

Disclosures to third parties

Introduction

- 8.1 The Committee was asked to consider whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted. The term third party refers to an entity outside both the organisation and authorised external integrity agencies that does not have a direct concern with the subject of a disclosure and is unable to effect action in response to a disclosure.
- 8.2 Examples of third parties include the media, Members of Parliament, unions, professional associations and privately engaged legal advisors. Disclosures to third parties are generally not provided for in most public interest disclosure legislation in other jurisdictions. It is more common for legislation to remain silent on the issue, so that the focus on handling disclosures remains within government.
- 8.3 The appropriateness of protecting public interest disclosures made directly to the media was one of the more contentious aspects of the inquiry. Disclosures to the media can cut across some of the key principles driving public interest disclosure legislation such as confidentiality, procedural fairness and the value of internal disclosures. Many of the arguments concerning the treatment of disclosures to the media apply to disclosures to other third parties.

- 8.4 The Committee received a large amount of evidence in relation to disclosures to the media, Members of Parliament and unions. This chapter covers each of those in turn.

Disclosures to the media

Current legal framework

- 8.5 Section 70 of the *Crimes Act 1914*, and Public Service Regulation 2.1 prohibit the making of unauthorised disclosures by public servants to any third party, including the media. As noted in Chapter 1, common law protections available to whistleblowers who disclose to the media are not reliable.
- 8.6 Research findings of the WWTW project indicates that whistleblowing directly to the media is a very rare course of action amounting to less than one per cent of recorded disclosures.¹
- 8.7 The Australian Federal Police indicated that, in the three years to June 2008, there were 45 referrals made in relation to the unauthorised disclosure of information, predominantly to the media. Of those, 30 were investigated and four were referred to the Commonwealth Director of Public Prosecutions.² In terms of the outcome of those for cases:
- One of those is subject to appeal at the moment and has been reported on in the media just recently, one received a \$1,000 recognisance for good behaviour for three years, in another the defendant was convicted and fined \$750 and ordered to pay court costs of \$70 and in the final one the DPP advised there was insufficient evidence to proceed.³
- 8.8 These figures do not include other action that may have been taken in relation to unauthorised disclosures apart from referral to the AFP, for example disciplinary action, however the data appear to suggest that the measures available under the *Crimes Act 1914* are used sparingly.

1 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand, School of Government, p. 91.

2 Deputy Commissioner Negus, *Transcript of Evidence*, 23 October 2008, p. 12.

3 Deputy Commissioner Negus, *Transcript of Evidence*, 23 October 2008, p. 13.

8.9 Prosecutions for unauthorised disclosures to the media inevitably become high profile matters. There is a perception that action against those who disclose to the media without authorisation is designed to send a broader message to the public sector. As one former journalist told the Committee:

I believe calling in the police is designed more to intimidate and spook public servants who may have public interest in their mind. It is designed to intimidate them from leaking something they might have been intending to leak. That seems to me to be the objective, rather than actually finding the leaker. There is always a burst of publicity when the police become involved.⁴

8.10 It is not an offence for journalists to publish material received in breach of the general provision against disclosure in s. 70 of the *Crimes Act 1914*. However, it is a serious offence for journalists to possess documents or publicise material from documents covered under the official secrets provision of s. 79 of the *Crimes Act 1914*.⁵

8.11 The Standing Committee of Attorneys-General is currently considering changes to journalists' 'shield laws' to strengthen the power of the media to withhold the identity of their sources.⁶ This could potentially encourage whistleblowers to approach the media. However, strengthening the protection of journalists' sources would not prevent the investigation and potential prosecution of persons responsible for unauthorised disclosures.

8.12 The rate of disclosure to the media may reflect current legislative provisions that do not authorise disclosures to third parties and the effect of a number of high profile prosecutions for unauthorised disclosure to the media.⁷ This suggests that if legislation enabled or protected disclosures to the media, the rate of such disclosures could increase.

8.13 The rate of disclosure to the media can be seen as a measure of the level of confidence that whistleblowers have in the current ability of the system to appropriately address wrongdoing.⁸ As Mr Peter Bennett told the Committee:

... people go directly to the media [where] they have no faith in the existing system. They simply say, 'I don't trust them. The system doesn't work. There is no sense in going there. I'm going to get

4 Mr Thomas, *Transcript of Evidence*, 28 October 2008, p. 13.

5 Deputy Commissioner Negus, *Transcript of Evidence*, 23 October 2008, p. 19.

6 Standing Committee of Attorneys General 7 November 2008, *Communiqué*.

7 See, for example, case studies on Mr Allan Kessing and Mr Desmond Kelly.

8 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 64.

done like a turkey if I do that. The only option I've got is the media.'⁹

- 8.14 This suggests that the establishment of a comprehensive public interest disclosure system that achieves recognition and strong support in the public sector would reduce the incentive for people to disclose to the media.

The role of the media

- 8.15 The media plays a key role as the 'fourth estate' in the democratic process by scrutinising the actions of government, exposing official wrongdoing and bringing matters of public interest to the attention of the public. In fulfilling that role, the media rightly considers whistleblowers as a valuable source of information.
- 8.16 Mr Anthony Maniaty, Director for the Australian Centre for Independent Journalism, told the Committee of the value of whistleblowers to the media:
- ... in general and in principle, we can never have too many public servants willing to tell us in the media about wrongdoings that involve the use of taxpayers' money or the abuse of public trust. As journalists, we welcome strong leads, and we take it from there.¹⁰
- 8.17 Mr Paul Chadwick, Victoria's first Privacy Commissioner and now Director of Editorial Policies at the Australian Broadcasting Corporation, argued that whistleblowing plays an important role as a kind of 'safety valve' in democratic societies. The media, he argued, possess the appropriate resources and skills to assess the impact of a disclosure on the public interest and can take that into account in determining the timing and manner of a publication.¹¹
- 8.18 Similarly, the Committee was told of the role of the media in fulfilling the public's right to know about corruption, maladministration and other forms of wrongdoing in the public service or government. In performing this service, the media is said to act responsibly by applying a filtering mechanism to ensure the quality, rigour and appropriateness of the material that is published. As Mr Peter Bartlett, an eminent Australian lawyer who has represented media interests for many years, explained:

9 Mr Bennett, *Transcript of Evidence*, 9 September 2008, p. 35.

10 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 51.

