CHAPTER 6: THE WHISTLEBLOWING PHENOMENON

Lessons from DFAT's experience

6.1 DFAT's experience with whistleblowers provides important lessons which will come as no surprise to those familiar with the burgeoning literature on whistleblowing. The first is the need for a conclusive result in any whistleblowing episode. Whistleblowers, having nerved themselves to take the large and risky step of seeking an external remedy to problems they perceive in their organisation, are likely to be extremely persistent in their claims. They can expect to suffer significantly from any result short of complete victory and have little to lose by continuing to press their case until the bitter end.

6.2 Other factors combine to make whistleblowers persistent. They often begin their campaigns with over-optimistic expectations of the remedies available. If, as has been the case in DFAT, the whistleblowers' experience of other organisations is limited, they may also have unrealistic expectations of what can be achieved in the management of large bodies and an unduly low opinion of the quality of management in their own organisation. The general grievances of long-serving whistleblowers will often be intertwined with specific disputes they have had with other long-serving members of the organisation, disputes that are of little or no interest to anyone outside the tiny world in which they took place but which are difficult to separate from the substantive matters raised and which tend to aggravate already tense relationships during the whistleblowing episode.

6.3 All these factors can maintain a whistleblower's determination and determination can easily turn into obsession. Whistleblowers can become so single-mindedly focussed on the complaints they have raised that they lose all detachment and objectivity. They may then see a more balanced comment on their grievances as part of a conspiracy to conceal malpractice. The result may be a persistent campaign by an apparently sincere individual or group which can win prominence for the matters raised that is far out of proportion to their significance. But there is a public interest in reaching a definitive end even to justified cases of whistleblowing. The costs of continuing whistleblowing activity, to the individual and organisational targets, to the taxpayer and to the whistleblowers themselves can be large and will increase as the episode persists. The large number of DFAT officers who needed to attend the hearings of this Committee are only one indication of the costs of the current episode.

6.4 It is clear from DFAT's experience that, in the absence of an effective system for dealing with whistleblowing, punishing the whistleblower will not guarantee an end to the episode, even if the punishment can be justified in isolation. Nor will it always be sufficient to have claims investigated and certified groundless by external authorities. Suspicions will persist and conspiracy theories develop until, and sometimes even after, all the facts are exposed.

6.5 A second major lesson of the DFAT cases is that whistleblowers can be wrong and it is necessary to balance different interests in a whistleblowing case. Quite apart

from the possibilities of malice or mischievous intent, whistleblower error can derive from misreading of documents, misunderstanding of legislative or other rules, misinterpretations of facts, or from having access to only some of the facts. Some whistleblowers may have genuine disagreements on policy with their employers. Others may have difficulty with the concept of risk management, seeking perfection where it is more sensible to accept a satisfactory result. The whistleblowers themselves take large risks, experience serious stress, and usually face significant formal or informal penalties. Where their claims are justified and where they have behaved ethically, they deserve protection but even then their interests are not the only ones involved.

6.6 The targets of whistleblowing, both individuals and organisations, also have rights and interests that need to be protected, especially against incorrect or malicious claims. But even when accurate allegations are made, the accused have the right to have proper processes of justice observed. The reckless publication of claims so seriously inaccurate as those made by Mr Carroll and the ORC (and made to the Committee but not publicly by the DFAT Reform Group) illustrates the damage that can be done by inappropriate whistleblowing. Such incidents could discredit the concept of ethical whistleblowing and are to be deplored for that reason as well as for the immediate damage they do.

6.7 Some whistleblowers will be fully justified in exposing genuine and serious malpractice. Others will become whistleblowers as a result of sincere but misguided beliefs about the iniquity of their employer and the scope for reform through public exposure and external review. Some will be motivated mainly by malice or personal spite. The ideal balance of the various interests involved in a whistleblowing episode will differ according to the motivation and justification of the whistleblower.

