



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**

TUESDAY, 9 SEPTEMBER 2008

CANBERRA

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HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 9 September 2008

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

Members in attendance: Mr Dreyfus, Ms Neal, Mr Neumann, Mr Perrett, 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.

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Committee met at 1.31 pm

CHAIR (Mr Dreyfus)—I declare open the Legal and Constitutional Affairs Committee’s roundtable discussion on protecting whistleblowers within the federal government public sector. I would like to welcome the participants, who are a very distinguished group of experts, all of whom have accepted the committee’s invitation to this roundtable discussion to explore issues, challenges and best practices surrounding protection of whistleblowers within the federal government public sector.

It is a very auspicious day because the book from the Whistling While They Work project was launched by Senator Faulkner this morning, and we have had a number of presentations already this morning, including a session with media representatives at which John McMillan and Dr AJ Brown spoke. Our purpose in holding this roundtable on the same day as the launch of the book was to take the advantage of the gathering here in Parliament House of a group of people who are, if not the pre-eminent experts in the field in Australia, certainly amongst those who know most about the field of protecting whistleblowers.

The purpose of the roundtable is to inform consideration of what might constitute effective legislation in this area. The committee hopes—and we have five members of the committee here—that the discussions we have here today will assist it in its report on a preferred model of legislation for the Commonwealth for a scheme of whistleblower protection, or public interest disclosure as it is sometimes called.

For the benefit of the public gallery and those who are listening or watching in their homes or in schools, as people do, I should explain that this afternoon is going to consist of two separate sessions. The first session will have these two themes: first, “If in doubt, report”: recognising the full landscape of public interest whistleblowing’; and, second, ‘Making it work in practice: systems and institutions for the capture and management of disclosures’. After a short break for afternoon tea we will then conduct a second session focusing on two further themes: first, ‘When all else fails (1): an effective system for compensating mismanaged whistleblowers’; and, second, ‘When all else fails (2): when is it “reasonable” to make a public or third party disclosure?’

As the chair of the committee, I propose to chair the roundtable throughout the afternoon, but each of these themes will be introduced by one of the participants, who will have been invited to give a three- to five-minute outline on the particular topic. That is intended simply to open the topic for discussion. Everyone has a set of focus questions but, again, they were not intended to limit the discussion; they are simply there to focus attention on some questions that might be raised.

[1.35 pm]

BENNETT, Mr Peter, National President, Whistleblowers Australia

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WORTLEY, Professor Richard Keith, Chief Investigator, 'Whistle While They Work' research team, Griffith University

CHAIR—I welcome witnesses to this roundtable discussion. The committee does not require you to give evidence under oath, but I should advise that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. As a roundtable, these proceedings are definitely intended to be less formal than the traditional committee hearing setting where we have the committee and a single witness in front of us. In fact, there are two people participating—Stephen Jones and John McMillan—who have already given evidence to the committee, for which we thank them, in that more formal setting. But notwithstanding the lesser degree of formality, I would ask everyone to bear in mind that the proceedings are being recorded by Hansard and are being broadcast on the parliamentary channel.

I would like to move straight to the first theme: ‘If in doubt, report: recognising the full landscape of public interest whistleblowing’. I will ask Dr AJ Brown to introduce that topic.

Dr Brown—On behalf of the many of us who are directly and indirectly involved in the Whistle While They Work project, I would like to thank you for the opportunity to have a discussion with all the members of the committee who are here about these very important issues. We have not actually made a submission as such to the inquiry and I guess the purpose of releasing the research today, and as it comes through, is that we hope that it will all be of use in helping the committee to form its views.

The way in which we approached a fair bit of the research was to try to provide some hard data where previously there has been none on just basic things like how much whistleblowing goes on, what the nature of it is, what the outcomes are, how it is being handled and what the gaps are. We have already talked about some of those things this morning. But I think it is true to say that we have also tried to then identify key principles, key issues and often just key questions that we know have to be answered but for which we do not pretend to have the definitive answers. Many of the issues that we will talk about this afternoon come into that category. They are things in which the committee and the parliament will make the decisions that actually determine what the answers are.

Something that I really wanted to throw in as a sort of a threshold question is the very basic question of whether you see the task as being something that is confined to certain types of reporting about certain type of wrongdoing in certain circumstances for certain people—to just deal with a minority or a particular selection or cross-section of cases of people who blow the whistle in the public interest on wrongdoing in the public sector—or whether, and this is the question that I would really throw open to all members of the roundtable but especially to the members of the committee, you want to see it a bit more comprehensively and a bit more broadly than that.

One of the big problems of public interest disclosure legislation, especially in Australia but also in other jurisdictions up until now, has been an assumption that we are talking about a relatively small number of people who blow the whistle in the public interest—and that therefore you are really designing legislation to deal with a fairly finite select group of people in certain circumstances—combined with what you might normally call floodgate fears: ‘Well, hang on a minute; how far do we go here? Will this encourage too much disclosing of too much information in too liberal a way that is not consistent with our normal traditions of parliamentary democracy, responsible government, the loyalty of public servants to the government of the day and all those sorts of things?’