11 Mr Chadwick, *Transcript of Evidence*, 9 September 2008, p. 40.

There are whole different levels of that review. The first is the journalist. The journalist gets the call. The journalist talks to the source. The journalist looks at any documents produced by the source. If the journalist takes the view that it has no credibility or little credibility, it stops there and the story would not go any further. If the journalist takes the view that it is a story that should be published, the journalist would further research that story and produce an article. That is then looked at by editorial staff. If it is a big story, it is looked at by the editor. It then goes through the lawyers. At any one of those stages, it is reviewed and reviewed and reviewed. It would only get into the paper if it passes all of the tests and if people do not see a flaw in it.¹²

8.19 The prospect of a disclosure to the media can be an incentive for investigative bodies to efficiently manage their own procedures and report back to a whistleblower.¹³

8.20 Associate Professor David McKnight of the Media Research Centre at the University of New South Wales drew the Committee's attention to the apparent inconsistency in the treatment of public servants who leak information to the media compared to Ministers who leak:

... ministers leak, and will continue to leak, confidential material to journalists, but when a similar action is taken by a junior public servant it can result in the loss of their job, of their peace of mind and their income.¹⁴

8.21 It was suggested to the Committee that the conditions under which it is appropriate to make a disclosure to the media should be no more onerous than the conditions for attracting protections for internal disclosures or disclosures to a prescribed external integrity agency. Ms Chapman of News Limited argued that whistleblowers themselves are in the best position to determine to whom they should disclose and that their choice of recipient should not affect their protection:

As soon as the public interest test is defined, the key should then be that the matter is addressed and that it is solved. If the whistleblower feels that the best way to do it is to go internally or if they believe the best way to do it is to go externally, that is the

12 Mr Bartlett, *Transcript of Evidence*, 21 August 2008, p. 23.

13 Ms Hambly, *Transcript of Evidence*, 9 September 2008, p. 36.

14 Associate Professor McKnight, *Transcript of Evidence*, 27 October 2008, p. 52.

decision that they should take because it is probably in their best interests to know how that issue should be dealt with.¹⁵

- 8.22 If the Commonwealth does not legislate on disclosures to the media, it may be overtaken by technological advances enabling the anonymous disclosure of official information on the internet on sites such as Wikileaks. The Wikileaks website contains measures to protect the identities of its contributors and does not include any Australian filtering mechanism.¹⁶

Case study Third party disclosures: Ms Toni Hoffman AM

Background

In 2003 Ms Toni Hoffman was in charge of the Intensive Care Unit at Bundaberg Base Hospital. Ms Hoffman recalls having a degree of concern about complex surgery being done in a provincial hospital like Bundaberg because, in her view, it could lead to inadequate or unsafe health care. When she raised the matter she was told that the operations would continue. Subsequently, she identified risk factors that she believed led to complications after surgery and she spent the next two years trying to have her allegations examined. She raised her concerns with the Director of Medical Services and the district manager and other staff at Bundaberg.

After raising her concerns internally, Ms Hoffman had further discussions with her union and the district manager for Queensland Health. The response of Queensland Health was to pass the matter between various officials and it appears that no formal steps were taken towards an independent review until December 2004. Even then, the Chief Health Officer thought it 'too early and inappropriate to raise any particular concerns'.¹⁷ When he visited the hospital in February 2005, the Chief Health Officer did not seek to gain evidence on particular allegations but, rather, 'sought to "collect [the] personal impressions of issues of concern" to those who chose to meet with him'.¹⁸ Ms Hoffman felt that her allegations were being ignored and visited the office of Mr Rob Messenger MP in March 2005 and provided him with a copy of the formal allegations she had made within Queensland Health. Mr Messenger then tabled Ms Hoffman's document in the Queensland Legislative Assembly.¹⁹ At that time Queensland had a public interest disclosure law but it did not provide protection for this form of disclosure and Toni Hoffman was vulnerable to civil action for defamation and administrative censure for breach of the Code of Conduct.

Discussion

Among the important issues from this case are: the need for managers to be sensitive to the fact that a disclosure has been made, whether or not a formal procedure was followed; that there must be positive obligations on managers to act once a disclosure is made; and there is a need for protection to be retained when a person has acted in the public interest. The study also shows that, despite the existence of a disclosure system, there can be occasions where management fails to meet its obligations. Toni Hoffman considered it necessary to go to her union and to a Member of Parliament, both outside her organisation and outside of the prescribed disclosure system. Doing this came at personal risk. But, in doing so, her allegations were aired and led to a public inquiry.²⁰

15 Ms Chapman, *Transcript of Evidence*, 27 October 2008, 61.

16 Dr Harris Rimmer, *Transcript of Evidence*, 16 October 2008, p. 10.

17 Queensland Public Hospital Commission of Inquiry exhibit 225, GF12.

18 Queensland Public Hospital Commission of Inquiry report, p. 158.

19 Queensland Public Hospital Commission of Inquiry report, p. 162.

20 The allegations of Ms Hoffman were considered in the Queensland Public Hospital Commission of Inquiry but had not been, at the time of tabling this report, considered in any court proceedings.

