

CHAPTER SEVEN

AN INDEPENDENT WHISTLEBLOWERS AGENCY?

7.1 Having determined that the practice of whistleblowing should be the subject of Commonwealth legislation to enable the making of such disclosures in the public interest, the Committee now focuses upon paragraph 2(c) of the terms of reference - whether a new agency should be created to receive and investigate disclosures and to investigate any discrimination suffered by whistleblowers as a result of those disclosures, or whether an existing Commonwealth agency should have that role.

7.2 The Committee received a diversity of views and opinions on this aspect, ranging from the creation of a new all powerful agency through to virtually no change in the role and responsibility of existing Commonwealth agencies.

Creation of a new agency

7.3 Senator Chamarette's Whistleblower Protection Bill proposes the establishment of a whistleblowers protection agency with powers to receive and investigate allegations of wrongdoing, to provide protection for whistleblowers, to investigate allegations of discrimination and harassment and to take or recommend the taking of corrective action. Comments on this bill and the proposed agency are considered in Chapter 12.

7.4 The functions and powers envisaged for such an agency in the Whistleblower Protection Bill can be seen as one end of the spectrum. The establishment of such a powerful new agency received support from some people in evidence.¹ It was even suggested that a new agency should be given powers to cross jurisdictions. For example, Len Wylde recommended that "a national whistleblowers protection body be set up to examine complaints made by or on behalf

1 e.g. Christina Schwerin, evidence p.429; Bill Toomer, evidence p.579; Greenpeace Australia, evidence p.1292.

of whistleblowers. It must be given sufficient authority to override State, local or financial influences in the public examination of complaints".²

7.5 However concerns were expressed over the creation of a large, powerful agency within the mainstream of bureaucracy. On one hand was a bureaucratic concern that the agency would duplicate certain functions and powers of existing organisations.³ On the other was that, even though such an agency would be established with good intentions, by existing within the bureaucracy it would ultimately become a part of and reflect the culture which whistleblowers distrusted.

7.6 Whistleblowers, although generally supportive of a new agency, were particularly sceptical in their comments by emphasising the need for independence. As the Queensland Whistleblower Study noted its respondents had an 'understandable disillusionment with all emanations of the state'. The problem for these people was to envisage how any new state-resourced organisation could avoid becoming what they perceived all other state-funded watchdogs had become - as corrupt as the systems they were intended to rectify.

7.7 The Queensland Whistleblower Study envisaged strong, independent whistleblower controlled organisations at the federal and each State level which could "enter into abrasive and sometimes conciliatory relationships with investigative authorities at the federal and state level to pursue systemic corruption".⁴ As noted in paragraph 6.57 QWS suggested that effective and incorruptible protection for whistleblowers would be best provided by an organisation based outside state apparatus, possibly without any legislative framework. The QWS responded to comments that such an organisation might be unable to act with authority and could

2 Len Wyde, evidence p.415. See also Dr Kim Sawyer who contends that a Federal Whistleblowing Agency is required, evidence p.634.

3 Merit Protection and Review Agency, evidence p.1225.

4 Dr William de Maria (QWS), evidence p.1065.

be marginalised, by suggesting that marginalisation would be preferable because in that situation whistleblowers retained their independence and freedom of action.⁵

7.8 Whistleblowers Australia indicated that whistleblowers would not avail themselves of procedures or organisations which have, in the past, had the power and resources to investigate discrimination, victimisation and harassment, yet failed to do so. 'The system' was too entrenched to be changed by legislation alone. Whistleblowers Australia believed:

An approach outside the existing system is necessary if the whistleblower is to be protected in a positive manner. A new body, aware of the present short comings, and independent of the current system's control, is essential. ... A separate independent agency, however, must not become a form of government control over dissent.⁶

7.9 Much of the argument against the creation of a new agency centred around resource/cost issues of duplicating functions of existing organisations. The Australian Conservation Foundation offered a further reason. It was wary that "a single purpose agency may be easily disbanded, and its important functions lost, in the different political climate of some future time".⁷

Stakeholder Councils

7.10 An alternative approach was suggested by Mr Shann Turnbull based upon the introduction of corporate senates and stakeholder councils for every significant public or private sector organisation. Corporate senates would overview and resolve potential conflicts of interests by management and directors of organisations in matters of fiduciary interest and private duty. Stakeholder councils would be composed of elected representatives of employees, customers and

5 ibid.