So there are some very interesting threshold questions that are caught up in the committee’s terms of reference about what types of public officials, what types of wrongdoing and in what circumstances. I want to throw a concept on the table to kick off which really informs all of the findings that we have put in the book that we have launched today, and obviously we are very keen to discuss this and argue for it if necessary. I encourage the committee to think about and recommend to the parliament the philosophy of ‘If in doubt, report’ at the level of the ordinary, everyday public servant out there in the field, working in the public sector or as the employees of contractors working for federally contracted-out services or whatever. I want them to take the

comprehensive view that, at the end of the day, the ‘If in doubt, report’ test is really the ultimate test that every single legislative drafting decision they make needs to pass.

At the end of the day, you have to be thinking about the average public servant out there who may or may not have some sort of internal gripe or grievance or who may already be involved in some sort of internal conflict in their organisation. It is quite possible that that will be the case, especially if it is a badly managed workplace or if there is an issue that has been festering for a while that is causing angst. Even if that is the case, you have to think of that sort of situation or think of an archetypal altruistic public servant who wants to do the right thing or somebody who just stumbles across information that they know that they should act upon but have not and who has to face the question of whether they act upon it or not.

I think the acid test for the committee and the parliament is to keep putting yourselves in the situation of that average public servant. We can talk about who that average public servant might be but, at the end of the day, it has to be a question of what you are going to do to basically make that public servant think: ‘Okay; if in doubt, I should report this,’ and ‘I can report this and I will not have to suffer unnecessarily as a result of reporting this.’ A lot of those decisions about how wide you go or how narrow you go need to be able to capture that public servant, irrespective of the type of wrongdoing they are worrying about and without them needing to go: ‘Hang on a minute; where does this fit in the fine detail of some piece of legislation I may never actually have heard of?’

I would just like to throw that out as an opening concept. We in the research team are happy to field questions about how much whistleblowing goes on, what its nature is, what it covers, how important it is, and what the evidence is for all of that sort of thing. But I think, in terms of the fundamental questions of legislative design, I really just wanted to throw that on the table as being a proposition for the committee to come to grips with, to determine whether that going to be a useful concept for you to use as one of your acid tests.

CHAIR—Thanks very much, AJ. That is a good start to put on the table what might be an overall philosophical approach that might be taken to legislation. Does any one of the participants have a comment on the proposition that the touchstone to this might be: ‘If in doubt, report?’

Prof. McMillan—Can I just make one observation to do with terminology. The broader the scheme extends, the less appropriate it seems to me to use the term whistleblowing, which carries certain connotations, at least in the public mind at the moment. I know that this project toyed with other terms: ‘internal witness’, ‘public interest disclosure’ and things of that kind. I think the report of the project was interesting in that it detailed a list of about 25 kinds of wrongdoing and then asked people when they had seen it and whether they had reported it. All of the categories of wrongdoing are ones that can potentially be wrapped up within a scheme, but not all of those instances or categories fit easily with whistleblowing, at least in the popular sense that it has developed.

Prof. Wortley—To respond to that, interestingly too, the sorts of behaviour that you are alluding to were also probably the most popularly endorsed by our respondents. For example, probably the largest items identified were things to do with personnel practices. We excluded those from some of our analyses, but when you simply ask people what they had observed, that

really dominated a lot of the responses from people. So there was a fine line between what was simply a personal grievance and things like bullying, for example. Where does a grievance become bullying and so forth?

Ms Bird—I think the definitional issues are important. The basic philosophy and concept of ‘if in doubt, report’ is fundamental to a good culture within the Public Service; it is the mechanisms and the system behind which you make those reports. So I strongly endorse that kind of approach: finding the right mechanisms to build the culture within an organisation that ultimately builds the best confidence and positiveness within that workplace about being able to deal with issues that often are essentially in the nature of a personal grievance within the workplace—and ensuring that they are appropriately responded to—versus those things that may at the other end look at issues of a more systemic or public interest nature and ensuring that they are dealt with appropriately. There is quite an array of things in there that require sensitive management.

Behind all of that is appropriate support for the person who is making the disclosure and appropriate support for the person or group of people that the disclosure is being made against, as well as the whole workplace itself. So they are complex matters in terms of trying to tease out what the best systems are that support the ultimate goal of ensuring that there is a culture within an organisation that says ‘If in doubt, report,’ because reporting any suspected wrongdoing is the best way of getting things out in the open and dealt with and improvements made.

Mr PERRETT—I have a question for Robert and AJ, I guess. Unless I misunderstood it, AJ, you were saying that in Queensland the mechanism is a very fine one but you seemed to intimate that the culture and the support were not there—that the system was a bit of a jarring in that the mechanism was fine but the cultural support or something else was not there to create the right sort of results.

Dr Brown—In Queensland the legislation is quite comprehensive but that has not guaranteed that any of it actually got implemented. That is really the key issue. It comes back to what is required at an organisational level to—

Mr PERRETT—What Penny was just talking about.

Dr Brown—Yes, and it comes back to the culture and all those support mechanisms. But I guess part of the problem there is that even in Queensland’s history of the legislation—and you can see this in the way that public sector agencies have or have not implemented the legislation—it has been very easy to see people using the technical distinctions that can be drawn in the legislation about the types of wrongdoing that can be covered and the people that you are allowed to make disclosures to.