6.8 Whatever the ideal balance might be in a particular case, publicity generated by the whistleblower is unlikely to be the best means of achieving it. Publicity can be justified only where a whistleblower has a reasonable basis for his or her beliefs, is broadly correct in his or her claims, and has no access to an avenue of review. Inappropriate resort to publicity is a most undesirable course because it can be difficult for individuals or organisations that are subject to whistleblowing to respond definitively to the whistleblower or to the public. Where the allegations are partly directed at individuals a full organisational response may be prevented or restricted by privacy rules. National security or other valid reasons for limiting a response may also leave individuals or organisations exposed to damage from plausible but incorrect or dishonest allegations. Even where a full response is possible, it will frequently be less newsworthy than the initial allegation and damage caused by the publicity might not be corrected effectively.

6.9 This leads to the third major lesson of the DFAT cases, the need for a proper process for dealing with whistleblowing. Publicity has undesirable side effects when used as a whistleblowing tool. However, whistleblowers are unlikely to remain silent and it may be difficult to punish malicious whistleblowing if there is no effective, visibly honest process for dealing with genuine complaints. Since a whistleblower is likely to be suspicious of internal review, involvement of an external agency in the process is likely to be required for it to be seen to be fair. Such involvement is also desirable because the targets of whistleblowing will often be expected to rectify the faults the whistleblower has exposed and, understandably, may not be enthusiastic about doing so. An effective

process for dealing with whistleblowing episodes thus will require some degree of involvement or review by an external body.

6.10 A fourth important lesson from the DFAT cases is that whistleblowing episodes can offer valuable general insights about organisations even if the whistleblower's specific claims are incorrect. The allegations in both the DFAT cases, although wrong in many particulars, were directed towards areas of management in which the Department was weak. In hindsight, it is a matter for considerable regret that the systemic flaws hinted at in reviews of the early 1980s DFAT whistleblowing case were not corrected at the time. Some of the Carroll/ORC/Reform Group allegations, although not adequately supported by evidence of wrong-doing by individuals, did indicate serious problems in DFAT's administrative systems. Although the Department had already resolved many of the problems publicised in that episode and had shown its willingness to resolve others, the allegations taken as a whole provide a useful window into DFAT's management culture up to the late 1980s and some clues to problem areas.

6.11 The general lesson is that even a misconceived attempt at whistleblowing can provide useful information on defects in management systems. The review of whistleblowing claims should never stop at the point at which the particular subjects of the claims are cleared of actionable offences as occurred in the first DFAT case. The standard of behaviour and efficiency expected of Australian Government departments and agencies is higher than mere absence of criminality. Much of the value of an effective system for handling whistleblowing cases would flow from the assurance it could offer that the broader or underlying causes of a complaint would be identified and dealt with.

The importance of process

6.12 The lessons about whistleblowing that were so painfully and expensively exposed in the DFAT cases: that whistleblowers are likely to be determined; that their interests are not the only ones needing protection; that a proper process for handling whistleblowers' reports, including the involvement of an external agency, would be desirable; and that systemic flaws may lie behind even unsubstantiated allegations, are not embodied in the current APS system for dealing with whistleblowing episodes. A recent authoritative study of whistleblowing concluded:

> The desirability of reporting (of "whistleblowing" on) serious impropriety and maladministration is acknowledged in some degree in almost all Australian jurisdictions, be this in public service regulations obliging supervisors to report the misconduct of subordinate officers or in the statutory reporting obligation of designated officials imposed in New South Wales by the *Independent Commission Against Corruption Act, 1988* and in Queensland by the *Criminal Justice Act, 1989*. But no jurisdiction as yet confronts the phenomena of whistleblowing and, importantly, of whistleblower protection, in anything approaching a principled and systematic way (Finn 1991, p. 45).

6.13 Internal review apart, the present system in the APS, so far as there is one, allows for complaints to external agencies such as the Ombudsman, the Auditor-General, the MPRA or the AFP. Each review body has limited jurisdiction and complaints to any of them can fall through jurisdictional cracks or be reviewed in too narrow a context. As the system currently operates, genuine whistleblowers are inadequately protected and their complaints may not be properly investigated but genuine, misguided and malicious whistleblowers alike are still able to secure repeated, often expensive, reviews by different bodies. An individual who is prepared to act without regard for his or her public service career and who is prepared either to risk defamation action or to arrange for potentially defamatory material to be published under cover of parliamentary privilege can sustain for a very long time a campaign against a government body. The DFAT cases show that such individuals exist.

