CHAPTER 4

Term of reference (b)

4.1 The second part of the terms of reference require the Committee to inquire and report on the implications of part (a) for measures which should be taken:

> (i) to prevent the destruction and concealment by government of information which should be available in the public interest,
>
> (ii) in relation to the protection of children from abuse, and
>
> (iii) for the appropriate protection of whistleblowers.

4.2 Evidence to the inquiry focused on part (a) of the terms of reference. The Committee received only one submission, from the Australian Society of Archivists, which specifically related to part (b). Nevertheless, the Committee has identified from the material before it a number of specific issues arising from the Lindeberg Grievance relevant to each part of term of reference (b). These issues are discussed in this chapter.

(i) prevent the destruction and concealment by government of information which should be available in the public interest

4.3 The Australian Society of Archivists (ASA) highlighted in its submission several specific issues arising from the shredding of the Heiner documents relevant to the protection and availability of government information. These were:

- The importance of good recordkeeping practices, underpinned by sound frameworks and systems;[1]
- The importance of fully informed document appraisal and disposal practices, governed by sound records disposal authorities;[2] and
- The importance of impartiality and statutory independence for government archivists.[3]

Recordkeeping

4.4 The ASA stated that to prevent incidents such as the shredding of the Heiner documents, organisations need to put in place sound procedures for managing their records:

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1 Australian Society of Archivists, Submission no. 2, p.3

2 Australian Society of Archivists, Submission no. 2, pp.5-6

3 Australian Society of Archivists, Submission no. 2, p.5

> The implementation of sound recordkeeping procedures, based upon Australian and International best practice, prevent the destruction and concealment of records and the information they contain.[4]

4.5 The ASA stated that agreed principles for good recordkeeping are promoted in the Australian Standard/International Standard ISO 15489 – 2002: *Records Management*.[5] The National Archives of Australia (NAA) has endorsed this standard for use by all Commonwealth agencies.[6] The NAA has also published a manual compliant with the standard to help agencies develop and implement sound recordkeeping practices. The manual is titled *DIRKS (Designing and Implementing Recordkeeping Systems) – A Strategic Approach to Managing Business Information*.[7]

4.6 The relevant authority in each State and Territory has also endorsed the standard as the best practice model for recordkeeping.

Appraisal processes

4.7 The ASA advised that one of the fundamental accountability issues raised by the 'Heiner Affair' is the basis on which government archivists give approval to destroy official records.[8] The evidence given by the ASA suggests that the appraisal process resulting in the destruction of the Heiner documents was inadequate:

> The disposal decision made by the State Archivist in relation to the Heiner material was an ad hoc decision. It was a decision made in a short time frame. It was also made in the absence of a records disposal authority. Records disposal authorities (containing disposal rules and policies) when applied by archivists to records, produce consistent disposal outcomes. Sound appraisal regimes, consisting of records disposal authorities, appraisal criteria, and disposal rules and policies should be put in place to support … appraisal process[es] that are open to public scrutiny and are understood and accepted.[9]

4.8 The *DIRKS* manual issued by the NAA gives Commonwealth agencies detailed guidance on the steps required to develop adequate record disposal

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4 Australian Society of Archivists, Submission no. 2, p.4

5 Australian Society of Archivists, Submission no. 2, p.4

6 Australian National Archives, *Archives Advice 58, Australian Standard for Records Management AS ISO 15489*, July 2002

7 National Archives of Australia, 2003, *DIRKS–A Strategic Approach to Managing Business Information, Part 1*

8 Australian Society of Archivists, Submission no. 2, p.9

9 Australian Society of Archivists, Submission no. 2, p.6

authorities.[10] It is designed to prevent the ad hoc appraisal of individual records, as was the experience with the Heiner documents.

