6.91 However, based on the evidence it has received, the Committee wishes to make some observations in relation to John Huey. As indicated in para 6.4, Matthew Ready secretly recorded his interview with Huey and Farrah after being tipped off by police from the CIB. Huey did not express any surprise at this explanation for the tape-recording of the interview.[96] Ready has asserted that in 1981, Huey's reputation for the methods by which he conducted investigations were 'well known and well accepted throughout the police force'.[97]

6.92 The findings of the 1989 Judges Commission of Inquiry, which were highly critical of John Huey, have been referred to in para 6.8. In response to repeated questions in relation to the Commission's findings, Huey simply said 'they did not accept my evidence'. Finally, he conceded that 'I suppose from that you could say it made adverse findings about my evidence'.[98] These adverse findings were not acted upon and later in 1989 Huey was promoted to detective superintendent and transferred from the Fitzgerald Inquiry back to the CIB. Members of the Task Force Branch of the Police Union voted unanimously for a motion of no confidence in Huey. Huey passed off this expression of concern by CIB officers by suggesting 'they were worried that I was going to make them do a bit of work - maybe shift some of the corrupt ones out to uniform'.[99]

6.93 The Committee notes that John Huey was a reluctant witness whom the Committee had to subpoena. However, it found his selective recollection of events when answering questions particularly unhelpful and the general tenor of his evidence disingenuous.

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94 Quoted in submission, Mr Robert Butler, 25.5.95, p. 153.

95 ibid.

96 Evidence, p. 608.

97 Evidence, p. 572.

98 Evidence, pp. 582, 603, 619.

99 Evidence, p. 620.

6.94 One particular allegation which received considerable attention during the course of the inquiry related to John Huey's retirement in September 1990. It was alleged that Huey had not been subjected to the required clearance procedures prior to his retirement because complaints of official misconduct were outstanding against him, and that the CJC and Commissioner of Police had abrogated their statutory responsibilities by allowing Huey to retire with a large superannuation payout to which he was not entitled.[100]

6.95 This allegation was considered by the PCJC which concluded that the criticism of the CJC and Commissioner of Police in permitting Huey to resign was unjustified. The complaint against Huey which had been raised by Harris and Reynolds had been investigated by the Director of Prosecutions. The PCJC considered that in the light of the Director's opinion (dated August 1990) it could not be said that the complaint was in any sense a live complaint in September or October 1990.[101]

6.96 The CJC responded that 'even if there had been complaints of misconduct against Huey when he applied to retire, the Commission had no power to prevent his retirement, nor was it the Commission's policy to do so'.[102] A police officer who is liable to be charged with a 'prescribed offence' which would lead to suspension from duty or is under suspension, can not retire or resign. The CJC noted that it could only recommend to the Police Service that an officer be suspended to prevent his or her retirement if it had information to suggest that the officer had been involved in conduct that constituted a prescribed offence. Huey was 55 years of age and entitled to retire without notice if he so chose. The CJC 'could have intervened only if it had information which suggested that he was liable to be charged with a "prescribed offence". The Commission had no such information.'[103]

6.97 Robert Butler highlighted that the legislation governing police conduct provides a wide range of offences, some of a quite trivial nature, which would allow the Police Commissioner to suspend an officer. Butler argues that 'there were reasonable grounds for suspecting official misconduct or disciplinary offences, either of which were sufficient grounds to suspend Detective Superintendent Huey'.[104]

Summary comments

6.98 The Committee believes that it should make some observations on the evidence it has received or seen and considered within its terms of reference. The Queensland Government and the Director of Prosecutions have expressed the view that it may have been reasonable for Harris and Reynolds to undertake initial investigations into the allegations made against Huey and refer these concerns to the CJC, and that it was most unfair to impute improper motives to Harris and Reynolds. However, the Committee considers that, based on the evidence, it was reasonable for Harris and Reynolds to undertake these actions and that they did so for proper motives.

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100 This allegation was summarised in the complaints to the PCJC (see para 6.44-5).

101 PCJC Report No. 21, 1993, pp. 17-18.

102 Submission, CJC, February 1995, p. 109.

103 Submission, CJC, February 1995, p 110; see also submission, CJC, August 95.

104 Submission, Mr Robert Butler, 16.6.95, p. 12.

6.99 By not accepting the opinion of the Director of Prosecutions that no further action could properly be taken and by undertaking further investigation of Huey contrary to instruction, Harris placed himself in a position whereby he became the central focus of action rather than his original allegations. The Committee recognises that the events of this case occurred in the post-Fitzgerald Commission climate when the spotlight was clearly on reforming the Police Service. The Fitzgerald Commission had emphasised the 'manifest duty' of police officers to take action against corrupt officers.[105] The Committee cannot concur with the CJC view that Harris was 'substantially the architect of his own misfortune'.[106]

6.100 In evidence to the Committee, the CJC argued that the inquiries and actions taken against Harris followed the letter of the law. The Committee believes that the CJC was no doubt influenced by Harris' determination to pursue the case against Huey. The Committee nevertheless acknowledges that within the 'letter of the law' discretion is permissible and expresses its concern at the vehemence with which various authorities pursued Harris. It considers their motivations questionable. As has been discussed earlier, the Committee especially considers that the CJC could have exercised greater discretion in certain situations and that actions of the Police Service were vindictive.

6.101 As indicated earlier the propriety of Harris' undertaking his initial actions has been referred to positively by the Queensland Government and the Director of Prosecutions. Similarly positive comments have been made in Harris' favour concerning his actions in continuing to pursue the case against Huey. The Court of Appeal noted that 'Harris may well have been wrong-headed or even over-zealous in pursuing the investigations after being ordered to refrain from doing so. But it cannot be suggested that he set out deliberately to break the law'.[107]

6.102 Mark Le Grand indicated that there was an error of judgment on the part of Harris and Reynolds at the beginning of proceedings and that events compounded the situation.[108] Whether there was an error of judgment or not, the pursuit of Harris and the related events were unwarranted. In the Committee's view, the claim that Harris was 'over-zealous' or made an 'error in judgment' must be set against the background of the Fitzgerald inquiry. In any case, the criticism of Gordon Harris could never justify the severity of action to which he was subjected for pursuing the case against Huey, nor the detriment he has personally suffered as a result.

Implications for proposed Commonwealth whistleblower protection legislation

6.103 This case graphically illustrates the difficulties faced by whistleblowers when their allegations are not accepted or investigated within their organisation, or when superiors instruct the whistleblowers to desist. Convinced of the correctness of their cause, the whistleblowers pursue their allegations determinedly, only to find that they, rather than their allegations, have become the centre of the organisational response. Questions then arise as to

105 See, for example, Fitzgerald report, p. 180.

106 Evidence, p. 233.

107 Evidence, p. 231.

108 Evidence, pp. 234-5.

where they can take their allegations, to whom they can turn for advice, counselling or protection.

6.104 Whistleblower protection legislation will have to contend with other issues raised by this case: the conduct of investigations into the substance of allegations; the use of open or closed hearings; the relevance and admissibility of evidence, especially in court proceedings; the costs of pursuing legal action, especially through the courts; protection against acts of retribution; and recourse to the media.

CHAPTER 7

OTHER CASES CONSIDERED BY THE COMMITTEE

Introduction

7.1 The following discussion covers the other cases considered by the Committee. The Committee reiterates that it neither sought input from every individual involved in the cases discussed nor did it attempt to provide a solution for each case.

Former Sale Councillors

7.2 Ms Christina Schwerin, former Sale councillor, and two other former councillors, Ms Carolyn Crossley and Mr John Smith, appeared before the Committee in Melbourne on 15 March 1995. Ms Schwerin had in a submission to the Committee outlined her experiences while a councillor at Sale from February 1989 to August 1991. Ms Schwerin stated that on taking her place on council she was confronted by:

- violations of law;
- subversion of the democratic process;
- gross mismanagement and waste of public funds;
- abuse of authority;
- coverup of dangers to public health;
- council endorsement of submission to government of false statistics and information; and
- conflicts of interest through persons holding more than one office.[1]

7.3 Ms Schwerin also stated that she and other independent councillors were the subject of harassment and intimidation as a result of not acceding to the influence of certain interest groups with links to the council. The harassment and intimidation included personal attacks in council, victimisation, smear campaigns in the local media, the use of unnecessary litigation, and death threats. Ms Schwerin alleged that the harassment was instigated by an interest group and was undertaken by shire officials and local police.

7.4 At the Committee's public hearing, the former councillors gave evidence concerning other incidents involving residents of Sale, shire officials and police. Documentary evidence was also tendered.

Investigations of the matters

7.5 The former councillors raised their problems with the council with a number of government bodies:

a) Victorian Minister for Local Government: Ms Schwerin reported to the Committee that the former councillors had been advised that the Local Government Act had been

1 Submission, Ms Christina Schwerin, 25.1.95, p. 1.

amended to allow greater autonomy to local government and that complaints should therefore be dealt with by the local council concerned.

b) Victorian Ombudsman: Ms Schwerin stated that the Ombudsman advised the former councillors that their complaints were 'too prolific' for him to undertake an investigation.[2]

c) Victorian Deputy Ombudsman (Police Complaints): Ms Schwerin submitted that an officer of the Deputy Ombudsman's office stated that he viewed the complaints by the former councillors as 'a situation where "a group of Sale citizens were harassing the local Police"'.[3]

d) Police Internal Investigations: Ms Schwerin alleged that Internal Investigations overlooked 'blatant' discrepancies in police reports and untrue statements made by police.

e) Victorian Director-General of Planning and Urban Growth: It is alleged by Ms Schwerin that the Director-General did not act on complaints concerning the submission of false information to his Department by the City Engineer thereby allowing the City Engineer to take on the dual role of City Engineer/Building Surveyor.

f) National Crime Authority (NCA): An interview took place with the NCA and documents were supplied by former councillors. However, the NCA declined to carry out an investigation and although it is alleged the NCA indicated that a written response giving reasons for this decision would be supplied, no correspondence was received by the former councillors.[4]

The whistleblowing claims

7.6 Ms Schwerin's principal whistleblowing claim is that the then Sale Council was not controlled by elected councillors but by the City Engineer 'with whatever support this required of a local business mens' group, which by arrangement with the City Engineer, had their interests favoured and protected, by any means that it took'.[5]

Responses to evidence

7.7 As a result of evidence given at its public hearing, the Committee wrote to the acting Victorian Ombudsman and the Secretary of the Department of Planning and Development inviting them to comment on matters raised by Ms Schwerin. The Acting Ombudsman replied that there appeared to be a misunderstanding of the powers of both the Ombudsman and Deputy Ombudsman (Police Complaints) and made the following observations:

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2 Submission, Ms Christina Schwerin, 25.1.95, p. 3.