6 Whistleblowers Australia, evidence p.702.

7 Australian Conservation Foundation, evidence p.1289.

suppliers. As elected representatives, the councils would have power independent of the executive - be it the chief executive of a private corporation or a government minister. The councils would act like a performance auditor, advising ministers as well as chief executive officers and boards of directors. They would provide a watchdog role.⁸

7.11 The Australian Shareholders' Association supported this proposal, suggesting that "such a system would be easier to set up, be less bureaucratic, closer to the problem and as a consequence, provide a better chance to resolve the concern and protect the rights of both the whistleblower and the subject of the whistleblowing".⁹

Use of existing agencies

7.12 Moving to the other end of the spectrum is the suggestion that a type of hybrid whistleblower protection agency could be created within or attached to an existing agency. For example, a whistleblower ombudsman operating from within the Commonwealth Ombudsman's Office. The Privacy Commissioner proposed that rather than creating a separate agency, it might be possible to require the Commonwealth Ombudsman, or any other agency that receives a whistleblowing complaint, to so designate the complaint. Complaints designated as whistleblowing complaints could then be kept within a separate unit or stream, subject to the control of a separate officer. An external person could have a monitoring role.¹⁰

7.13 Proposals such as this are closely linked with the powers of existing agencies in handling whistleblowers complaints and the possibility of enhancing these powers.

8 Shann Turnbull and James Guthrie, evidence pp.983-987. Mr Turnbull details institutionalising whistleblowers through stakeholder councils in his submission and supporting documents, evidence pp.911-976.

9 Australian Shareholders' Association, evidence pp.457-8.

10 Privacy Commissioner, evidence p.841.

7.14 It was noted in Chapter 4 that the Gibbs Committee and a number of parliamentary committees recommended or suggested greater powers for existing organisations to deal with whistleblowing. The State legislation proposals referred to in that chapter also place responsibility for the receipt and investigation of whistleblowers reports, together with their protection, in the hands of existing organisations.

7.15 The view that existing organisations, rather than the creation of a new agency, should deal with whistleblowing was also expressed by a number of witnesses.¹¹ In particular, the roles of the Commonwealth Ombudsman and the Merit Protection and Review Agency (MPRA) were canvassed. In virtually all cases this view was qualified by the comment that additional or enhanced powers and responsibilities would be required to ensure that protection and investigation of whistleblowers and their complaints were satisfactorily addressed. In considering this issue, one witness emphasised that:

the overriding determining factor when choosing between establishing a new agency or utilising the infrastructure of an existing agency is that whistleblowers must have complete confidence in whom they are dealing with and in the integrity, honesty and compassion of the personnel who should have appropriate training, skills and experience to enable them to carry out their duties professionally and without favour or bias.¹²

7.16 A common reason given by whistleblowers when discussing their loss of faith in 'the system', related to the lack of action taken over their case by existing organisations on jurisdictional grounds. Regularly they would be told by an organisation that it could not provide assistance because dealing with the particular complaint was not within their power. Some whistleblowers suspected that organisations would interpret their statutory responsibilities narrowly so as not to have to deal with the 'problem' whistleblower.

11 Attorney-General's Department, evidence pp.124, 131; Department of Defence, evidence p.1340; National Crime Authority, evidence p.438; Privacy Commissioner, evidence pp.835, 838; Australian Federal Police, evidence p.84.

12 Alwyn Johnson, evidence pp.533-534.

7.17 In referring to this jurisdictional problem, the Queensland Whistleblower Study indicated that a number of investigative agencies are "jurisdictionally strangled" and that "whistleblowers are perpetually falling through the gaps in those jurisdictions".¹³

7.18 The Commonwealth Ombudsman and the MPRA have identified shortcomings in their statutory powers when dealing with whistleblower complaints.

7.19 The Commonwealth Ombudsman currently receives and investigates whistleblower complaints although in some circumstances it would be desirable if certain complaints could be referred to another agency for investigation. In some cases it is difficult to distinguish an employment issue from discrimination or retribution which may have arisen from the action of whistleblowing. This limits the action which the Ombudsman can take on the case.