4.9 The NAA has also specified three areas that it expects Commonwealth agencies to take into account when considering maintaining or disposing of records. These are:

- business needs;
- the requirements of organisational accountability; and
- community expectations.[11]

4.10 Of particular relevance, given the Heiner experience, the NAA states that it expects Commonwealth organisations to maintain records if:

> • it is reasonable to believe that the records may be required for a judicial proceeding; and
>
> • destruction or disposal would compromise existing or future claims in relation to the rights and entitlements of persons with whom the organisation or its predecessors has dealt, where those rights and entitlements are known or projected at the time of appraisal.[12]

4.11 Further, the NAA states:

> We will not knowingly authorise disposal, and existing authorities should not be implemented, while formal processes are in train or pending to see or use the records concerned.[13]

Statutory independence

4.12 The ASA acknowledged in its submission that not all government documents can be retained for the public record, and said that the responsibility for determining which public records should be kept rests with the archivist.[14] As such, the ASA argued that to prevent inappropriate destruction of government documents, the independence of government archivists from political or other interference should be guaranteed.[15]

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10 National Archives of Australia, 2001, *DIRKS–A Strategic Approach to Managing Business Information, Appendix 8 – Procedures for developing a records disposal authority in the Commonwealth*

11 National Archives of Australia, *Why Records are Kept: Directions in Appraisal,* www.naa.gov.au/recordkeeping/disposal/why_keep/expectations.html

12 National Archives of Australia, *Why Records are Kept: Directions in Appraisal,* www.naa.gov.au/recordkeeping/disposal/why_keep/expectations.html

13 National Archives of Australia, *Why Records are Kept: Directions in Appraisal,* www.naa.gov.au/recordkeeping/disposal/why_keep/expectations.html

14 Australian Society of Archivists, Submission no. 2, p.5

15 Australian Society of Archivists, Submission no. 2, p.5

4.13 The ASA noted that the provisions of the *Libraries and Archives Act 1988 (Qld)*, in force at the time of the Heiner inquiry did not provide such protection.[16] However, the ASA recognised that this issue has since been addressed, as the independence of the Queensland State Archivist was established under the *Public Records Act 2002 (Qld)*. The Act states:

> The archivist and the staff of the archives are not subject to the control or direction of a Minister or a department in relation to making decisions about the disposal of public records.[17]

Committee comments

4.14 The Committee agrees with the ASA's view that good recordkeeping is fundamental to government accountability. In the Committee's view, the shredding of the Heiner documents was an undesirable course of action, representing substandard recordkeeping and archival practices. Considering the angst that the shredding continues to generate some fourteen years later, and the significant time and resources that have been devoted to the matter by the protagonists and others involved in various investigations, the Committee adds it support to the findings of the UWB Committee:

> Greater consideration ought to have been given to alternative approaches to resolving the problems associated with the [Heiner] inquiry.[18]

4.15 However, the Committee notes that legislative reform in the relevant jurisdiction, and the endorsement of recordkeeping standards and best practice guidelines since the time of the Heiner inquiry have addressed the specific issues raised in evidence.

(ii) in relation to the protection of children from abuse

4.16 No recommendations for reforms to prevent child abuse were submitted to the Committee. The material received by the Committee in relation to child abuse primarily concerned the details of a sexual assault on a resident of the JOYC, the inadequacy of investigations into that case and failure to punish those culpable for the assault. The Committee emphasises that it does not have a judicial role and cannot adjudicate on particular cases.

4.17 Nevertheless, the evidence received by the Committee suggests serious failures by those with a duty of care to children detained in the JOYC in the late 1980s and early 1990s. Existing documents indicated that physical abuse of children

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16 Australian Society of Archivists, Submission no. 2, p.5

17 Public Records Act 2002 (Qld), section 27(1), quoted in Australian Society of Archivists, Submission no. 2, p.5

18 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p.60

occurred,[19] and submissions and correspondence to the inquiry detailed sexual abuse.[20]

4.18 The material received by the Committee points to several systemic deficiencies in the operation of the JOYC at the time, including:

- Inadequate complaint mechanisms and protection for complainants;
- Inadequately trained staff and underperforming staff;
- Deficient supervisory and management practices;
- Deficient departmental oversight and response to identified issues; and
- Inadequate monitoring of compliance with regulations and legislation.

