

## Procedures in relation to protected disclosures

### Introduction

- 7.1 Administrative procedures in relation to a public interest disclosure scheme, informed by the overarching aim of accountability and integrity in public administration, provide a framework for participants to negotiate the somewhat tricky path of addressing suspected misconduct in the workplace.
- 7.2 This chapter discusses how information should be disclosed to attract protection, the obligations of public sector agencies and the responsibilities of integrity agencies. The themes examined by the Committee include:
- the type of pathways that should be available in a protected public interest disclosure scheme, including procedures for disclosures to be made within an agency or to another body;
  - the obligations of public sector agencies in handling public interest disclosures, including the treatment of whistleblowers;
  - the responsibilities of integrity agencies including possible roles in monitoring the system and providing education and training; and
  - the procedures applying in relation to intelligence and security matters.

## Pathways for protected disclosures

### Internal disclosure

- 7.3 A strong view expressed in evidence to the Committee was that whistleblowers should have more than one avenue through which to make a public interest disclosure.<sup>1</sup> There was general agreement that the first point of disclosure should, where possible, be within the whistleblower's own agency.
- 7.4 The Committee heard that protecting disclosures made to senior officers close to the whistleblower, starting at the supervisor level, would facilitate a prompt and potentially low key handling of the allegation.<sup>2</sup> Indeed, disclosures to lower level officers in the first instance could be made informally, providing some flexibility on how the matter is treated.
- 7.5 The Australian Public Service Commission (APSC) submitted that the internal reporting of disclosures enabled the agency to efficiently assess the nature of the allegation, how it should be handled and promotes awareness of, and confidence in, the system.<sup>3</sup> The Commissioner added that 'internal mechanisms should be exhausted before using an alternative avenue for reporting'.<sup>4</sup>
- 7.6 It was submitted that it is a 'matter of ethics' that a disclosure should be made internally first, to give an organisation a chance 'to fix itself up'.<sup>5</sup> The making of internal disclosures supports the common law duties of public servants to serve to promote the accomplishment of the principal purposes of their employers.<sup>6</sup>
- 7.7 Research indicates that the making of disclosures internally is common practice. Ninety seven percent of the public interest whistleblowers

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1 For example see, Commonwealth Ombudsman, *Submission no. 31*, p. 9; Australian Public Service Commission, *Submission no. 44*, p. 13; Whistleblowers Australia, *Submission no. 26*, p. 45; Attorney-General's Department, *Submission no. 14*, p. 3.

2 Commonwealth Ombudsman, *Submission no. 31*, p. 9.

3 Australian Public Service Commission, *Submission no. 44*, p. 13.

4 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 3. The Commissioner supports serious matters being taken to oversight agencies at first instance.

5 Dr Bibby, Dr Bowden, *Transcript of Evidence*, 27 October 2008, pp 8, 26.

6 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. 279. *Herscu v R* (1991) 173 CLR 276, para 8 (Mason CJ, Dawson, Toohey and Gaudron JJ).

reported internally in their agency in the first instance. Of all public interest whistleblowing, 90% ended within the agency.<sup>7</sup>

7.8 Alternative internal avenues for disclosure were proposed for situations where, for example, the allegation concerns a whistleblower's immediate supervisor or colleagues.<sup>8</sup> The Commonwealth Ombudsman described these as 'safe' channels to receive disclosures and provide confidential advice and to be used to develop in-house expertise on public interest disclosures.<sup>9</sup>

7.9 The Australian Taxation Office's existing whistleblower scheme allows multiple internal reporting pathways and differentiates between the substance of a disclosure and any adverse treatment an employee might suffer. The ATO is of the view that legislation for a disclosure scheme should not be overly-prescriptive, but that certain outcomes and a degree of formality should be part of a scheme.

The ATO accepts that different circumstances apply in different agencies for the effective handling of public interest disclosures. In our experience, disclosures should be handled by persons or areas trained and authorised to do so, to ensure that such reports are handled sensitively, treated confidentially, and so that proper consideration can be given to the possibility that the reporting employee may suffer ...<sup>10</sup>

7.10 The Australian Institute of Private Investigators noted that too much emphasis on internal disclosure mechanisms may leave an agency open to claims of suppression of information and a lack of independence and transparency in its investigations. The Institute suggested that a private agency would be a relevant disclosure pathway.<sup>11</sup>

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7 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, pp. xxv.

8 Commonwealth Ombudsman, *Submission no. 31*, p. 9.

9 Commonwealth Ombudsman, *Submission no. 31*, p. 9.

10 Australian Taxation Office, *Submission no. 24*, p. 2.

11 Australian Institute of Professional Investigators, *Submission no. 20*, p. 2.

## Case study The need for systems: Equine influenza

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### Background

On 23 April 2008, the Hon Mr Ian Callinan AC presented his report on the outbreak of equine influenza in Australia to the Minister for Agriculture, Fisheries and Forestry.

Commissioner Callinan concluded that the most likely explanation for the outbreak was that the virus escaped from Eastern Creek Quarantine Station on the person, clothing or equipment of a person who had contact with an infected horse and who then left the Station without cleaning or disinfecting adequately or at all.

The Commissioner characterised the administration of quarantine in Australia as being run along lines of 'inertia, inefficiency, lack of diligence, incompetence and distraction by unproductive bureaucratic process'.<sup>12</sup> Dr Phillip Widders, Chief Quarantine Officer (Animals) NSW, was alert to the risk of equine influenza in May 2004 and wrote of it to other regional officers. At about the same time, the Chairman of the Australian Racing Board (ARB) wrote to the Minister on two occasions, expressing the same concerns.

Dr Widders and others sought advice 'plaintively and futilely' about their powers in relation to aspects of the veterinary health operations at the airport, including permitting access and giving directions, but there was a continued failure by management to provide advice.<sup>13</sup>

Between May 2005 and August 2007 there was no training regime for AQIS officials attending airports and the procedures relative to horses were still not finalised. The Commissioner found that the failure to attend to a lack of procedures contributed to the outbreak of equine influenza in August 2007.

### Discussion

This example of maladministration was the result of a poorly implemented management structure of overlapping responsibilities. Despite persistent attempts by the veterinarians, through management, and the ARB, through the Minister, there was inertia by AQIS.

The case demonstrates the need for clear pathways for raising concerns and the availability of external channels. It demonstrates that there may be occasions where it is appropriate for Commonwealth officers to seek advocacy and support through an external integrity or oversight body when management failures have the potential to compromise public health or safety.

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### External disclosure

- 7.11 An external disclosure is a disclosure to an authorised agency but not the agency whose interests are directly concerned with the disclosure. This may be a disclosure made to an integrity agency, such as the Public Service or Merit Protection Commissioners under current APS arrangements or the Inspector-General of Intelligence and Security for intelligence agencies.
- 7.12 In addition to considering the role on external integrity agencies, the Committee took evidence on the possible role of a central oversight agency within a new public interest disclosure system.
- 7.13 In the Australian states and territories, only Western Australia and Victoria provide legislation for a lead agency to administer the relevant Act across the whole of government.<sup>14</sup> In the former, the Public Sector Standards Commissioner fulfils the role and, in the latter, the Ombudsman.
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12 Callinan, Hon. Ian AC April 2008, *Report of the equine influenza inquiry*, p. 248.

13 Callinan, Hon. Ian AC April 2008, *Report of the equine influenza inquiry*, p. 49.

14 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. 270.