7.20 The Ombudsman has suggested that the situation would be improved by enhancing the referral arrangements available to the Ombudsman so that the specialist agency, eg the MPRA or Equal Opportunity Commissioner, can be fully briefed and advised as to the result of the Ombudsman's investigation and the significance of the case. There is also a need to enhance the protection provisions to ensure that the referral to another agency remains fully protected.¹⁴

7.21 The MPRA referred to the situation where a whistleblower, who is a Commonwealth employee, claims to have been discriminated against in their employment as a result of their whistleblowing disclosures and lodges an appeal or grievance with the MPRA. The MPRA can only make a recommendation to the relevant organisation. This was regarded as clearly insufficient in the case of proven discrimination against a whistleblower by that organisation.

13 Dr William de Maria and Tony Keyes (QWS), evidence p.1038, 1049. Wider jurisdictional issues involving Commonwealth v State and public v private sector legislative coverage are considered in Chapter 8.

14 Commonwealth Ombudsman, evidence p.45.

7.22 In addition, if a Commonwealth employee leaves Commonwealth employment for any reason, he or she loses the right to lodge a grievance with the MPRA. This prevents whistleblowers who allege that they were either forced, or otherwise unduly influenced, into resigning from having an avenue for redress.

7.23 In these circumstances the MPRA submitted that

- (a) for the purpose of being able to lodge an appeal or grievance under the *Public Service Act 1922* and regulations made under that Act, a person who ceases to be a Commonwealth employee should be deemed to continue to be a Commonwealth employee - for a period of, say, 6 months - in relation to actions that were taken in relation to the person's employment as a Commonwealth employee; and
- (b) in relation to actions that were taken in relation to the employment of a Commonwealth employee who had been, or proposed to be, a whistleblower in the terms of any proposed whistleblower protection legislation, the MPRA (or a tripartite review committee established by the MPRA) should have the power to make a determination that would be binding on the agency concerned - in cases of unfair dismissal and similar, this should include the power to re-instate the employee concerned.¹⁵

Considerations in formulating a recommendation

7.24 After deliberating upon the form that legislation should take and whether a new agency should be created, the Committee based its decision on three major considerations.

7.25 Firstly, it was anticipated that once educational campaigns directed towards bringing about attitudinal and cultural change begin to take effect, the response to reports of wrongdoing should become much more positive. In the long term, this would significantly reduce the need for whistleblowing. However, it was

15 Merit Protection and Review Agency, evidence, p.1228.

recognised that such change would not occur overnight and that action needs to be taken on the situation regarding whistleblowing as it currently exists.

7.26 Secondly, there was concern at the need for independence to be very visible in any agency which has, or would have, responsibility for acting upon whistleblowers reports. It was crucial that any agency gained the trust and confidence of whistleblowers.

7.27 Thirdly, there was an acknowledgment that there already existed procedures and organisations which are involved in responding to whistleblowers and offering protection. It was accepted that many of these procedures and organisations were not operating to the satisfaction of whistleblowers. In recognising this point the Committee nevertheless accepted that it was not feasible to make recommendations which would duplicate the roles and responsibilities of existing organisations. Rather, these existing procedures and organisations should be made to operate in the manner intended and to the satisfaction of all parties involved. The Committee was also cognisant of the recommendations and suggestions made in previous parliamentary reports.

Model for receiving whistleblowers' reports

7.28 In balancing these considerations with the evidence presented to it, the Committee has formulated the following model for receiving whistleblowers' reports.

7.29 The Committee is in general agreement with the three level reporting procedure supported by Professor Finn and the Gibbs, Elliott and Finance and Public Administration Committees. However, the Committee has expanded aspects of these procedures which it sees operating together so as to provide reporting options, rather than a sequential process. The Committee considers that internal reporting procedures within organisations are the cornerstone to whistleblowing. If they are operating effectively and people have confidence in using them, many reports of

wrongdoing could be resolved at this level. Internal reporting procedures are discussed further in paragraphs 9.25 - 9.31.

7.30 The second tier to the Committee's model is the establishment by legislation of a small but powerful independent agency to be known as the Public Interest Disclosures Agency (the Agency). The role of the Agency would be to receive and register public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures, to provide a national education program and to make and oversee the implementation of recommendations relating to its role.

7.31 It is anticipated that the disclosures to the Agency would usually be by people who for whatever reason felt unable to raise their complaint with the internal reporting procedures of their organisation or who were dissatisfied with the procedures or results of an internal investigation.

7.32 Reporting through the media would remain a third option in specific cases, although the Committee believes that with the developments recommended for reporting and investigating complaints of wrongdoing and the protection of the whistleblower, recourse to the media should be considerably reduced. Whistleblowing to the media is discussed further in Chapter 9.