3 Submission, Ms Christina Schwerin,, 25.1.95, p. 3.

4 Evidence, Ms Christina Schwerin, p. 312.

5 Submission, Ms Christina Schwerin, 25.1.95, p. 1.

- the Ombudsman and the Deputy Ombudsman have the powers of a Royal Commissioner, therefore they have investigatory powers;
- the Deputy Ombudsman is able to conduct his own investigations and it is mandatory for the Deputy Ombudsman to carry out the investigation of any complaint made against the senior members of police command;
- the Ombudsman's power in relation to local government is not limited to whether there is a breach of an Act as asserted by Ms Schwerin;[6] he may also determine that such action complained of was unreasonable, unjust, oppressive or improperly discriminatory along with a range of other conclusions;
- the Ombudsman does not have the power to investigate the actions of the elected council or the actions of individual councillors, but he does have the power to investigate the administrative actions of council officers and 'in any event in most cases the restriction has little impact as most actions taken by councils are the result of recommendations or reports made to Council by its officers and the Ombudsman may investigate those recommendations and reports';[7] and
- the Ombudsman and Deputy Ombudsman can, following an investigation, make recommendations only; they do not have the power to make binding judgements.

The Acting Ombudsman concluded that:

> one comment I would like to make on the evidence given to your Committee by the witnesses is that some statements are just plain nonsense and, in particular, the reference to the Ombudsman or Deputy Ombudsman being a "feel good" department. The fact of the matter is that in respect to a number of issues which were raised with them there was a problem of a lack of evidence.[8]

7.8 The Director of the Office of Local Government replied that in relation to the *Local Government Act 1989*, the Minister for Local Government may appoint inspectors of municipal administration who are able to investigate certain matters associated with the operation of a council within the province of the legislation. With respect to the indemnity of Ms Crossley under the Act in relation to a defamation action, the Director stated that advice from the Victorian Government Solicitor indicated that the Act gives some legal protection to persons acting in their capacity as councillor but does not provide a blanket indemnity from all actions including the defamation of an individual.[9]

7.9 In evidence Ms Crossley suggested that information concerning meetings with officials was released to other Sale councillors and officials.[10] The Director responded that it was not the policy of the Office of Local Government to release the names of those who lodge complaints however, 'this policy cannot be enforced when complainants publicly state that they had lodged complaints with the Office'.[11]

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6 Evidence, Ms Christina Schwerin, p. 315.

7 Correspondence, Acting Ombudsman, 6.4.95.

8 Correspondence, Acting Ombudsman, 6.4.95.

9 Correspondence, Director, Office of Local Government, 1.5.95.

10 Evidence, Ms Carolyn Crossley, p. 310.

11 Correspondence, Director, Office of Local Government, 1.5.95.

7.10 The Committee also wrote to Senior Sergeant Peter Mann inviting him to respond to comments which may have been construed as reflecting adversely upon him. Sergeant Mann replied that the allegations made about him were 'totally false and without foundation'. He noted that he had been a former councillor and that he and Ms Schwerin, Ms Crossley and Mr Smith had 'disagreed on most issues, and on many occasions the debate became extremely heated'. He concluded that 'if any of the allegations have been proved to be true, I would no longer be a Police Officer, and would have been removed from my civic duties. Neither took place.'[12]

Discussion

7.11 The Committee notes that the former councillors have made complaints to, and sought assistance from, a large number of government agencies, with, it must be noted, varying outcomes. The Committee acknowledges the difficulties faced by the former councillors in having their complaints dealt with in piecemeal fashion. Ms Crossley described the difficulties to the Committee:

> The fact that there was not one body that could deal with the whole picture. That the issues that we raised were by [their] nature complex and cross departmental. That actions in one area had consequences in another. The full picture could never be looked at as it had to be compartmentalised for each sphere of influence. Each issue was taken in isolation. We felt isolated and abandoned suffering death threats, public vilification in the press, threatening and offensive anonymous mail and general harassment. When all we were doing was raising allegations with the appropriate authorities.[13]

7.12 While the former councillors may have perceived that their allegations, seen in totality, indicated a wide degree of corruption and malfeasance, the agencies approached could only act within the bounds of their jurisdiction. And while the former councillors did make allegations that the investigations carried out by some of these agencies were less than satisfactory,[14] the Committee notes the Acting Ombudsman's response:

> A large number of allegations were made with very little evidence on which to base any firm conclusions. There is, as you would be aware, a vast difference between assertions or allegations and evidence'.[15]

7.13 The Committee believes that the former councillors have acted in good faith in trying to have public officials made accountable for their actions. The Committee is not in a position to say that the matters raised in evidence by the former councillors amounts to corruption or organised crime. It should also be noted that the City of Sale Council no longer exists. Following changes to local government arrangements in Victoria, Sale Council has now been incorporated into the Shire of Wellington.

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12 Correspondence, Sergeant Peter Mann, 8.5.95.

13 Correspondence, Ms Carolyn Crossley, 24.5.95.

14 Evidence, Ms Christina Schwerin, p. 308.

15 Correspondence, Acting Ombudsman, 6.4.95.

7.14 The Committee does, however, believe that there may be a case indicating that those involved in the former Sale Council should have exhibited a greater degree of ethical behaviour in carrying out their civic duties. The Committee notes the comments of Keep Australia Beautiful Council after visiting Sale as part of its Tidy Towns program:

> In all our years of association with committees and municipal councils in arranging Tidy Towns Presentations we cannot remember one other committee which has left all the staff feeling as disappointed as yours ... we feel that the [Sale Council] Committee were only involved for what they could gain financially and not for what they could do for Sale.[16]

7.15 The Committee also notes that some persons connected with the Sale Council appear to have been less than careful in recalling the facts of various incidents. This has added to the distress suffered by the former councillors. Ms Schwerin has, for example, alleged that there was the continued misrepresentation of her departure from her position as Executive Secretary to the City Engineer in 1988. Ms Schwerin was dismissed in 1988 but following union and legal action, the Sale Council withdrew the notice of termination, accepted her resignation, paid compensation, provided a reference and a written apology. Ms Schwerin has commenced defamation action in regard to the continuing allegation that she had been dismissed.

7.16 Ms Schwerin also noted that in Sergeant Mann's response to the Committee he stated that complaints made to the Equal Opportunity Board 'resulted in two writs being issued which were fully litigated in court with a result that they were both dismissed with costs ordered against the plaintiffs'.[17] Ms Schwerin responded that one complaint resulted in no costs being awarded against the complainant and the other is yet to be heard.

7.17 The Committee notes with concern the allegations made with respect to some members of the Sale police force. This Committee cannot condone any acts involving intimidation, favouritism, and unethical behaviour by a member of a police force and the use of government officials or government mechanisms as a means of harassment. However, most of the matters raised were brought to the attention of the appropriate agency and where an allegation was proven, action was taken. Agencies cannot act on allegations alone, evidence must be available to establish proof of wrongdoing to a standard sufficient for an agency to bring criminal or disciplinary charges. In this regard the Committee notes the response from Chief Superintendent PF Ryan, Victorian Police Internal Investigations Department, to Ms Schwerin concerning investigation of alleged death threats made to her by Sergeant Mann. The Chief Superintendent stated that 'the evidence does not enable the allegation to be determined one way or another'. However, it was found that Sergeant Mann had committed a breach of Departmental discipline and he had been formally admonished.[18]

7.18 A further matter raised by Ms Schwerin was the use of members of the police by the Sale Council in official capacities. The employment of police as council prosecutor occurs in

16 Evidence, Ms Christina Schwerin, p. 318.

17 Correspondence, Sergeant Peter Mann, 8.5.95, p. 1.

18 Submission, Ms Christina Schwerin, 15.8.95, Enclosure 1.

other shires.[19] While this may be efficient for council, it does raise questions of conflict of interest, especially when the officer involved is, or has been, a member of council.

7.19 The Committee believes that elected officials should be able to carry out their duties and to put their views without harassment, vilification or threats. The Committee also recognises that politics at local level does involve many interest groups within small communities. As noted by Senator Macdonald:

> We all understand very well the problem with the situation of community involvement that you have, because we all come from reasonably small communities ... I suggest that, unfortunately - and perhaps that is the wrong word - this sort of community interaction is the way it operates in small communities and regional cities. As senators, we fly over them and we look down and say, 'We don't know that city, but we know how it operates.'[20]

Implications for proposed Commonwealth whistleblower protection legislation

Counselling

7.20 In her reply to the Acting Ombudsman's response, Ms Schwerin noted that she was not advised by the Ombudsman's office how to deal with ongoing harassment, death threats and intimidation. These comments reinforce the view taken by the SSCPIW on the importance of counselling services for whistleblowers. Counselling would not only help whistleblowers to cope with events after blowing the whistle but would also provide guidance and information about courses of action and such matters as common law and statutory rights and obligations.

Standard of proof

7.21 The Committee has already noted the response of the Acting Ombudsman who indicated that a number of the issues raised by the former councillors could not be pursued because of a lack of evidence. The councillors also provided this Committee with a large amount of documentation, some based on heresay information. While the councillors may believe that a major wrongdoing has occurred it is difficult to clearly identify any links between persons and incidents from the evidence presented. The Committee acknowledges that an investigation may establish the proof required, however, agencies can only act where there is proof of wrongdoing to a standard sufficient to bring criminal or disciplinary charges.