- 7.14 In NSW it is seen as unnecessary to provide a whole of government approach in administering the legislation. The NSW Joint Parliamentary Committee on the Independent Commission Against Corruption heard that the NSW protected disclosure system can be satisfactorily managed on an agency-by-agency basis and that oversight agencies are better suited to exploring trends and policy issues on a consultative basis.<sup>15</sup>
- 7.15 The Member for Fremantle, Ms Melissa Parke MP, submitted that an independent agency with responsibility for administration and coordination of the proposed law on Public Interest Disclosures be established and that such a function could be appropriately established by extending the current functions and powers of the office of the Commonwealth Ombudsman or by creating a new independent statutory body.<sup>16</sup>
- 7.16 The empirical evidence from the WWTW project shows that successful implementation of protected disclosure schemes is uneven when done agency-by-agency, producing poor outcomes and, on reviewing the record of non-compliance with recording, monitoring and reporting statistics, it is evident that, in some jurisdictions, the scheme is not readily open to accountability.<sup>17</sup>
- 7.17 Evidence to the Committee showed very strong support for protecting disclosures made to an external agency. Disclosure to an external agency should occur following an internal disclosure. The accessibility of disclosure to an external integrity agency was considered critical to the success of a public interest disclosure scheme:
- The success of the legislation will hinge on whether the requirements of the Act are understood throughout government and applied consistently and professionally. That is unlikely to occur unless there is a central agency (or agencies) that is responsible for monitoring and promoting the operation of the Act.<sup>18</sup>
- 7.18 While the specific responsibilities of an integrity agency are discussed in a subsequent section below, the main perceived benefits of enabling disclosures to such an external body include:

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15 Parliament of NSW, the Joint Parliamentary Committee on the Independent Commission Against Corruption 18 August 2008, *Transcript of Evidence* before that Committee, pp. 21-22.

16 Ms Melissa Parke MP, *Submission no. 51*, p. 5.

17 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. 235.

18 Commonwealth Ombudsman, *Submission no. 31*, p. 10.

- providing an alternative avenue for the reporting of public interest disclosures where whistleblowers do not feel they are able to safely report within their own agency;<sup>19</sup>
- undertaking investigations or referring disclosures to a more appropriate body for investigation;
- reviewing investigations carried out by agencies where the whistleblower is not satisfied with the outcome; and
- monitoring and reporting on the general operation of the public interest disclosure system.<sup>20</sup>

7.19 A number of options for a new system of external disclosure were put to the Committee including the appointment of the current external disclosure recipients under a revised framework, the creation of a new dedicated public sector integrity body, or expanding the role of an existing body such as the Australian Public Service Commission or the Commonwealth Ombudsman. The merits of these options are discussed below.

#### Continuation of the current external disclosure recipients

7.20 Under the current APS whistleblower protection framework, the Public Service and Merit Protection Commissioners, the Inspector-General of Intelligence and Security (IGIS) and the Integrity Commissioner are authorised recipients for disclosures from the general APS, intelligence and security agencies and law enforcement agencies respectively.

7.21 These existing integrity agencies could continue to receive disclosures under a new public interest disclosure framework. In working together to implement a new system, the agencies would require a mechanism such as a coordinating committee to coordinate their education, monitoring and reporting functions.<sup>21</sup>

7.22 The APSC warned that adopting the option of continuing the current external disclosure system could lead to confusion in the public sector over which agency to approach in relation to a range of allegations.<sup>22</sup> However, this risk would be mitigated if the existing agencies implemented the same system with cross-referral powers.

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19 Commonwealth Ombudsman, *Submission no. 31*, p. 10.

20 Summarised from a number of submissions including, Whistleblowers Australia, *Submission no. 26*, pp. 41-42, Australian Public Service Commission, *Submission no. 44*, p. 13-15; Commonwealth Ombudsman, *Submission no. 31*, p. 10.

21 Australian Public Service Commission, *Submission no. 44*, p. 17; Commonwealth Ombudsman, *Submission no. 31*, p. 11.

22 Australian Public Service Commission, *Submission no. 44*, p. 17.

## A new public sector integrity body

- 7.23 Whistleblowers Australia recommended that one of two possible new integrity bodies could be created. A Protected Public Interest Disclosure Commission comprising of an Investigatory and Prosecution Office and a Whistleblower Protection Office could handle the separate functions of assessing disclosures and protect the interests of those who make them. Alternatively, similar functions could be performed by the one, new, Public Interest Disclosure Agency.<sup>23</sup>
- 7.24 Another suggestion for an integrity body was the creation of an Australian Whistleblower Protection authority to protect whistleblowers, gather evidence on disclosures, fund legal action for adverse treatment against whistleblowers, and be accountable to the people by oversight through a parliamentary committee.<sup>24</sup>
- 7.25 In 1994 the Senate Select Committee on Public Interest Whistleblowing recommended the creation of two related integrity bodies, a Public Interest Disclosure Agency to receive, refer and investigate disclosures and report to Parliament, and a Public Interest Disclosures Board comprising of public sector appointees and parliamentarians to oversee the work of the Agency.<sup>25</sup>
- 7.26 The possible benefits of a new dedicated integrity agency would be to have an integrated, clear and unambiguous process for whistleblowers. However, the perceived disadvantages of this approach include cost compared to expanding an existing agency and the estimated scale of misconduct to be addressed, the challenge of building public confidence in a new agency and the potential confusion over the role of the new body in relation to the role of other agencies.<sup>26</sup>
- 7.27 It is administratively difficult to establish a new agency and have it in operation within a short period:
- It is very hard to create a new, purpose-built agency, to give it a national coverage, to have it start overnight with a staff of 10 or 20 to develop tradition, training capacity and resources – the existing agencies already have that.<sup>27</sup>

## Building on an existing integrity agency

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23 Whistleblowers Australia, *Submission no. 26*, p. 42.

24 Mr Lindeberg, *Submission no. 12*, p. 3.

25 Senate Select Committee on Public Interest Whistleblowing 1994, *In the public interest*, p. xv. This was supported by some submissions, for example, Ms Kardell, *Submission no. 65*, p. 21.

26 Australian Public Service Commission, *Submission no. 44*, p. 14.

27 Professor McMillan, *Transcript of Evidence*, 9 September 2008, p. 11.

- 7.28 Most submissions to the inquiry supported extending the role of an existing integrity agency as an authorised external recipient of public interest disclosures. The main candidates suggested to the Committee for taking on the expanded role are the Commonwealth Ombudsman and the Australian Public Service Commission.
- 7.29 The primary considerations for choosing an existing integrity agency on which to build were the actual and perceived independence of the organisation, and the experience and expertise of the organisation in conducting complex and sensitive investigations into serious aspects of public administration.
- 7.30 In advancing its credentials for taking on an expanded role in public interest disclosures, the Commonwealth Ombudsman cited its high profile, reputation for independence and working relationship with other agencies:
- The office has a high profile in government and the community. The respected independence and powers of the office mean that people are confident to approach it with complaints against government. The office deals with allegations of a kind that are likely to be made under a public interest disclosure Act. The office also has excellent working relationships with all agencies in government, and is accustomed to referring matters to other agencies for investigation when appropriate. The stature of the office in administering the Act would be enhanced by the statutory creation of a new position in the office of Deputy Commonwealth Ombudsman (Public Interest Disclosures).<sup>28</sup>
- 7.31 A number of other contributors to the inquiry supported the possibility of the Ombudsman taking on the new role including the Attorney-General's Department, Associate Professor Thomas Faunce, Dr Peter Bowden, Mr Andrew Podger, Mr Ivon Hardham, the Community and Public Sector Union and Dr Harris Rimmer.<sup>29</sup>
- 7.32 According to the Secretary to the Attorney-General's Department the Commonwealth Ombudsman is an appropriate institution to build on:
- ... building on existing institutions and not creating a whole lot of new ones is often a useful rule of thumb. So, if you have got an Ombudsman there, then you should use the Ombudsman. The

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28 Commonwealth Ombudsman, *Submission no. 31*, p. 11.

