



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, 4 SEPTEMBER 2008

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HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 4 September 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 Andrews, 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

**BRENT, Mr Ron, Deputy Commonwealth Ombudsman, Office of the Commonwealth
Ombudsman2**

**McMILLAN, Professor John, Commonwealth Ombudsman, Office of the Commonwealth
Ombudsman2**

Committee met at 9.30 am

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

[9.31 am]

BRENT, Mr Ron, Deputy Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

McMILLAN, Professor John, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

CHAIR—Although the committee does not require you to speak under oath, you should understand that these hearings are formal proceedings of the Commonwealth parliament. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I invite you to make a brief introductory statement.

Prof. McMillan—Firstly, I thank the committee for the opportunity to appear at this hearing. I commence by reflecting on the importance of the topic under inquiry. Whistleblower protection connects with two core themes in Australian society: safeguarding the integrity of government and upholding the right of individual conscience. Human nature being what it is, there will always be threats to integrity in government. Though Australia has a strong reputation internationally for honesty and propriety in government, it would be wrong to be complacent.

Over the past two decades across all levels of government in Australia we have witnessed the prosecution and at times imprisonment on corruption and fraud offences of a state premier, state government ministers, a commissioner of police, a chief magistrate, members of parliament, judges, numerous officials at all levels of government and prominent national businessmen. Royal commissions and special inquiries in Australia over the past decade have investigated allegations of corruption in political lobbying, policing, job recruitment, occupational licensing, vehicle registration, land and building development, offender management, public procurement, revenue collection, financial investment and foreign bribery, as well as within crime and anticorruption commissions themselves.

If we lower the bar and look beyond corruption to illegality, maladministration, fiscal wastage and public health threats, the risks to integrity in government are much larger. To combat those threats and to preserve integrity, we need a comprehensive ethical strategy and a strong legal framework. Whistleblower protection laws must be an essential part of that framework for the simple reason that nearly all unethical behaviour occurring within organisations is known to and disapproved of by insiders. They are usually the first and sometimes the only ones to know of malpractice occurring within. So we need to encourage honest workers in the organisation to uphold the public interest and to report what they know. To encourage them, we must first assist and protect them. This should not be a false promise; telling the truth should not be a costly mistake.

Our present legal framework is deficient. Simply, it lets people down. There is not a clear procedure for Australian government employees to report knowledge of wrongdoing, adequate protection for those who do or punishment for those who retaliate. The submission from my office proposes a new system based on a few key principles. They include a special act entitled the public interest disclosure act that contains procedures and protections and places an

obligation on all government agencies to establish workable procedures. The emphasis in the act should be upon allegations being raised and handled internally through a dedicated and tailored procedure that is subject to external monitoring and with the option for a person to approach an independent external agency.

The whistleblower protection scheme should build on the strong framework that already exists for investigation of corruption, code of conduct breaches, fiscal impropriety and maladministration by agencies such as the Auditor-General, Public Service Commissioner, Ombudsman, Inspector-General of Intelligence and Security and Integrity Commissioner. One or more of those agencies should have a central role to coordinate the handling and investigation of disclosures, monitor the operation of the act, promote the act, conduct training and publish guidelines.

The Office of the Commonwealth Ombudsman would be well placed to perform that central role. The office has over 30 years experience in dealing with complaints and allegations against government. Our jurisdiction extends to the whole of government. We are independent and at arm's length from government. We have offices around Australia. We have public respect and credibility and an excellent working relationship with other government agencies, in particular with other external integrity agencies.

Finally, the purpose of a public interest disclosure act is to protect people who pursue their conscience and who engage in principled dissent, even where their concerns turn out to be groundless. It would not be the purpose of the act to intimidate or punish dissent, so the act should not contain penalties or sanctions to discourage it being used.

In conclusion, and as my submission notes, the issue of whistleblower protection has been a topic of inquiry and discussion within the parliament for over 15 years. Through these hearings, through the work of this committee and through the publication next week of the research findings of one of the most comprehensive studies of public sector whistleblowing to have been undertaken internationally, the Australian parliament is well placed to enact the world's best-practice public interest disclosure legislation.

CHAIR—Thanks very much, and thank you also for the very helpful submission that your office and you have prepared. I observe for the record that, as your submission makes clear, you have been involved in the Griffith University project, the report from which is to be published this month, called 'Whistling While They Work'. To an extent, having worked on that project has enabled you to have a degree of insight in addition to your work as Ombudsman, which brings your submission to a level that it might not otherwise have reached.

Prof. McMillan—Yes. My office has been a lead partner in that project because of our strong belief that it was a necessary project to establish a strong empirical research basis for the design of better laws in this area and better administrative procedures as well.

CHAIR—I am going to ask the committee whether they have some questions based on your submission.

Mr NEUMANN—You talk about the five specialist roles the Ombudsman has in relation to defence, immigration, law enforcement, the postal industry and taxation. Would you envisage it

being possible for there to be another specialist division? My side of politics talks about specialist divisions all the time these days; do you envisage a public interest management role?

