



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

**HOUSE OF
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

**Reference: Whistleblowing protections within the Australian government public
sector**

THURSDAY, 28 AUGUST 2008

CANBERRA

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HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 28 August 2008

Members: Mr Dreyfus (*Chair*), Mr Slipper (*Deputy Chair*), Mr Andrews, Mr Butler, Mr Georgiou, Mr Melham, Mrs Mirabella, Ms Neal, Mr Neumann and Mr Perrett

Members in attendance: Mr Dreyfus, Mr Melham, Ms Neal, Mr Neumann, Mr Perrett and Mr Slipper

Terms of reference for the inquiry:

To inquire into and report on:

A preferred model for legislation to protect public interest disclosures (whistleblowing) within the Australian Government public sector. The Committee's report should address aspects of its preferred model, covering:

1. the categories of people who could make protected disclosures:
 - a. these could include:
 - i. persons who are currently or were formerly employees in the Australian Government general government sector*, whether or not employed under the Public Service Act 1999,
 - ii. contractors and consultants who are currently or were formerly engaged by the Australian Government;
 - iii. persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants; and
 - b. the Committee may wish to address additional issues in relation to protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise;
2. the types of disclosures that should be protected:
 - a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment; and
 - b. the Committee should consider:
 - i. whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit; and
 - ii. whether grievances over internal staffing matters should generally be addressed through separate mechanisms;
3. the conditions that should apply to a person making a disclosure, including:
 - a. whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a)); and
 - b. whether penalties and sanctions should apply to whistleblowers who:
 - i. in the course of making a public interest disclosure, materially fail to comply with the procedures under which disclosures are to be made; or
 - ii. knowingly or recklessly make false allegations;
4. the scope of statutory protection that should be available, which could include:
 - a. protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;
 - b. immunity from criminal liability and from liability for civil penalties; and
 - c. immunity from civil law suits such as defamation and breach of confidence;
5. procedures in relation to protected disclosures, which could include:
 - a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two;
 - b. the obligations of public sector agencies in handling disclosures;

- c. the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education); and
 - d. whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted;
6. the relationship between the Committee's preferred model and existing Commonwealth laws; and
7. such other matters as the Committee considers appropriate.
- * As defined in the Australian Bureau of Statistics publication Australian System of Government Finance Statistics: Concepts, Sources, Methods, 2003 p.256.

WITNESSES

DONNELLY, Ms Melissa, Senior Legal Officer, Community and Public Sector Union1
JONES, Mr Stephen, National Secretary, Community and Public Sector Union1
RAHILL, Ms Alison, Parliamentary Liaison Officer, Community and Public Sector Union1

Committee met at 9.33 am**DONNELLY, Ms Melissa, Senior Legal Officer, Community and Public Sector Union****JONES, Mr Stephen, National Secretary, Community and Public Sector Union****RAHILL, Ms Alison, Parliamentary Liaison Officer, Community and Public Sector Union**

CHAIR (Mr Dreyfus)—I declare open this public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs. This is the second public hearing of the committee's inquiry into whistleblowing protections within the Australian government public sector. I welcome everyone here today. I am sure our discussions will be informative.

Although the committee does not require you to speak under oath you should understand these hearings are formal proceedings of the Commonwealth parliament and giving false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Mr Jones, do you want to make a brief introductory statement?

Mr Jones—Yes. The CPSU believes that a strong, professional and independent public service stands as the cornerstone of our democracy. We believe the Commonwealth Public Service and the Commonwealth public sector are relatively free from the forms of maladministration and, dare I say, corruption that may beset the public sector in other countries and jurisdictions. Against this background, one might ask why my organisation supports strong whistleblower laws and believes the current laws are in need of reform. We do so because we think those laws go a long way towards enhancing the culture within public sector agencies and, just as importantly, enhancing public confidence in the institutions of government and governments as a whole.

With those opening comments in mind, we have made some fairly specific recommendations to the committee about where we think any new statutory provisions should go to. We are happy to go through the details of those specific recommendations, which were provided to the committee yesterday. I understand that, with such short notice, members of the committee may not have had the opportunity to read them. I thank the committee for accepting the late submission. The reason it was late is that we have been engaged in a policy discussion with our members on this very issue, which concluded only last week, and we wanted to have the mandate of our membership to make a submission to this committee.