Some of those basic legislative design issues can easily become very high barriers to your average public servant being confident to say: ‘I know that I can report under this legislation’, because your average public servant will not be thinking of the legislation; they will be thinking about ‘Where am I in this organisation? Do I know who to report to? Do I hear any assurances that I can report and do I believe them?’ What therefore becomes most important is whether there are people in the organisation who feel that they can implement that legislation. It is then very easy to see the difference between organisations where people do take an ‘If in doubt,

report' approach to the legislation within the organisation—even if it is not actually technically consistent with the legislation, because the legislation is very technical—and those where people sit back and say: 'I am only going to treat this as a public interest disclosure if it ticks all these little technical boxes. If it does not, it is not covered and therefore we just do not deal with it.'

So there is a whole issue about how you create a framework there which supports that management culture. There are things that you can do in the legislation, in terms of how you calibrate some of those thresholds and distinctions, which will basically provide much more encouragement and direction to the people who need to implement it at the agency level but make it much more difficult to basically cotton on to the fact that this is the type of philosophy that we are encouraging. But there are all sorts of issues about how what is captured in that big net is streamed, in effect, and managed in different ways, some of which will not actually be public interest at all. Unless you are designing a system which is capable of capturing it all then you will never be in a position to make sure that what needs to have been captured has been captured. That is the philosophy that I guess I am suggesting to you.

Mr Chadwick—Just on the legislative philosophy point, we know we cannot legislate to make people good, nor can we legislate to make them courageous. Is it a corollary of what you are saying, 'If in doubt, report', that there ought to be a duty not to hinder the making of a report?

Dr Brown—Absolutely.

Mr Chadwick—And that you craft as a positive duty or would it depend on rank?

Dr Brown—I think the crucial thing is that you make it part of the management responsibilities of all public sector managers at all levels to hear and act on what they hear. Then you back that up with formal systems to require them to disclose to the integrity practitioners within their own organisation that they are dealing with these matters. Thereby you actually create some formal systems by which what is actually being handled can be tracked. But I think it comes down to a question of the responsibilities of managers to manage, in effect. What is a good manager or a bad manager? But these things actually go part and parcel with—the primary responsibilities that are needed to operationalise any realistic regime are ones that basically just go with the responsibilities of managers to manage.

Mr NEUMANN—I have some concern in relation to 'If in doubt, report' because on page 284 of your book you set out some tests—a subjective test and an objective test. We have heard very detailed evidence from Mr Jones and his union and from Professor McMillan and his organisation, the Commonwealth Ombudsman, that talks about tests. They support your idea of tests. This idea that 'if you simply are motivated or you feel inclined, report it' seems to me to be at odds with the statement:

The motivation or intention of the person making the disclosure should not be relevant.

The idea that if I feel like I want to do it, I should report it does not seem to fit well with your whole theory here.

Dr Brown—Not at all; it fits perfectly.

Mr NEUMANN—How?

Dr Brown—John may be in a position to talk a little bit more about the sorts of thresholds that we think are the right default ones for the legislation, but they are in effect to recognise when people may have some information about wrongdoing, in which case both the legislation and the system should both enable and encourage them to report it to somebody. In such a case, this is the subjective element: they think, based on reasonable grounds, that they have some information. Alternatively, they may have information that is about wrongdoing which they disclose to somebody and they may actually have no consciousness that it is what it is.

They may think it is a small thing, and in fact it may be a huge thing. It may look like a small thing to begin with and then it might rapidly turn out that it is actually just the tip of an iceberg of a much bigger thing that is much more serious. In that case there should be an objective test, which means that those who are assessing the information and administering the scheme—the Robert Needhams—are in a position to say ‘This person has got no idea what they really reported. They think they may have reported a personal grievance but in fact they have reported a major fraud.’ In that case it needs to be covered by an objective test.

So the particular legislative threshold that we are suggesting, which is really just combining the best elements of things that are currently in different legislation, is to make a comprehensive catch-all that is still reasonable and not by any means impractical or non-administrable. It is quite a feasible thing. But basically it does quite neatly embody how you would go about, in that particular issue, institutionalising a philosophy of ‘when in doubt, report’.

Prof. McMillan—As AJ is proposing it, the catchcry of whistleblower protection laws is: ‘if in doubt, report’. The catchcry of my ombudsman organisation is: ‘you have a right to complain’. One runs into the other. There is an area of overlap but there are areas of different coverage for each. There is one where exercising the right to complain is the more appropriate description and there is one at the other end of the spectrum where reporting wrongdoing is the better description. But it emphasises the need for schemes that are integrated—that realise that a whistleblower protection law does not stand aside from everything else, and I will make some comments about that. Secondly, it emphasises the need to make an early threshold decision to assist somebody as to which category they are falling into or which pathway they are going down. The reality is that you do not expect the person, particularly if they are feeling aggrieved and emotionally injured by some action, to know necessarily which pathway they move down. They need that early support and assistance to resolve that issue.