Prof. McMillan—My submission is that, if the central coordinating role is given to my office, the best model for doing that would be to create a position of Deputy Ombudsman, Public Interest Disclosures. That would give prominence to the role and it would enable proper development of the function. I anticipate that in the early months of a public interest disclosure act there would be considerable work for an independent agency to ensure that the up to 200 Australian government agencies nationally have developed effective procedures.

The reason I propose that the model should be a Deputy Ombudsman with specialism in this area is that it would be institutionally awkward and untidy to have within the office two people—that is, the Commonwealth Ombudsman and a public interest ombudsman, in a sense—sitting alongside each other and exercising powers under the same act. I can see managerial and administrative problems. So the better model and the one we use at the moment is for one Ombudsman with some non-delegable powers; there are currently two deputy ombudsmen, who are independent statutory appointees, appointed on the same basis. I would envisage maybe a third position that sits in that framework.

CHAIR—Just to follow up on that—with specialist duties related to public interest disclosure?

Prof. McMillan—Yes. The statutory powers should ultimately belong to the Ombudsman, but it would be anticipated that in the normal course of events they would be exercised by the Deputy Ombudsman. Indeed, that is the case at the moment. There are some formal powers that I alone exercise, such as issuing a public report, but most of the other functions in the office at the moment are in fact exercised by the Deputy Ombudsman, including the issue of compulsory notices, signing off most correspondence and the like.

Mr NEUMANN—That would be a considerable augmentation of your staffing and budget, of course. Have you thought about what additional costs there might be and the number of staff you might need?

Prof. McMillan—It partly depends upon the scheme that is ultimately proposed, but my estimate at this stage is that initially at least you would probably need a new staff of 10 people just to deal with the start-up work of preparing training packages, manuals, consulting with all agencies to ensure that they have their procedures in place. It may be a lesser number once the scheme is underway. My deputy, Ron Brent, is in charge of the finance and corporate side of the office.

Mr NEUMANN—Perhaps I should have directed the question to Mr Brent.

Prof. McMillan—I might see whether Ron has a comment on that issue.

Mr Brent—Yes, certainly we are talking about a significant amount of resources. We are talking about the need to establish systems for taking complaints, for taking allegations of improper treatment and so on. We are also talking about the need to produce publications in the form of guidelines and guidance more generally: education programs for the agencies involved,

awareness-raising and so on. I would imagine that we are talking about 10 or so people, and therefore in practice we are talking about perhaps \$1½ million or so. I would imagine there would be some room to have that decline after probably two to three years, perhaps down to the order of \$1 million and six or seven people. But, realistically, much less than that and we are not going to be able to do the job properly—and that would be the same for any other agency that took it on. It would be significantly more for a new independent agency if one was set up.

CHAIR—Just to give us an idea of the scale or relativities involved here, how many staff does your office have at the moment?

Prof. McMillan—The effective full-time equivalent is about 150 at the moment, and they are spread across nine offices nationally. I will supplement that by saying that one of the new functions that the office was given back in 2005 was the function of Immigration Ombudsman, with specialist functions of preparing, for example, reports on those who have been in immigration detention for two years and monitoring immigration compliance and detention operations. We had a large additional staff to do that, and the numbers have now reduced as the function has settled down. But probably the great advantage that both we and government found in giving that function to our office was that we were able to start that function within a couple of weeks of the function being conferred. That is the great advantage of using an existing agency with experience, tradition, reputation, officer training and so on.

Mr Brent—And with a national infrastructure of officers and systems in place.

CHAIR—I want to follow on from this because I want to pick up something that you have looked at in your submission. It is to explore with you the question of who should be protected by a scheme of public interest disclosure protection—whether it be anyone, which is one of the concepts you explore, or whether you end up with only people who are working within the Australian government public sector. In your act, the Ombudsman Act 1976, it is open to anyone to make a complaint in any way concerning government, and so it is a very general jurisdiction that you are given. Is that right?

Prof. McMillan—That is correct.

CHAIR—Under section 37 of your act, there is what I describe as a reasonably limited protection available to someone who makes a complaint. Is that right?

Prof. McMillan—Yes, that is correct. It is a protection against civil action, yes.

CHAIR—It is a protection against civil action and that is it. Of all of the complaints that you get, I assume some of them would fall within a category that could be described as whistleblowing in the sense of being a disclosure from someone working with or connected to the Australian government sector. Can you give us an idea of how many complaints you might receive in any one year that could fall within that category of whistleblower allegations?

Prof. McMillan—I cannot put a precise number on it, but probably the best example of what you mention is that in the last couple of years we have received a steady number of complaints, often anonymous complaints, from people about government procurement and tendering decisions. I think, in the last year, we have done a reasonable investigation of about six such

complaints. In every instance we found two things: firstly, the person's information was not complete, the story was more complex and the impropriety was not as alleged; and, secondly, in every instance we found that internal agency procedures could withstand improvement and the agency in each case acknowledged that the problem had partly arisen because people inside obviously did not feel confident about raising their complaints and chose to go anonymously, in some instances, to the Ombudsman.