CHAIR—Thank you. We were aware that you were embarked on that process of consultation and we are grateful for the submission you have made. You very correctly flagged to us in an earlier letter that the submission was coming. I think not all members of the committee have had a chance to study the submission, but we will. In any event, this submission fleshes out what you had indicated in summary in the earlier letter. It will help us that you have gone into that added level of detail.

We note that the union has made previous submissions and recommendations to a couple of Senate inquiries in the past. One of them was quite a long time ago, in 1994, and another one was a bit more recently, in 2002. We have access to those submissions and obviously we have access to the reports of those Senate committees. Perhaps it is fairly clear that one of the reasons

this inquiry is taking place at all is that there has not been the action that was recommended by both of those Senate inquiries, and the position is that the whistleblower protection that is available for the Commonwealth public sector is very piecemeal. We cannot say that there is not any, but, such as it is, there is not much.

I might start by asking a couple of general questions which any or all of you should feel free to answer. Does the CPSU have a view on whether there is a difference between what is called 'public interest disclosure' and leaking?

Mr Jones—Yes, we do. We take the view that public interest disclosure should be provided for in a statutory regime. We think that whistleblowing, or public interest disclosure, should be dealt with internally in the Public Service, albeit with mechanisms for reporting and corrective action. Quite frankly, we do not think the front pages of the tabloids of this country should be the first port of call if a public sector employee or a person performing public sector work is apprised of an instance of maladministration or corruption or illegal activity in the course of their employment. We think it is in the public interest that there should be a regime for providing internal mechanisms within the Public Service, albeit mechanisms which are at arm's length from any particular agency and appropriately resourced to investigate and make recommendations and, if necessary, take corrective action to deal with instances of maladministration.

That said, you would note that we said in our written submission that we believe there should be a last-resort protection for a disclosure to third parties. But the condition upon which that form of disclosure should be protected is by way of those internal mechanisms referred to in our submission—a complaint or a disclosure to the proper investigating authority. In our submission, a public service ombudsman would be the independent body that would receive such a complaint where that complaint has not been dealt with satisfactorily.

Mr SLIPPER—I was very pleased to see the leaks in the paper about how the key order departments had advised the government against a Fuelwatch scheme. I was pleased to see that. However, I am more interested in your view as to whether that was a whistleblowing exercise or an unjustified leak.

Mr Jones—I was critical at the time about the leaking of that material and I would have been equally critical if that leak had been made under the former government. I was critical because I believe it fundamentally breaches the trust that is essential between an apolitical public service and the executive of the day. If the executive of the day believes that it cannot receive advice, indeed contrary advice, from the various agencies of state and be able to deliver upon that advice without fear that it is going to appear in the newspaper then it fundamentally breaks down the relationship between the Public Service and the executive and the capacity of the Public Service to give frank and fearless advice.

Mr SLIPPER—As a former parliamentary secretary to the former Prime Minister I was disturbed to hear that PM&C are no longer giving coordinating comments—I forget the actual terminology used—on cabinet submissions. Would you say that may be an overreaction to that unjustified leak—and I agree with you that it was unjustified—in relation to Fuelwatch? I think if that is what the government has done it bodes ill for good governance, because PM&C is a first order department with lots of really good advice and I think that all departments—

Mr MELHAM—This has got nothing to do with whistleblowing.

Mr SLIPPER—It was a reaction, perhaps, to the leak.

Mr MELHAM—As you just said, it was a leak. It was not a whistleblowing and, as I understand it, from what they are submitting it would not qualify as whistleblowing.

CHAIR—Perhaps we should ask the question of you, Mr Jones. What is your view as to whether or not the example that has been raised by Mr Slipper is whistleblowing or leaking?

Mr Jones—I do not believe it was an instance of whistleblowing and indeed I do not know anything more than that which has been reported in the paper about the response of the Department of the Prime Minister and Cabinet to that incident. But if it is true I think it undermines my fundamental point—that is, if there is not a basis of trust between the Public Service and the executive of the day then the information which flows from the Public Service to the executive is far from optimum.