Public Interest Disclosures Agency and Board

7.33 The Committee decided to name the Agency 'Public Interest Disclosures' in preference to 'Whistleblowers Protection' primarily to emphasise the positive benefits from the action of whistleblowing, rather than focussing upon the negative reaction to the person who undertook the action. This does not diminish the fact that protection of the whistleblower is an integral part of the Committee's scheme.

7.34 The Committee proposes that the investigation of whistleblower complaints and protection from harassment and victimisation should be primarily

undertaken by existing organisations, but with oversight by the Agency. The Committee considers that this proposal should operate in conjunction with the strengthening through legislative means of the powers and responsibilities of these organisations especially the Ombudsman and the Merit Protection and Review Agency. These organisations should provide reports back to the Agency on the result of all investigations and the action taken. The Agency should provide an avenue of appeal if the whistleblower is dissatisfied with the report, leading to special reports to Parliament, if necessary.

7.35 The Committee recognises, however, that in some circumstances these investigations may be impractical, be progressing unsatisfactorily or have been inappropriately dealt with, in which case the Agency should have the power to conduct its own inquiry or resume the existing inquiry by using relevant experts on short-term contracts.

7.36 The Committee is concerned to ensure that the Agency remain small and essentially non-bureaucratic by not becoming a burgeoning part of the bureaucracy. It is equally important that the Agency gains the trust of whistleblowers in the performance of its functions. For these reasons the Agency needs to be a step removed from existing organisations and have as its major focus the provision of a central point of assistance and protection for whistleblowers and to monitor and oversight various investigations. This point is emphasised by recommending strong accountability mechanisms for the Agency including reporting, record keeping and client satisfaction surveys.

7.37 The functions of the Agency are discussed in detail in ensuing chapters. They include:

To act as a clearing house for complaints and allegations so as to identify those matters which properly come within the category of public interest disclosures. (see para 9.38)

- . To advise and assist in respect of those matters which are not identified as public interest disclosures and to make formal referrals to the appropriate authority. (see para 9.39)
- . To receive, register and oversee the investigation of public interest disclosures or alleged wrongdoing. (see para 7.30)
- . To receive reports on the result of investigations and action taken and to provide an avenue of appeal if the whistleblower is dissatisfied with the report. (see paras 7.34 and 7.46)
- . To oversee the investigation of complaints of harassment, ill-treatment or victimisation of whistleblowers. (see para 9.59)
- . To have an appeal role over actions taken as a result of the investigation of such complaints. This role should involve a mediation process.(see para 11.6).
- . To ensure that whistleblowers and those who are the subjects of whistleblowing have access to a confidential counselling service. (see 9.99)
- . To devise and implement a national education program, in liaison with other organisations concerned with workplace ethics and to assist and co-ordinate education programs devised by individual organisations. (see paras 6.35, 6.50 and 9.77)
- . To monitor client satisfaction and the success of education programs.
- . To undertake ongoing monitoring, evaluation and comparison of the different approaches to whistleblower protection and future developments within comparable international legislatures. (see para 3.34)

7.38 The Committee believes that a level of independent control should be provided to act as a safeguard over the activities of the Agency. Accordingly, it proposes that a Public Interest Disclosures Board should be created whose role would be to provide direction to and control over the Agency in the performance of its functions. The independence of the Board would be emphasised through a membership balance between Parliamentary, public service and community-based representatives.

7.39 The Committee acknowledges that for whistleblowing legislation to be effective and its benefits realised, both potential whistleblowers and employer organisations must have confidence in the legislation and accept it as credible and workable. As an adjunct to this objective, the Committee has endeavoured to propose the most appropriate and cost effective means to achieve greater accountability and responsiveness from government processes. Creation of a separate Agency through whistleblower legislation will have a twofold benefit. In the most tangible way it demonstrates a commitment to recognising the legitimacy of whistleblowing and in practical terms provides an 'open' system which facilitates the reform process by highlighting maladministration and exposing corruption.