Mr Brent—I will add a bit of extra information around that. Although there is in the order of six investigations, the number of complaints we receive in the area is always significantly greater. We often refer complaints back to the agency and they can be resolved that way. I would also say that it is very difficult to define the precise number because of definition issues. Part of the concern about the whistleblowing regime is that there will always be a very difficult and grey edge around what is a whistleblowing complaint, what is an employment related complaint, and what is a complaint about activities that affect that individual only and do not go to broader whistleblowing issues. So, depending on definitions, we could come up with a much larger number. One of the clear things, though, is that we are already engaged in the field to some degree and certainly we are getting complaints of that kind already.

CHAIR—I want to explore with you why, having canvassed the possibility of broader coverage or perhaps 'open door to all' as a scheme of protection for public interest disclosure, you have opted to recommend that there should be specialist legislation that applies only to people working inside the Australian government public sector. Are you able to take us through what the reasoning has been there?

Prof. McMillan—In origin, the concept of whistleblowing does focus on the knowledge of the insider, on the person within the organisation who has observed things that they think are unacceptable and that as a matter of conscience and public interest they want to disclose. So that, in origin, is the thing. It obviously is comparable with dob-in and hotline schemes and informant programs, but in origin it is a different concept, and I think there is some advantage in keeping a focus on whistleblower protection and designing an appropriate and tailored scheme.

Secondly, the Whistling While They Work study, of which my office has been a part, will be publishing its research results next week. What it shows is that an area in need of great improvement is internal procedures—recording whistleblowing complaints, inquiring into whether a person faces disadvantage or retaliation and so on. The area in need of greatest reform is internal processes. That is another strong reason for designing a scheme that is tailored to the problem and the challenge, but while bearing in mind that it is not the whole picture.

In a sense, in the same way, of course, we have already tailored schemes across agencies for dealing with problems arising in government. We have, as I mentioned, the Ombudsman, the ANAO, the Inspector-General of Intelligence and Security and the Australian Commission for Law Enforcement Integrity. That is already an acknowledgement that sometimes there is an advantage in having a number of schemes that sit alongside each other but which are focused on particular areas and specialist problems.

CHAIR—Thank you for that. I think Mr Slipper has a question before he leaves us.

Mr SLIPPER—Unfortunately, I have to leave, Professor. I do recall that at one of the early hearings another witness was not entirely enthusiastic about the Ombudsman having a key role in whistleblowing. He seemed to suggest—and I might be wrong—that maybe the processes of your office are too slow. Do you have a comment on that?

Prof. McMillan—Yes. Our annual reports say that delay is a challenge for all organisations, including our own. However, I think 90 per cent of the complaints and approaches to the office—and we are talking upward of 40,000 here—are dealt with within three months. In fact, most are dealt with within a month.

Mr SLIPPER—Dealt with and finalised?

Prof. McMillan—Yes, dealt with and finalised. There are some matters that take longer. Often the reason why matters take longer—the excusable reason—is that we have to follow a natural justice procedure. In finalising a report, we sometimes have to provide parts of the report to individuals, then the whole of the report to an agency and then there can be further consultation and refinement. That can take a long while. Other times, there are less excusable reasons for delay, but overall the office is certainly focused on that issue. Indeed, we have recently instituted new quality assurance procedures focused strongly on reducing delay.

Mr SLIPPER—Thank you, Professor.

Mr Brent—I might add one other important note. Recently we have restructured the office to create what we have called a public contact team. The focus of that team is essentially to enable us to triage complaints—I think that is the jargon term of the time—to get to urgent complaints quickly. Average complaint times are not a good guide as to how we can deal with ones that do need urgent action. We will get complaints where somebody is about to be deported and action needs to happen within hours. We can deal with that.

Mr SLIPPER—Gentlemen, thank you for that. I just wanted that answer on the record.

Prof. McMillan—If I might add, too: in some ways, a larger agency like ours, with a multiplicity of functions, is better situated to deal with delay because with a larger staff we can move people around from one function to another to deal with the peaks and troughs in different complaint work, whereas my experience is that small agencies with only a single function in fact have the larger problem overall in dealing with delay. Even just a lag in the recruitment of one or two people can have a major impact on the efficiency of the office.

CHAIR—Thank you very much. You have raised in that answer the fact that all complaints or all disclosures are likely to throw up different considerations for the investigation which are likely to mean that in some cases it will be a long investigation and that in others it might be short. But it also raises the question of whether or not there might be certain circumstances in which the matter that is being raised is so urgent that it is appropriate that a scheme of protection protect the disclosure to persons outside an internal complaint regime, including even possibly the media. You would be aware, Professor McMillan, that that suggestion has been raised in the past.

Prof. McMillan—Yes.

CHAIR—Do you have any comment on what is appropriate—perhaps there are two questions. Firstly, should disclosure to persons outside a complaint mechanism—perhaps it could be described as ‘any third person’, which would include the media—be possible? And, secondly, what should be the criteria for such outside disclosure?