Mr Peter Jesser

Background

7.22 In the summer semester 1990-91 Mr Peter Jesser, then a Lecturer in the Department of Human Resource Management and Employment Relations at the University of Southern Queensland (USQ), acted as moderator for Unit 51379 offered by the Department. A number of students complained to the Interim Dean, Ms Deborah Ralston, concerning the grades awarded for the Unit. The Interim Dean instructed the examiner to review all the examination

19 Evidence, Ms Christina Schwerin, p. 305.

20 Evidence, Senator Sandy Macdonald, p. 309.

papers. Mr Jesser also investigated the matter. He alleged that there was evidence of arbitrary marking, a high number of failing grades, errors in recording and adding up of grades, the examination required detailed answers to very narrow questions (contrary to information given to students) and not all students sat the same paper.

7.23 In March 1991, Mr Jesser drew his concerns to the attention of the Dean of the Faculty, Professor AM Barnett. The Dean passed the matter on to Professor Craig Littler who subsequently passed the matter on to Associate Professor Hede. According to Mr Jesser, Associate Professor Hede dismissed the complaints concerning the Unit.

7.24 In April 1991, Mr Jesser took the matter to the School of Management Board. Mr Jesser alleged that action on the matter was obstructed by the Dean (Professor Barnett) and so he referred the matter to the University Council. The Council asked the Interim Vice-Chancellor, Professor Tom Ledwidge, to investigate. His findings were handed down in December 1991. He concluded:

- that there were irregularities in the way the exam had been set and that Mr Jesser had performed the duties of moderator by bringing the matter to the attention of the Dean;
- that Mr Jesser's contribution to the clarification of the role of moderator was acknowledged by the School and endorsed by the Interim Vice-Chancellor; and
- that the cut-off mark for eligibility for a supplementary exam was lowered to 35 per cent and that he was reasonably satisfied that this would result in no deserving student being disadvantaged.

Professor Ledwidge therefore decided that all students who scored less than 35 per cent in the Unit and felt that they were unfairly assessed could appeal to the Deputy Vice-Chancellor for a supplementary examination.

7.25 The then Deputy Vice-Chancellor, the Dean and Mr Jesser were informed on 9 December 1991 of the Interim Vice-Chancellor's direction to give students the opportunity to sit a supplementary examination. Mr Jesser noted that the exam did not take place until November 1992 after further intervention from himself. On 19 February 1992, Ms Ralston, former Interim Dean, supplied Professor Barnett with a statement of her recollection of the facts surrounding Unit 51379. In that statement she noted that the staff member concerned had been reprimanded, the role of the moderator in the appeal process clarified and that there were no students who had outstanding appeals.[21]

7.26 Mr Jesser also alleged that an allegation of non-performance was made against him in June 1992 by Professor Barnett. The allegation was in a confidential memorandum from Professor Barnett to the Vice-Chancellor using a performance review of Mr Jesser carried out by Ms Ralston in February 1991. In August 1992, Mr Jesser submitted a grievance to the then Vice-Chancellor which related, in part, to the allegations of non-performance by the Dean of the School of Management, to the appointment of a reviewer other than Professor Barnett to undertake Mr Jesser's performance reviews and to the non-confirmation of tenure. In October

21 Submission, Mr Peter Jesser, 23.1.95, Attachment H.

1992, the tenure aspect of the grievance was dealt with by the new Deputy Vice-Chancellor, Professor KL Goodwin, and tenure was granted.[22]

7.27 In mid-1993 Mr Jesser sought assistance from the National Tertiary Education Union to try to resolve the outstanding matters. A meeting with the Union industrial officer, the Deputy Vice-Chancellor and Mr Jesser was held in June 1993. Mr Jesser believed that at this meeting an agreement was reached that included Mr Jesser commencing 12 months study leave after five weeks notice. Mr Jesser was eventually granted 6 months leave commencing at the end of the academic year. Following further attempts to resolve the matter, Mr Jesser requested that the Deputy Vice-Chancellor honour the June agreement or deal with the outstanding matters of the grievance.

7.28 The Deputy Vice-Chancellor denied that any agreement had been reached and he maintained that a memorandum had been sent to Mr Jesser in July stating that Mr Jesser should apply for leave under the standard rules and he, the Deputy Vice-Chancellor, would ask the Dean to give the application immediate consideration. The leave was to be for 6 months, the standard period. Mr Jesser denied having received the memorandum.

7.29 On 9 September 1993, the Deputy Vice-Chancellor handed down his report on the grievance. He found, in part, that:

- Ms Ralston was dissatisfied with Mr Jesser's performance as head of Program (Postgraduate Studies), but the Deputy Vice-Chancellor was uncertain that this dissatisfaction could be called 'non-performance';
- in Professor Barnett's document of 4 June 1992, he did not take sides; his statement was one of report, not judgment; and
- there was no evidence that Professor Barnett had circulated unfavourable opinions of Mr Jesser, or that Mr Jesser's reputation had suffered.

The Deputy Vice-Chancellor offered to close and seal that part of Mr Jesser's personal file referred to in the grievance procedures and all documents associated with the grievance. These documents could then not be used in the future without the express consent of both parties and would have the effect of 'providing a new start for all parties'.[23] Mr Jesser claimed that this document contained a statement which he considered defamatory and a gross misrepresentation of the situation.[24]

7.30 Following further meetings with University officials, Mr Jesser's Union took the allegations of non-performance to the Industrial Relations Commission as an industrial dispute. The matter was heard in January 1994. The University argued that the allegation of non-performance against Mr Jesser was 'illusory' and that it had not been unduly tardy in handling the grievance. The parties were directed to engage in further consultation with a view to resolving the issues.

7.31 At the same time that Mr Jesser was involved with the matter of Unit 51379, a further matter arose concerning research work within the Department of Human Resource

22 Submission, Mr Peter Jesser, 23.1.95, p. 14.

23 Submission to CJC, Mr Peter Jesser, Attachment E.

24 Submission to CJC, Mr Peter Jesser, p. 5.

Management. In March 1993, Mr Jesser and a masters student volunteered to prepare a research proposal. Mr Jesser stated that the proposal was revised in conjunction with Professor Craig Littler and included a literature review.[25]

7.32 During 1993 the Department submitted a research proposal to the Faculty of Business in order to obtain funding. The Department also submitted a proposal to the Australian Research Council (ARC) under its Small Grant Scheme.

7.33 In mid-1994 Mr Jesser secured a copy of the proposal for the Faculty grant and noticed that his literature review had not been used. Shortly after, Mr Jesser came across a published article 'which contained a tabulated analysis of published articles ... almost identical to that reproduced in the research proposal which had won Faculty funding and - apparently - in the ARC Small Grant proposal'.[26] Mr Jesser claimed that the ARC Small Grant proposal did not cite the article as the source of the table while the Faculty proposal showed the table as being partly adapted from the published article.[27]

7.34 Mr Jesser wrote to the Deputy Vice-Chancellor on 7 September 1994 claiming that the ARC proposal did not acknowledge the work of Mr Jesser or the masters student involved, that a portion of the proposal appeared to have been taken from another published article and the same proposal was used to gain funding from two sources. He asked that the matters be investigated. The Deputy Vice-Chancellor found, in part, that the use of 'truncated references' was not unusual and concluded 'it seems that, granted the cooperative, collegial and open nature of the procedures, no individual's intellectual property rights were appropriated; due process was maintained at an acceptable level; and a range of potential funding sources for the interlocked projects was always openly discussed'. [28]

7.35 During March 1995, Mr Jesser received memoranda from the Head of the Department, Mr Jim McDonald, concerning the research project and the impact of Mr Jesser's allegations on the Department. On 10 March a departmental meeting was held and a report on the research project prepared by the Head of Department was discussed. Mr Jesser left the meeting after this Committee's inquiry was raised.

7.36 On 13 March 1995, Mr Jesser received a memorandum from the Head of the Department concerning an allegation made about Mr Jesser's authorship of a thesis guide. Mr Jesser had amended the guide in 1990 and he was requested to explain why his name appeared as author even though he had made only a small number of amendments to an earlier guide and why it took a number of years before his name was removed by other staff.

7.37 Mr Jesser indicated that his name had been added to the guide by the University 'because the University's policy at the time was to place authorship on all external study material'.[29] He stated that he was unaware that it was on the guide until approached some time

25 Submission, Mr Peter Jesser, 6.4.95, p. 2.

26 Submission, Mr Peter Jesser, 6.4.95, pp. 3-4.

27 Submission, Mr Peter Jesser, 6.4.95, p. 3.

28 Submission, Mr Peter Jesser, 6.4.95, Attachment J.

29 Submission, Mr Peter Jesser, 6.4.95, p. 10.

later and he agreed that it should be removed. Mr McDonald responded that authorship was only included when specifically requested by the author.[30]

The whistleblowing claims

7.38 Mr Jesser's principal whistleblowing claim is that he reported academic malpractice at the University of Southern Queensland in 1991 relating to the examination of an academic unit in the Faculty of Business.

7.39 Mr Jesser alleged that as a result of his whistleblowing activities, he and his wife were subject to harassment. The harassment suffered by Mrs Jesser included not being treated on merit in selection processes for promotion, selection processes being halted so that her application could not be included and grievances being dismissed. Mrs Jesser subsequently resigned from her position at the University of Southern Queensland and she has since found alternative employment.

7.40 Mr Jesser maintained reprisals taken against him included: a secret reinvestigation of the charge of academic malpractice which ignored the Interim Vice-Chancellor's findings, 'presented outright fabrications and gross distortions, questioned [Mr Jesser's] motives and grossly defamed [him]'[31] and a secret allegation of 'non-performance' made against him with the reinvestigation of the charge of academic malpractice being used as evidence of non-performance.