Ms NEAL—You seem to be distinguishing between public interest disclosures or leaks on the basis of who they went to. If they went to the media they were leaks and if they went to some sort of internal Public Service person or body then it was a public interest disclosure. Do you believe there is also a distinction in terms of what is disclosed?

Mr Jones—Yes, I do, and it goes to the types of disclosures. Absent a provision provided for in public interest disclosure legislation, they are all leaks. Absent a provision which protects certain forms of disclosure, they are all leaks. Public servants are under a range of obligations provided for under, at least, section 20 and section 21 of the Crimes Act, together with the provisions of the Public Service Act and the values in the Code of Conduct, broadly speaking, not to disclose unless there is some other supervening legislation which provides a separate right for them to disclose. They are all leaks.

Ms NEAL—If there were legislation, should there be a distinction?

Mr Jones—Yes, and this is dealt with on page 2 of our lengthy written submission, where we say there are certain forms of disclosure which should be protected. In our submission, those types of disclosures deal with allegations of illegal activity, corrupt conduct, misuse or waste of public funds, maladministration—which we understand will be a fairly broad term—danger to public health or safety and danger to the environment. In our submission, disclosures about those subject matters or allegations about those broad headings should be subject to protection through public interest disclosure legislation.

Ms NEAL—The term ‘maladministration’ is very broad. It can mean almost anything. How would you define it in terms of what should be a protected disclosure?

Mr Jones—Systemic incompetence may not be illegal and might not be corrupt but would certainly be an instance of maladministration. I think one of the most notorious and recent examples of that was the subject of an inquiry by His Honour Justice Callinan into the equine influenza incident. I do not think there was any allegation of corruption and I do not think there was any allegation of illegal behaviour, but there was certainly a volume of evidence to show

that there was systemic incompetent administration which led to that crisis in the horseracing industry. I think that is a good example.

Ms NEAL—That is a good example. If we were to look at legislation, we would have to define it in some way. I was wondering if you had any views about how maladministration can be defined.

Mr Jones—It is our submission that a broad category is probably most appropriate at this point in time. After the operation of the legislative provisions at some point in time, it would always be open for the legislature to review those broad categories to see whether they have been appropriately adjusted to the cause they are seeking to regulate. In our submission, there should be a broad category. If it is not working, then it is always open to the parliament to review that.

Ms NEAL—To do something on the basis that it might be wrong and we can do something later is very dangerous.

CHAIR—I take it from what you have said that you are indicating that there is a degree of difficulty in defining what maladministration is.

Mr Jones—That is right.

CHAIR—You simply favour the use of that term as one of the categories that might be the subject of protected disclosure?

Mr Jones—That is correct. We do so because we think just identifying illegal and corrupt behaviour is not going to be enough to provide avenues for persons to disclose information which should be of interest to the government and agency heads. It is certainly in the public interest to ensure that corrective action be put in place.

Mr NEUMANN—In relation to the conditions which you would apply to the person making a disclosure, you have said:

... disclosures made maliciously, based on information known to the individual to be false or misleading or that the individual should have reasonably known to be false or misleading, would not be protected.

Would you extend that to, say, recklessness, which the courts have looked at on numerous occasions?

Mr Jones—Yes, I would. Reckless indifference to whether the allegation made is true, in our view, would be vexatious.

Mr NEUMANN—You are happy with that. It is not simply carelessness—

Mr Jones—Reckless indifference, I think, was the term.

Mr NEUMANN—In terms of the conditions, you say:

A person should be entitled to the protection of the legislation if:

- the person when making a disclosure honestly believes, on reasonable grounds, that there has been misconduct or wrongdoing ...

You seem to be looking at an objective test there. Is that the case?

Mr Jones—We think that, yes, there should be an objective test, but the objective test should apply to the position of the person who made a disclosure. For example, the objective test should apply to a person in the position of an APS 1, the very base grade in a particular department, as opposed to some objective test which might be applied to a senior executive service employee. We believe there should be an objective test.