Prof. McMillan—My view is that the scheme does need to include that option for public disclosure in exceptional circumstances, if for no other reason than that we use the popular term ‘blowing the whistle’ to describe the scheme, and the very concept of ‘blowing the whistle’ is to draw public attention to a matter that is otherwise concealed from public view. Indeed, I think in origin the term ‘blowing the whistle’ comes from the practice of the British bobby of blowing the whistle to attract attention to the fact that a crime is being committed.

So I think that, both symbolically and practically, a scheme does need to include the option of public disclosure. However, it should be in limited or exceptional circumstances. The recommendation of the Gibbs committee some years ago was that a public disclosure could be made in circumstances where it was excusable or reasonable and appropriate, and similar formulae have been used in other legislation. One of the proposals made in our submission is that a person has used all other avenues and there is a reasonable justification for taking it public.

Can I just supplement that by saying, though—and this relates also to the issue of promptness—that my office, in its role as ACT Ombudsman, has jurisdiction under the Public Interest Disclosure Act. One of the procedures that operate within the office is that public interest disclosures are brought to my attention. On at least two occasions I have brought the person who wishes to make a public interest disclosure directly into my office. I have met with them within a day or two of the complaint being received, just to clarify with them the seriousness and importance of it. So there are internal mechanisms of that kind that can be adopted to signify the importance. I have sometimes got people who are contemplating being whistleblowers in, and explained to them all the statutory powers that I have and given them a personal reassurance that if they were to complain to me and there were any retaliation then I would do everything I could to ensure that the officials involved were prosecuted. It is a good way of reassuring a person that they can trust in the external mechanisms that are there, and they do not need, in a sense, to martyr themselves unnecessarily by some other process.

Mr ANDREWS—Professor McMillan, as sort of an extension of that: one of your recommendations is that there should not be any sanctions or penalties in the proposed legislation. Can I explore that a bit further with you? Your submission says that, in effect, the person will be exposed potentially to a civil action for publishing a defamatory statement, a disciplinary penalty for unprofessional conduct, a criminal penalty for unauthorised disclosure of official information, or prosecution under the Criminal Code, et cetera. The difficulty I have with that is that bringing an action for defamation is difficult. Having advised, in a past life, on quite a few occasions, people wanting to bring defamation actions, almost invariably the advice was, ‘Don’t’—even though, in my opinion, there was defamatory material. But there are great difficulties in bringing a defamation action: it is costly; there is no assurance of outcome to it. So I tend, I suppose, on the basis of experience, to discount that as a remedy that people have, except in the most egregious case where it is quite clear and the defamation is of such a significant nature.

So I will explore the second aspect of it—that is, the penalty for unprofessional conduct. Presumably this would be something that would arise under the Public Service legislation and regulations. I am interested to hear from you—for example, we had legislation in this field administered by the Ombudsman’s office—as to how there would be an interplay with the Public Service Commission in relation to any penalty that potentially could be imposed or how even the Public Service Commissioner would address that in this context, not where somebody has made a mistake or, as you say, had incomplete information but where a person is obviously acting in a way which involves some degree of intention or recklessness.

Prof. McMillan—I will make two points in reply. Firstly, all of those ultimate sanctions are rarely, if ever, used. As I have also mentioned in the submission, it is already an offence under the Crimes Act to provide false or misleading information to a government agency. The reality is that those penalties are not used, but they send a message and, in designing a scheme, it is important to focus on what messages are being sent. I think it is wrong to send the message that this scheme is about protecting dissent and assisting people to dissent, ‘But be careful, because we could prosecute you, even though it may never happen.’ Indeed, when the Ombudsman Act was first enacted, section 36(2) provided that it was an offence to make a false complaint to the Ombudsman. Fortunately that section was repealed later on, so we now have a framework that says that you can complain to the Ombudsman.

The second point is that the constraints come into play usually midway into the process—that is, if somebody lodges what they say is a whistleblower complaint and, after initial investigation, a decision is made that it is not a whistleblower complaint and does not come within the scheme, the person is then counselled to be careful because they are now outside the framework of the act and their behaviour can attract normal civil disciplinary and other consequences. Indeed, I have had that experience in dealing with matters under the ACT Public Interest Disclosure Act, and I have to say to people, ‘We’ve formally terminated dealing with this as a public interest disclosure matter, so you must be wary now, you must be cautious about how you handle it, because the normal legal and employment conditions apply to your actions.’

CHAIR—I will follow up on that just to confirm that your submission is very directly that there should be no punishments and no sanctions—

Prof. McMillan—Correct.

CHAIR—for making a false or malicious complaint for the reason that you have just explained, which is that it is to provide a very major disincentive and is contrary to the philosophy of the scheme to put such sanctions in it.

Prof. McMillan—Correct.

CHAIR—Is it your view that the making of false complaints—and I think we have to recognise that there is always a possibility of false or malicious complaints—can be dealt with administratively in the way that you have just outlined?