29 Attorney-General's Department, *Submission no. 14*, p. 4; Associate Professor Faunce, *Submission no. 4*, p. 3; Dr Bowden, *Submission no. 18*, p. 2; Mr Podger, *Submission no. 55*, p. 5; Mr Hardham, *Submission no. 54*, p. 10; Community and Public Sector Union, *Submission no. 8a*, p. 5; Dr Harris Rimmer, *Transcript of Evidence*, 16 October 2008, p. 9;

Ombudsman is a very successful institution of administrative review. I do not see why it would not be the correct institution to use for this purpose.<sup>30</sup>

- 7.33 The Secretary to the Department of Immigration and Citizenship preferred the Ombudsman for the new role due to its expertise in handling administrative complaints:

My personal view is that that needs to be a properly resourced external body, and of the existing bodies the most appropriate would be the Ombudsman, who has a clear complaints management role and who is skilled at dealing with people who are raising concerns about administrative decisions.<sup>31</sup>

- 7.34 Dr Brown observed that:

... the Ombudsman's Office would be logical...you are really talking about an agency that needs to be able to oversight, monitor and then second-guess, where necessary, quite complex investigation processes in a way that an integrity agency that has high existing case handling responsibility is the better starting point in terms of the types of skills and resources it has, whether it is an anticorruption body or an ombudsman's office that is actually already handling, processing and monitoring high levels of cases. That would also mitigate in favour of attaching it to the Ombudsman's Office rather than the APSC because the Ombudsman's Office is dealing with a higher number across a much wider range of more public interest related types of wrongdoing.<sup>32</sup>

- 7.35 Administrative convenience may be a consideration in favouring a particular organisation to assume the role of the oversight integrity agency. The Australian Commission for Law Enforcement Integrity told the Committee:

... the Law Enforcement Integrity Commissioner Act, at section 23(5), and also the Ombudsman Act, at sections 6(16) and 6(17), provide the legislative framework by which our agencies interact in relation to corruption issues. I think the point is that were the Ombudsman to also be conferred the role of receiving whistleblower issues under new legislation then our relationship with the Ombudsman would already be safeguarded.<sup>33</sup>

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30 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 16.

31 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 5.

32 Dr Brown, *Transcript of Evidence*, 9 September 2008, p. 19.

33 Mr Sellars, *Transcript of Evidence*, 23 October 2008, p. 4.

- 7.36 Some of the previous reviews and proposals for public interest disclosure legislation have nominated the Commonwealth Ombudsman as the preferred central integrity agency including the Australian Government's 1995 public interest disclosure proposal.<sup>34</sup> The Murray Bill provided for the Ombudsman to act as the central oversight body of the system.
- 7.37 The APSC expressed interest in taking on an expanded role as a public interest disclosure oversight integrity agency arguing that it was well suited to take on such a role, on the basis of:
- the Public Service Act contains the only disclosure protection provisions in the Australian government sector
  - the Public Service Act covers everyday matters where officials make allegations about breaches of the APS Values and Code of Conduct and more serious issues that might fall under the new protected public interest disclosure scheme
  - a proven track record in research, monitoring, analysis and reporting arrangements of a range of public interest disclosure matters
  - a comprehensive background in handling sensitive and complex investigations, including mediation
  - as part of its existing work, the Commission has robust arrangements for the handling and providing of sensitive and confidential advice, including through the SES Advisor role and the advice provided through the Public Service Commissioner and Deputy Commissioner
  - expertise in communicating new and ongoing arrangements for whistleblowing in the APS, as well as developing education material and providing necessary training
  - being able to provide a 'one-stop-shop' for all disclosures and thereby avoiding the confusion of having to deal with different agencies
  - the Public Service Commissioner's other current statutory independent roles.<sup>35</sup>
- 7.38 The Commissioner's current role includes responsibilities for Code of Conduct investigations and providing leadership in public sector employment and management. These responsibilities could be augmented by opening a new area of business to deal with disclosures and act as a clearing house for referring disclosures for investigation.
- 7.39 The Commissioner noted the following risks with expanding the role of the Commonwealth Ombudsman as an integrity agency:

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34 Kerr, Hon Duncan MP, 26 October 1995: *Report of the Senate Select Committee on public interest whistleblowing: Government response*, Ministerial Statement, House of Representatives.

35 Australian Public Service Commission, *Submission no. 44*, p. 16.

- the likely confusion by APS employees of the extent to which the Ombudsman could consider employment matters
- the Ombudsman's legal obligations to attend to all complaints received, including relatively minor issues under the office's existing role, which may detract resources and focus from the most serious allegations of fraud and corruption.<sup>36</sup>

7.40 Some whistleblowers spoke out against the Ombudsman taking on an expanded role in public interest disclosures. For example, Mr Greg McMahon argued that the Ombudsman has an excessively high rate of declining to investigate complaints.<sup>37</sup>

7.41 The Ombudsman's discretion to decline to investigate complaints is reflected in the Ombudsman's Annual Report for 2007-2008, which notes that:

The legislation administered by the Ombudsman gives the office a range of discretionary powers not to investigate complaints in particular circumstances. The most common reason for not investigating a complaint is that the person has not raised the matter with the agency involved. There are advantages for both the complainant and the agency if an issue is first raised at the source of the problem and an attempt made to resolve it before external intervention.<sup>38</sup>

7.42 The Australian Public Service Commissioner and the Deputy Commonwealth Ombudsman indicated that to establish a scheme would involve about \$1.5 million including appointing a statutory officer as a Deputy responsible for activities under the legislation. It was expected that the level of demand would decline after two to three years, down to the order of \$1 million and six or seven people.<sup>39</sup>

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36 Australian Public Service Commission, *Submission no. 44*, p. 17.

37 Mr McMahon, *Submission no. 45a*, p. 5.

38 Commonwealth Ombudsman, *Annual Report 2007-2008*, p. 21.

39 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p 8. Mr Brent, *Transcript of Evidence*, 4 September 2008, p. 5.

## Case study The obligations of agencies: Mr Allan Kessing

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### Background

On 29 June 2007, Deputy Chief Justice Bennett of the New South Wales District Court sentenced Allan Robert Kessing to a suspended period of nine months imprisonment for an offence against s 70 of the *Crimes Act 1914*.

While Mr Kessing was working with Customs, he had drafted and circulated documents relating to security at Sydney airport. These reports had been submitted to line management at the airport but senior managers in Canberra were not aware of their existence. Details of the documents later appeared in the press.

The charge against Mr Kessing was that he had published or communicated the contents of those documents when he ceased to be a Commonwealth officer, and it was his duty not to disclose that information.

After sentencing, Mr Kessing warned that anybody who knows of maladministration or corruption ... would be well advised to say nothing, do nothing, keep their heads down and look after their career and mortgage.<sup>40</sup>

Much attention was focused on the apparent irony that Mr Kessing ended up with a criminal record but the leak resulted in a major review of airport safety and security by Sir John Wheeler after which the Government implemented a \$200 million package to improve airport security. In some circles, Mr Kessing is considered a 'hero'.

### Discussion

It is common for people who detect criminal activity, maladministration or corruption to take the matter up with their line managers in the expectation that line managers will take action. Line managers may not necessarily have the same understanding of the importance of an issue as the person raising it. Staff members may have expectations about what line managers should do when presented with information, yet those expectations might not be met.

Informal reporting is normal and acceptable, but there must be a reporting scheme that opens pathways to bypass line management and to formalise matters of concern. In this case, such a scheme could have provided an opportunity to press the issues of concern directly to senior management or to an oversight agency.

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## Obligations on agencies

7.43 Evidence to the inquiry indicates that imposing obligations on public sector agencies in handling public interest disclosures will be a very important aspect of the new system.

7.44 The Queensland Public Service Commission noted that managing the expectations of whistleblowers can be very challenging and that poor management of disclosures leads to further complications.