Mr NEUMANN—Further, the concept of good faith is very important in relation to whistleblowing. Often whistleblowers are motivated by public interest. It takes a lot of courage for someone to come out and disclose maladministration in circumstances where their careers may be in jeopardy or they may receive opprobrium at the hands of fellow employees in the circumstances. ... How do you feel about the idea of good faith as a condition as well?

Mr Jones—In our submission we say that we do not see a lot of profit in attempting to dig into the motivation for the disclosure. Our submission says attention should be directed at whether the disclosure is honestly held on reasonable grounds. If it meets that test, if it is not vexatious or reckless, then it should be sufficient to attract the protection of the legislation. The reason for that is that there may be numerous motivations in somebody making a disclosure.

Mr NEUMANN—You say that there should be anonymity for whistleblowers. I think I have asked this before, and it certainly came up in our public hearings in Melbourne, where a number of people talked about instances. I do not wish you to name individuals, but what has been the experience of your members? Are there any examples you can bring to mind of the consequences to whistleblowers who have in good faith or with the best of intention disclosed maladministration? You said before you were consulting your members. Presumably you consulted people who were whistleblowers in the circumstances. What has been the experience of your members?

Ms NEAL—There are no whistleblowers anymore. They are all leakers.

Mr Jones—Can I deal with the question by using the words of more than one member. When we have had these discussions, they say there are no protections for whistleblowers. If you blow the whistle, you lose your job or you put your career on the continual backburner.

CHAIR—Is that something you have heard from many members: if you blow the whistle you lose your job?

Mr Jones—Or you put your career at risk.

Mr MELHAM—How many whistleblowers have been looked after? I do not know of many, even if they have had legitimate complaints. That is my understanding just from a casual observation—that if people blow the whistle, whether it is legitimate or not, they suffer in the current environment.

Mr Jones—That is certainly the culture, which legislation alone would not fix—not alone.

CHAIR—You have indicated to some extent in your submission that two things go together: there has got to be legislation setting up a scheme of protection but in addition there has to be an administrative regime which gives effect to the desire for protection.

Mr Jones—That is absolutely right. The mere passage of legislation is not in and of itself going to change the culture, let alone the knowledge of the rights and obligations in this area. If the legislation were only to apply to the Australian Public Service—and we say that it should be broader than that—you are talking about 150,000 employees scattered through every town in Australia, it would take considerable time and effort to make people aware of both rights and obligations in this area and to change the culture. We are dealing with exactly the same mindset, the same cultural issues, when it comes to freedom of information. There is a culture. The mere passage of legislation does not necessarily change that culture.

Mr SLIPPER—You quite rightly pointed out the need for a change of culture. Personally, I think you are dreaming if you think that the Australian Public Service will ever change its culture to welcome whistleblowers. I share the concern that Daryl outlined. Essentially, it seems to me today, and it seems to me that this will be the case forever, that someone who does choose to whistleblow in the Commonwealth Public Service will effectively be making a decision to leave the Commonwealth Public Service or to just tread water and give up future advancement prospects. I think that is a horrible indictment of us as a country. But, honestly, I have been around for a while and I cannot see how you could successfully change the culture. Could you tell us how you think you can change the culture?

Mr Jones—One cannot discount the important rhetorical effect of a legislative move in this area. It will raise awareness. I can guarantee that it will raise a discussion in every public sector workplace in the country. I actually do not take such a cynical view—

Mr SLIPPER—Pessimistic, not cynical.

Mr Jones—We do not do away with traffic laws because people speed, and we know that people will always speed. By the same token, we should not seek to put in place legislative provisions because we know that there will be instances where the culture does not meet our highest aspirations.

Mr SLIPPER—My colleagues from the Labor Party probably understand your union better than I do, but can you tell me your coverage? What areas do you actually cover as far as your members are concerned?

Mr Jones—The Community and Public Sector Union represents the interests of employers in Commonwealth government employment, not just the Commonwealth Public Service. Another branch of my union represents employees in state government employment. My branch represents government business enterprises, communications industry workers, territory employees—

Mr SLIPPER—Australia Post?