CHAIR—I was going to direct a question to Stephen based on what you said a moment ago, AJ, which I took to be, in a sense, a plea for simplicity in any framework or in any legislation. It is desirable that it be simple because we are talking about sending particular messages to people working in the public sector. Stephen, you have members across the country working under all existing state regimes and the very partial Commonwealth regime that exists. Do you have a comment on what form the legislation might need to take from the point of view of public servants?

Mr Jones—Yes, I do. I will preface it by saying that I prefer the term ‘public interest disclosure’ to ‘whistleblower’, but hereafter we will use the term ‘whistleblower’ for shorthand. Our view is that the legislation should be clear within its scope and should not seek by reference

to describe the sorts of behaviours that are subject to a disclosure. I will explain that. I think one of the weaknesses in the current Commonwealth regime is that it provides protections for whistleblowers who feel that they are apprised of a breach of the code of conduct. That requires a degree of characterisation and knowledge—legal and otherwise, which is often beyond the scope of many lawyers let alone the normal public servant working within the Commonwealth or elsewhere, I would argue. So it is our view that the legislation should clearly prescribe the scope of the behaviours that are reportable within the regime.

The sorts of things that we have talked about in our submission go to issues such as illegal activity and corrupt conduct. I would have thought they were beyond controversy. The areas where there might be perhaps a little, but not much, controversy would be danger to public health and safety and danger to the environment. I would have thought that they are areas of little controversy. When I talk about it publicly and elsewhere, the areas that seem to attract controversy are the other two: misuse and waste of public funds, and maladministration.

I prefer the frame that AJ has talked about, and that is: if in doubt, then report. I note that you are saying, ‘If in doubt, report,’ not ‘If in doubt, leak’—and therein lies an important distinction. I think that broad category covers everything that could conceivably fall within public interest disclosure. I would encourage the government, if it is attracted to carve-outs, to make any carve-out very succinct indeed. The carve-out, as far as I am concerned, should be complaints against something that is clearly government policy that an individual public servant might not agree with and is aggrieved about. Clearly, that would fall outside the scope of the regime.

I am not at all attracted to carve-outs from areas such as misuse and waste and maladministration that apply to employment related areas—and I suspect therein lies an area of potential controversy. I think there are very cogent reasons, practical and otherwise, why they should not be excluded. If the objection is that that will lead the way to a floodgate, then I merely point to the current Commonwealth legislation which has at its heart the capacity to lodge complaints or disclose against a broad range of employment related areas including by somebody who feels aggrieved that they have not been treated with respect or courtesy or have been subject to harassment. You could not get any broader than that and any more central to the employment relationship than those areas, and yet there is no evidence of a floodgate.

So those are reasons, practical and otherwise, for the impracticality of carving out employment related matters when this is a service that employs around 150,000 employees at an average total employment cost of about \$100,000 per employee. You are talking about significant areas of public expenditure that I would have thought go to the very heart of the things that should be subject to the scope of such legislative provisions.

CHAIR—Just on that carve-out point, we have had submissions that have suggested that intelligence related matters, because they are already covered by a fairly comprehensive scheme through the inspector-general of intelligence services, might be suitable to be left in that pre-existing scheme. It is in fact one of the fuller schemes that exist for disclosure, but it is a stand-alone area.

Mr Jones—I would concur with that.

Dr Brown—I would not. I got in ahead of Peter Bennett: that was good!

CHAIR—We have not heard much from Peter, so we will hear from him on this.

Mr Bennett—There are a couple of threshold issues I want to go back to first, Chair. I would like to come back to that but I will have to let that just sit for the moment. We see that this is being approached from the bottom up rather than the top down. We think there actually should be disclosure unless there is a compelling and necessary reason why there should not be a disclosure. What we seem to be doing at the moment is looking at introducing legislation which will restrict, confine, control and manage the process of disclosing information and put the responsibility virtually on the whistleblower, when in fact the public has a right to a great deal of information which it is not getting ready access to at the discretion of bureaucrats. For that reason, we see this as being the situation in reverse: we are actually not looking at disclosing information; we are actually looking at better ways to manage its disclosure. We think that is probably not the correct way to go.

I do not think we are going to win the point. It is unlikely that any government is going to say, ‘Yes, let’s make everything disclosable,’ unless there is a tag that goes on the top of the page that says, ‘This should not be released for a particular reason.’ So that is probably not going to win, but that is the ideal situation. That is what every citizen should be entitled to, and that is: whatever information is in government should be available to the public and it should be allowed to be disclosed unless there is a really compelling reason why it should not be. But what we are doing at the moment—and I have no objection to doing what we are doing, but I think there is a better system—is we are actually looking at a way of controlling that information. We are still going to mete it out in some fashion through a set of legislation that is going to say, ‘Yes, but only if we allow it to be done in this particular way, to that extent, under these sets of circumstances, for these people, in a narrow sphere of activity.’ That really does not help the community. It really is not public interest disclosure. It is whistleblower management. I understand that is what the project was about, but it is not what the committee is about.

CHAIR—Indeed, it is not. It is, however, concerned fundamentally with how to protect people who assist in uncovering wrongdoing, maladministration, illegal conduct and the types of behaviour that Stephen went through a moment ago.