Discussion

7.41 The Committee's consideration of the matters raised by Mr Jesser is limited to general issues and those concerning the initial whistleblowing incident involving Unit 51379. Mr Jesser raised the matters concerning the Department's research proposals and the allegation over authorship of the thesis guide as reprisals as a result of the giving of evidence to the Committee. The Committee has reported to the Senate that Mr Jesser may have been intimidated and the Senate has referred the matter to the Committee of Privileges. These allegations are now the subject of an inquiry by the Committee of Privileges.

University of Southern Queensland response

7.42 Although submissions were received from the Department of Human Resource Management and Employment Relations, the University of Southern Queensland (USQ) chose not to provide a detailed response to Mr Jesser's submission as 'there appears to be nothing to add to Peter Jesser's statement as he has, as could be expected, preempted the only submissions that could be made'. The University noted that many investigations had already been undertaken and 'all avenues have been exhausted'.[32] However, the University submitted the following statement:

> The University finds fault with almost the totality of the case as stated by Peter Jesser.

30 Submission, Mr Jim McDonald, 7.6.95, p. 12.

31 Submission, Mr Peter Jesser, 23.1.95, p.13.

32 Submission, University of Southern Queensland, 10.5.95, p.1.

> Further, the University finds fault with almost every aspect of the interpretation of the matter as stated by Peter Jesser.
>
> The University retains utmost faith in the staff of the University who have been named by Peter Jesser as being implicated in any alleged cover-up and any alleged maladministration.[33]

7.43 While the Committee notes that the University has conducted investigations into Mr Jesser's complaints and that significant resources have been expended, the Committee believes that it should be recognised that public interest benefits are derived from whistleblowing within public and private sector organisations and the community generally. However, the Committee, as a general principle, recognises the rights of the subjects of whistleblowing to protection in accordance with the principles of natural justice.

Definition of whistleblowing

7.44 The University also disagreed that Mr Jesser had made a public interest disclosure and 'consequently, under the terms of the [Queensland Whistleblowers Protection] *Act*, no reprisals can have been taken by the University'.[34] The Department of Human Resource Management and Employment Relations submitted that a whistleblower was 'an altruistic complainant who raises maladministration, malpractice and fraudulent behaviour with a view to seeking the rectification of wrongdoing and the establishment of justice' and that a person could move from being a genuine whistleblower to being non-genuine whistleblower through behaviour antithetical to the altruism of a whistleblower.[35] The Committee has discussed the definition of whistleblower in Chapter 2.

7.45 The SSCPIW recommended that the proposed Public Interest Disclosures Agency should act as a 'clearing house' for complaints and allegation so as to identify matters which could properly be considered as public interest disclosures.[36] The Committee supports the recommendation of the SSCPIW that there is a need to establish whether an allegation is a public interest disclosure. It is for the appropriate external agency to make this decision, not the organisation or individual the subject of the complaint. Further, while the Committee supports the SSCPIW's recommendation that a penalty be imposed where a person knowingly makes a false allegation, no allegation should be excluded under whistleblower protection legislation because it is made for other than altruistic motives, so long as it meets the other criteria.

Evidence and documents

7.46 The Committee is concerned at the allegations made by Mr Jesser relating to destruction of documents and falsification of documents. Mr Jesser stated 'I have good reason to believe that information has disappeared because of its direct relevance to the reprisals taken by the University against myself and my wife'.[37] The matter is being investigated by the

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33 Submission, University of Southern Queensland, 10.5.95, pp.1-2.

34 Submission, University of Southern Queensland, 10.5.95, p. 2.

35 Submission, Department of Human Resource Management, 27.4.95, pp. 5,25

36 SSCPIW report, p.173.

37 Submission, Mr Peter Jesser, 23.1.95, p.18

Queensland Information Commissioner. However, as a general comment, the Committee believes that any allegations of tampering with documents are serious if proven.

7.47 Another matter raised by Mr Jesser was that USQ had complained in the hearing before the Industrial Relations Commission 'that I had been using freedom of information to gather the documents about my case and suggested that this was an unnecessary burden on the university, resources wise. The inference was that it was a vexatious use of FOI.'[38] The Committee found it useful to have access to additional documentation in cases where conflicting interpretations have been presented. It is also important for both sides that as full a picture as possible is obtained. It is unfortunate that Mr Jesser had to resort to such an extensive use of FOI procedures to obtain documents to present his case.

Unit 51379

7.48 The Committee notes that people who make public interest disclosures which lead to unfavourable outcomes have often interpreted subsequent events in a negative manner. Mr Jesser noted that:

> In the end, it is no longer a matter of who was right and who was wrong or who did what to whom and why. The treatment meted out to whistleblowers sensitises them to the reprisals and the whistleblower reacts accordingly. Similarly, the organisation becomes sensitised to the whistleblower and acts towards him or her in the same way.[39]

7.49 It appears to the Committee that this is an apt statement in the view of the situation that arose from Mr Jesser's endeavours to have what he saw as an injustice to students rectified. Mr Jesser sought what he thought was the rightful outcome for the students and complained when this was not achieved. The Interim Dean, on the other hand, was satisfied that the matter had been concluded: the examination results were reassessed so that, she believed, apparently no students were disadvantaged, and the examiner had been reprimanded. As endeavours to have the matter brought to a satisfactory conclusion failed, the problems compounded. Mr Jesser apparently saw actions which the Department maintained were normal staff practices, such as his performance appraisal, as a reprisal for blowing the whistle. Again, the statement provided to Professor Barnett by Ms Ralston was seen by Mr Jesser as a 'secret reinvestigation' of the charge of academic malpractice.

7.50 The Department and University response to Mr Jesser included many of the elements reported by the SSCPIW as typical organisational responses to whistleblowers.[40] The Department sought to lay some of the blame for the problems that occurred on Mr Jesser: 'Mr Jesser had clearly failed in his duty as moderator, and therefore, should be held equally [responsible] with [the examiner] for the error'.[41] The Department also questioned Mr Jesser's motivations and mental stability and attempted to contain dissent within the Department. The Committee concurs with the SSCPIW's conclusion that 'it is the problem raised by the

38 Evidence, Mr Peter Jesser, p. 407.

39 Evidence, Mr Peter Jesser, p. 400.

40 SSCPIW report, pp. 67-69.

41 Statement, Ms Deborah Ralston, p. 2.

complaint which needs to be objectively assessed, not the whistleblowers who raised the problem in the first instance'.[42]

7.51 The Committee makes no further comment on the issues raised by Mr Jesser as matters reported to the Senate by the Committee are still before the Senate Committee of Privileges.

Mr Jack King

Background

7.52 Mr King was appointed to a position in the South Australian Department of Environment in 1984 to produce legislation on marine pollution and to 'look after marine pollution matters generally for that department'.[43] In 1987 Mr King produced a Cabinet submission to accompany draft legislation for marine pollution controls. It included a summary of pollution problems in South Australia and sought approval to proceed with the development of legislation. Mr King stated that he was instructed by directors of his Department to delete references in the Cabinet submission to the large amount of heavy metals being discharged to Spencers Gulf from lead smelters at Port Pirie.[44]

7.53 According to Mr King, that direction constituted censorship, and he raised objections to it. Mr King also claimed:

> Victimisation started around that stage (all of which I opposed) and I finally got concerned enough about the Directors motives and behaviour to write to the Minister for Environment and Planning (in June 1988) pointing out what was going on and what was frustrating and preventing proper marine pollution controls.[45]

7.54 In July 1988, Mr King wrote to the Commissioner for Public Employment about non-compliance with reasonable management standards and with the South Australian Government Management and Employment Act (GME Act). He requested that the situation be rectified.

7.55 Mr King also forwarded the letter he wrote to the Minister for Environment and Planning to the media and spoke on ABC radio. As a result, Mr King was charged under the GME Act for making public statements to the media without permission. Mr King claimed 'that initiated a whole chain of events designed to try to get rid of me'.[46] Briefly, these events included: the appointment of a disciplinary inquiry as a result of his media statements; not being included in the Department of Environment and Planning following a reorganisation; being directed to have a psychological assessment; being dismissed from the Department of State Development; and, being denied a position in the Department of Labour.

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42 SSCPIW report, p. 69.

43 SSCPIW, Submissions and Other Written Material, Vol, 5, No. 91, p. 2.

44 SSCPIW, Submissions and Other Written Material, Vol. 5, No. 91, p. 3.

45 SSCPIW, Submissions and Other Written Material, Vol. 5, No. 91, p. 3.

46 Evidence, Mr Jack King, p. 289.

7.56 Mr King responded to these events in a variety of ways. He applied to the Supreme Court firstly, to have the person appointed to conduct the disciplinary inquiry removed and secondly, to prevent his dismissal from the South Australian public service. He also commenced a number of grievance appeals and wrote to the Psychological Board of South Australia, the Premier of South Australia and the Ombudsman complaining about the misuse of psychiatry by the public sector. In January 1990, Mr King wrote to the South Australian Ombudsman complaining about general non-compliance with the GME Act and victimisation. Mr King claimed that he took no action. Mr King retired in 1993 from the South Australian Water Board.

7.57 Following the introduction in South Australia of the *Whistleblowers Protection Act 1993*, Mr King made three representations under the Act. Firstly, Mr King wrote to the Ombudsman disclosing alleged corruption, maladministration, illegal behaviour by certain public officers and the misuse of psychiatry. Secondly, Mr King made a complaint to the Police Commissioner alleging corruption by Santos and others. Finally, he made a complaint to the Commissioner for Equal Opportunity alleging victimisation by Santos following his revelation of alleged corruption and operations that risked employee health and safety.