Ensuring that whistleblowers are aware of the circumstances under which they can make a public interest disclosure and awareness of the process that is to come, is vital...The impacts of poorly managed public interest disclosure can be widespread' and have broad negative effects'.<sup>41</sup>

7.45 The Secretary to the Department of Immigration and Citizenship told the Committee that a thorough-going cultural change is required to create a

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40 *The Law Report*, ABC Radio 29 May 2007.

41 Queensland Public Service Commission, *Submission no. 47*, p. 4.

culture of disclosure and that this needs to be supported by placing a positive obligation on management to accept, assess and investigate disclosures.<sup>42</sup> The role of cultural change in a new public interest disclosure system is discussed further in Chapter 9.

- 7.46 The Committee heard that a legislated scheme is not a complete solution to managing disclosures, but considers that placing positive obligations on agency heads should provide for a measure of confidence in a disclosure system.<sup>43</sup>

### Obligation to receive disclosures

- 7.47 Legislation, common law and equitable principles cannot fully answer the question of what obligations should exist in making or receiving disclosures.

- 7.48 Disclosures are usually made by people in good faith. The analysis of reporting patterns conducted by the WWTW project shows that disclosures are often received at a relatively low supervisory level within an organisation:

... effective public sector procedures for dealing with whistleblowing should be focused on anyone who has a supervisory role. The pattern of reporting to line managers appears so strong that procedures stipulating that only certain officers in the organisation can receive disclosures, perhaps removed from the immediate workplace of many employees, are unlikely to shake the frequency of this behaviour.<sup>44</sup>

- 7.49 The view most commonly represented to the Committee was that legislating positive obligations to receive disclosures will assist in the implementation of a scheme and ensure that the burden for its operation and management is at an appropriately senior level within an organisation, but that the system supports people at relatively junior supervisory levels in understanding their roles and responsibilities in receiving disclosures.<sup>45</sup> This appears to be best practice in furthering the purposes of the legislation.

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42 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 5.

43 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 15.

44 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. 92.

45 See, eg. Dr Brown, *Transcript of Evidence*, 9 September 2008, p. 6. Commander Walters, *Transcript of Evidence*, 23 October 2008, p. 14. Mr Mrdak, *Transcript of Evidence*, 27 November 2008, p. 10.

## Obligation to act on disclosures

7.50 The Murray Bill set out a range of obligations on agencies once in receipt of disclosures. These included the following:

- to provide protection of employees;
- to make risk assessment;
- to give notice of official action taken; and
- to provide for confidentiality.

7.51 Legislated requirements of that type were generally supported by evidence before the Committee. An agency receiving a disclosure would be obliged to assess it to determine if it is was a disclosure that the legislation provided for, and take prompt and appropriate action including a risk assessment of the likelihood of the person making the disclosure being exposed to detrimental action.

7.52 Appropriate action includes investigating the disclosure or referring it to a more appropriate agency or to refuse to investigate the matter further. In terms of means of investigation available, the WWTW team found that:

... the professionalism of an agency's systems for assessing and investigating possible wrongdoing will determine not only whether the primary issues are identified and problems rectified; they will bear directly on whistleblowers' experiences of reporting, their level of stress, the risk that they will suffer reprisals or become engaged in organisational conflict and on the messages that pass to other employees about whether the organisation is a safe environment in which to speak up.<sup>46</sup>

7.53 This suggests that, while the initial process of making a disclosure could be less formal, the referral, investigation and ongoing management system should be a formal process.

7.54 An example of positive obligations being legislated is found in the Western Australian legislation. The obligations set out in s. 8 of the WA legislation are:

- (1) A proper authority must investigate or cause to be investigated the information disclosed to it under this Act if the disclosure relates to –
  - (a) the authority;

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46 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. 292.

- (b) a public officer or public sector contractor of the authority;  
or
  - (c) a matter or person that the authority has a function or power to investigate.
- (2) A proper authority may refuse to investigate, or may discontinue the investigation of, a matter raised by the disclosure if it considers that –
- (a) the matter is trivial;
  - (b) the disclosure is vexatious or frivolous;
  - (c) there is no reasonable prospect of obtaining sufficient evidence due to the time that has elapsed since the occurrence of the matter; or
  - (d) the matter is being or has been adequately or properly investigated by another person to whom an appropriate disclosure of public interest information has been made in accordance with section 5(3).<sup>47</sup>

- 7.55 The validity of controlling the availability of information, minimising the extent of publicity given to a disclosure and delaying or stopping public disclosure was recognised in evidence to the Committee.<sup>48</sup> A legislated scheme would include the requirement to provide a report when an investigation is completed or discontinued. This would be similar to measures in other legislation such as the Western Australian Act and it would address the issue of keeping a person informed within the limits of what is appropriate in the circumstances.
- 7.56 The Committee considers that, when, on receiving a report, a person considers that the outcome is inadequate, it would be appropriate for the legislation to provide for reconsideration by the agency concerned, or review by an oversight agency. Under Tasmanian legislation, this issue is partially addressed by providing for a review of reasons by an integrity or oversight agency where a matter is said to not be a public interest disclosure.<sup>49</sup> A similar provision that provided for reconsideration by the agency concerned, or review by an oversight agency, no matter whether a matter is deemed to be a public interest disclosure or not, would be relevant for Commonwealth legislation.

## Obligation of confidentiality and privacy

- 7.57 There is no single policy or unique doctrine governing the protection of information imparted in confidence. The law is unsettled.<sup>50</sup> Nevertheless,

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47 *Public Interest Disclosure Act 2003 (WA)*.

48 *Whistleblower's Australia, Submission no. 26*, p. 3. Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, pp. 2, 3.

49 *Public Interest Disclosures Act 2002 (Tas)* s. 36.

50 Dean, R 2002, *The law of trade secrets and personal secrets* (2<sup>nd</sup> edition), Pyrmont, Lawbook Company, pp. 28, 29.

some principles should be relied upon in order to provide protection to those who make public interest disclosures and those who may be adversely affected by a disclosure.

7.58 Public interest disclosure legislation establishes, either implicitly or explicitly, an obligation of confidence. Legislation arising from this inquiry should establish that obligation explicitly.<sup>51</sup>

7.59 When confidential information is disclosed to a person, the disclosure will commonly result in an obligation on that person to maintain the confidentiality of the information. This obligation extends to all persons to whom it is necessary to make subsequent disclosures when seeking to resolve issues about which the original disclosure was made and includes 'entirely innocent third parties' who can be required to protect a confidence.<sup>52</sup>

7.60 The Commonwealth Ombudsman submitted that disclosures be received and investigated in private as a means of providing safeguards:

Disclosures should be received and investigated in private, so as to safeguard the identity of a person making a disclosure to the maximum extent possible within the agency's control. Avenues should be available for disclosures to be made confidentially, and where practical, individual disclosures should be dealt with in ways that do not disclose the identity of the person making the disclosure, and preferably even that a disclosure has in fact been made.<sup>53</sup>

7.61 This was the view put forward in the submission of the Community and Public Sector Union.<sup>54</sup> Privacy and confidentiality provisions encourage confidants to express their views without fear and assist in protecting them from harassment. The same provisions would protect any other person whose interests are adversely affected.

7.62 The confidentiality principle has three limbs:

- confidentiality of the information contained in the disclosure;
- confidentiality of the identity of the person making the disclosure and an obligation to protect the privacy of named individuals; and

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51 For a discussion on the features of confidential information, see Dean, R 2002, *The law of trade secrets and personal secrets* (2<sup>nd</sup> edition), Pyrmont, Lawbook Company, Chapter 3.

52 For a discussion on the obligations surrounding confidentiality, including third party obligations, see Dean, R 2002, *The law of trade secrets and personal secrets* (2<sup>nd</sup> edition), Pyrmont, Lawbook Company, pp. 60-63.