Mr Bennett—But there are four people involved in a whistleblowing matter: the person who does the wrong thing in the first place; the whistleblower who observes it; the supervisor, who should manage the whistleblower to make sure that they are protected; and the manager of the whole process, who should ensure that it does not happen in the first place. The legislation—90 per cent of it—deals with the whistleblower, who has the least power and the least opportunity to do anything about it. All they do is say, ‘Look, boss, I saw that happening,’ and that is the end of their role. Good or bad, that is where it should finish, but we are having to create regimes, legislation and procedures and practices to look after that because the whistleblower is not managed properly, because the person gets away with it too readily and because the person who oversees the whole process has not done their job in the first place. That is the position we are in at the moment.

Changing the legislation alone is not going to do it because this legislation has been in place nationally for more than 10 years and it has consistently failed. There have been statutory obligations on agencies nationally, and the Commonwealth, to bring into place an effective

regime for whistleblowing, but none of them has done it—none of them has done it well and certainly none of them has done it properly, and the Commonwealth has done it worst of all.

CHAIR—That is why we are here.

Mr Bennett—Yes, that is why we are here. Our problem is that if we simply bring in more legislation aren't we then in exactly the same position we were in 10 or 15 years ago? We introduced the legislation and we said 'Go off and do it,' and they did not do it. If we just change the legislation again, are they going to say, 'Well, we have got another 15 years before there is another inquiry to correct it again.' My view, and I have put it to AJ and others on a number of occasions, is that we have passed that. We really have to have a new agency. Take it away from the people who have not been able to manage it properly in the first place and give it to some organisation that can.

Lastly, it can be cost neutral. Every agency has people who are allocated for the function, and the Public Service Commissioner has been allocated for the function. You have got a manpower resource—numbers and finances—already committed. If they were moved sideways into a new organisation it would cost absolutely nothing, but at least they would then focus on the job. If they can focus on the job, those who have not done it properly in the past may get a chance to do it properly in the future. Sorry, I did not address your question.

CHAIR—That is all right. I am going to move to John McMillan for the second theme. We have to keep this moving along because we only have limited time for the second theme. In this discussion we have, in a sense, reached that theme, which is: 'Making it work in practice: systems and institutions for the capture and management of disclosures'. John, as Commonwealth Ombudsman, has had some contact with people who might fall into the category of being whistleblowers, even though that is not the statutory purpose of John's agency. I thought I would get John to speak briefly to that topic.

Prof. McMillan—The early Australian laws on whistleblower protection contained principles but no mechanisms, without an eye to implementation. It has become clear over the years that the implementation and creation of mechanisms is important. The view that has been put by many, including me, is that that can best be done by building the scheme around our existing mechanisms with some additional provisions and protections, which I will come to. Building it around existing mechanisms means placing a statutory obligation upon agencies individually to develop procedures for receiving reports, for handling them, for investigating them and for protecting and supporting those who report.

It means using the existing oversight agencies which already deal with many complaints, and in the Commonwealth that is bodies like my own, the Public Service Commission, the National Audit Office, the Privacy Commissioner, the Inspector-General of Intelligence and Security and the Integrity Commissioner. It means allowing people the right to complain, either internally or to one of the oversight agencies. The advantages of going down this path are, firstly, that it avoids that difficulty of having to distinguish matters that are clearly inside the scheme or outside the scheme. As I said in my evidence the other day, some of the minor administrative errors that we see about getting the spelling of people's names and their date of birth wrong lead to horrendous consequences. They are the kinds of administrative errors that can legitimately come within the scheme, but you would not regard them as serious maladministration.

Secondly, it uses the expertise of the existing agencies. It is very hard to create a new, purpose-built agency, to give it a national coverage, to have it start overnight with a staff of 10 or 20 to develop tradition, training capacity and resources—the existing agencies already have that. It assists the person, to build it around the existing mechanisms. Whistleblowing disclosures are on a continuum with many other grievances and complaints people have. It also sends the message that whistleblower protection is not for the exceptional heroic case; it should be a routine part of ethical management in agencies nowadays to have to deal with problems and disputes.

Finally though, if you are going down the path of building it around existing mechanisms, you need to avoid the risk of smothering the original objective by bringing it all internal and downplaying it. The way that you protect the original idea of public interest disclosures is as follows: you require an annual report by one of the oversight agencies on all of the activity; you allow a person the option of making a public complaint in exceptional circumstances; you build in special measures for support and for compensation of people who are injured; and you give additional resources to one or other of the external oversight agencies so that they can develop a proper scheme with proper training and support and the like and not just be expected to merge it within their existing functions.

CHAIR—I will lead off with a question, John. You do see a scheme for public interest disclosure as one that will require some resources. It is not going to be possible to do this without—

Prof. McMillan—Yes, and I think that is one of the problems at the moment. My impression is that agencies are switched on to the idea that they have to deal properly with grievances, dissent and complaint, but, because there is no separate identification or resourcing of this function, there is a tendency to redefine whistleblower complaints really as staff grievances—

Mr Bennett—Hear, hear!