Risks associated with unconditional disclosure to the media

8.23 A number of contributors to the inquiry argued that disclosures made to the media should not be protected in a new public interest disclosure system. Whistleblowers who disclose to the media may not have full information on the alleged misconduct, may not be aware of the potential ramifications of the disclosure, and could potentially put at risk other important aspects of the public interest such as procedural fairness in investigations.

8.24 The Attorney-General's Department submitted to the Committee that:

The difficulty with disclosing to a third party is that the whistleblower may not be aware of all the facts and circumstances, and the third party is less likely to be in a position to ascertain the entire picture compared to a person or office that has the powers to investigate whistleblower's allegations.²¹

8.25 The 2006 review of the Queensland *Whistleblowers Protection Act 1994* noted that the media has quite a different role in handling the disclosures made to it:

The media, although an integral component of the democratic process, is clearly separate from the processes of government. The commentary provided by the media on the activities of government can be influential, but it is important to distinguish this role from that of the careful collection and consideration of evidence on which governments can properly be held accountable.²²

8.26 The media may be motivated by the self interest of boosting ratings or circulation rather than the interests of the wider public or those involved with an allegation. Professor Ken McKinnon of the Australian Press Council offered a somewhat less idealised view of how the media determines what is fit for publication, arguing that sales and the threat of defamation action are primary considerations:

[A story] would not be included unless it was something that the editor thought would reach the public in some way and be interesting enough to make them want to keep buying the paper.

21 Attorney-General's Department, *Submission no. 14*, p. 4.

22 Office of the Public Service Commissioner Queensland 2006, *Review of the Whistleblowers Protection Act 1994*, p. 17.

Finally, what stops editors from publishing some things are defamation laws.²³

8.27 Another view put to the Committee was that by maintaining the focus on internal processes and improving internal procedures, the need for taking matters to the media would be minimised. As a Community and Public Sector Union witness told the Committee:

... we do not think the front pages of the tabloids of this country should be the first port of call if a public sector employee or a person performing public sector work is apprised of an instance of maladministration or corruption or illegal activity in the course of their employment. We think it is in the public interest that there should be a regime for providing internal mechanisms within the Public Service ...²⁴

8.28 The NSW Deputy Commissioner Against Corruption told the Committee that a person, having made a disclosure, sometimes wants to know how an enquiry is progressing but, because the matter is still under investigation, nothing can be disclosed. In these circumstances, people may feel compelled to go to their local Member of Parliament or to the media and may actually end up damaging any outcome that might have been achieved.²⁵

8.29 While the media has capacity to mitigate some of those risks through the 'filtering' process described by some witnesses, it should not be assumed that the filter is consistently applied. A number of witnesses noted the very broad range of activities that could be included in 'the media' from established broadsheet newspapers to the publication of web logs or 'blogs', by private individuals.

8.30 Even within the print media, standards of publication can vary and whistleblowers essentially have no control over how their information is treated once it is provided. Whistleblowers need to exercise caution in deciding which journalist to approach, as one former journalist explained:

I would be very concerned to identify the right messenger for the story. It takes diligence and dedication and precision for a story that does turn on people's lives to be properly conveyed so that people are not overly alarmed, but at the same time appreciate that this is a real problem that needs to be addressed.

23 Professor McKinnon, *Transcript of Evidence*, 27 October 2008, pp. 55, 56.

24 Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 2.

25 Ms Hamilton, *Transcript of Evidence*, 27 October 2008, p 81.

[Whistleblowers] need to be assured that that journalist has a track record for accuracy, and then the onus is on the journalist to actually make sure that the story is not beaten up, overcooked and thus loses its impact because people can see through it or you can pick holes in it from the beginning.²⁶

8.31 The consequences of disclosures to third parties relating to security, intelligence, defence and policing could be much more serious than disclosures on other types of matters such as fraud concerning grants for social services. The Inspector-General of Intelligence and Security argued strongly against protecting disclosures to the media where security and intelligence information is involved.²⁷

8.32 The Attorney-General's Department told the Committee:

... the whistleblower and the third party may not necessarily appreciate the potential damage disclosure could cause to national security, defence or inter-governmental and international relations and therefore may not give the information the protection required.²⁸

8.33 All existing state and territory public interest disclosure legislation, with the exception of New South Wales, is silent on disclosures to the media. Under those Acts, the media are not authorised as formal recipients of disclosures and, therefore, protections would not be afforded to people who disclose to the media. Indeed, if public servants did report directly to the media, they would be acting outside the relevant Act and may be liable for prosecution.

8.34 However, the occurrence of disclosures to the conventional media and the gradual impact of other forums such as Wikileaks, and the inevitability that there will be dissatisfaction with the result of some disclosures, suggests that, to some extent, disclosures to the media may be inevitable. As Dr Brown told the Committee:

We live in the world where the question of public exposure has to be managed rather than there being any option of saying that these things will not get into the public domain. It is a question of whether they get into the public domain in a reasonable way and whether they are properly managed in that relatively limited set of

26 Mr Thomas, *Transcript of Evidence*, 28 October 2008, p. 15 & 16.

27 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 3.