53 Commonwealth Ombudsman, *Submission no. 31*, p. 14.

54 Community and Public Sector Union, *Submission no. 8*, p. 2.

- confidentiality in conducting any enquiries arising from the disclosure.

### Confidentiality of information

- 7.63 A statute that confers a power to obtain information for a particular purpose defines, expressly or impliedly, the purpose for which the information can be used or disclosed.
- 7.64 There is a duty on the person who obtains information to not disclose the information obtained except for the purpose for which it was obtained and to treat the information obtained as if it is confidential whether or not the substance of the information is of a confidential nature.<sup>55</sup>
- 7.65 New legislation on public interest disclosure would define the purpose for which information can be obtained, used or disclosed. The Committee considers that any provision that does this should reflect the National Information Privacy Principles as adapted for the protected disclosure scheme.<sup>56</sup>

### Confidentiality of identity and right to privacy

- 7.66 The principle of confidentiality should encourage and facilitate disclosures. Confidentiality is an obligation to the person who provides information. Protection of privacy is an obligation owed to persons who may be affected by a disclosure of information especially those whose reputations may be affected by the allegations made in a disclosure.<sup>57</sup> Employees reporting concerns in accordance with legislated procedures are not in breach of privacy or confidentiality principles.<sup>58</sup>
- 7.67 Disclosed information is to be kept confidential to those who genuinely need to know. Those with a genuine need should only be told as much as they need to know.<sup>59</sup>
- 7.68 A person who has a proper interest in receiving information is under a duty to consider privacy rights of all people affected by a disclosure. A

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55 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423 (Brennan J).

56 See Schedule 3, *Privacy Act 1988*.

57 National Information Privacy Principle 11 prohibits record keepers with the possession or control of records containing personal information from disclosing that information to a person, body or agency other than the individual concerned except in specified circumstances. National Information Privacy Principle 4 provides that an organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

58 *Privacy Act 1988* s. 14.

59 National Information Privacy Principle 9 provides that a record-keeper who has possession or control of a record that contains personal information shall not use the information except for a purpose to which the information is relevant.

duty of confidence means any duty or obligation arising under the common law or at equity pursuant to which a person is obliged not to disclose information, but does not include legal professional privilege.<sup>60</sup>

- 7.69 Where an obligation of confidentiality has arisen, a party who purports that the obligation does not extend in the current circumstances must prove that is the case.<sup>61</sup> Should it be shown that confidentiality or privacy have been breached, then penalties similar to those contained in the *Privacy Act 1988* would be appropriate.

### Confidentiality in conducting inquiries

- 7.70 Witnesses emphasised the need for confidentiality when conducting enquiries.<sup>62</sup> There was some caution that too much confidentiality in a disclosure system might bring it into conflict with transparency and accountability of government. Dr Lesley Lynch of the NSW Council for Civil Liberties saw open government leadership as a requirement to support concepts of accountability.<sup>63</sup>
- 7.71 In circumstances when an inquiry is undertaken, the person undertaking the inquiry should be satisfied that it is necessary to invoke confidentiality principles. This is consistent with the National Privacy Principles, which include the option that all or part of the inquiry may be conducted in private.
- 7.72 Confidentiality provisions should not be used to withhold information from the person who has directed that the inquiry take place or from an oversight body. Confidentiality is limited to the extent that it does not obstruct the course of justice.<sup>64</sup>
- 7.73 The principle of confidentiality is subject to the need to disclose a person's identity to other parties - for example, where this is absolutely necessary to facilitate the effective investigation of a disclosure, provide procedural fairness, protect a person who has made a disclosure, or make a public report on how a disclosure was dealt with or by the operation of law.<sup>65</sup>

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60 See *Privacy Act 1988* s. 80G.

61 *A v Hayden* (1984) 156 CLR 532, 546 (Gibbs CJ).

62 Dr Bowden, *Transcript of Evidence*, 27 October 2008, p. 29.

63 Dr Lesley Lynch, *Transcript of Evidence*, 27 October 2008, p. 3.

64 *A v Hayden* (1984) 156 CLR 532, 597 (Deane J).

65 Commonwealth Ombudsman, *Submission no. 31*, p. 14.

## Procedural fairness

- 7.74 Where a person's real rights or interests are affected, legislation should be construed as being subject to an implied general requirement of procedural fairness, save to the extent of a clear contrary provision.<sup>66</sup>
- 7.75 The rules of procedural fairness are minimum standards of fair decision-making imposed by the common law on administrative decision-makers. The rules of procedural fairness are generally formulated as the rule against bias and the right to a fair hearing.
- 7.76 An administrative decision-maker may, after considering the material presented, put a person on notice that a decision adverse to that person's rights or interests is being contemplated, and the person then be afforded an opportunity to put a case. In these circumstances the right to a fair hearing is honoured.<sup>67</sup> If the rules of procedural fairness are not complied with, an aggrieved person will (usually) be able to seek judicial review of a decision.<sup>68</sup>
- 7.77 A number of submissions covered the balance between providing procedural fairness to a person whose interests are adversely affected by a public interest disclosure and the protection offered a person making a disclosure.<sup>69</sup> This suggests that the protection afforded by procedural fairness should be positively legislated rather than be implied into new legislation.

## Obligation to provide protection

- 7.78 The scope of protection that should apply to a person making a disclosure was discussed in Chapter 6. In terms of an obligation of agencies to provide protection, the Murray Bill provided:
- ... a regime of candid disclosure and protection ... (through) a robust framework whereby public sector officials know these options are open to them and that they are fully supported by senior officials as a means to ensure that problems are raised and solutions are found.<sup>70</sup>

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66 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ).

67 *Retnaraja v Morauta* (1999) 93 FCR 397, 412 (von Doussa J).

68 Ombudsman NSW March 2008, *Administrative decision-making delegations and avoiding bias*, - Seminar Paper.

69 For example, Community and Public Sector Union, *Submission no. 8a*, p. 6.

70 Murray, Senator Andrew Public Interest Disclosures Bill 2007, Second reading speech, p 3.

- 7.79 Mr Kevin Lindeberg proposed that protection should be part of a system that gives a ‘new understanding’ to the meaning of a safe working environment.<sup>71</sup> Australian Lawyers for Human Rights argued that protection should include indemnities and support services to mitigate risks to whistleblowers.<sup>72</sup>
- 7.80 The Australian Lawyers for Human Rights’ submission is supported by the evidence that there has been a low level of support services for whistleblowers. The WWTW project determined that there were many factors contributing to this, including:
- the low level of resources dedicated to such programs;
  - a previous shortage of data about the overall level of whistleblowing;
  - uncertainty or confusion about the types of employees intended to be targeted;
  - an absence or inadequacy of procedural guidance on how employees should access the support, including an over-reliance on whistleblowers self-identifying for the purposes of gaining support;
  - lack of management information systems for ensuring that all deserving whistleblowing cases can be identified and assessed for support; and
  - inadequate or misapplied statutory definitions.<sup>73</sup>
- 7.81 The effectiveness of a public interest disclosure scheme relies on the scheme protecting persons from adverse repercussions arising from making a disclosure.

## Separating disclosures from personal grievances and management issues

- 7.82 Whistleblower arrangements currently exist either under the APS Code of Conduct provisions of the *Public Service Act 1999* or because agencies have implemented internal programs. A number of agencies currently deal with the substance of a disclosure independently of an individual’s interest in it. This practice appears to be a common-sense approach, noting that it may not always be possible to completely disentangle some issues involved in a

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71 Mr Kevin Lindeberg, *Submission no. 12*, p. 5.