Mr Jones—Yes.

Mr SLIPPER—That brings me to a submission we had from another organisation representing unofficial post offices. They were suggesting that the whistleblower legislation should protect not only postal employees but those people who do similar work in the private sector, often working side by side with postal employees. Would you agree that that should occur?

Mr Jones—It is consistent with our submission. I will explain why. In many areas of Commonwealth government employment you have people working as employees and people working as contractors doing exactly the same job. In some workplaces they are working side by side and in some instances they are working in different workplaces. It would be absurd to regulate people performing the one function because they are employees in a particular way and not regulate people performing exactly the same function who are employed by the Commonwealth in a different way. To use the example—and it is pertinent—of the Quarantine and Inspection Service in its meat inspection functions, they employ veterinary officers and meat inspectors. Some of them are employees; some of them are engaged as contractors. They are at the front line of our biosecurity and the multimillion dollar trade industry. Their role is to ensure public and international confidence in our meat exports.

Mr SLIPPER—I am pleased to hear you give that response.

Mr Jones—They are at the front line and they are under intense pressure from abattoir operators and farmers to get the meat through. They are often in a position where they have to say, ‘No, we cannot process these beasts.’ There is more than one instance where they have blown the whistle and they have been punished for it.

Mr NEUMANN—I presume you are suggesting a special Public Service ombudsman be created in the circumstances. Is that what you are saying?

Mr Jones—We are submitting that there should be a statutory office holder appointed by parliament which is located within the office of the Public Service Ombudsman.

Mr NEUMANN—Separate from the Commonwealth Ombudsman?

Mr Jones—Located within the office.

Mr NEUMANN—In terms of breaking the culture, I am aware that in some court systems, for example, we have cultural awareness training and judges, magistrates and court staff go off for training on, say, Torres Strait islander and Indigenous issues. Are you thinking about seminars and training for public servants in relation to whistleblowing? Is that what you are talking about?

Mr Jones—That is exactly what we are talking about. It is a process that has been followed in Queensland and New South Wales and other areas where they have introduced new legislation. The training regime has to be backed in.

Mr NEUMANN—Continuing education.

Mr Jones—Correct.

CHAIR—I have to suspend the hearing now. Thank you for your attendance to this point.

Proceedings suspended from 9.59 am to 10.29 am

CHAIR—I reopen this meeting of the House of Representatives Standing Committee on Legal and Constitutional Affairs. I apologise for the inconvenience to our witnesses. Thank you very much for accommodating the members of the committee, including me.

Mr MELHAM—Mr Jones, could you summarise what the critics of whistleblower legislation say as to why there should not be whistleblower legislation? How do you meet their criticisms?

Mr Jones—I guess there are the deniers who say there is no need for these forms of legislation for one reason or another, that there are no problems therefore we need no such regime. To them I say firstly that, yes, I agree that our Public Service, when compared to any other comparable public service around the world, is relatively free of instances of corruption or incompetent administrations. I think we have one of the best public services in the world. However, the way to keep it that way is to ensure that we have continuous mechanisms for correction and continuous mechanisms for disclosure of corruption or maladministration so that when they do occur they are exposed, dug out and dealt with. And there mere existence of those provisions is another bulwark against corrupt administration or maladministration.

There is a second group of people who say that, yes, there might be a problem but that providing provisions such as this will—if you will forgive the language—encourage every lunatic to come forward with vexatious complaints which will consume the scarce resources of the Commonwealth in investigating and will provide no public benefit. To them I say that the nature of the legislation can very easily contain that problem, together with the right sort of education and cultural regime in the workplace.

Mr MELHAM—Can I also ask, in relation to the regime, if we talk about an independent—

Mr Jones—I am sorry, I should find another word: ‘regime’ has all sorts of connotations.

Mr MELHAM—Well, in some respects it is a regime.

CHAIR—Could we try ‘procedure’ or ‘framework’.

Mr MELHAM—I am interested, if it were to be brought in, in the role that anonymity would play in allowing people to come forward and protecting their identity. In some respects you will eventually get a report or whatever, but it might not necessarily be one of those things that are made public immediately. The benefit of that of course, given the fear that crackpots could cause great damage if their complaints were made public, is that it goes nowhere because there is a level of anonymity.