Parliamentary involvement in whistleblower protection

7.40 A number of proposals were made relating to parliamentary involvement with whistleblower protection. Senator Chamarette's Whistleblowers Protection Bill 1993 proposes the establishment of a Parliamentary Joint Committee. The main duties of the Joint Committee would be to inquire into and report on activities of the proposed Whistleblowers Protection Agency and any matters drawn to the Joint Committee's attention by the head of the Agency or referred by Parliament, and to examine and report on any matters arising out of the special reports or annual report prepared by the Agency and tabled in Parliament.¹⁶

7.41 Professor Finn also suggested that the third-tier of his reporting model 'going-public' should include making a report to a parliamentary committee of any matter which could have been reported either 'in-house' or to an independent agency under the Finn proposals, where that parliamentary committee has undertaken an inquiry into a matter in relation to which that report would be a relevant consideration.¹⁷

16 Whistleblowers Protection Bill 1993 (Commonwealth) clauses 40-42.

17 Finn Report, op. cit., pp.7, 60-61.

7.42 A number of witnesses expressed their confidence in the capacity of parliament to independently examine and assess issues and scrutinise government operations. They therefore suggested that Parliament should have a role in the protection of whistleblowers and the investigation of disclosures.¹⁸ The Health Insurance Commission suggested that "there was much to be said for disclosures being made to a Parliamentary Commissioner so that any investigations of disclosures and the protection of any witnesses might properly fall within the ambit of Parliamentary privilege."¹⁹

7.43 The Committee has considered this matter and believes that the most appropriate form of parliamentary involvement should be as follows - House of Representatives and Senate membership of the Public Interest Disclosures Board and the enabling of the Public Interest Disclosures Agency to provide annual and special reports to the Parliament.

7.44 The F&PA Committee noted in its report on the Department of Foreign Affairs and Trade that:

a parliamentary inquiry into a whistleblowing episode can easily elevate the status and significance of the episode above any level that could be justified on its merits. Parliamentary committees, in any case, have no power to rectify any malpractice they might find. To the extent that parliamentary involvement would be desirable in a whistleblowing episode, it would best take the form of a committee review of a report on the episode by an independent body.²⁰

7.45 In relation to the reporting to Parliament, the Committee is aware that some organisations, for example the Ombudsman and MPRA, must submit annual

18 e.g. Keith Potter, evidence p.575; Dr Kim Sawyer, evidence p.635.

19 Health Insurance Commission, evidence p.1269.

20 F&PA DFAT Report, op. cit., p.56.

reports and may make special reports to the Prime Minister or the Parliament,²¹ although there is no obligation that these reports will be acted upon.

7.46 The Committee considers that the Public Interest Disclosures Agency should be given similar powers to make special reports to Parliament on any matters relating to its functions and operations which the Agency considers need Parliamentary support or action. However the Committee believes that this power should be strengthened by a requirement that action must be taken over these reports.

7.47 The Committee recommends that:

Public Interest Disclosures Agency -

- . **Legislation be enacted to establish an independent agency, to be known as the Public Interest Disclosures Agency (the Agency).**
- . **The role of the Agency should be to receive public interest disclosures and arrange for their investigation by an appropriate authority, to ensure the protection of people making such disclosures, to provide a national education program and to make and oversee the implementation of recommendations relating to its role.**
- . **The Agency should consist of an administrative unit with the capacity to contract relevant experts as required, and an education unit.**
- . **The Agency should have the following accountability mechanisms:**
 - a. **Report annually to Parliament;**

21 Ombudsman Act 1976, sections 16-19 and Merit Protection (Australian Government Employees) Act 1984, sections 52 and 53.

- b. Present special reports to Parliament on any matters relating to its functions and operations which the Agency considers need Parliamentary support or action;
- c. Maintain files, statistics and records of cases;
- d. Provide evidence of client satisfaction through surveys, the results of which will form part of the annual report.

Public Interest Disclosures Board -

- . A Public Interest Disclosures Board should be created whose role would be to provide direction to and control over the Agency in the performance of its functions.
- . The Board should be supported by a small secretariat from within the Agency.
- . Appointments to the Board should aim at achieving gender equality and include nominees from the following organisations: Human Rights and Equal Opportunity Commission, Privacy Commission, Commonwealth Ombudsman's Office, Merit Protection and Review Agency, a recognised whistleblower support group, a Public Interest Advocacy Centre, an Ethics group, a Trade Union, and other national community organisations.
- . Parliamentary involvement should be included by the appointment of a Senator and Member of the House of Representatives. The Member should be a government nominee and the Senator a non-government nominee or alternatively the Parliamentary members should include a government and non-government nominee.

Members of the Board should be appointed for a period of three years, with eligibility for reappointment to a second term only.