28 Attorney-General's Department, *Submission no. 14*, p. 4.

circumstances where matters are of a nature or the circumstances are such that they are more likely to get into the public domain.²⁹

Possible qualifications for protecting disclosures to the media

- 8.35 Ideally, disclosures to the media would not be necessary with the establishment of a well designed public interest disclosure system that provides ample opportunity to make disclosures internally or to an external integrity agency.
- 8.36 There may be exceptional circumstances in which authorised avenues for disclosure are unsatisfactory or too slow in providing an outcome.³⁰ Some contributors to the inquiry considered that disclosures to the media may be appropriate where there are exceptional circumstances as a last resort, where all other mechanisms for raising the matter within the government have been exhausted, and where the matter disclosed serves the public interest.³¹
- 8.37 There are a variety of ways to protect only the most serious disclosures to the media by applying conditions under which protection is appropriate. Such conditions could include:
- a) the person has reported through specified internal channels first;
 - b) the person has reported to a specified external oversight or integrity body;
 - c) the matter has not been resolved over a specified period of time;
 - d) the result of internal or authorised external investigation has been inadequate and that the person has a reasonable belief that the matter needed to be escalated to the media (subjective test);

29 Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 18.

30 For a carefully documented example of unnecessary delay in investigation following disclosure, see the judgment of Justice Gray in *Henry v British Broadcasting Corporation* [2006] EWHC 386 (QB), a successfully defended defamation action arising from disclosure of falsified hospital waiting list data: <http://www.bailii.org/ew/cases/EWHC/QB/2006/386.rtf> (accessed 19 February 2009).

31 Commonwealth Ombudsman, *Submission no. 31*, p. 11; Mr Podger, *Submission no. 55*, p. 6; Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 10; Mr Needham, *Transcript of Evidence*, 9 September 2008, p. 38.

- e) the result of internal or authorised external investigation has been inadequate and there is a genuine public interest in disclosing the matter (objective test);
- f) the substance of the disclosure is of a nature that it would not be appropriately or adequately resolved through internal or external authorised processes;
- g) the substance of the disclosure is a serious immediate risk to public health and safety; and
- h) The category of the information (for example, information concerning national security and intelligence could be exempt from disclosure).

8.38 In its submission to the Committee, the Australian Press Council outlined the circumstances in which it considered that disclosures made to the media should be protected:

- Where [whistleblowers] honestly believe, on reasonable grounds, that to make the disclosure along internal channels would be futile or could result in victimisation, OR
- Where they honestly believe, on reasonable grounds, that the disclosure is of such a serious nature that it should be brought to the immediate attention of the public, OR
- Where they honestly believe, on reasonable grounds, that there is a risk to health or safety,
- Where internal disclosure has failed to result in prompt investigation and corrective action.³²

8.39 Australia's Right to Know, a coalition of 12 major media organisations, suggested disclosures to the media should be protected where:

- (a) the employee honestly believes, on reasonable grounds, that it is in the public interest that the material be disclosed; and
- (b) the employee honestly believes, on reasonable grounds that the material is substantially true; and
- (c) the employee honestly believes on reasonable grounds either that:
 - i. to make the disclosure through internal channels is likely to be futile or result in the whistleblower [or any other person] being victimised; or

32 Australian Press Council, *Submission no. 21*, pp. 4-5 (emphasis in the original).

ii. the disclosure is of such a serious nature that it should be brought to the immediate attention of the public.³³

8.40 New South Wales is the only Australian jurisdiction to provide for disclosures to the media. Section 19 of the *Protected Disclosures Act 1994* provides the following conditions for making a protected disclosure to a journalist:

(1) A disclosure by a public official to a Member of Parliament, or to a journalist, is protected by this Act if the following subsections apply.

(2) The public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of this Part.

(3) The investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred:

- (a) must have decided not to investigate the matter, or
- (b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or
- (c) must have investigated the matter but not recommended the taking of any action in respect of the matter, or
- (d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.

(4) The public official must have reasonable grounds for believing that the disclosure is substantially true.

(5) The disclosure must be substantially true.

8.41 The NSW provisions contain elements of procedure (that it must already have been referred to an approved authority for investigation), time (where the authority had failed to notify the person after 6 months), and subjective and objective tests of truth.

33 Australia's Right to Know, *Submission no. 34*, p. 4.

- 8.42 Dr Brown criticised the NSW approach, arguing that the ‘substantially true’ requirement sets an excessively high threshold, that it is not clear who the arbiter to the test would be, and a court or tribunal, where whistleblowers would be defending themselves, is not an appropriate forum to investigate the substance of the claim.³⁴
- 8.43 In reviewing state and territory whistleblower legislation, Dr Brown suggested the following checklist to determine when disclosures to the media are reasonable:

1. Disclosures to parliamentarians or the media should only be protected if the official first made the disclosure internally to the agency, and/or to an appropriate independent agency – unless neither of these courses is reasonably open to the official. Circumstances in which official channels are not reasonably open might include a specific, reasonably held risk that they or someone else will suffer a reprisal if the matter is disclosed.

2. Disclosures to parliamentarians or the media should also only be protected if the official has reasonable grounds for believing that no appropriate action has been or will be taken on their internal disclosure(s) within a reasonable period, by either the agency or the independent agency.

Rather than imposing arbitrary timeframes, the legislation should provide for a ‘reasonable period’ to be determined having regard to the nature of the matter, the time and resources required to properly investigate, its urgency, and guidelines on the timeframes and level of communication to which investigating agencies should normally adhere depending on the circumstances. The legislation should provide for these guidelines to be published by a coordinating agency, and provided to officials who make public interest disclosures, who will be presumed to be aware of them.

3. Finally, for the further disclosure to be protected, the court, tribunal or officer determining the matter must be generally satisfied that it was in the public interest that the matter be further disclosed. For this, they should be satisfied that:

(a) the person making the disclosure believed that appropriate action had not been and would not be taken on an issue of significant public interest as a result of previous disclosures; and

34 Brown, AJ, ‘Privacy and the public interest disclosure: when is it reasonable to protect ‘whistleblowing’ to the media?’ in *Privacy Law Bulletin*, 4 (2), p. 24.