Prof. McMillan—or complaints about financial management. The only way to turn that around is to have a scheme with special measures, special legislation and special resources so that you can re-educate the public service community to see that some of the matters they are currently dealing with need a different badging and need different treatment.

Mr Bennett—Sorry, but they really are not going to take you seriously. Ten years—and I have spoken to you on a number of occasions about trying to get government agencies to do that cultural jump from ‘This is the way I control my department and this is how we will assess things’ to ‘Somebody might make me accountable. This person might actually make me have to go to people and be accountable for what I am doing.’ That is a big jump, because this person might just be a pencil pusher at the very bottom of the tree but they can actually provide a piece of information that may make the CEO of that organisation be accountable. That is an enormous jump and they are going to resist it like the plague. They have done it for 12 to 15 years. There is no reason—you would have to make penalties for failing to bring in parts of the legislation and to enact it and to train and to properly allocate staff for the function. The penalties would have to be for the CEO of the organisation; otherwise, it is just going to be ignored as it has been.

Prof. McMillan—I agree that cultural change is difficult, but I am more optimistic than you are, Peter. But I will let others come in on that.

Dr Brown—I think that we are. If the committee is looking at a really comprehensive regime—which it obviously is—then I think that, by doing what John is talking about here, the legislation can start to address what Peter was saying just before we slightly changed topic. He is absolutely right. Previously, up until now the legislation, because of all those floodgates fears, categorisation fears and reading things down, has focused on the whistleblower and setting out all these hoops that a whistleblower has to jump to become a whistleblower, rather than focusing on exactly what Peter said: the responsibilities of agencies in managing disclosures and their responsibilities to assess, track, report and support. Those things can be made enforceable. The ways that they will be made enforceable are through a number of mechanisms, but the easiest way is by making clear the liabilities that will fall to public sector agencies, as employers, for getting it wrong. That is an issue that is also on our agenda.

The broad approach of what John is talking about is actually doing exactly what Peter said: shifting from a focus on the whistleblower to being a focus on the process, the organisation, and the responsibilities of management and managers. Those things start to become much more detailed, and the provisions that will specify who can or cannot be a whistleblower can become much simpler. That balance can be shifted in what this committee does. I have been—as have we all—in the lucky position of having seen in this research quite a lot of the ugly and a fair amount of the bad but also a reasonable amount of the good, and know that in some public sector agencies, despite the lack of legislation and any good model procedures, and in the face of some incredibly high integrity risks, there are organisations that manage to do things reasonably well.

I think that what we are talking about is a much more detailed framework that operates to change agency behaviour, which those agencies that are already doing it well will find quite supportive and reinforcing but which will put the challenge on those agencies that are not. Either they will cotton on to the philosophy or they will not. If they do not, it will be very clear that they have not, and in those cases there will be a range of liabilities that will naturally flow if the committee gets it right.

Mr Chadwick—John, can I tease out two points in what you said in your introduction and get your response? The first is that it seems implicit in what you are saying—the need for an oversight agency—that, in effect, even the integrity agencies need a watcher. If the primary jurisdiction for a given public interest disclosure is, say, the Ombudsman or the Privacy Commissioner, there nevertheless is value in an oversight, similar to the way we have seen public interest monitors develop in some other jurisdictions or in some other areas of public policy making. Do you see any harm in the oversight agency and what you might call the primary integrity agency—the one who is actually charged with the task of the investigation of the disclosure—being required to report annually to parliament on the number of public interest disclosures that they deal with, the numbers that are upheld, the numbers partly upheld and the numbers still under investigation, so that there is a kind of barometer for the legislature to be able to look to which agencies appear to be too slow, getting a lot of public interest disclosures et cetera?

Prof. McMillan—Yes, I agree that one clear element of this has to be public reporting, both of the statistics and of the problems that have been raised. I think it is important, both

symbolically and practically, to adhere to the original concept of whistleblowing, which is of course about drawing public attention to wrongdoing occurring. It is essential that there is proper public reporting of every stage. On the other element—having watchers watching watchers—I think you can get caught in a tangle and end up with an industry where you have complaints about complaints about complaints. There should be oversight mechanisms of one kind or another. My own view is that, for organisations like my own, Senate estimates committees and other parliamentary committees do it excellently. For some other organisations, like anticorruption commissions, you do need special parliamentary inspectors, public interest monitors or whatever because of the peculiar danger to society if the anticorruption body itself becomes corrupt. That is when you go to the extra stage.

Ms Bird—I agree with that. Our agency is charged with overall monitoring and compliance under the Public Interest Disclosure Act 2003 of Western Australia. There are some disadvantages that we suffer under at the present time in regard to the clarity of the requirements under the legislation. I certainly support what AJ was saying in terms of the need for that oversight and the clarity of exactly what is required of the oversight agency. If there is any ambiguity then there is, I think, an option to go soft on that. There is a need within the legislation to be much clearer about what the role of the oversight agency is, exactly what monitoring compliance with the act means and what the expectations and consequences for agencies where there is poor or low compliance are that flow from that.