Prof. McMillan—Yes, I think it is always better to deal with it administratively. For example, one of the functions my office had was under special legislation relating to complaints against the Australian Federal Police under an act that was repealed two years ago. It included a

provision that it was an offence to make a false complaint against the Australian Federal Police. I was aware from time to time of complaints that I could probably refer to prosecution authorities to consider whether to prosecute, but I did not follow that course of action. I thought that it was better to get the complaint resolved and closed rather than take it to another level.

My experience generally is that once somebody has been told their complaint is not being investigated further, most people will move on at that stage. Some do not, but most do. So I think those other mechanisms for complaint handling are more effective for dealing with those issues. But ultimately, if somebody does pursue it, they do face the threat of defamation proceedings and other action, and that is appropriate.

CHAIR—There is, of course, Professor McMillan, an implicit sanction in the sense that if you describe and enact a scheme of protection, it is going to define what types of disclosure and in what circumstances the protection will be provided. If you fall outside that scheme of protection, that is in itself a potential sanction.

Prof. McMillan—Yes.

CHAIR—Do you regard that as a sufficient sanction?

Prof. McMillan—Yes, I do.

Mr Brent—In practical terms, to deal with the very valid point that defamation actions are rare and generally counselled against, the area where I would see most practical consequences occurring would be in disciplinary action. The Public Service Act has a strong regime of enabling disciplinary action to be taken where appropriate, and it is something that does occur quite frequently. It seems to me the appropriate forum and it is one that would provide a genuine disincentive to act outside the protections that the act provides—or, rather, that the potential act would provide.

Mr MELHAM—Professor McMillan, on page 8 of your submission you talk about the scope of statutory protection for the whistleblower. You have some public interest disclosure legislation key principles. I am particularly interested in Principle 8, which is in relation to confidentiality. Forgive me for being cynical—maybe I am just too old and ugly and have been through too many experiences—but it seems to me that the only protection for a whistleblower is confidentiality, and that the minute that their identity is disclosed, for whatever purpose, then their career, wherever it is, frankly is over because of human nature and a whole range of things. They are experiences that one can draw on. For me, and this is why I am putting it on the table, you do talk about confidentiality, and I am impressed with the principles that you disclosed. But it seems to me that, when you talk about procedural fairness being a basis for disclosure, that is not necessarily the case in legal proceedings, in criminal proceedings, where ASIO protects informants, federal police, the police, or whatever. I come from the Defence side, where identity in some instances is important. But I would favour the narrowest of reasons for anyone's identity to be disclosed, because frankly I just do not accept that those principles will protect someone once their identity is disclosed. I am interested in your comment.

Prof. McMillan—I certainly agree, as a general observation, that once somebody becomes embroiled in conflict with their own organisation, then their chances of enjoying a full and

ambitious career can be limited. However, I would not be as pessimistic as you. I would say it for this reason, that when my office was created over 30 years ago, the conventional view was: why would anybody complain to an external agency, because they have just identified themselves as a troublemaker, and the organisation, with all its punitive and subtle powers, will retaliate. Over 30 years we have changed that. Over 200,000 Australians each year now complain to public sector and industry ombudsman officers, and they do so confident that organisations have now developed integrity and respect and do not punish those who disagree. We are seeing the same, in a sense, in the defence department at the moment. Certainly in the focus group discussions that my office has undertaken in our Defence Force Ombudsman role, people will often say: 'Yes, we believe in having all of these redress of grievance procedures. However, we would be reluctant to use them because it may be viewed as a sign of weakness or failure.' But that is being turned around because there is a strong message coming from the top that complaints and grievances feed into the integrity processes of an agency.

Mr MELHAM—But it is not necessarily the top that I am worried about at times; it is their peers.

Prof. McMillan—Yes.

Mr MELHAM—Quite frankly, I think that there have been a couple of instances in recent times of discrimination within the defence forces where people have had legitimate complaints and have basically left. That is the aspect that I am worried about. It is all right for the brass to say, 'You won't be discriminated against.' Quite frankly, on the ground, that just does not happen.

Prof. McMillan—I think it is changing, though, and I think that if somebody asks you for advice on what the potential implications of being a whistleblower are, frankly, you have to say, 'There is a risk, human nature being what it is, that souring the relationship with your colleagues will work against you in the long term.' However, when there is a proper framework in place with proper procedures and strong messages, then I think it turns the tide on that. That is what I see as one of the strong reasons for enactment of a scheme like this, with an independent agency with a strong role in monitoring, education and promotion, to have the idea set in practice that it is part of ethical practice within agencies for people to note their disagreement with improper actions.

Mr NEUMANN—I have suggested that anonymity is a last resort to a number of other witnesses who have made submissions. This comes from my background too as practising or writing criminal law. Where the prosecution wanted to put a case, particularly in serious crimes, the defence had a right to natural justice and they could really put the prosecution witness to the test. What do you say about that idea—the denial of natural justice where anonymity is concerned?