(b) the person making the disclosure was reasonably justified in their belief that appropriate action had not been or would not be taken; and

(c) the person's primary reason for making the further disclosure, at the time of the disclosure, was a reasonably held intention that it would result in appropriate action being taken on the issue; and

(d) the further disclosure did result, should result, should have resulted, or could yet result in appropriate action being taken on the issue.³⁵

8.44 Other contributors to the inquiry were critical of the time limit imposed by the NSW legislation for protecting disclosures to the media. Cynthia Kardell, for example, argued that, in practice, time limits had been used to undermine the timely resolution of disclosures by agencies seeking to avoid account ability:

... time based restrictions have tended to operate mainly as a delaying mechanism and have failed to encourage and facilitate the timely in-house rectification of wrongdoing by the accused agency, contrary to what you might have thought might have been the result.³⁶

8.45 Rather than time elapsed from the initial disclosure, it was suggested that the seriousness of the allegation could be an appropriate requirement to protect a disclosure to the media.

8.46 The Murray Bill contained more expansive conditions by including categories for especially serious conduct and exceptional circumstances:

(2) A public official may make a public interest disclosure to a journalist if:

(a) the public official does not make the disclosure for purposes of personal gain; and

(b) under all the circumstances, it is reasonable for the public official to make the public interest disclosure; and

(c) the disclosure has already been made to a proper authority under section 8, or a senator or Member of the House of Representatives under subsection (1), but has not been acted upon,

35 Brown, AJ 2006, *Public interest disclosure in legislation in Australia: towards the next generation – an issues paper*, Commonwealth Ombudsman, p. 44.

36 Ms Kardell, *Submission no. 65*, p. 16.

to the knowledge of the public official, within 6 months of the disclosure; or

(d) the disclosure has already been made to a proper authority under section 8 or a senator or Member of the House of Representatives under subsection (1), and acted upon, but it is reasonable for the public official to believe that the action was not adequate or appropriate; or

(e) the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.

8.47 The 1994 Senate Select Committee on Public Interest Whistleblowing recommended the adoption of the approach taken by the 1991 Gibbs Committee Review into Commonwealth Criminal Law, which took into account the seriousness of the allegation. It recommended that, where information concerned wrongdoing:

... was such that its disclosure without authority would not be a breach of the penal provisions proposed in [Chapter 31 of the Gibbs Report] or any special penal provision, the person would be exempted from any disciplinary sanction for publishing it to any person including the media if -

(i) he or she reasonably believed the allegation was accurate;

and

(ii) notwithstanding his or her failure to avail of the alternative procedures, the course taken was excusable in the circumstances, which would of course include the seriousness of the allegations and the existence of circumstances suggesting that use of alternative procedures would be fruitless or result in victimisation, but such a person would not be given any special protection as regards the law of defamation or any other law of general application.³⁷

8.48 Another approach to disclosures to the media would be to combine a timeframe with the seriousness of the allegation so that the most serious of allegations had no time requirement to be afforded protection, whereas less serious allegations involving no immediate threat to the public could wait up to six months prior to protecting the disclosure to the media. As Mr Maniaty suggested to the Committee:

³⁷ Senate Select Committee on Public Interest Whistleblowing 1994, *In the public interest*, p. 198. The Government rejected the proposal on 13 November 1995 on the basis that a whistleblower, lacking full information, is not in a position to assess public interest considerations.

Can we not build a set of circumstances over a range of time frames that are of greater public interest, and you could define them to some degree, to the point where a major security attack is about to happen? That is clearly not something we can wait six months for. But if it is the wasting of \$2 or \$3 million in a government department I think we can all wait six months to find out about that.³⁸

Alternatives to direct disclosures to the media

- 8.49 A public interest disclosure system that provided a broader scope of protection and instilled confidence that allegations would be properly tested internally or through a dedicated and independent external body, may reduce the need for people to approach the media while reducing any harm caused if people, nonetheless, decide to go to the media.³⁹
- 8.50 Another proposition put to the Committee was that in certain circumstances, it may be appropriate for an integrity agency to release the substance of a disclosure or a report to the public, where it is in the public interest to do so. For example, the Commonwealth Ombudsman, the IGIS and Integrity Commissioner of the Australian Commission for Law Enforcement Integrity, have the authority to publicise its reports.⁴⁰
- 8.51 Recent amendments to s. 22A(2) to the Victorian *Whistleblowers Protection Act 2001* enabled the Victorian Ombudsman to disclose the identity of a person against whom protected disclosures are made where it is in the public interest to do so. Procedural fairness processes are required.

Disclosures to other third parties

- 8.52 A number of contributors to the inquiry argued that conditions relating to disclosures to the media should be no different to condition relating to any other third party. For example the Attorney-General's Department submitted that disclosures to third parties, including the media should not be protected.⁴¹
- 8.53 Alternatively, while agreeing that conditions for the disclosure to all third parties should be the same, Mr Christopher Warren of the Media, Entertainment and Arts Alliance, argued and that such disclosures should

38 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 64.

39 Dr Brown, *Transcript of Evidence*, 28 October 2008, p. 15.

40 Mr Moss, *Transcript of Evidence*, 23 October 2008, p. 6; Mr Varghese, *Transcript of Evidence*, 16 October 2008, p. 6.