4.19 Submitters argued that information available in the Queensland media prior to the Heiner inquiry indicated that the relevant Queensland ministers for family services knew about child abuse at the JOYC.[21] Submitters posited that the Heiner inquiry took evidence on such abuse, and argued that had the Heiner inquiry been permitted to report, later instances of abuse may have been prevented.[22] Submitters also stated that by shredding the Heiner documents, not only had the abuses been covered up, but evidence which may have been used by victims in later court actions had been destroyed.

4.20 As discussed in Chapter 3, whether allegations of sexual abuse were covered in the material gathered by the Heiner inquiry has not been established. The Committee also received differing views as to whether the shredding of the Heiner documents obstructed potential court actions. Mr Lindeberg presented the view that the Heiner documents would have formed admissible evidence:

> The [Heiner] documents could also have been used for the children who were abused as probative contemporaneous records for their court proceedings.[23]

4.21 On the other hand, in correspondence to the Committee, Mr Barnes stated that the Heiner documents would not have been admissible:

> The suggestion that evidence of child abuse was destroyed or lost when the documents were shredded is complete nonsense. The records of any such

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19 Mr Morris QC and Mr Howard, *An Investigation into Allegations by Mr Kevin Lindeberg and Allegations by Mr Gordon Harris and Mr John Reynolds,* October 1996, Attachment A; Exhibits 20 and 31 to the Forde Commission of Inquiry, made available to the Committee; Director-General, Queensland Cabinet Office, Response to the Senate Select Committee on Unresolved Whistleblower Cases, 31 August 1995, Document 13

20 Mr Grundy, Submission no. 3 and attachments

21 Mr Lindeberg, Submission no. 1, p.15

22 Mr Grundy, Submission no. 3, p.10

23 Mr Lindeberg, *Committee Hansard,* 11 June 2004, p.55

> allegation made to Mr Heiner could not have been admitted in any civil or criminal proceedings that sought to prove that such abuse had occurred. On the other hand, if people who appeared before Mr Heiner had such evidence they could and still can give [it] to the appropriate law enforcement authorities. Nothing that was done to the "Heiner documents" in any way impacted upon that.[24]

Committee comments

4.22 Regardless of the legal status of the Heiner documents, and whether or not the Heiner inquiry covered allegations of sexual abuse, the Committee concurs with the view that had the alleged abuses been thoroughly investigated earlier, future incidents may have been averted. The same may be said of institutional child abuse in all jurisdictions.

4.23 In relation to Queensland, it may be that the shredding of the Heiner documents was genuinely motivated by the need to protect Mr Heiner and other witnesses from possible defamation. It remains unclear however, as to why the Goss Labor government did not establish a fresh inquiry, properly constituted under the appropriate act, into matters to do with the John Oxley Youth Centre. Similarly, it remains an unanswered question as to why the Queensland National government in 1996 did not accept the recommendation of the Morris-Howard report that a public inquiry be conducted to investigate matters of concern arising out of Mr Lindeberg's allegations. Such inquiries may have provided an avenue for the investigation of the abuses which have now come to light.

4.24 The Committee has identified from the submissions and documents received several systemic issues contributing to the occurrence of child abuse at the JOYC around the time of the Heiner inquiry. The Committee notes that these issues have been identified in previous inquiries along with recommendations for reform. In particular, the Commission of Inquiry into Abuse of Children in Queensland Institutions (Forde inquiry) made wide ranging recommendations for reforms in legislation, policy and practice to prevent institutional child abuse.[25] The Committee draws attention to the recommendations made by that inquiry, along with relevant national inquiries which have recommended measures to assist in reparation for past victims of child abuse.[26]

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24 Mr Barnes, *Correspondence*, 18 September 2004, p.2

25 Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions, May 1999

26 See Human Rights and Equal Opportunity Commission (HREOC), *Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, April 1997; Senate Community Affairs References Committee, *Lost Innocents: Righting the Record, Report on Child Migration*, August 200l; Senate Community Affairs References Committee, *Forgotten Australians, A report on Australians who experienced institutional of out-of-home care as children*, August 2004

(iii) for the appropriate protection of whistleblowers

4.25 As noted in Chapter 2, the Lindeberg Grievance has its origins in the treatment of a whistleblower, that is, of Mr Lindeberg who was dismissed by the QPOA. The grievance first came before the Senate in the form of a submission to the PIW Committee, and was later aired more thoroughly before the UWB Committee. Perhaps indicating the extent to which the nature and substance of the Lindeberg Grievance has shifted over time, this Committee received scant evidence relating to whistleblowing, and no recommendations for measures which should be taken for the protection of whistleblowers.