Prof. McMillan—I believe that anonymity must be an option available to a person and it contains its own limitation. As I say, we get anonymous complaints and they often provide a very useful basis for inquiring into real probity issues in government. But of course you always say to a person, 'The inquiry is likely to be of limited scope and so you should lower your horizons in terms of what will come out of this investigation if we cannot disclose your identity or if we can't come back to you for supplementary information that would reveal who you are.'

As to the natural justice issue, it is unfortunately one of the trade-off features of a whistleblower protection scheme. But, at the end of the day, what a whistleblower protection scheme is doing is denying people against whom allegations are made the right to institute criminal, civil or other proceedings for having been defamed. A whistleblowing allegation is, by definition, an allegation that ‘my colleagues are doing the wrong thing’, and so the decision to adopt a whistleblowing scheme is, in a sense, to reset that balance and say that we will tolerate a degree of protected complaint that besmirches the reputations and integrity of others; but, in the balance of things, that is how it should be.

Mr NEUMANN—In paragraph 8 on page 14 you talk about confidentiality, saying:

This principle—

that is, disclosure—

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—

et cetera. Do you have any criteria where anonymity should be the norm?

Prof. McMillan—I do not have any criteria at the moment but I agree: clearly, some have to be developed further in guidelines.

Mr NEUMANN—On the basis of the seriousness of the disclosure or maladministration or corruption?

Prof. McMillan—I think it has to be a mixture of two things: firstly, there has to be the consent of the person who has made the complaint or allegation and, secondly, there has to be a degree of independent judgement by the coordinating agency on the seriousness of the issue and the need to explore it. In a sense, that is not unlike the kinds of judgements already made, particularly by commissions of inquiry, which have the option to proceed publicly or in camera—and courts have as well, although they are driven very strongly by a presumption of openness in all that they do.

Mr NEUMANN—Okay.

CHAIR—Could I just follow up on this point about anonymity. As I understand it, where you as Ombudsman—not necessarily in relation to a whistleblower—receive a complaint and you determine that there is a need to protect the complainant’s identity, sometimes you commence what is called an own-motion investigation.

Prof. McMillan—Correct.

CHAIR—I am not necessarily suggesting that that is something that needs to be provided for in a scheme of public disclosure protection, but does it indicate that questions of anonymity and the preservation of identity are things that can be dealt with administratively rather than by seeking to prescribe a particular procedure in the scheme?

Prof. McMillan—Yes. All of these difficult questions, in my view, support the idea of basing a whistleblower protection scheme within the existing framework of agencies that deal with allegations of corruption, maladministration and code of conduct breaches, because it does provide that fluidity to work between, in a sense, one scheme or another and to decide how best to handle it. These problems become more acute if there is an entirely separate agency or procedure that deals with whistleblowing matters, because you then have to make a decision, either at the threshold or subsequently, to go down the path of this scheme or that scheme. At the moment, certainly in our ACT jurisdiction, our whistleblowing matters, however they are defined, are handled within the one agency. Sometimes we decide to take a matter down that statutory path and sometimes down another statutory path, but it is still handled by the same people in the same agency, with the same statutory protections and requirements of privacy, confidentiality and the like.

Ms NEAL—In relation to categories of persons who should be able to make protected disclosures, some state legislation includes legislators as one of those categories—members of parliament. Is that something you have turned your mind to?

Prof. McMillan—My view is that it is best not to include them in an act applying to the Australian government public sector. My view is that the act should be focused on people who have an employment relationship as employees, contractors, consultants or the like. That is not to say there should not be protection for members of parliament, but the first question obviously is: are the contempt powers of the parliament adequate to provide whatever protection is necessary; and, if not, is there a need for additional legislation under the Parliamentary Privileges Act or something of that kind?

Ms NEAL—Contempt is a very narrow field and certainly would not protect members of parliament who made disclosures about the operations of the Public Service.

Prof. McMillan—Again, my experience over the years is that that has not been a large problem. It is an issue but it is not a large problem, whereas the protection of people working within government agencies is a large problem, and that is the one that should be addressed through this process.

Ms NEAL—The other thing I have trouble getting my mind around is the word ‘maladministration’. I have asked a few people what they mean by that. I suppose I am wondering, if you put it in legislation, saying that is covered, what would it mean? What do you think it means?

Prof. McMillan—There are two points. Firstly, again, defining the term only becomes critical if the whistleblower protection procedures are quite separate from the other procedures in government for dealing with complaints. That is, if there is to be a separate agency that deals with whistleblowing matters and an ombudsman who deals with maladministration generally, you have got to decide where the dividing line falls between them. However, if all the existing agencies—the Public Service Commission, the Ombudsman and so on—are used, then since, at the moment, they equally deal with the trivial to the major, a whistleblower protection scheme sits comfortably there.