72 Australian Lawyers for Human Rights, *Submission no. 9*, p. 5.

73 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. xxxiii.

disclosure, but many so-called public interest disclosures are personnel management issues.<sup>74</sup>

7.83 The Committee heard that a substantive issue in a disclosure that is escalated to an oversight or integrity agency would need to be separated from any personal issues because the oversight or integrity agencies, with the exception of the Public Service Commission, would not be in a position to remedy pre-existing personal or management disputes. What oversight and integrity agencies can do in these circumstances is to hold a watching brief over the treatment of a person in the workplace once a disclosure has been made.

7.84 The approach adopted by the Commissioner for Law Enforcement Integrity is to distinguish between the substantive issue and the personal matters surrounding it. In doing so there would not normally be a personal remedy available from the Commissioner for a wrongdoing, nor personal restitution, arising out of an investigation of the substance of a disclosure.<sup>75</sup> That is the approach adopted by the NSW Police Integrity Commission which is of the view that it is not interested in the circumstances surrounding a decision of a person to make a disclosure: 'how we came about the information is irrelevant'.<sup>76</sup> This approach was supported by the Community and Public Sector Union.<sup>77</sup>

7.85 Dr Brown commented that management of personnel issues related to a person making a disclosure should be within the system of values and norms of an agency's overall human resources management framework:

It is becoming clearer that these obligations are more akin to employers' other responsibilities to ensure their organization functions in a way which recognizes and protects the occupational health and safety (OH&S) of employees, than has previously been recognized in research and policy-making relating to whistleblowing. As discussed in our report, there has been a tendency to treat whistleblowing as something 'rare and special' when in fact this is not the case – and hence also to overlook the reasons why the obligation to properly recognize and support employees who make internal disclosures, should be treated as a basic, routine part of public sector management.<sup>78</sup>

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74 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 2.

75 Commissioner for Law Enforcement Integrity, *Submission no. 13*, p. 8.

76 Commissioner Pritchard, *Transcript of Evidence*, 27 October 2008, p. 76.

77 Mr Jones, *Transcript of Evidence*, 9 September 2008, p. 23.

78 Dr A. J. Brown, *Submission no. 68*, p. 2.

## Responsibilities of integrity agencies

- 7.86 The term ‘integrity agencies’ as used in this section refers to agencies that are authorised as external recipients of public interest disclosures. Many contributors to the inquiry identified a similar grouping of agencies that should assume this role including the Commonwealth Ombudsman, the Australian Public Service Commissioner, the Australian National Audit Office, the Inspector-General of Intelligence and Security.<sup>79</sup>
- 7.87 The responsibilities of integrity agencies proposed to the Committee include a duty to genuinely assess the soundness of the allegation made and to assess whether the matter is within power to investigate; a duty to investigate the matter or, where relevant, refer it to other persons to carry out an investigation; a duty to report the result of an investigation; and a duty to provide reasons for not further investigating a matter when that decision is made.
- 7.88 The reason for comprehensive responsibilities for integrity agencies is primarily because the data from the WWTW project shows a ‘patchiness’ and ‘generally low comprehensiveness and substantial variability of procedures’ in all jurisdictions. The WWTW Project reported that this requires:
- development of new ‘best-practice’ or ‘model’ procedures, clearer statutory requirements and better oversight of the quality of procedures and the adequacy of their implementation.<sup>80</sup>
- 7.89 There was general agreement that there should be legislated obligations related to confidentiality and privacy.<sup>81</sup>
- 7.90 In an attachment to the APSC submission, the submission from the Department of Education, Employment and Workplace Relations noted the following issues in relation to determining the role of the central oversight agency:
- the powers of the integrity agency to review agencies’ decisions/mechanisms;
  - any requirements for a level of commonality to be maintained across all agencies for how to deal with disclosures and whistleblowers;

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79 For example see, Commonwealth Ombudsman, *Submission no. 31*, p. 10.

80 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. xxxvi.

81 Australian Commission for Law Enforcement Integrity, *Submission no. 13*, p. 7. Commonwealth Ombudsman, *Submission no. 31*, p. 14.

- reporting obligations of the integrity agency, perhaps annually, especially to avoid any scope for third party reporting; and
  - Options for appeals and/or review including consideration of what status would be accorded to any decision of the integrity agency.<sup>82</sup>
- 7.91 A consistent theme in evidence was that people must have sufficient knowledge of the scheme to build confidence in it and, therefore, a duty should exist to provide relevant education.<sup>83</sup>
- 7.92 Broadly, the evidence received by the Committee was that the role of an agency administering legislation would be to set standards by which disclosures are properly assessed, investigated, actioned, reconsidered, reviewed and reported, to set standards for the protection of persons from reprisals and to monitor the treatment of people making disclosures.
- 7.93 The majority of evidence before the Committee supported an administering agency having an investigative role and powers to refer cases to other agencies and to have powers to investigate matters of its own motion, possibly with the assistance of other agencies.
- 7.94 It was proposed to the Committee that an administering agency, in addition to its other roles, would have the role of assisting agencies to implement comprehensive models of best practice in the management of whistleblowing and playing an educative role.<sup>84</sup>
- 7.95 In summary, it was suggested that the oversight integrity agency could have the general responsibilities of the other integrity agencies and in addition, monitor the system, report to parliament on the implementation and operation of the system and provide training and education.<sup>85</sup>

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82 Department of Education, Employment and Workplace Relations in Australian Public Service Commission, *Submission no. 44*, p. 21.

83 Mr McMullen, *Transcript of Evidence*, 21 August 2008, p. 80; Mr Jones, *Transcript of Evidence*, 28 August 2008, p. 6.

84 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. 3.

85 Commonwealth Ombudsman, *Submission no. 31*, p. 11.

## Case study When the system doesn't suit: Lieutenant Colonel Collins

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### Background

Lieutenant Colonel Lance Collins was an Army intelligence analyst. In his view, the Defence Intelligence Organisation (DIO) was pro-Indonesian and, as a result, intelligence was being 'doctored', intelligence support to Australian troops in East Timor had been deliberately cut by DIO, and his criticisms of DIO had caused his career to suffer.

Of his own initiative, Collins analysed DIO assessments about Indonesia to evaluate their accuracy. He circulated his critiques through an informal network within the intelligence community, including a pejorative report in September 1999. His conduct was said to be at times 'divisive and unprofessional' and 'jaundiced' when it came to Indonesia.<sup>86</sup>

In December 2000 Collins wrote to the Defence Minister setting out his concerns. That complaint was passed to the Inspector-General of Intelligence and Security (IGIS). Collins then formed the view that IGIS was not proceeding in the way he should. Collins lodged an application for redress of grievance in May 2003 just as IGIS was completing his inquiry. In his report, IGIS rejected Collins's assertions.

Captain Martin Toohey was appointed to investigate and report into the redress of grievance application, which now covered old ground but included fresh complaints about IGIS' handling of Collins' complaint to the Minister.

In his report in September 2003, Toohey supported Collins' original assertions. Subsequently, the 'Toohey Report' was found to have lacked jurisdictional authority and to lack evidence to substantiate the findings. Toohey's inquiry had miscarried, was inadequate to resolve the Collins matter and, as a result, a decision was made to not release it until the matter was settled.

In March 2004, Collins wrote to the Prime Minister to ask that a Royal Commission inquire into intelligence and on 11 April 2004, the 'Toohey Report' was in the hands of the Bulletin magazine. There is no public knowledge about who leaked the report.

### Discussion

The leak of the 'Toohey Report' led to two successful actions for defamation by the former head of the DIO and created an atmosphere which the Chief of the Defence Force described as 'a miasma of innuendo' that was detrimental to DIO in doing its job.<sup>87</sup>

Even where there is determination to settle complaints and considerable resources are used to do so, no disclosure scheme will be attractive when a person is intent on having a strongly held opinion predominate, irrespective of whether or not it is correct.