41 Attorney-General's Department, *Submission no. 14*, p. 4.

be protected.⁴² Protecting disclosures to all third parties in the same way removes the problem of defining the 'media' in legislation and recognises that once a disclosure is published in the media, it is effectively disclosed to all third parties.⁴³

- 8.54 A number of submissions supported the protection of disclosures to Ministers and other parliamentarians and to advocates such as legal advisors, unions and professional associations.⁴⁴

Disclosures to Members of Parliament

- 8.55 It is not common for legislation in other jurisdictions to include parliamentarians as authorised recipients of public interest disclosures. However, some examples include:
- Section 26(1A), *Whistleblowers Protection Act 1994* (Qld), protects disclosures to a Member of the Legislative Assembly;⁴⁵
 - Section 5(4), *Whistleblowers Protection Act 1993* (SA), protects disclosures to a Minister of the Crown;
 - Section 19, *Protected Disclosures Act 1994*, (NSW) protects disclosures to a Member of Parliament on the same conditions as a disclosure to the media; and
 - Section 3(d), *Protected Disclosures Act 2000* (New Zealand) notably excludes Members of Parliament as recipients of disclosures, while s. 10 of that Act provides additional conditions for protecting disclosures to Ministers.
- 8.56 At the Commonwealth level, disclosures made to parliamentarians may be protected, in certain circumstances, by the *Parliamentary Privileges Act 1987*. Section 16 of that Act provides certain immunities in a court or tribunal in relation to 'proceedings in Parliament'. A public interest-type disclosure could therefore attract protection if formed part of proceedings in parliament, meaning 'words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'.⁴⁶

42 Mr Warren, *Transcript of Evidence*, 27 October 2008, p. 65.

43 Mr Maniaty, *Transcript of Evidence*, 27 October 2008, p. 65.

44 For example, see Mr Ross, *Transcript of Evidence*, 28 October 2008, p. 23.

45 Queensland has a unicameral Parliament.

46 Section 16, *Parliamentary Privileges Act 1987*.

8.57 Even if a disclosure to a Member of Parliament did not form part of proceedings in Parliament, a House can still punish for contempt for action against a person who communicated with a Member where it is found that the action:

... amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a Member of the Member's duties as a Member.⁴⁷

8.58 Protection against adverse treatment could apply to the making of disclosures through providing evidence to a House or committee:

A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of: (a) the giving or proposed giving of any evidence; or (b) any evidence given or to be given; before a House or a committee.⁴⁸

8.59 The provisions for protection under the *Parliamentary Privileges Act 1987* are premised on Article 9 of the UK Bill of Rights 1688 concerning freedom of speech in Parliament, and the general democratic principle of open communication between Parliament and the people. Protection, where extended, can therefore apply regardless of the employment category of the person making the disclosure and the subject matter of the disclosure.

8.60 The Clerk of the Senate, Mr Harry Evans, wrote to the Committee to express his support for the approach taken in the Public Interest Disclosures Bill 2007. That Bill, proposed by the former Senator Murray, provided for disclosure to Members of Parliament on the following grounds:

A public official may make a public interest disclosure to a senator or Member of the House of Representatives if:

(a) under all the circumstances, it is reasonable for the public official to make the public interest disclosure; and

47 Section 4, *Parliamentary Privileges Act 1987*.

48 Section 12 (1), (2) *Parliamentary Privileges Act 1987*.

(b) the disclosure has already been made to a proper authority under section 8, but has not been acted upon, to the knowledge of the public official, within 6 months of the disclosure; or

(c) the disclosure has already been made to a proper authority under section 8, and acted upon, but it is reasonable for the public official to believe that the action was not adequate or appropriate; or

(d) the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.

8.61 The Murray Bill provided for the referral of public interest disclosures to a Parliamentary committee:

A public interest disclosure made to the President of the Senate or the Speaker of the House of Representatives ... may be referred by the President or the Speaker to a committee of the Senate or the House of Representatives, as the case may be, in accordance with a procedure of that House, or to the Senate or the House of Representatives, respectively.⁴⁹

8.62 The Acting Clerk of the House of Representatives supported the inclusion of Members of Parliament as authorised recipients of disclosures:

It would be respectful of Members in that it would give them a potentially important role in matters of government and it would group them with significant officers such as the Public/Parliamentary Service Commissioner, the Merit Protection Commissioner, departmental heads and the Ombudsman.⁵⁰

8.63 If parliamentarians were to be made recipients of public interest disclosures under a new scheme, both Clerks advised that new legislation should not interfere with the immunity of proceedings in Parliament under s. 49 of the Constitution and the *Parliamentary Privileges Act 1987*:

It is important that this aspect of parliamentary privilege be left to operate in conjunction with, and unaffected by, any statutory regime for public interest disclosures to Members of the Parliament. The ability of citizens to communicate with their parliamentary representatives, and the capacity of those representatives to receive information from citizens, should not be

49 Section 6(2), Public Interest Disclosure Bill 2007.

50 Mr Wright, *Submission no. 70*, p. 5.

restricted, inadvertently or otherwise, by a statutory public interest disclosure regime.⁵¹

8.64 The status of Parliament, as distinct from the executive, limits the extent to which Members of Parliament can be subject to the same public interest disclosure procedures compared to those that might apply in the public service. In 2007, the Queensland Parliament considered this issue in debating amendments to the *Whistleblowers Protection Act 1994*. A new Standing Order was adopted to guide Members of Parliament on the treatment of public interest disclosures, requiring Members to:

... exercise care to avoid saying anything inside the House about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures (“whistleblowers”), which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.⁵²

8.65 A schedule was inserted into the Queensland Standing Orders advising Members to consider withholding the substance of a disclosure from Parliament unless:

- the Member was not satisfied that the matter was being investigated or otherwise resolved; or
- the matter had been referred for inquiry but the Member had a reasonable belief that further disclosure in a parliamentary proceeding was justified to prevent harm to any person; or
- the matter had been referred for inquiry but the Member decides to bring it to the attention of a committee of the House with responsibilities in the area.⁵³

8.66 The guidelines in the Queensland Standing Orders are cautionary rather than mandatory, recognising the independence of Parliament and absolute privilege of freedom of speech in the institution.