Where it becomes difficult is in defining what is maladministration—what is serious, what is trivial—because, particularly as our inquiries into immigration detention show, the most trivial of problems have caused the most significant of consequences. The simple act of misrecording somebody's date of birth or date of arrival in Australia or the spelling of their name has led to periods of wrongful detention. One of the major problems in the Vivian Alvarez case, for example, is that her name was spelt by officials in 11 different ways, all wrong, so every time they went into the computer to try and find her they came up with a nil result. They decided on that basis that she was an unlawful noncitizen, and she was removed from Australia for nearly three years. Those were minor administrative errors, but you would have to say that, if an official wanted to lodge a complaint or if somebody internally within an organisation were to say, 'There is internal sloppiness that could cause great consequences,' then I think it would be appropriate for such matters to potentially come within the whistleblower protection scheme.

To come back directly to your question: my office has defined 'administrative deficiency', and I can send the policy along. We have redefined it as 12 different categories, including legal error, factual error, human error, procedural error; lack of resources; matters that are harsh, unreasonable, inappropriate—so we have a well-developed policy on what we define as administrative deficiency. I can provide that to the committee.

Ms NEAL—So you use 'administrative deficiency' to mean 'maladministration', on an interchangeable basis?

Prof. McMillan—That is right; yes. Different offices use different terms—'maladministration', 'defective administration', 'agency defect'. We use the term 'administrative deficiency' and we have spelt it out in a policy. It really, in a sense, supplements the provisions in the Ombudsman Act.

Ms NEAL—It would be helpful to have that.

CHAIR—We will certainly look at that. As you have said in the submission, some terms that will be employed in any scheme of public interest disclosure protection, like 'corruption', or 'breach of conduct', are defined already, but there might be a need to attempt to define 'maladministration' for the purposes of this proposal.

Prof. McMillan—Yes.

CHAIR—Perhaps just to follow on from your mention there of the investigations of your office into difficulties in the immigration area and wrongful deportation and wrongful detention of Australian citizens, some of the investigations, as I understand from the public reporting, have indicated that there were attempts made to draw the attention of the administration to irregularities in several cases. Is that kind of attempt to draw attention to irregularities something that might have been better or assisted if there had been a scheme of whistleblower protection?

Prof. McMillan—Yes. My office published the report on the Vivian Alvarez case, and it recommended that the department of immigration investigate the possibility of code of conduct breaches against three officers. It was clear that there was knowledge within both the Brisbane and Canberra offices that there might have been a wrongful removal from Australia, and it was clear that that information was not acted upon. It is precisely the kind of action that could be

covered by a public interest disclosure protection scheme; an official who has knowledge that their own organisation is suppressing information or not responding would then have a clear procedure. That is not to say they will use it, because there are all of those internal, collegial, career and other pressures that bear upon people's decisions. But, clearly, had there been a well-defined scheme in operation at the time, it might have been used and the story would not have had the same degree of anguish that it ultimately did.

Mr MELHAM—Is that a case, on the information that you have, where anonymity would have come into play?

Prof. McMillan—Yes. It is a case where, importantly, if somebody had reported it anonymously, the information could have been acted upon and the person's identity need never have been disclosed. It would have been a simple matter in the Vivian Alvarez case, had the information come to be known, of identifying that something was sorely amiss within the organisation.

CHAIR—You have just made the good point, Professor McMillan, that a scheme that protects public interest disclosure does not compel people to make disclosure, but what it can do is create the possibility of disclosure that will be made in circumstances where protection will be provided. That is about a changing of culture.

Prof. McMillan—Correct.

CHAIR—I want to move to another issue. In your submission you dealt at some length with the particular problems that arise for people working in the Australian government public sector outside Australia where they come across maladministration or corruption or wrongdoing in any form and may very well need protection from the consequences that might flow to them from making that disclosure. You said, and I think this is probably self-evident:

The risk of reprisal or disadvantage can be greater where a person is working in a small office overseas ...

We can all imagine the difficulties that might arise when you are in a mission with, say, only two people in it. Could you amplify what you said in the submission about the particular difficulties that arise for people working for the Australian government overseas.

Prof. McMillan—The difficulties were probably well explored in parliamentary inquiries that occurred in the 1990s into allegations that were made by employees of the department of foreign affairs against colleagues in foreign missions—for example, in Thailand, as I recall. That led to two parliamentary inquiries. The inquiries found that many of the allegations were not substantiated and in fact were mischievous, but the whole episode showed the importance of having a clear procedure so that a matter could be investigated and, in a sense, taken away from the site of the conflict. My office does get occasional complaints about administrative actions occurring in foreign offices, although I cannot recall offhand any specific complaints of a whistleblowing kind that have been handled recently.

CHAIR—Which might perhaps suggest that there is a considerable deterrent against making a disclosure.

Prof. McMillan—Yes, but certainly around the globe there are allegations often being made by staff working in foreign missions about expense accounts and personnel hiring practices and harassment and bullying. It is a fairly familiar complaint we hear in Australia; it is a fairly familiar complaint we see elsewhere as well.

Mr ANDREWS—One of the problems here is that, increasingly, locally engaged staff are now the majority of personnel in our overseas missions, and it strikes me that there is a natural impediment to complaints being made in those circumstances.