7.58 Mr King claimed that little action was taken by the Ombudsman in relation to his disclosures. Mr King stated:

> I consider the current reluctance of the ombudsman to be a continuation of the victimisation that occurred prior to me leaving the public service, in that he is still endeavouring to protect the devious public servants who discriminated against me illegally, against the Act, for so many years.[47]

7.59 The Commissioner of Police replied to Mr King that:

> In view of the circumstances, particularly the age of the information and the inability of the key witness to corroborate any of the allegations, I would not be justified in committing substantial investigational resources to enquire further into your allegations.[48]

In evidence, Mr King noted that the matter had been taken up with the Trade Practices Commission.[49]

7.60 Mr King stated that the Commissioner for Equal Opportunity had written to Santos and had received a reply but he was unaware of the contents of the correspondence.

The whistleblowing claims

7.61 In evidence to this Committee Mr King indicated that his experiences of victimisation as a whistleblower date back to 1976 with respect to a company operating in South Australia, and since then he has been endeavouring to 'get something done about it'.[50] He also claimed

47 Evidence, Mr Jack King, p. 282.

48 Submission, Mr Jack King, 13.13.95, p. 5.

49 Evidence, Mr Jack King, p. 284.

50 Evidence, Mr Jack King, p. 279.

that he made public interest disclosures in relation to South Australian marine pollution legislation, corruption and maladministration and misuse of psychiatry in the South Australian public sector.

Responses to evidence

7.62 As a result of Mr King's evidence, the Committee wrote to the Attorney-General's Department and the South Australian Ombudsman in relation to the Whistleblowers Protection Act and to the Psychological Board of South Australia. The Registrar of the Psychological Board advised the Committee that Mr King had renewed his complaint with the Board and the Board had directed the Registrar to carry out an investigation.

7.63 Both the Ombudsman and Mr K Kelly, the Chief Executive Officer of the Attorney-General's Department, replied to the Committee commenting on Mr King's whistleblowing claims and the Act. Their comments are discussed below.

Discussion

The whistleblowing claims

7.64 The Ombudsman responded to Mr King's claims by stating that Mr King's concerns were submitted in very general form, and that such concerns were beyond the time limitation imposed by the Ombudsman Act. Section 16(1) of the Ombudsman Act prohibits the Ombudsman from acting on a complaint made after twelve months from the day the complainant first had notice of the matters alleged, unless the Ombudsman chooses to exercise a discretion open to him based on all the circumstances of the case. Various factors are taken into consideration prior to exercising the discretion to extend the time period. These factors include:

> the age of the complaint and the ability to gather corroborative and reliable evidence from witnesses; the availability and or exercise by the complainant of other avenues to address the grievance; and most importantly the availability of a tangible remedy.[51]

7.65 The Ombudsman stated that his Office had been conducting an informal preliminary inquiry into Mr King's claims 'in order to examine whether I should embark on a "full" investigation pursuant to ... the Ombudsman Act. I propose to advise Mr King of the outcome of my enquiry by the beginning of next month'.[52]

7.66 However the Ombudsman went on to make the following comment:

> Mr King's concerns regarding the alleged maladministration in senior levels of the SA Public Service lack appropriate specificity at this stage for the purposes of an Ombudsman investigation, and they are now somewhat dated.[53]

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51 Correspondence, Ombudsman, 20.4.95, pp. 2-3.

52 Correspondence, Ombudsman, 20.4.95.

53 Correspondence, Ombudsman, 20.4.95.

He also noted that most of the witnesses had moved positions. With regard to remedy, he stated that it appeared that Mr King expected the Ombudsman's Office to 'establish the truth of his allegations to initiate disciplinary action against the public servants in question and then to publicise the matter to deter others'. The Ombudsman pointed out that his Office was not able to be an arbiter of fact in the same manner as a court and his role was not to penalise wrongdoers or publish his findings 'without compelling public interest reasons for doing so'.

7.67 Mr Kelly of the Attorney-General's Department responded briefly to Mr King's claims, in terms highly critical of Mr King:

> I am at a loss to understand why it is that the Committee seems to believe that Mr King is a whistleblower and, if that is the case, what criteria it is using (if any) to make that determination.[54]

Whistleblowers Protection Act

7.68 In relation to the South Australian Whistleblowers Protection Act, Mr King made a number of claims. Firstly, that the Act was 'specious and it just does not work' and Mr King called for an independent commission against corruption to receive and process disclosures and protect whistleblowers.[55] He stated that such a body should have royal commission type powers and report to parliament. He went on to state that there was a need for the Commonwealth legislation to: 'allow it to take over and investigate disclosures where the State authorities have irresponsibly failed to meet their responsibilities' and the legislation should:

(i) encourage disclosures of corruption, maladministration etc
(ii) ensure proper investigation of all disclosures
(iii) penalise the guilty parties
(iv) publicise the proven corruption and maladministration (to discourage others from similar malpractices)
(v) protect whistleblowers from victimisation
(vi) compensate whistleblowers for victimisation (by no-cost means) and penalise the victimiser.[56]

7.69 Secondly, Mr King commented on the retrospectivity provisions of the Act. He noted that 'Most unresolved Whistleblower issues (including continued victimisation) still being fought ... have been going on for many years and it would be most unjust to exclude them'.[57] He argued that there should be no limitations or at the very least, 20 years retrospectivity.

7.70 Thirdly, Mr King noted that the retrospectivity provisions in the legislation did not relate to victimisation:

> even though the legislation caters for retrospectivity for disclosures of malpractice it does not cater for retrospectivity for victimisation - and that is a problem. It is very important. That is claimed by the Commission of Equal

54 Correspondence, Chief Executive Officer, Attorney-General's Department, 12.4.95.

55 Evidence, Mr Jack King, pp. 276-77.

56 Submission, Mr Jack King, 15.1.95, pp. 2-3.

57 Submission, Mr Jack King, 15.1.95, p. 1.

> Opportunity. They said that for any consideration to be given to victimisation I would have to have made a disclosure or complaint since the date of introduction of the legislation. Whatever happened before does not matter, but I have to lodge a complaint from after the date of introduction of the legislation. Then, having lodged that complaint, it had to be a complaint of malpractice and victimisation and so on.
>
> Then I had to have had victimisation following that disclosure before they would do anything about it.[58]

7.71 Finally, Mr King was also concerned with the problems, delays and criticisms associated with his taking action under the South Australian legislation. For example, Mr King stated that the Commissioner of Police appeared not to address his complaint properly 'mainly because the Commissioner of Police appears not to have the powers necessary to investigate the matters I raised'.[59] Mr King also stated that the Police Anti-Corruption Branch interviewed only one person, a retired Minister for Mines and Energy who denied any involvement. Subsequently the Commissioner advised Mr King that, due to the lack of corroboration, he could not justify further inquiries. From discussions with the police, Mr King concluded they do not have the appropriate powers for investigation of such disclosures and therefore cites this as a weakness in the legislation under which the matter went to the Police Commissioner. He claims that the matter should instead have gone to the Ombudsman, 'since evidence in inquiries by the Ombudsman is given under oath and, under those circumstances, conveniently forgetful memories can be prodded to rejuvenation'.[60]

7.72 The Ombudsman and Mr Kelly of the Attorney-General's Department responded to Mr King's comments in relation to the Act. Mr Kelly stated that Mr King's comments concerning the effectiveness of the Act were 'unsupported' and noted:

> One of the principal functions of policy and legislation in this area must be to sort the genuine whistleblower from the vexatious complainer, and it appears, in the case of Mr King, that the legislation has functioned accurately.[61]

7.73 The Ombudsman made the following comments in relation to the Whistleblowers Protection Act: the Act gives no additional investigative powers to the Ombudsman or to any other authority; the Ombudsman's investigative powers are provided for within the Ombudsman Act; and the Act is only designed to protect a person who 'genuinely discloses public interest information to an appropriate authority for legal action'. He went on to note 'while the Act does seem to anticipate an official investigation subsequent to a disclosure', it does not compel any authority to inquire into the subject of a disclosure made by any person. He commented 'I am unsure whether Mr King has grasped this notion in registering his concerns with my Office'.[62]

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58 Evidence, Mr Jack King, p. 279.

59 Evidence, Mr Jack King, p. 283.

60 Evidence, Mr Jack King, p. 284.

61 Correspondence, Attorney-General's Department, 12.4.95.

62 Correspondence, Ombudsman, 20.4.95, p. 3.

7.74 The Ombudsman also informed the Committee that as Mr King made his disclosures to the Ombudsman after the commencement of the operation of the Whistleblowers Protection Act he is protected from any resulting future criminal or civil liability, if such disclosures are 'appropriate' and relate to 'public interest information' as defined in the Act. The Ombudsman was of the opinion that:

> the Whistleblowers Protection Act arguably does not confer protection for disclosures made prior to the commencement of the Act; and of course, it would be illogical to suggest that the Act could grant retrospective protection to Mr King or another in his situation.[63]

7.75 In relation to Mr King's claims that the Act is 'specious', the Ombudsman made the following comments:

> I consider the Whistleblowers Protection Act is quite clear and unequivocal in its terms and provisions, and in my view, any alleged or apparent lack of overt commitment on my Office's part to investigate Mr King's concerns is more reflective of the nature of his disclosures ... the provisions of the Ombudsman Act, and my Office's resources rather than any inherent deficiency within the Whistleblowers Protection Act. I should also add at this point that my Office has been equipped with no additional funds or resources for the purposes of exercising my role under the Act.[64]

Implications for proposed Commonwealth whistleblower protection legislation

Need for an independent body

7.76 The South Australian experience, and this case in particular, lends support to the establishment of a body as proposed by the Select Committee on Public Interest Whistleblowing. The South Australian legislation did not create a separate body, nor did it confer additional investigative powers on the Ombudsman or any other authority given responsibilities under the Act. It appears from Mr King's experiences that frustration's have arisen in handling the case for both sides, regardless of the particular views on its merits. In the case of the Ombudsman at least, insufficient resources generally was at least implied in the evidence.

Definition of whistleblower

7.77 From this case arises the question of when does whistleblowing activity lose its character of disclosure and when do allegations of victimisation become confused with irrelevant and unhelpful criticism. This Committee supports the view of the SSCPIW Committee that the definition should be as wide as possible and discussed this at paras. 2.11 to 2.19.