8.67 As with any disclosures made to a third party, particularly the media, there will be uncertainty regarding how that third party treats the allegation. Disclosures to Members of Parliament could be used to further the personal interest of a Member and the political interest of a party, rather than to address the public interest aspect of the disclosure.⁵⁴ Furthermore, Members of Parliament are not in a position to conduct

51 Clerk of the Senate, *Submission no. 67*, p. 2.

52 Quoted in Mr Wright, *Submission no. 70*, p. 6.

53 Quoted in Mr Wright, *Submission no. 70*, pp. 6-7.

54 Mr Wright, *Submission no. 70*, p. 5.

investigations into the disclosures brought to them and are therefore unable to assess the risks related to public exposure.⁵⁵

Disclosures to trade unions

8.68 Australian Council of Trade Unions (ACTU) submitted that trade unions often receive public interest-type information from both members and non-members concerning the affairs of their employer. Unions typically seek to resolve those matters directly with management.⁵⁶

8.69 However, it is not always possible for unions to resolve issues on behalf of its members through discussions with management. The ACTU argued that existing law should be changed to enable unions to release the information it receives on the grounds that it is in the public interest to do so. Examples of how unions would like to release public interest information include:

- report the problem to other members at the workplace (for example, through a posting on the union noticeboard at work);
- report the problem to other members at other workplaces (for example, through an article in the union bulletin);
- discuss the problem with other unions or the ACTU;
- publish the report in the public domain, with a view to exposing the practice in question;
- convincing management to reverse or alter its decision (or to consult with unions and employees, etc).⁵⁷

8.70 In consideration of the significant liability for employees to disclose information to unions and the similar liabilities constraining the use of that information by unions, the ACTU recommended to the Committee that unions be made authorised recipients of public interest disclosures with the authority to publicly release the information it receives.⁵⁸

8.71 Mr Jeffrey Lapidos, Secretary, Australian Services Union Taxation Officers Branch, informed the Committee that he already assists members of his union when they are making a whistleblower report.⁵⁹ The Queensland Nurses Union, representing the Australian Nurses Federation gave evidence that the need to involve unions in advising nurses on public interest matters was of ongoing and practical value in many situations.

55 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 20.

56 Australian Council of Trade Unions, *Submission no. 64*, p. 1.

57 Australian Council of Trade Unions, *Submission no. 64*, p. 2.

58 Australian Council of Trade Unions, *Submission no. 64*, pp. 3-4.

59 Mr Lapidos, *Transcript of Evidence*, 21 August 2008, p. 48.

The Union informed the Committee of a number of recent incidents of significant concern:

For example, last week a non-Member called our call centre to report that unlicensed staff were checking the dangerous drugs before providing them to residents and that these staff were also in possession of the keys to the dangerous drugs cupboard. At law, this work is required to be undertaken by a licensed registered nurse. The practices are dangerous and potentially fatal. The caller declined to say where she worked. We have also had calls from Members concerned about directions from their employer with respect to altering documentation. We have had calls from Members regarding being directed to work outside their scope of practice. In the past we have had calls from Members concerned about the purposes for which funding was being spent.⁶⁰

View of the Committee

- 8.72 The issue of protecting public interest disclosures made outside the public sector challenges some of the key values discussed throughout this report such as privacy, confidentiality, procedural fairness and the importance for people to make disclosures internally. However, experience has shown that internal processes can sometimes fail and people will seek alternative avenues to make their disclosure.
- 8.73 There are cases, including cases with implications of utmost seriousness, when disclosure through third parties has been initially necessary and consequentially beneficial. Examples include the prelude to the Fitzgerald Inquiry in Queensland and the Shipman case in the UK. A public interest disclosure scheme that does not provide a means for such matters to be brought to light will lack credibility. Over time, to the extent such matters do arise and harm is shown to have been compounded through delayed disclosure, a scheme that did not facilitate quicker disclosure will be seen to have failed in its fundamental public interest objective. Several potential third party recipients of disclosures have legitimate check-and-balance roles in any system of democratic governance, including Members of Parliament, unions, professional associations, legal advisors and the media.

60 Mr Ross, *Transcript of Evidence*, 28 October 2008, pp. 22, 23.

- 8.74 In determining the appropriateness of protecting disclosures made to the media, the primary consideration must be how such disclosures could serve the public interest. If disclosure to a third party cannot promote accountability and integrity in public administration, or otherwise serve the public interest, then the disclosure does not warrant protection. In this context, the interests of the individual whistleblower and the interests of the media are not the primary concern.
- 8.75 Protecting disclosures to the media on the same basis as disclosures made internally is not in the public interest. There are major differences between the consequences of disclosures made internally or within the public sector and those made outside the sector. Among these differences, the media lacks a structured and rigorous system of investigating and assessing the risks of publishing a disclosure.
- 8.76 Disclosure to the media in the first instance poses a number of risks that are unacceptable. It is not in the public interest that internal investigations are undermined, that workplace confidentiality is breached, that whistleblowers and their colleagues are publicly scrutinised and that natural justice is denied to people against whom untested allegations are made. Disclosures to the media concerning unsettled policy issues, national security, intelligence and defence could interfere with the proper processes of government and in extreme circumstances could put lives at risk.
- 8.77 The risks associated with third party disclosures highlight the need to favour the importance of internal disclosures. However, despite the comprehensive multi-layered public interest disclosure system proposed in this report, it should not be assumed that the framework would adequately cater for every possible scenario. Each case of whistleblowing raises its own unique set of issues. It may be possible that in some cases, for example, where an agency has not fulfilled its obligations to a whistleblower, the disclosure framework within the public sector may not adequately handle an issue and that a subsequent disclosure to the media could serve the public interest.
- 8.78 Enabling protection for disclosures made to the media in certain circumstances could potentially act as a 'safety valve' where particularly serious matters have been disclosed and have not been resolved in a reasonable time, having regard to the nature of the matter. In these situations, protecting disclosures to the media would enhance the system by adding another check and balance as an additional layer of accountability.