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## Procedures for security related disclosures

7.96 Under the current legislative framework, the Inspector-General of Intelligence and Security (IGIS) is tasked with reviewing the activities of the six main Australian Intelligence Community (AIC) agencies:

- the Australian Security Intelligence Organisation (ASIO);
  - the Defence Imagery and Geospatial Organisation (DIGO);
  - the Australian Secret Intelligence Service (ASIS);
  - the Defence Signals Directorate (DSD);
  - the Defence Intelligence Organisation (DIO); and
  - the Office of National Assessments (ONA).
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<sup>86</sup> *Lewincamp v ACP Magazines Limited* [2008] ACTSC 69.

<sup>87</sup> Transcript of Chief of Defence Force, General Peter Cosgrove, interview with Matt Brown, ABC AM program, Monday 19 April 2004, 8 am.

- 7.97 The Inspector-General of Intelligence and Security, Mr Ian Carnell, submitted to the Committee that it should continue to be ‘the appropriate external recipient of whistleblower reports’, and that third party disclosures are not appropriate for intelligence agencies due to secrecy obligations.<sup>88</sup> This position was supported by the Director-General of the Office of National Assessments who addressed the Committee on behalf of the AIC agencies.<sup>89</sup> The issue of disclosures to third parties is discussed further in the next chapter.
- 7.98 In expanding on the submission Mr Carnell explained that intelligence agencies should be exempt from broader public interest disclosure procedures under possible new legislation so that intelligence related disclosures can only be made to his office.<sup>90</sup>
- 7.99 The Committee was told that the exception should apply to all allegations concerning the activities of AIC agencies, even where the substance of the allegations are of an administrative character, because all matters within those agencies can be linked to intelligence or security. According to Mr Carnell:
- Even if it is an administrative matter they have brought to you, the more general matter they might disclose is invariably operational security, so it is the very mixed nature of these things that means in practice that you could not give people clear instruction such as, ‘If it’s a security matter go to IGIS but if it’s an administrative matter then you have an option of going to the Ombudsman or Public Service Commissioner.’<sup>91</sup>
- 7.100 Given the argument for the separation of AIC from general public interest disclosure legislation, it was suggested that reviews of IGIS whistleblower investigations, where warranted, could be undertaken on a consultancy basis, rather than being handled by the Ombudsman.<sup>92</sup>
- 7.101 Mr Carnell identified areas where he considered that provisions of the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) should be improved by being brought into line with new public interest disclosure provisions. Currently s. 33 of the IGIS Act does not provide for protection of witnesses against criminal action. The range of protective measures that the Committee recommends as part of public interest disclosure legislation
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88 Inspector-General of Intelligence and Security, *Submission no. 3*, pp. 2-3. Mr John Wilson argued that public interest disclosure provisions should include means by which action can be bought against intelligence agencies, *Submission no. 40*, p. 3.

89 Mr Varghese, *Transcript of Evidence*, 16 October 2008, p. 1.

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

91 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 6.

92 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 8.

should be provided under the IGIS Act so that people from AIC agencies are protected during investigations under the IGIS Act.<sup>93</sup>

- 7.102 An area of potential for commonality of public interest disclosure provisions and the *Inspector-General of Intelligence and Security Act 1986* is the existing legislative relationship between the Ombudsman, the Committee's preferred central oversight agency, and the IGIS. Section 16 of the *Inspector-General of Intelligence and Security Act 1986* provides for consultation between the IGIS, the Ombudsman and the Auditor-General with respect to investigations.<sup>94</sup>
- 7.103 Another view put to the Committee was that there should not be a blanket exclusion for security matters from public interest disclosure legislation. Rather, security matters should be treated differently 'only in so far as it concerns actual military and intelligence operations and conceivably puts our operatives at risk'.<sup>95</sup>
- 7.104 Dr A. J. Brown expressed concern about 'carving out' intelligence and security from the general public interest disclosure legislation arguing that there will be no additional check to ensure that the system is working well without the additional oversight of the Ombudsman.<sup>96</sup>
- 7.105 Whereas s. 70 of the *Crimes Act 1914* provides for a general prohibition on the disclosure of official information, there is no equivalent in, for example, New South Wales legislation. However, Mr Roger Wilkins AO, Secretary to the Attorney-General's Department and former Director-General of the NSW Cabinet Office, told the Committee that the 'order of magnitude in terms of sensitivity' is much broader at the Commonwealth level compared to the state level and it was unwise to draw any direct comparisons between state and Commonwealth activities.<sup>97</sup>
- 7.106 Providing a separate set of provisions for security related information can be problematic because that information is not confined to discrete range of agencies. For example, national security matters now extend to previously unrelated areas such as climate change.<sup>98</sup>

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93 Mr Carnell, *Transcript of Evidence*, 16 October 2008, 4; Mr Varghese, *Transcript of Evidence*, 16 October 2008, p. 7.

94 It was noted that the Ombudsman can act as the Inspector-General of Intelligence and Security from time to time. See Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 7; Mr Moss, *Transcript of Evidence*, 23 October 2008, p. 4.

95 Ms Kardell, Submission no. 65, p. 19.

96 Dr Brown, *Transcript of Evidence*, 9 September 2008, p. 17.

97 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 2.

98 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 4.

- 7.107 The Australian Federal Police are not part of the AIC and their intelligence and security related activities are not reviewable under the *Inspector-General of Intelligence and Security Act 1986*. Both the IGIS and the AFP commented that AFP areas should be covered under general public interest disclosure provisions.<sup>99</sup>
- 7.108 Given that there is no reason why the IGIS should not exercise powers under the IGIS Act for the purposes of public interest disclosures, a common system of disclosure would be achievable.

## Finalisation

- 7.109 Many submissions to the Committee recounted the considerable delays and the complex processes that whistleblowers had experienced in attempting to resolve an issue.<sup>100</sup> Many whistleblowers indicated that they had never received satisfaction and continued to advance their causes for many years.<sup>101</sup>
- 7.110 Where there are competing interests, a matter should be brought to a close by a final decision. A final decision may be a decision in which it is not possible for a decision-maker to reach a concluded view because, for example, the available evidence is not sufficient to support or reject the accusation that has been made.
- 7.111 A final decision is necessary out of fairness to the parties involved and reasonableness. There is little merit in pursuing matters once avenues of investigation have been exhausted, particularly where the issue has become a disagreement about the outcome of an investigation.

I recently had a situation where a person who was a contractor for the department for a month or so a couple of years ago continued to make allegations. They raised them with members of parliament, raised them with the minister, raised them with myself; and even though we had two or three quite rigorous processes, the person continued to basically not accept the decision.<sup>102</sup>

- 7.112 A final decision in an administrative investigation does not restrict the right of a person to any appeals process that might be available through a court or tribunal.

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99 Mr Carnell, *Transcript of Evidence*, 16 October 2008, p. 7; Mr Whowell, *Transcript of Evidence*, 23 October 2008, p. 21.

100 Ms Merrylin Bulder, *Submission no. 32*; Mr Neil Winzer, *Submission no. 59*.

101 Mr Keith Potter, *Submission no. 43*.

102 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 6.

- 7.113 The proposed disclosure scheme sets out what is disclosable within the scheme and allows some discretion for agencies and oversight and integrity bodies to make an assessment of how to deal with what might not be precisely described. The discretion available under the scheme would enable decision-makers to act in the spirit of the 'open-ended' approach to categories of disclosure recommended by the Secretary to the Attorney-General's Department.<sup>103</sup> In doing so, however, the scheme should prevent creating 'a culture of forum shopping, with complainants approaching several agencies shopping for the best outcome'.<sup>104</sup>
- 7.114 The administration of the new legislation would provide for points at which a matter might be closed and the legislation could provide that the statutory officer responsible for the general administration of the new legislation may bring an issue to finality within the scheme, subject to a person's right to seek review of administrative decisions by courts and tribunals.
- 7.115 The detailed structure of the process is best left to administrative action, but it would provide for assessment of a claim, investigation, report, reconsideration, review and reasons being given along the way.
- 7.116 Finality is an important issue in managing the expectations of whistleblowers so that the protracted situations such as those described to the Committee are avoided to the extent possible.<sup>105</sup> Some issues will not be amenable to resolution through a disclosure scheme and the legislation would not expunge any existing legal rights.

