CHAPTER 3

GENERAL ISSUES

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

Higher education

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

5 Evidence, Professor Kim Sawyer, p. 388.

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

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

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

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

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

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

---

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

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

8 Evidence, Professor Kim Sawyer, p. 384.

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

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

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

Commonwealth/State jurisdiction

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

13 Submission, APESA, 13.1.94, p. 1.

14 Submission, APESA, 13.1.95, p. 2.

15 SSCPIW Report, 1994, p. 118.

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

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

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

And:

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

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

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

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

---

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

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

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

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

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

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

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

Environmental protection

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

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

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

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

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

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

---

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

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

23 Evidence, Mr Jim Leggate, p. 441.

24 Evidence, Mr Jim Leggate, p. 441.

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

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

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

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

25 Transcript, *7.30 Report*, 6.4.95.

26 Correspondence, Mr Brian Coe, 4.5.95.

27 SSCPIW report, 1994, p. 163.