Prof. McMillan—We had one interesting investigation in my office which is recorded in the annual report. We had a complaint from locally engaged staff in the Belgrade embassy in Yugoslavia about their redundancy payments, and we did a search and investigation that led ultimately to the Department of Foreign Affairs deciding to pay in the order of, I think, \$1 million extra to the locally engaged staff. So it is familiar that offices such as mine can deal with complaints from people who are not Australian citizens and whose only contact with Australia is to have been a locally engaged staff member in a foreign office.

CHAIR—Professor McMillan and Mr Brent, I have to excuse myself from the hearing to go and speak in the House, but Mr Neumann is going to chair the balance of the hearing. Thank you very much.

ACTING CHAIR (Mr Neumann)—Professor McMillan, I want to explore something that the chair, Mr Dreyfus, mentioned before but which we did not really go into—that is, your suggestion in relation to the difficult question of whether public interest disclosure legislation be cast more widely. I think it was just touched on earlier. In your submission you did raise the idea that there is ‘a strong public interest justification for providing comprehensive and targeted protection for them’—referring to people outside of what you describe as the ‘insiders’. Can you explore what that scheme would be like—obviously it would be a different legislative framework—and whether your office would play any role.

Prof. McMillan—There are probably three different areas that require different responses. Firstly, there are employees in government, and we have been talking about that. Secondly, there are members of the public who complain about government. As I have said, they can currently complain to the Ombudsman and to the Law Enforcement Integrity Commissioner. All that is required there, probably, is some further legal protection against retaliation. Thirdly, and this is probably the more difficult area, is protection in the private sector—the employee of a private company, a law firm, wanting to complain. At the moment, many complaints that are probably of a whistleblowing kind are dealt with through the antidiscrimination and equal opportunity legislation, so there are mechanisms. People make anonymous complaints to police forces, do-in lines, hotlines and the like. But there is argument for having another whistleblower protection act that just applies to the private sector, although there are obvious challenges. The private sector comprises a large number of small organisations—a few people up to ones of many thousands of people. I suppose the workplace relations laws are a good example of the difficulty of having a single law applying to the whole area. Even in laws of that kind there are thresholds where the law applies only to organisations with 100 staff or more. I think it is really a topic for a separate inquiry—whether there should be a whistleblower protection law in the private sector.

ACTING CHAIR—Have you thought about the idea of what sort of body might be established, if I can put it that way, because there seems to be a preference in your suggestion for the Deputy Ombudsman to take that role in your organisation in terms of dealing with the Public Service. Have you thought about what other body might be established?

Prof. McMillan—The option that comes immediately to mind and the one that has been used historically is to use the Industrial Relations Commission, because in the private sector the issue often plays out as a wrongful termination case, so the issue of termination is dealt with there. In smaller organisations in the private sector, where people are on short-term contracts, it certainly is hard to give the same protection that you would give in a public interest disclosure act applying to the public sector. For example, one of the protections that you put in in a law applying to the public sector is that a person can be relocated either within an agency or to another agency. That is often an effective way of dealing with it. But if a person is working for a small firm in the private sector then relocation is simply not an option. It is either compensation or some other kind of redundancy option. So I think the first model to look at is the industrial relations model, I suspect.

Mr MELHAM—The point being that, in all those instances, the person's identity would be disclosed, which could poison the well in terms of the workplace.

Prof. McMillan—Yes.

Mr MELHAM—Underpayment, I think, is another complaint that often occurs in those private organisations. It is not just short payment on termination; it is a systemic underpayment of a particular type.

Prof. McMillan—Yes, but I would not, at this stage, propose that there be a new agency—a private sector whistleblower protection agency. I can see that it is an attractive option in principle that is riddled with practical problems.

Mr MELHAM—We will not put our toe in the water.

ACTING CHAIR—We have had a number of people here talk in their submissions about the Australian standard—AS 8004-2003, Whistleblower Protection Programs for Entities. Do you have any comments about the standard and whether any Commonwealth agencies have had reference to those standards in your experience?

Prof. McMillan—I strongly support the use of the Australian standards in all areas—complaint handling, whistleblower protection and so on—as providing an accessible framework of principles and procedures that could be adopted both by the public and the private sector. However, at the end of the day, I think that, once legislation is enacted, the Australian standards, in a sense, sit alongside the legislative scheme. My expectation is that the central coordinating agency—the Ombudsman, the Public Service Commission or whichever individual agencies—would use the standard as a guideline rather than as a binding framework. It is a convenient way of testing whether the internal procedures are adequate. The report that will be published next week will show that, while, in my experience, most agencies are now focused on the issue of whistleblower protection and have a genuine desire to do the right thing, not many have focused

on whether their procedures comply with the Australian standard. It is not an issue that has been prominent in people's minds, and I think more emphasis should be given to the issue.

ACTING CHAIR—Professor John McMillan and Mr Ron Brent, thank you for being here today. We thank you for your attendance. I would be grateful if you could liaise with the secretariat about any additional questions the committee may have on material that you have undertaken to provide. Thank you very much for being here.

Committee adjourned at 10.37 am