6.14 Reviews by parliamentary committees like this one, however comprehensive, do not compensate for the many defects of the current system. The choice of topics for parliamentary inquiry is not always systematic. The strengths of parliamentary committees tend not to lie in the primary investigation of malpractice and their inquiries can become politicised. A parliamentary inquiry into a whistleblowing episode can easily elevate the status and significance of the episode above any level that could be justified on its merits. Parliamentary committees, in any case, have no power to rectify any malpractice they might find. To the extent that parliamentary involvement would be desirable in a whistleblowing episode, it would best take the form of a committee review of a report on the episode by an independent body.

6.15 The absence of a comprehensive system for dealing with whistleblowing incidents probably increases the risk of improper behaviour by whistleblowers while reducing the likelihood that real malpractice will be reported. Unless there is a general perception that reports of malpractice will be competently and honestly investigated, some persons with concerns about administration will see publicity as the only way of having their concerns redressed and others will be deterred from raising them. This is not to say that the presence of effective mechanisms for review of complaints will prevent inappropriate actions by some individuals or that such actions should be condoned. A better system would, however, make it easier for unethical or improper behaviour by whistleblowers to be appropriately punished, an essential counterbalance to any systems for protection of ethical whistleblowers.

6.16 An effective system of dealing with whistleblowing episodes would also help to maintain desirable levels of individual privacy and official confidentiality. At present, if whistleblowers publish inaccurate or malicious claims, conspiracy theories can often only be disproved and public and staff confidence in a department or agency restored by the release of information contradicting the whistleblowers' claims. But in some of the DFAT cases release of the full story posed significant difficulties, not for any sinister reason but because of the potential for unfair damage to the reputations of individuals. This would not be unusual and other good reasons could exist for departments and agencies to not always respond to whistleblowing by releasing all the facts relevant to allegations. There is a public interest in individual privacy and official confidentiality which must be balanced against the interests promoted by the whistleblowers.

6.17 Whatever system applies to whistleblowing must balance competing interests. Influenced by its recent experience with the ORC, DFAT has suggested in evidence to the fraud inquiry of the House of Representatives Standing Committee on Banking, Finance and Public Administration that departments could be authorised to fund the legal expenses of officers who have been the subject of unsubstantiated allegations and who subsequently sue the person or persons who made the allegation. DFAT also suggested consideration of departments being authorised "to independently mount defamation actions where the reputation of the Department or agency itself has been defamed or impugned" (HRSCBFPA 1992, p. S362). These would be powerful anti-whistleblower mechanisms and, in the Committee's view, would be more likely to deter whistleblowers who have genuine matters of concern to raise than it would fanatics or fools. It would also pose the risk that public resources might be used to harass individuals or to suppress political or social dissent.

6.18 It is, of course, up to the House of Representatives Committee to reach its own conclusion on DFAT's submission. For its part, this Committee could not support the approach canvassed by DFAT. Where it is desirable that action be taken against inappropriate whistleblowing, that action should take the form of charges against the whistleblowers, laid and heard in criminal or disciplinary proceedings. No government should facilitate defamation actions by individuals or organisations as an indirect form of punishment of other individuals or organisations and governments should not intervene in private legal action between citizens without strong reasons to do so. In any case, the Committee would not support any measures to strengthen the direct or indirect penalties for whistleblowing unless they were part of a system that also protected ethical whistleblowing.