Retrospectivity

7.78 Mr King has made a strong representation on this matter. The Ombudsman also commented on the position as it applied to Mr King under the South Australian Act. The Committee has discussed in paras. 2.73 to 2.76 that it considers the five year period proposed by the SSCPIW as appropriate.

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63 Correspondence, Ombudsman, 20.4.95, p. 3.

64 Correspondence, Ombudsman, 20.4.95, p. 3.

Mr Jim Leggate

Background

7.79 Mr Leggate was employed between 1986 and 1992 by the Queensland Department of Minerals and Energy (DME) and its predecessor, the Department of Resource Industries (DRI). During this period he raised with his superiors concerns about non-compliance with official procedures. He claimed his concerns were ignored.[65]

7.80 Mr Leggate maintained he was instructed by his section head that an 'administration arrangement' existed where authorised officers were not using the directions powers as prescribed in the *Mining Act 1968*, a practice which continued under the *Mineral Resources Act 1989*. Mr Leggate alleged this constituted official misconduct by allowing illegal mining, by showing reluctance to enforce non-compliance provisions and by providing insufficient resources to enforce the Act. He pointed to a substantial liability arising for cleaning up and rehabilitation of mining sites.

7.81 In 1991 Mr Leggate lodged a grievance statement with his Department, as a result of being passed over for promotion. He stated that the initial response was 'that I had been too legalistic in reporting what I considered was lessee non compliance with mining leases and related conditions'.[66] Mr Leggate then set out to substantiate his grievance by compiling a list of operations throughout Queensland not complying with relevant operational and lease conditions. He also wanted to show that here was 'evidence of systematic collusion between industry and the Department, over more than a decade'.[67] This grievance statement was also lodged with the Department. Mr Leggate noted that his grievances were investigated independently by officers appointed by the Director-General from outside the Department, but 'each investigation concentrated solely on the procedures for the appointment of new staff and avoided the "core issue" of maladministration and non-compliance'.[68]

7.82 Subsequently Mr Leggate went to the Queensland Ombudsman with his allegations of improper administration of mining legislation. The Ombudsman later informed him that he was unable to investigate the matters raised. Mr Leggate stated to the Committee:

> The Ombudsman, after lengthy deliberation, I think, suggested that I did not have personal involvement - did not have standing, perhaps - to lodge a complaint against the mining industry: I was not being affected by the wrongdoing.[69]

7.83 In 1991 Mr Leggate also approached the Electoral and Administrative Review Commission (EARC). The Chairman suggested he lodge a submission with the Public Sector

65 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 4.

66 Submission, Mr Jim Leggate, 22.1.95, Attachment A. p. 6.

67 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 7.

68 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 11.

69 Evidence, Mr Jim Leggate, p. 443.

Management Commission Review Team. Such a submission was made and later returned to Mr Leggate without comment.[70]

7.84 In 1991 a second grievance statement was lodged with the DME after again failing to be promoted. Mr Leggate believed that failure of the Director-General to respond to his first grievance, as required by Public Service Management and Employment Regulations, had left him seriously disadvantaged. The independent investigator in this case concluded that the unresolved first grievance should be finalised.

7.85 Finally in 1991, Mr Leggate lodged an appeal under the *Public Sector Management Commission Act 1990* against the '"capricious and arbitrary administration" of the mineral resources legislation'.[71] He claimed to have been unfairly treated and was being punished for doing his job. At a hearing into the matter the convenor stated that 'it was not good enough' that the department had not responded to the non-compliance issue. The departmental representative conceded that there was a problem of non-compliance but that it was being managed using a new 'policy and planning framework'.[72]

7.86 Mr Leggate claimed that in the first half of 1992, he was isolated within the department and he was counselled to try 'to get me to support the government's new policy'. Mr Leggate expressed concern with a number of aspects of the new policy including that securities lodged by companies under the policy were in fact company based guarantees, not a cash bond or bank guarantee, and there were no agreed technical standards only a set of technical guidelines which were in any case, advisory only.[73]

7.87 In August 1992 Mr Leggate lodged a complaint to the CJC by telephone. He alleged negligence or incompetence by senior staff of DRI, in the enforcement of legislation on the rehabilitation of mining sites. He also alleged the Minister had made inaccurate statements about the DRI's enforcement of such legislation and other related matters. On 28 August 1992 the CJC advised Mr Leggate that his complaint:

> did not raise any suspicion of official misconduct and the alleged maladministration by the Director-General and the department did not constitute official misconduct and were properly matters for determination by the department's relevant Minister.[74]

Mr Leggate was interviewed by the CJC in 1992 after making further contact with the CJC. He raised again his complaint relating to alleged negligence or inaction by the DME in relation to non-compliance, accused the Minister of dishonesty in making misleading statements in the media and alleged he was victimised as a result of his standing regarding enforcement of mining legislation.

7.88 The CJC replied in November 1992, advising Mr Leggate that its investigative jurisdiction did not extend to the allegation of negligence or incompetence on the part of

70 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 12.

71 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 13.

72 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 13.

73 Evidence, Mr Jim Leggate, pp. 445-46.

74 Submission, CJC, March 1995, p. 18.

departmental staff. In relation to the Minister, he was advised that the CJC's jurisdiction with respect to public officers was restricted to conduct which could constitute a criminal offence. The conduct complained of did not reasonably raise such a suspicion. Further, the CJC had been advised that his transfer was because 'the mining industry had lost confidence in him' and not because of his approaches to the CJC.[75]

7.89 Also in late August 1992 press articles appeared based on the material Mr Leggate had provided to the DRI and other bodies. Mr Leggate denied he leaked the information.[76] He subsequently accepted a transfer to the Forestry Service. He finished with the Service in October 1992.

7.90 Mr Leggate wrote to the Commonwealth Attorney-General in 1993 about the validation of mining grants by the Native Title Bill 1993, and the environmental performance of mining companies in Queensland. In reply the Office of General Counsel advised that the matter of principal concern to Mr Leggate, that of adherence by mining companies to environmental standards imposed by the Queensland Government, was in the jurisdiction of that Government and was 'not a matter within the direct jurisdiction of the Commonwealth Government'.[77]

7.91 In 1994, as a result of a complaint, the CJC conducted an inquiry into the improper disposal of liquid waste in South East Queensland. Mr Leggate appeared before the inquiry and described his experience with mining operations and regulation in Queensland since 1973. The report on that inquiry noted that Mr Leggate had been concerned:

> 1. That non-compliance by mines with relevant operating conditions was rife resulting inevitably in the systemic discharge of water borne pollutants into the waterways;
> 2. A resultant legacy for the state of rehabilitation of mines which he spoke of being $1B but which was disputed by the Department;
> 3. The disrespect for the legislative provisions which bear upon the Department's regulation of the industry, e.g. authorised officers not being permitted to act on their statutory power to issue notices.[78]

7.92 The inquiry found no evidence of official misconduct or breach of other legislation, or that the CJC should conduct further investigation into mismanagement. However, the Commission pressed strongly for further investigation on a range of matters concerning the impact of mining in Queensland:

> This investigation should ... examine a range of matters concerning the impact of mining in Queensland, the rehabilitation of mines, the adequacy of securities held by DME and the departmental policies and oversight exercised by DME, DEH, Water Resources Commission and other bodies which may have authority in mining related issues; and finally, to establish appropriate

75 Submission, CJC, March 1995, p. 18.

76 Submission, Mr Jim Leggate, 22.1.95, Attachment A, p. 15.

77 Submission, Mr Jim Leggate, 22.1.95, Attachment C.

78 CJC, *Report by the Criminal Justice Commission on its Public Hearings conducted by the Honourable R H Matthews QC into the improper disposal of liquid waste in South-East Queensland*, Vol. 1, p. 6.

> legislation to produce a clear basis for the policies now applied to the mining industry.[79]

7.93 The Committee understands that whilst no further investigation has been formally undertaken, the departments concerned are having their legislation revamped and are producing new protocols for the mining industry to take account of concerns expressed in the CJC report.

Investigations of the matter

7.94 Apart from his employer department, Mr Leggate raised his allegations with the Department of Environment and Heritage, Queensland Ombudsman, EARC, Public Sector Management Commission (PSMC), CJC and the Commonwealth Attorney-General. He received a variety of responses to his submissions. The Queensland Ombudsman ruled that Mr Leggate did not have standing, the Commonwealth stated it did not have jurisdiction, the CJC found no official misconduct had occurred, the PSMC did not interfere with the Department's recruitment and selection process and EARC directed Mr Leggate to the CJC's liquid waste disposal inquiry.

7.95 The Committee also notes the media's involvement in this matter. In 1992 articles were published based on material Mr Leggate had submitted to his department, the Department of Environment and Heritage and the PSMC. Mr Leggate asserted 'he was not the leak'. Wide media coverage was given to Mr Leggate's evidence in 1994 to the inquiry into the liquid waste disposal. The matter died away until the report of the inquiry was tabled in the Queensland Parliament on 5 August 1994 which rekindled media interest for a short time before petering out.[80]

The whistleblowing claims

7.96 Mr Leggate's whistleblowing claims centre on his allegations of non-compliance with Queensland mining legislation resulting in environmental damage and a potential liability for taxpayers. He claims he was victimised and pointed to his failure to gain promotion and his transfer to the Forestry Service.

Discussion

7.97 The Queensland Government has acknowledged the backlog of environmental rehabilitation and stated that policies have been implemented to address this matter.

> In 1990 the Government and the DME adopted a clear and deliberate strategy to address poor environmental performance in the mining industry. A comprehensive planning framework for environmental management was developed in consultation with the mining industry and DME. This framework is embodied in the Environmental Policy for mining in Queensland and supported by the Minerals Resources Act 1989. This approach has

79 CJC, Liquid waste inquiry report, p. 26.

80 Submission, CJC, March 1995, p. 22.

> progressively led to a fundamental change in attitude and commitment to environmental management by the mining industry.[81]

Part of this policy of reform is a recognition of a legacy of non-compliance by the mining industry and a need to fully address past and future compliance matters.