- 8.79 Such a qualification places emphasis on the role of agencies, and the oversight integrity agency, to ensure that all aspects of the disclosure scheme are in place and that there is sufficient awareness of the disclosure system within the public sector.
- 8.80 Protecting disclosures to the media where the matter concerns immediate serious harm to public health and safety could be qualified on the belief of the whistleblower, on reasonable grounds, that it is necessary to make the disclosure and the requirement that the whistleblower had already made the disclosure internally and externally. Further qualifications, such as imposing an arbitrary timeline, would only serve to unduly complicate procedure and may not serve the public interest.
- 8.81 Protecting disclosures to the media in the limited circumstances described above is not likely to result in a flood of new disclosures. Most people appear to be reluctant to place themselves in the public eye by making a disclosure to the media. Whistleblowers themselves may be aware of the risks and unintended consequences of that avenue of disclosure.
- 8.82 Research indicates that disclosing to the media is not a preferred option for whistleblowers. On average, journalists are the ninth most likely recipients of public interest disclosures in the reporting process, behind supervisors and managers (first), unions and human resources units (second), government watchdog agencies (third) and Members of parliament (fifth).⁶¹
- 8.83 Consequently, it is the Committee's view that disclosures to the media, in limited circumstances, provide an important check on procedure and a 'safety valve' for the system.

Recommendation 21

- 8.84 **The Committee recommends that the Public Interest Disclosure Bill protect disclosures made to the media where the matter has been disclosed internally and externally, and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety.**

61 Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, Australia and New Zealand School of Government, p. 88.

- 8.85 The privilege of freedom of speech in Parliament and the protection of communications between citizens and Members of Parliament is a fundamental feature of Parliamentary democracy in Australia and is enshrined to some extent in the *Parliamentary Privileges Act 1987*. It is not the intention of the Committee that public interest disclosure legislation interfere with this important democratic feature.
- 8.86 In certain circumstances, parliamentary privilege may protect people who choose to make a disclosure to a Member of Parliament, particularly where the disclosure is used in parliamentary proceedings. Given the existence of such protections, the critical role of Members of Parliament in our democratic system and the broader improvements to the public interest disclosure system proposed in this report, the Committee considers that Members of Parliament should be authorised recipients of public interest disclosures.
- 8.87 As noted in the context of disclosures to the media, disclosures made to a Member of Parliament may give rise to unintended consequences for both individuals and the broader interests of public administration. The Committee therefore considers that the Standing Orders of the House of Representatives and the Senate should be amended to provide guidance on matters to be considered when receiving a disclosure. With this guidance in place and the protections already available in relation to disclosures to Members of Parliament, it is appropriate that there are no additional qualifications for disclosures to receive protection where they are made to a Member of Parliament.

Recommendation 22

- 8.88 **The Committee recommends that the Public Interest Disclosure Bill include Commonwealth Members of Parliament as a category of alternative authorised recipients of public interest disclosures.**

Recommendation 23

- 8.89 **The Committee recommends that, if Commonwealth Members of Parliament become authorised recipients of public interest disclosures, the Australian Government propose amendments to the Standing Orders of the House of Representatives and the Senate, advising Members and Senators to exercise care to avoid saying anything in Parliament about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures, which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.**

Recommendation 24

- 8.90 **The Committee recommends that the Public Interest Disclosure Bill provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*.**
- 8.91 The Committee received little evidence on disclosures made to professional associations or legal advisors. In any regard, the Committee considers issues in relation to those third parties analogous to disclosures to unions. While legal advisors, professional associations and unions perform different roles, one of their key commonalities is the provision of confidential advice.
- 8.92 The Committee considers that disclosures made to legal advisors, professional associations and unions should attract public interest disclosure protection where those disclosures are made for the purpose of seeking advice or assistance. This measure would provide yet another avenue for people to informally discuss workplace matters of concern to them and receive assistance with advocating their concerns.

Recommendation 25

- 8.93 **The Committee recommends that the Public Interest Disclosure Bill protect disclosures made to third parties such as legal advisors, professional associations and unions where the disclosure is made for the purpose of seeking advice or assistance.**
- 8.94 The Committee has recommended that public interest disclosure legislation provide more than one avenue for making a disclosure. If people are not comfortable disclosing internally, they can approach a range of other external integrity agencies or the central oversight integrity agency, the Commonwealth Ombudsman.
- 8.95 In order to reduce the need for people to go outside the system, the Committee has recommended that legislation provide clear guidance on the circumstances in which protection could be provided, and that decision makers have some flexibility to exercise discretion where procedures may not have been followed but people are shown to have acted in good faith in the spirit of the legislation.
- 8.96 The Committee wants to strengthen the new system of public interest disclosure by providing a role for the Commonwealth Ombudsman to conduct awareness campaigns in the public sector. This would assist in driving a change in bureaucratic culture to value and support those who speak out and promote an ethic of disclosure.
- 8.97 It is within the general powers of the Ombudsman to publish reports on its investigations.⁶² This power should be available to the Ombudsman in relation to public interest disclosures issues, so that the Ombudsman may report to the public on matters disclosed to agencies.

Recommendation 26

- 8.98 **The Committee recommends that the Public Interest Disclosure Bill provide authority for the Commonwealth Ombudsman to publish reports of investigations or other information relating to disclosures (including the identity of persons against whom allegations are made) where the Ombudsman considers it is in the public interest to do so.**

62 *Ombudsman Act 1976*, Section 35A.