Our experience is that agencies are increasingly very committed to public interest disclosure and very committed to supporting people who make disclosures. One of the challenges is having a regime where people can report their concerns and have them appropriately addressed through pathways that are clear and transparent to them and not having a single reporting pathway nor a single investigating pathway but having appropriate avenues commensurate with the concern that they have—having an integrated system that is clear and transparent to people.

I think that part of the reporting problem at the present time is that people try to compare statistics when they are not comparable. What one group may conceptualise as a grievance somebody else might conceptualise as a public interest disclosure. So you may say that there is low reporting on PIDs in one area and higher reporting in another area. That may not take into consideration that in our jurisdiction, for example, there is a crime and corruption commission that deals with a whole range of issues very appropriately, but they are not classified as public interest disclosures, so the reporting simply on a statistical basis is not very meaningful at the present time.

If you had an appropriate, integrated system that clearly articulated the alternative pathways and actually gave people pathways to go down appropriately commensurate with the concerns they have then I think you would get much greater compliance and much better engagement by agencies in responding to those concerns. At the end of the day, people want to protect people who make disclosures, people want to know what is going on and they want to address it. They need to have the right systems around them to support them to do that.

Mr Bennett—And it gives the whistleblower confidence if they can see that things are actually being recorded and they can see some successes. Even if they see some failures, at least they know that the matter is being addressed. In the Commonwealth Public Service at the moment you have no idea whether any matter is being addressed. Agencies simply do not report

in anything like the detail that has been suggested. The Public Service Commission's five-line report on whistleblowing can be missed in three blinks; it is gone. There is no detail at all. There is no way to measure and no way for the parliament to measure how effective the legislation is. Until you get that level of understanding that is and definitions that are consistent across the agencies you are wasting your time even putting the reports in. There has to be that consistency; otherwise, one agency will be describing a grievance matter and another agency will be describing a genuine whistleblowing matter and the two of them will be saying it is the same thing—and it is not.

Mr PERRETT—Mr Bennett, your position is that there is a bottleneck at the moment because of the culture—

Mr Bennett—Definitely.

Mr PERRETT—So the bottleneck could be freed—I think you were nodding in assent with AJ—by the right framework?

Mr Bennett—Yes. But it needs to be a cultural thing. The parliament needs to convince the Public Service that this is actually something that they want. It is part of their policies, part of the arrangement of providing better information for the public. It is giving the public something, and it needs to be come across in that fashion. Up until now it has just seemed to be an obligation. Now it has to go past that. It has to be a cultural shift, an awareness that this is something that is serving.

Public servants are the cheapest way in the world of monitoring what is happening in the Public Service. It costs you nothing. People are only too happy to put their hands up and say: 'Things are going wrong. Can we tell you about it?' Rather than having to build in a whole pile of audit systems and what have you, it is a very economical way of doing it. You should encourage them to do it.

It will develop its own preventive measures. If you have it there and people know that it works, people will back off. If you have a rough idea that there is going to be a copper down the street, you will slow up. If you think you are going to get caught, you will not be involved in malpractice or what have you. At the moment, there is no likelihood of you being caught. You just have to look at the statistics. Nobody is getting caught.

Mr PERRETT—That is not what AJ said.

Mr Bennett—What is not happening is that it is being reported. AJ and I have had discussions about the level of this. What is not found in those statistics is which ones are being reported and which ones are being dumped on. In other words, our view is that most of those that are being reported that are being supported by management are low-level forms of malpractice, misconduct and corruption. Management is only too happy to go out and grab those. It is not affecting them. As you move up the ladder and it starts to make senior people more accountable, they are the ones who are going to want to cover it up. They are also more likely to involve greater amounts of misconduct. The 22 per cent are being dumped on. The people coming forward and saying, 'There is the problem up the road, up towards senior management,' are the

ones who are really suffering. The ones being regularly reported in our view are the ones at the lower level.

Mr PERRETT—This proposition of yours does have a faint whisper of a conspiracy theory about it.

Dr Brown—Certainly there is empirical evidence to support what Peter is saying. It just stands to reason.

Mr Bennett—Because they have the power. People at the lower levels simply do not have the power to harass and harangue readily. The further up the ladder you go the more you have the power to do it and get away with doing it and the less chance you have to buck the system. The high up it goes the harder it is to beat. The 22 per cent are ostensibly being dumped on by more senior people in management.

Mr Jones—I want to comment on the proposition that you put to Professor McMillan about resourcing. This does take up one of the points that have just been made. Parliament can send a message to the Public Service in many ways about how seriously it treats the issue of public interest disclosures. Legislation is a crucial part of that. I concur with the points made by Professor McMillan on the need for internal agency based procedures which work within the existing agency frameworks. I did not hear him say this, but I assume he also meant that there needed to be some agency with the responsibility for overseeing the integrity of internal agency processes.

None of this can be done resource neutral. One of the ways that parliament can send a signal to the Public Service that it does take this stuff seriously is for discrete funding. The cost to agencies will not be uniform and the size of those agencies will not necessarily be a factor, but rather the activities that those agencies are engaged in. Program agencies with relatively small numbers of staff that dispense large amounts of public money, service delivery agencies and border protection agencies are the ones that are more likely to have a higher resource need. Their size may not necessarily be a factor. A rather large policy development agency, in my submission, probably would have a lesser need to find the resources to deal with internal mechanisms. I think many of the points that Peter raised are actually going to come up after the afternoon tea break in terms of the judicial remedies that might need to be available as well.