> A process of public consultation will be conducted to develop an Environmental Protection Policy for Mining under the Environmental Protection Act 1994.[82]

7.98 The Committee acknowledges the endeavours by the Queensland Government to address the environmental problems caused by mining. Further, the Committee considers that the implementation of this policy did play a major part in the problems experienced by Mr Leggate. It appears that Mr Leggate had difficulty reconciling his personal views with this policy or its rate of implementation. As well, according to the Government, it was Mr Leggate himself who initiated the question of his transferring to another section.[83] Mr Leggate was also offered and accepted a position in the Forestry Division of the Department of Primary Industries, suitable to his experience and qualifications and with no loss of remuneration or conditions.[84] However it appears that these problems arose because Mr Leggate attempted to implement the provisions of mining legislation as enacted by the Queensland Parliament and attempted to bring breaches of legislation to the attention of the relevant authorities. The Committee believes that Mr Leggate was acting only as required to do so as a responsible public sector employee. Legislation, as enacted by Parliament, should be implemented at least to the letter of the law. If problems arise with legislation it is the role of Parliament to amend the legislation; it is not the role of the public sector to implement 'administrative arrangements' to circumvent the letter of the law or to ignore alleged breaches of legislation.

7.99 The Committee also notes Mr Leggate's wide experience in the mining sector and considers him to be an honourable and credible witness. It may well be that the attention drawn to the matters by Mr Leggate has assisted in changes to policy relating to mining and environmental concerns.

Implications for proposed Commonwealth whistleblower protection legislation

Need for an independent body

7.100 The Committee considers most, if not all, of Mr Leggate's frustration and difficulties stemmed from his difficulty in receiving any satisfaction from his initial disclosures of improper practices in his department. In order to take his claims further it was necessary for Mr Leggate to link his personal issues of victimisation to his broader allegations. The issues of improper practices which he raised would seem to be of an almost text-book quality for consideration by an independent body dedicated to public interest disclosures. Once his department refused to take action on his claims, those bodies to which he then appealed were either not suitable or lacked jurisdiction.

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81 Attorney-General's statement, 21.2.95, p. 11.

82 Attorney-General's statement, 21.2.95, p. 12.

83 Attorney-General's statement, 21.2.95, p. 11.

84 Evidence, Mr Jim Leggate, p. 449.

Whistleblowing counselling

7.101 It was understandable that Mr Leggate became increasingly agitated and frustrated as the process of making his claims extended further into different jurisdictions. The resulting antagonism is not helpful to either the efficiency or to the standing of the authorities to which such allegations are being made. However, this case may be an example where the sort of independent assistance and advice counselling as envisaged by the SSCPIW could have been usefully employed.

Legislative protection and powers

7.102 This case raised significant questions of government policy and practice, and the difficulties particular individuals may have with those policies and practices. As the CJC clearly said, and it relates to other independent agencies as well:

> It is not for the CJC to come along and say that anyone who follows the policy of the government is committing official misconduct. It is not for the CJC to dictate to the government what the policy should be. That is for electors, ultimately and for other forums to explore such as this and debate in parliament, to bring it to public notice. The CJC does not control policy by prosecution.[85]

The Committee believes there is an important role for the independent body in explaining to whistleblowers, where necessary, that what they are objecting to is a matter of government policy and needs action of a different kind to affect any change. However, as already noted by the Committee, it is a very different matter where the application of legislation is involved. Public sector employees must implement the law as enacted by parliament and expect that they will be supported in their endeavours to do so.

Mr Greg McMahon

Background

7.103 In 1988 the Queensland Cabinet attempted to reduce the pay of public sector officers while those officers were engaged in military activities. Lobbying by the Army resulted in this proposal not being implemented. In December 1988, the Queensland Water Resources Commission issued a written direction concerning entitlements for Army Reserve activities. The direction limited staff to two weeks special leave per year, contradicting Governor-in-Council determinations for special leave for army reserve activities. Mr Greg McMahon, a serving reserve officer and employee of the Commission, disclosed this action to the unions and the Commonwealth Government. As a result, representations were made to the Minister for Water Resources and Commissioner for Water Resources. The Commission's instruction concerning special leave was subsequently withdrawn.

7.104 In 1991, Mr McMahon instituted grievance procedures after being passed over for a Senior Executive Service (SES) position in the Department of Environment and Heritage. He alleged discrimination in his employment because of his union and army reserve activities, the latter, if proven, constituting breaches of the *Defence Re-establishment Act 1965*. He was

85 Evidence, Mr Barry Thomas, p. 503.

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.

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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

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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]

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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, Eduction 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 is 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]

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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 with 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.

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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 Toomer[143] and Mr Walsh[144] 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 pre-dated 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

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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 wrong-doing 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.

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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:

> Suspicions 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.

APPENDIX 1

ADVICES FROM THE CLERK OF THE SENATE

THE SENATE

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Labor Senator for Tasmania

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Canberra Office
The Senate
Parliament House
Canberra
A.C.T. 2600
Telephone: (06) 277 3551
Facsimile: (06) 277 5899

6 December 1994

Mr Harry Evans
Clerk of the Senate
Suite SG 39
Parliament House
CANBERRA ACT 2600

FAXED
6/12/94 8:30 am

BY FAX: (06) 277 3199

Dear Harry

I am seeking your advice on a couple of matters relating to the new Select Committee for Unresolved Whistleblower Cases.

Firstly, I would like to know what jurisdictional rights/powers a Senate Committee has to demand documents that are in or under the control of a State Government.

Secondly, assuming a Senate Committee has the power to send for persons and documents, what powers does it have if such documents are refused or persons refuse to appear on the basis of protection under certain aspects of a State Constitution or the Australian Constitution as it relates to the difference between State and Commonwealth Laws or State Government Regulations?

It would be greatly appreciated if I could have your advice on these matters as soon as possible.

Yours sincerely

SHAYNE M MURPHY
Labor Senator for Tasmania

smm:jlm

AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600
TEL. (06) 277 3350
FAX (06) 277 3199

OFFICE OF THE CLERK OF THE SENATE
hm/l/10195

6 December 1994

RECEIVED - 6 DEC 1994

FILE	SC- WB 92
PENDING	
T/F	
ANS'D	

Senator S M Murphy
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Murphy

SELECT COMMITTEE ON UNRESOLVED WHISTLEBLOWER CASES – POWERS

Thank you for your letter of 6 December 1994 in which you seek advice on the powers of the Select Committee on Unresolved Whistleblower Cases, particularly the power to require the production of documents within the control of a state government.

The Select Committee has been given the powers, in paragraph (6) of its resolution of appointment of 1 December 1994, to require the attendance of witnesses, the giving of evidence and the production of documents. These powers are conferred on the Committee pursuant to standing order 34. The powers to require the attendance of witnesses, the giving of evidence and the production of documents are among the undoubted powers of the Senate under section 49 of the Constitution. The Senate may delegate these powers to its committees, but only the Senate may punish default as a contempt. The power to punish contempts is codified by the *Parliamentary Privileges Act 1987*.

There are no explicit limitations on these powers to require the attendance of witnesses, the giving of evidence and the production of documents. There are probably, however, two relevant implicit limitations on the powers.

First, the powers may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate. There is judicial authority for the proposition that the Commonwealth and its agencies may not compel the giving of evidence and the production of documents except in respect of subjects within the Commonwealth's legislative competence (*Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1913 15 CLR 182; *Lockwood v the Commonwealth*

1954 90 CLR 177 at 182-3), and, if the matter were litigated, the High Court might well hold that this limitation applies to the inquiry powers of Senate committees.

Secondly, it could well be held that the inquiry powers of the Senate do not extend to members of state parliaments and officers of state governments. There is no authority for this proposition, and the matter has not been litigated, but the High Court could arrive at such a conclusion by reference to the federal nature of the Constitution and the doctrine that the Commonwealth may not impose a requirement inimical to the integrity of the states (something like this reasoning was used in *Melbourne Corporation v the Commonwealth* 1947 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* 1985 159 CLR 152).

Whatever the legal situation, it is a parliamentary rule, and a rule of the Senate, that the inquiry powers are not exercised in respect of members of the House of Representatives (standing order 178), and as a matter of first principle the same rule extends to members of state and territory parliaments. Senate committees as a matter of practice have in the past accepted this rule, and have not endeavoured to exercise their inquiry powers in respect of members of state parliaments or officers of state governments. Such persons have given evidence before Senate committees on invitation and voluntarily. The Senate has also accepted the application of the rule to state parliaments in making requests to state houses for the attendance of their members before the Select Committee on the Australian Loan Council (*Journals of the Senate*, 5 October 1993, p. 565-6)

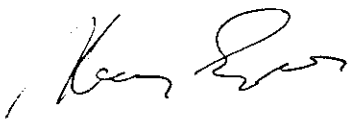
It is possible that, should the matter be litigated, the courts would apply the parliamentary rule as a rule of law and find that the inquiry powers of the Senate do not extend to state or territory parliaments or state or territory officers.

If a Senate committee issues a subpoena requiring the attendance of witnesses, the giving of evidence or the production of documents and is met with a refusal, the committee has no power to take any further action, but can only report the matter to the Senate. It is then for the Senate to determine whether it should treat the refusal as a contempt and seek to impose any penalty. It is at the stage of the attempted imposition of a penalty that a person in receipt of a subpoena, such as a state minister, member of parliament or other office-holder, could challenge in the courts the exercise of the Senate's powers. It is possible that the attempted exercise of the inquiry powers could be challenged at an earlier stage, such as on the issue of a subpoena.

My advice to all Senate committees is that they should observe the parliamentary rule and the past practice and not seek to summon members of state or territory parliaments or state or territory officers, or to require them to give evidence or to produce documents. Such persons should be invited to appear or submit documents if a committee desires to take evidence from them, and any invitation to state or territory officers should be directed to the relevant state or territory minister. In the event of an invitation being declined, a committee should not take the matter any further.