4.26 The sole submission received by the Committee relating to whistleblowing, from Mr McMahon, focussed on the specific experience of the submitter and its parallels with the Lindeberg case.[27] Mr McMahon's case was among those investigated by the UWB Committee. While it is beyond the terms of reference of this inquiry to again review Mr McMahon's case, from the evidence received two issues are broadly relevant to term of reference (b). These are: the need to effectively protect whistleblowers acting across jurisdictions, in this case a State public servant disclosing breaches of a Commonwealth law by other State public servants; and the importance to whistleblower cases of preservation and access to relevant documents.[28]

4.27 These two specific issues were also identified and considered by the UWB Committee. In relation to jurisdictional issues that committee was concerned to ensure there were no 'gaps' in the legislative protection afforded to whistleblowers.[29] In relation to the destruction of evidence, the UWB Committee noted its appreciation of the difficulties created for whistleblowers, but considered the solutions raised by witnesses, including reversing the onus of proof, or lowering the legal standard of proof, were inappropriate.[30]

4.28 The PIW Committee report made several recommendations for the protection of whistleblowers, including that:

> …the practice of whistleblowing should be the subject of Commonwealth legislation to facilitate the making of disclosures in the public interest and to ensure protection for those who choose so to do.[31]

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27 Mr McMahon, Submission no.6

28 Mr McMahon, Submission no.6

29 Report of the Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p.33

30 Report of the Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p.20

31 Report of the Senate Select Committee on Public Interest Whistleblowing, *In The Public Interest*, August 1994, p.xiv

4.29 While no Commonwealth whistleblowing legislation has been enacted, every state and the Australian Capital Territory has passed whistleblowing legislation.

4.30 Bills relating to the protection of whistleblowers in the Commonwealth jurisdiction have been introduced into the Senate on a number of occasions. In June 2001, Senator Murray introduced the *Public Interest Disclosure Bill 2001*. This Bill was referred to the Senate Finance and Public Administration Legislation Committee (F&PA Committee) which concluded as follows:

> … the Committee recommends that the Public Interest Disclosure Bill 2001 [2002] not proceed in its current form. Nevertheless, the Committee recognises the need for separate legislation addressing the matter of whistleblowing and supports the general intent of the Bill.[32]

4.31 In December 2002 Senator Murray introduced another bill, the *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002,* which he said sought to refine the 2001 bill by addressing the issues raised in the F&PA Committee's report.[33] In Senator Murray's view the new bill 'seeks to meet the pressing need to provide protection for those who speak out against corruption and impropriety'.[34]

Committee comments

4.32 It is apparent from the evidence received that that the treatment of whistleblowers is no longer a central concern of the Lindeberg Grievance and the limited material submitted gives rise to no new recommendations in relation to the protection of whistleblowers. As such, should the Senate wish to initiate reforms in this area, the recommendations of previous Senate committee inquiries, including the need for Commonwealth legislation, could be revisited.

Conclusion

4.33 The Committee reiterates that its second term of reference is contingent on the first – that is, the specific implications arising from the matter of contempt. Given this, and the nature of the submissions received, the Committee's investigation of the issues and reforms required in relation to term of reference (b) has inevitably been limited. Where possible, the Committee has identified specific implications arising from the Lindeberg Grievance. Should the Senate consider that the issues raised warrant further investigation, it could of course refer the matters in term of reference (b) to the relevant Senate standing committees for comprehensive inquiries.

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32 Senate Finance and Public Administration Legislation Committee, *Public Interest Disclosure Bill 2001 [2002]*, September 2002, p.1

33 Senator Andrew Murray, *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002: Second Reading Speech*, 11 December 2002.

34 Senator Andrew Murray, *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002: Second Reading Speech*, 11 December 2002.

Senator John Watson
Chair