6.19 In its report earlier this year on its review of the Office of the Commonwealth Ombudsman, the Committee cited research by Professor Paul Finn of the Australian National University in support of the introduction of a system of channelled and confidential review of whistleblowing-type complaints, under the aegis of the Ombudsman. The Committee envisaged the Ombudsman's office filtering the complaints, referring them to other agencies when appropriate, investigating some itself and monitoring the quality of internal investigations (SSCFPA 1992, pp. 68-9). Professor Finn's proposal included provision for the making of reports known to be false or misleading to be both a criminal and a disciplinary offence. In addition, he proposed that whistleblower protection be available only in restricted circumstances to those whistleblowers who secured publicity for their complaints outside the formal review structure (Finn 1991, pp. 81-4).

6.20 The Committee is still of the view that a system along the lines proposed by Professor Finn would be desirable and is still of the view that the Ombudsman should have a central place in it and the resources and jurisdiction to do it properly. An alternative, embodied in a private senator's bill introduced by Senator Vallentine in 1991, is the establishment of a Whistleblowers Protection Agency under specific legislation. The Ombudsman, however, is an existing institution with generally appropriate powers and there might be benefits in combining the handling of whistleblower complaints with the broadly similar current functions of the Ombudsman. The Committee noted in its report on its review of the Office of the Commonwealth Ombudsman, to which the Government

is yet to respond, that the current exclusion of employment-related grievances from the Ombudsman's purview is a significant jurisdictional gap. This gap in particular is one through which whistleblower complaints could fall.

6.21 A system of this nature would provide a structure within which whistleblowing episodes could be brought to a definite conclusion with the likelihood that genuine problems would be resolved and that genuine administrative failings would not be covered up. It would have the advantage of building on established institutions rather than creating a wholly new structure. The Committee has noted above that the desirability of whistleblower legislation is part of the terms of reference of the inquiry by the House of Representatives Standing Committee on Banking, Finance and Public Administration and therefore has avoided commenting further on the issue in this report. However, it commends this report to the consideration of the House of Representatives Committee.

Costs and benefits

6.22 DFAT has suffered to an unusual extent from attacks by whistleblowers on its management systems and practices. While it would be possible to speculate on the reasons for this, the Committee's main concern was with the extent to which the attacks were justified. The Committee gave serious and lengthy consideration to the matters raised by the Reform Group and concluded that the Group's claims were, at best, seriously over-stated but much more frequently simply wrong. The Reform Group submission drew the Committee's attention to some general issues relating to DFAT's management systems and these are dealt with elsewhere in this report. The overwhelming impression associated with the successive whistleblowing episodes and the responses to them, however, was of a waste of talent, time and public money and of damage to the careers and reputations of individuals. Those raising the complaints were themselves were among the victims.

6.23 There remain, nevertheless, good reasons for supporting ethical and justified whistleblowing. As one recent academic survey put it:

> Whistleblowing can be a useful weapon in the armoury against corruption for personal gain and also corruption for political purposes ... it can alert the public to dangers and provide the community with the information that could not necessarily be obtained under administrative law even if one knew where to begin looking. Taking this point further, whistleblowing can be seen to contribute to the democratic process which requires citizen participation and cannot survive in an environment of secrecy. Apart from sounding the alarm on immediate dangers, whistleblowing can bring benefits to society through improving the efficiency and integrity of the public sector (Harders, 1991, p. 30).

There are costs to set against these benefits, as the same article notes. The DFAT cases give an indication of the scale and extent of those costs, both to individuals and to the Government. But the Committee believes that the costs would be reduced and more of

the potential benefits realised through the establishment of a formal process for dealing with whistleblowing.

6.24 The operation of such a process would itself have costs and these would need to be added to the balance in any decision on whether or not to establish a process for handling whistleblowing. It is particularly important in making such calculations that the scale of the possible benefits not be overlooked because they are scattered across organisational units and individuals and less readily visible to the central decision makers. The Committee's intuitive feeling is that the benefits of a proper process would outweigh the costs. The Committee was concerned also that the proper handling of whistleblowing should not be dismissed as too hard an issue to resolve. The easy alternative would be to continue with a system in which ethical and justified whistleblowing is deterred while inappropriate whistleblowing action still occurs. DFAT's experience provides full evidence of the costs of the status quo.