Mr Jones—This is a vexed question and not at all simple for the union to resolve because in every other instance we champion the importance of natural justice.

Mr MELHAM—I am not arguing against natural justice.

Mr Jones—But it goes to the heart of anonymity. If somebody is making an allegation against you then you have every right to be able to meet it and know the substance and the details of that allegation. So where we have landed in our submission is that there is an important role for anonymity in the early stages of the process, and if an allegation can be judged on the papers and there is no need for the complainant to reveal its identity—if the verification of those papers is sufficient to initiate an investigation—then that should be good enough. But where a complaint is made and it requires the testing of one person's version of events against another's, then the principles of natural justice must be applied.

Mr MELHAM—Yes, but what about the argument of the complainant—and I am concerned about whistleblowers who are genuine in their complaints—that if their identity is revealed, even if their complaint is justified, then they themselves may suffer as a result of that.

Mr Jones—Yes.

Mr MELHAM—In terms of natural justice, it seems to me that, yes, there are probably some instances when you need to know the identity of the complainant, but there are a number of instances where that is not necessary, where the allegation itself can be put and met without knowing the identity. It is not one size fits all.

Ms Donnelly—In our submission we drew a distinction between revealing identity to an ombudsman, who is independent, and to the agency. The position we took was that the identity of a whistleblower should not be disclosed to the agency in which they are engaged, without their consent.

Mr MELHAM—Right.

Ms Donnelly—So there might be instances where someone is prepared to tell the Ombudsman who they are but not the actual agency.

Mr MELHAM—Okay. So you are saying it is a consensual thing in terms of the release of their identity.

CHAIR—I am sorry, we have to go to a division in the chamber, so can I ask you to bear with us a bit longer.

Proceedings suspended from 10.36 am to 10.51 am

CHAIR—I will reconvene the hearing as a subcommittee, consisting of me and Mr Perrett.

Mr PERRETT—I am sorry if we have gone over this before. In terms of the other whistleblower legislation at state level, Mr Melham asked you a question earlier about the anonymity provisions. I assume, from my limited knowledge of the Queensland legislation, it is an opportunity that most whistleblowers are provided with.

Mr Jones—That is correct.

Mr PERRETT—My understanding is that there is a ‘frivolous and vexatious’ clause that rules out a ‘maddie’, or whatever the term was. That would allow you to quickly sort through a lot of unnecessary whistleblowing.

Mr Jones—The point is that a vexatious or frivolous complainant does not attract the protection of the law.

Mr PERRETT—Yes.

Mr Jones—They do it on notice that they do not attract the protection of the law and that they may leave themselves subject to other actions at general law or in accordance with other statutes.

Mr PERRETT—Okay.

CHAIR—Your submission does not go to any detail, but just to pick up this point about frivolous or vexatious—or I think the word you used was ‘lunatic’—complainants.

Mr Jones—I might regret that, Mr Chair.

CHAIR—All facetiousness aside, it is an understood term, and it is probably an accurate description for some kinds of complaints by some people in the Public Service from time to time. It is a quite vexed question as to how one can have an effective scheme of protection but at the same time eliminate ‘vexatious or frivolous’ complaints—that is the term used in courts. A lot of the submissions that we have received focused on this point, and some of the submissions have suggested to us that, whatever device is adopted for reducing or trying to eliminate frivolous or vexatious complaints, one should not focus on the motive of the whistleblower for the fairly simple reason is that quite often someone who is wishing to uncover or disclose wrongdoing will wish ill towards the person who is carrying out the wrongdoing and that if malice, in that sense, were to be considered that could cause a problem. Sorry for the long question, but do you have a comment on that?

Mr Jones—I think the answer to your question is best framed in consideration of what the public interest is. I do not think the public interest is served by or cares too much about what the motivation of the complainant is. The public interest is served by discovering and correcting maladministration, malfeasance, and corrupt and illegal behaviour.