Please let me know if I can provide any further information or assistance in relation to this matter.

Yours sincerely



(Harry Evans)

THE SENATE

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7 December 1994

Mr Harry Evans
Clerk of the Senate
Suite SG 39
Parliament House
CANBERRA ACT 2600

FAXED
7-12-94
9.05 am

BY FAX: (06) 277 3199

Dear Harry

Further to my request of 6 December, relating to the Select Committee for Unresolved Whistleblower Cases, I would again appreciate your advice on some further matters:-

a) Following its inquiry, and should the Committee's findings be contrary to the outcomes already found in particular cases, would the Committee have any powers to:-

   i) order compensation for the people concerned?

   ii) order a judicial inquiry into the particular cases?

   iii) provide any assistance to the persons concerned other than finding in their favour?

Again, this advice would be appreciated at the earliest opportunity. Thank you.

Yours sincerely

SHAYNE M MURPHY
Labor Senator for Tasmania

smm:jlm

AUSTRALIAN SENATE

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hm/l/10202

7 December 1994

Senator S M Murphy
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Murphy

SELECT COMMITTEE ON UNRESOLVED WHISTLEBLOWER CASES – POWERS (2)

Thank you for your letter of 7 December 1994 in which you seek further advice on the powers of the Select Committee on Unresolved Whistleblower Cases.

The Committee has no power to order that compensation be paid to persons, to order a judicial inquiry into particular cases or to provide any assistance to persons other than making findings in their favour. The Committee can only recommend such steps. The Senate itself, acting alone, would not be able to take any of those steps, as they would require legislation or action by the executive government.

Please let me know if I can be of any further assistance.

Yours sincerely

(Harry Evans)

APPENDIX 2

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED SUBMISSIONS, SUPPLEMENTARY SUBMISSIONS AND WRITTEN RESPONSES TO EVIDENCE AUTHORISED FOR PUBLICATION BY THE COMMITTEE

The Committee was provided with a total of 140 submissions, supplementary submissions and written responses to evidence. Given that the Committee decided to concentrate on a number of unresolved whistleblower cases which came to the attention of its predecessor, the Select Committee on Public Interest Whistleblowing, this Committee determined to publish only those submissions and responses which related to the cases under specific consideration. The other submissions were considered by the Committee for the light they could shed, in general terms, on the issues to be addressed in proposed Commonwealth whistleblower protection legislation. Although they have not been published by the Committee and are being returned to the submittors, the Committee acknowledges the whistleblowing concerns raised by many of these submissions and thanks the submittors for their contribution to the inquiry.

Atherton, Mr FG, Victoria
Attorney-General's Department, South Australia
Baker, Mrs J, Queensland
Butler, Mr R, Queensland
Callinan, Mr I, QC, Queensland
Campbell, Mrs K, Queensland
Channel 7, Queensland (Mr R Butler and Mr C Adams)
Coyne, Mr P, Queensland
Criminal Justice Commission, Queensland
Griffith, Mr C, Queensland
Harris, Mr G, Queensland
Jesser, Mr P, Queensland
Kerin, Mr S, Queensland
King, Mr J, South Australia
Leggate, Mr J, Queensland
Lindeberg, Mr K, Queensland
Littler, Prof. C, University of Southern Queensland, Queensland
Luxton, Ms D, Queensland
MacDonald, Mr P, Queensland Justices' & Community Legal Officers' Association, Queensland
McDonald, Mr J, University of Southern Queensland, Queensland
McLennan, Mrs T, Queensland
McMahon, Mr G, Queensland
Mann, Snr Sgt P, Victoria
Merit Protection and Review Agency, ACT
Moore, Mr T, Queensland
O'Neill, Mr D, Queensland
Office of Local Government, Victoria

Ombudsman, South Australia
Ombudsman, Victoria
Patullo, Mr G, Queensland
Peterson, Mr RD, Queensland
Potter, Mr K, Victoria
Preston, Dr N, Queensland
Queensland Cabinet Office
Queensland Director of Public Prosecutions
Queensland Government - Office of the Premier
Ready, Mr M, Queensland
Richards, Mr KH, Association of Professional Engineers and Scientists Australia, Queensland
Rothe, Mr R, Queensland
Sawyer, Prof. K, Victoria
Schwerin, Ms C, Victoria
Shepherd, Mr P, Queensland
Skrijel, Mr M, Victoria
Slack, Mr D, MLA., Queensland
Toomer, Mr B, Victoria
University of Southern Queensland, Queensland
Walsh, Mr DH, Victoria
Whistleblowers Action Group, Queensland
Whistleblowers Australia, New South Wales
Zingelmann, Mr B, Queensland

APPENDIX 3

INDIVIDUALS WHO APPEARED BEFORE THE COMMITTEE AT PUBLIC HEARINGS

Thursday, 23 February 1995, Brisbane

Mr Kevin Lindeberg
Mr Des O'Neill
Mr Ian Callinan, QC
Mr Roland Peterson

Dr Noel Preston, School of Humanities, Queensland University of Technology

Mr Peter MacDonald, General Manager, Queensland Justices & Community Legal Officers Association

Mr Eric Thorne, Secretary/Treasurer, Whistleblowers Action Group (Queensland)

Criminal Justice Commission -
Mr Rob O'Regan, Chairman
Mr Mark Le Grand, Director, Official Misconduct Division
Mr Michael Barnes, Chief Officer, Complaints Section
Ms Theresa Hamilton, Executive Legal Officer

Friday, 24 February 1995, Brisbane

Mr Gordon Harris
Mr John Reynolds
Mr Robert Butler

Mr Bill Zingelmann

Criminal Justice Commission -
Mr Rob O'Regan, Chairman
Mr Mark Le Grand, Director, Official Misconduct Division
Mr Michael Barnes, Chief Officer, Complaints Section
Ms Theresa Hamilton, Executive Legal Officer

Wednesday, 15 March 1995, Melbourne

Mr Jack King

Ms Christina Schwerin, former Councillor, Sale City Council
Ms Carolyn Crossley, former Mayor, Sale City Council
Mr John Smith, former Mayor and Councillor, Sale City Council

Mr Keith Potter, Spokesperson, Whistleblowers Australia
Mr Bill Toomer
Mr Denis Walsh
Mr Frederick Atherton

Associate Professor Kim Sawyer

Mr Mehmed Skrijel

Thursday, 16 March 1995, Brisbane

Mr Peter Jesser

Mr Robin Rothe

Mr James Leggate

Mr Greg McMahon

Mr Eric Thorne, Secretary, Whistleblowers Action Group (Queensland)

Criminal Justice Commission -
Mr Mark Le Grand, Director, Official Misconduct Division
Mr Michael Barnes, Chief Officer, Complaints Section
Ms Theresa Hamilton, Executive Legal Officer
Mr Barry Thomas, Counsel retained by CJC

Friday, 5 May 1995, Brisbane

Mr Peter Coyne

Mr Stephen Kerin
Mr Matthew Ready

Mr John Huey
Mr James Varitimos

Mr Peter Beattie, MLA

Mr Roland Peterson

Criminal Justice Commission -
Mr Mark Le Grand, Director, Official Misconduct Division
Mr Michael Barnes, Chief Officer, Complaints Section
Ms Theresa Hamilton, General Counsel

Monday, 29 May 1995, Canberra

Criminal Justice Commission -
Mr Mark Le Grand, Director, Official Misconduct Division
Mr Michael Barnes, Chief Officer, Complaints Section
Ms Theresa Hamilton, General Counsel

APPENDIX 4

STANDING ORDER 81 AND EXTRACT FROM PRIVILEGE RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

Standing Order 81

Privilege motions

81. A matter of privilege, unless suddenly arising in relation to proceedings before the Senate, shall not be brought before the Senate except in accordance with the following procedures:

(1) A Senator intending to raise a matter of privilege shall notify the President, in writing, of the matter.

(2) The President shall consider the matter and determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate.

(3) The President's decision shall be communicated to the Senator, and, if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the Senate.

(4) A Senator shall not take any action in relation to, or refer to, in the Senate, a matter which is under consideration by the President in accordance with this resolution.

(5) Where the President determines that a motion relating to a matter should be given precedence of other business, the Senator may, at any time when there is no other business before the Senate, give notice of a motion to refer the matter to the Committee of Privileges, and that motion shall take precedence of all other business on the day for which the notice is given.

(6) A determination by the President that a motion relating to a matter should not have precedence of other business does not prevent a Senator in accordance with other procedures taking action in relation to, or referring to, that matter in the Senate, subject to the rules of the Senate.

(7) Where notice of a motion is given under paragraph (5) and the Senate is not expected to meet within the period of one week occurring immediately after the day on which the notice is given, the motion may be moved on that day.

Parliamentary Privilege - Resolutions agreed to by the Senate on 25 February 1988

1. Procedures to be observed by Senate committees for the protection of witnesses

That, in their dealings with witnesses, all committees of the Senate shall observe the following procedures:

(18) Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.

6. Matters constituting contempts

That, without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

Interference with witnesses

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

Offences by witnesses etc.

(12) A witness before the Senate or a committee shall not:

(a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;

(b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or

(c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

(13) A person shall not, without reasonable excuse:

(a) refuse or fail to attend before the Senate or a committee when ordered to do so; or

(b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a committee.

(14) A person shall not wilfully avoid service of an order of the Senate or of a committee.

(15) A person shall not destroy, damage, forge or falsify any document required to be produced by the Senate or by a committee.

Unauthorised disclosure of evidence etc.

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;

(b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or

(c) any proceedings in private session of the Senate or a committee or any report of such proceedings, unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.

APPENDIX 5

BIBLIOGRAPHY

Note: A bibliography was also included as Appendix 3 to the report of the Senate Select Committee on Public Interest Whistleblowing. That bibliography included material relating to whistleblowing.

Acts and Bills

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