## **View of the Committee**

- 7.117 A clear message to the Committee from the evidence was that a public interest disclosure system should provide more than one avenue for reporting disclosures. Decision makers should have some discretion to exercise flexibility in the initial receipt of disclosures so long as the person making the disclosure shows good faith in the spirit of the new legislation. The Committee agrees with these suggestions.

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103 Mr Wilkins AO, *Transcript of Evidence*, 27 November 2008, p. 13.

104 Ms Briggs, *Transcript of Evidence*, 25 September 2008, p. 3.

105 Mr Metcalfe, *Transcript of Evidence*, 27 November 2008, p. 20.

- 7.118 The vast majority of whistleblowing-type disclosures that are made are reported internally in the first instance.<sup>106</sup> Legislation on public interest disclosures should encourage this practice of making disclosures internally because of the agencies' proximity to the issue and ability to effect action.
- 7.119 However, a subsequent disclosure to an external entity could be protected, for example, where an agency has failed to meet its obligations under the Act or where the whistleblower considers on reasonable grounds, that the matter has not been handled appropriately by the agency.
- 7.120 It is the view of the Committee that agency heads should be obliged to establish public interest disclosure procedures appropriate to their agencies, report on the use of those procedures to the Commonwealth Ombudsman, and delegate powers to appropriate staff within the agency to receive and act on disclosures.
- 7.121 Under new legislation, agencies should be obliged to undertake investigations into disclosures that are made from within the organisation or referred to it by an another agency; undertake an assessment of the risk that detrimental action could be taken against the person who made the disclosure; within a reasonable time period or periodically, notify the person who made the disclosure of the outcome or progress of an investigation, including the reasons for any decisions taken; provide for confidentiality; and separate the substance of a disclosure from any personal grievance a person who had made a disclosure may have in a matter.
- 7.122 The Committee is of the view that the Public Service Commissioner and the Commonwealth Ombudsman could each bring expertise to the role of providing the central oversight function.
- 7.123 The Public Service Commissioner manages the strategic performance in the public sector and has a key role in fostering the 'embedding (of) ethics and integrity' within the public sector.<sup>107</sup> In addition to the Commissioner's role in developing an ethical public service, the Commissioner's responsibilities and, therefore, expertise, can be best described as in those areas that develop, promote, review and evaluate APS employment policies and practices, foster continuous improvement in the management of people, and provide strategic direction in those personnel functions that have an APS-wide application.

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106 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, pp. xxv.

107 Australian Public Service Commission, *State of the service report 2007-2008*, p. 160.

- 7.124 The Committee is of the view that the agency responsible for administering the new legislation should have extensive experience and an established reputation for handling complex and sensitive investigations in matters of public administration beyond individual grievances. This is beyond the current administration of matters that traditionally fall within the Public Service Commissioner's responsibilities.
- 7.125 In the Committee's view, the Commonwealth Ombudsman, as the Commonwealth's only generalist investigative agency, already possesses the requisite skills, experience and public profile to fulfil the roles of providing the central oversight function and general administration of the new legislation.
- 7.126 The disclosure system should provide that once the matter has been disclosed internally, a whistleblower can request a reconsideration of the matter or request a review of the agency's investigation by a different external agency. To prevent the possibility that whistleblowers may continuously seek forums to obtain a desired outcome, protection would only be provided to internal disclosures in the first instance and to one subsequent disclosure made to an external agency. Protection would not apply to additional disclosures of the same matter to other agencies.
- 7.127 The Committee considers that the new public interest disclosure system should include the flexibility for a number of authorities to receive disclosures on matters within their responsibility and act together or individually to resolve them, while providing a clear line for reporting security and intelligence matters to the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.
- 7.128 The role of the Commonwealth Ombudsman as the central oversight agency for the new public interest disclosure system should include general administration of the legislation under the Minister, setting standards for the investigation, reconsideration, review and reporting of public interest disclosures, referring public interest disclosures to other appropriate agencies, receiving referrals of public interest disclosures and conducting investigations or reviews where appropriate. In addition, the role could include providing assistance to agencies in implementing the public interest disclosure system including, providing assistance to employees within the public sector in promoting awareness of the system through educational activities and providing an anonymous and confidential advice line. Finally, a further role would include receiving data on the use and performance of the public interest disclosure system and reporting to Parliament on the operation of the system.
- 7.129 The Committee notes that public interest disclosures that implicate the Ombudsman or Deputy Ombudsman may arise. As the Office of the

Ombudsman is a portfolio agency, currently of the Department of Prime Minister and Cabinet, disclosures that implicate the Ombudsman or Deputy Ombudsman would be referable to the head of the agency with responsibility for the general administration of the portfolio.

### **Recommendation 15**

**7.130 The Committee recommends that the Public Interest Disclosure Bill provide an obligation for agency heads to:**

- **establish public interest disclosure procedures appropriate to their agencies;**
- **report on the use of those procedures to the Commonwealth Ombudsman; and**
- **where appropriate, delegate staff within the agency to receive and act on disclosures.**

### **Recommendation 16**

**7.131 The Committee recommends that the Public Interest Disclosure Bill provide that agencies are obliged to:**

- **undertake investigations into disclosures that are made from within the organisation or referred to it by another agency;**
- **undertake an assessment of the risks that detrimental action may be taken against the person who made the disclosure;**
- **within a reasonable time period or periodically, notify the person who made the disclosure of the outcome or progress of an investigation, including the reasons for any decisions taken;**
- **provide for confidentiality;**
- **protect those who have made a disclosure from detrimental action; and**
- **separate the substance of a disclosure from any personal grievance a person having made a disclosure may have in a matter.**

**Recommendation 17**

7.132 The Committee recommends that the Public Interest Disclosure Bill provide that the following authorities, external to an agency, may receive, investigate and refer public interest disclosures:

- the Commonwealth Ombudsman, including in his capacity as Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman and Postal Industry Ombudsman;
- the Australian Public Service Commissioner; and
- the Merit Protection Commissioner.

**Recommendation 18**

7.133 The Committee recommends that the Public Interest Disclosure Bill provide that the following authorities, external to an agency, may receive, investigate and refer public interest disclosures relevant to their area of responsibility:

- Aged Care Commissioner;
- Commissioner for Law Enforcement Integrity;
- Commissioner of Complaints, National Health and Medical Research Council;
- Inspector-General, Department of Defence; and
- Privacy Commissioner

**Recommendation 19**

7.134 The Committee recommends that the Public Interest Disclosure Bill provide that where disclosable conduct concerns a Commonwealth security or intelligence service, the authorised authorities to receive disclosures are the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.

**Recommendation 20**

7.135 The Committee recommends that the Public Interest Disclosure Bill establish the Commonwealth Ombudsman as the oversight and integrity agency with the following responsibilities:

- general administration of the Act under the Minister;
- set standards for the investigation, reconsideration, review and reporting of public interest disclosures;
- approve public interest disclosure procedures proposed by agencies;
- refer public interest disclosures to other appropriate agencies;
- receive referrals of public interest disclosures and conduct investigations or reviews where appropriate;
- provide assistance to agencies in implementing the public interest disclosure system including:
  - ⇒ provide assistance to employees within the public sector in promoting awareness of the system through educational activities; and
  - ⇒ providing an anonymous and confidential advice line; and
- receive data on the use and performance of the public interest disclosure system and report to Parliament on the operation of the system.