If that is brought to the investigating authorities by somebody of ill will, I have to say: so what! The attention of the investigating authorities must be turned to ensuring that the complained-of behaviour is investigated, corrected, rooted out and, in the appropriate circumstances, punished. That is what the public interest is, not the motivation of the complainant. As you quite rightly identify, they will probably have a whole range of motivations, and one of them might be revenge.

CHAIR—Can I just follow this up with the question of how to weed out the kind of complaint that one would not want to receive. Other submissions have focused on the difficulty of using objective truth as a basis for rejecting a complaint or, indeed, sanctioning or punishing someone who has made a false complaint at a later time. Do you have a comment about that? What I am looking for is a suggestion from the union as to what should be the touchstone for

determining that a complaint has in truth being frivolous or vexatious, for want of a better description, and what should be the criterion, if any, that can be employed in determining whether someone should be sanctioned or punished for having wrongly sought the protection of the scheme.

Mr Jones—We do not suggest that there is a need for specific statutory provisions within, say, public interest disclosure legislation which provide sanctions against a vexatious whistleblower. We think the provisions of the Public Service Act, where they apply, or the general law, where it applies, provide a sufficient regime to deal with that sort of behaviour. And I think we need to make a distinction between processes and regulation which attach particular rights to particular whistleblowers and administrative procedures which enable you to weed through the vast array of written and other material that might come through the agency's door, and work out which ones warrant an investigation and which ones do not.

I do not think there is any provision of any law that is going to be able to prevent vexatious complaints being made. There are lots of administrative procedures that can be put in place to ensure that they do not waste too much public time in their investigation. These problems are not unknown to law or public administration. Anybody who has ever worked in a politician's office would know that you get a lot of uneven complaints coming through the door.

Mr SLIPPER—Have you?

Mr Jones—Yes, I have.

CHAIR—So I take it you are suggesting that you may not necessarily need a sanction, or at least not a very severe sanction, because there might well be procedures that could be adopted that deal with the problem, if there be one, of people making false complaints.

Mr Jones—That is our submission.

Mr PERRETT—Is that through the Public Service Act? I am not familiar with the act.

Mr Jones—The Public Service Act, with a code of conduct within that act, is a good place to start. There are broad-ranging obligations of public servants. I think Ms Donnelly wants to complement my answer.

Ms Donnelly—The regulations for public servants specifically deal with this issue. If the legislation had wider protection, it would be presumed that either under the enabling legislation or at general law there would be a way to deal with those.

Mr Jones—And, of course, if the disclosure carries with it information that would otherwise be protected then there are also other remedies, under the Crimes Act and elsewhere, for the unauthorised disclosure of that information.

Mr MELHAM—Can I go back to something I was asking you about before we had to break for the division, and that was to do with anonymity and whistleblowers, and the suggestion that that might somehow cause a problem in terms of natural justice. Can I put it to you, in relation to the New South Wales Police, the Federal Police and indeed ASIO, where they are involved, that

anonymity of informants occurs in criminal cases and the question of natural justice does not arise, but it is felt that you need to protect that informant, be it for future operations or whatever. It seems to me that that principle could be extended to whistleblowers without anyone invoking that it is a denial of natural justice.

Mr Jones—I think the distinction I am making is that, yes, I think there is a proper role for anonymity, certainly at the early stages in the process, but where the investigating authority is required to weigh versions of events and it is not something that can simply be assessed upon a paper which is able to be verified—

Mr MELHAM—No, I understand that. But in those instances, in the court cases, the informant gives evidence but their identity is protected.

Mr PERRETT—Sworn evidence.

Mr MELHAM—Yes, sworn evidence; it is criminal sanctions. I am just using that as an example that means that natural justice is not invoked. They do not have to see their accuser or have the name of their accuser.

CHAIR—It is certainly something we are going to have to look at. I have to close the hearing now because it is 11 o'clock. When the committee have had a chance to fully consider the detailed submission we have received today, is there a possibility that we might be able to call on the union to have you attend again?

Mr Jones—Certainly.

CHAIR—Thank you very much, and thank for your attendance today. Thank you to Hansard.

Resolved (on motion by **Mr Perrett**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 11.00 am