Ms NEAL—I want to broaden out the debate a little bit. We have had a fair bit of discussion about the fundamental principles, and I understand that. I will direct my question to Robert Needham, but anyone else who wants to dive in should feel free to. Basically, the issue of what policy areas should be carved out was raised. The one example that was given was security and intelligence. Are there some areas that should be carved out and should they include security and intelligence? If so, which areas should they be? Also we have discussed a bit what types of persons should be able to make disclosures. Are there circumstances, as there are in your state, where it should be compulsory for persons in particular positions to make disclosures? If so, what sorts of persons should they be?

Mr Needham—Dealing with that last one, it is not really whistleblowing. Under our legislation the head of a public sector agency is obliged to report to the CMC any information they have which leads to a reasonable suspicion of official misconduct. That is so we are aware

of it, we can decide what should be done about it—whether we investigate it or send it back to them—and what steps to take in between. That is a little bit different from whistleblowing. But I might say that a lot of matters come to us generally through what we call our liaison officer, the officer in the department who deals directly to us—we have the liaison officer written down as the notifier. But there will be a lot of those that the liaison officer has found out from a whistleblower and we might not even know it is a whistleblower. Ninety-eight per cent of those cases go through very smoothly without any problem and without any suggestion of any difficulty at all for the whistleblower. Occasionally we do see some problems and we then make our best attempts to assist the whistleblower.

If we go back to what matters should be carved out, intelligence matters is an area outside our jurisdiction in the state but I can certainly see a lot of very good reasons why you would want to look very seriously at carving out intelligence areas, especially if there is a separate regime for that, such as the Inspector-General, who is able to deal with all whistleblower complaints effectively within that area.

Other matters that I would not like to see put in as whistleblowing things are the sorts of things that Penny Bird mentioned earlier: pure personnel matters. A staff member complaining to a manager two up that their immediate supervisor is bullying or harassing them should not come within the whistleblower regime. That is a managerial issue and it should be dealt with within that agency by a proper management response. If you elevate it to whistleblowing you are making a mountain out of a molehill and you end up with all sorts of fights over it. We often see situations where there is an internal argument within personnel in an agency. Each person will start making a public interest disclosure about the other, each of them claiming protection as whistleblowers from the other person. It just becomes a mess. Those personnel matters need to be dealt with as personnel matters by proper management action within the organisation. If there are genuine complaints that are made, then they have to be hived off and dealt with totally separately from that initial personnel aspect.

Apart from that, I note that your term of reference 2a sets up various matters. I would see all of those as being properly matters to be within the whistleblowing regime, except I wonder why ‘official misconduct involving a significant public interest matter’ includes the word ‘significant’. If you try to add in something like that it makes it very hard on a definitional basis to be saying whether it is significant or not. I would leave out the ‘significant’ and just have ‘public interest’.

CHAIR—That goes right back to what AJ said at the start of this afternoon which was if one is going to take ‘if in doubt report’ then introducing notions that are quite difficult to define, like ‘significant’, might just cause problems.

Mr Needham—Indeed.

Mr Wheeler—On the issue of carve-out, there is a problem that can occur with overcomplexity. If you look at complaints and disclosures as part of a continuum, there are statutory protections and eligibility requirements for complaints by the public against the government and for complaints by public officials against the government and then, depending on the nature of the complaint, internal complaints by public officials to their own agency and external complaints by public officials to, say, an ombudsman. The level of complexity that has

been built in does not help. You have to start thinking about the purpose of these eligibility criteria. What is the purpose of limiting access to these protections?

Presumably, it is to ensure that the right to complain, the information obtained and the protections are not misused. There might be ways to achieve that without limiting how you come in, possibly by changing the focus from what is protected to what is not protected. How do you lose protections? Should you have a presumption that you are protected? If you assume everybody has a right to complain, should there be a presumption that whoever complains has a right to certain levels of protection—they are not going to be taken on for defamation and they will not end up in a court, unless it can be shown that there was bad faith or that they went public without following correct procedures or that they misused the system. I have a great problem with the idea of carving things out. Maybe a better approach there is to have a specific avenue for those sorts of disclosures to be made—the same system, the same description, but you might say that disclosures about this area go only to the Inspector-General of Security; disclosures of the same nature about other areas go to a different place.

In New South Wales we have a range of watchdog bodies and the act basically says that you can make a disclosure about corrupt conduct to the ICAC, maladministration to the Ombudsman, serious and substantial waste to the Auditor-General et cetera. You do not carve things out; you specify where those disclosures are appropriately directed.

Dr Brown—That goes back to what we were talking about before we changed tack slightly. I would caution the committee strongly against the idea of starting to carve out particular areas—very strongly. What is the rationale for doing so? If we are so convinced that our scheme for handling complaints from members of the intelligence services about what might be going on within those intelligence services is so good then why are we not prepared to simply say that those disclosures, if they fulfil those requirements and those characteristics, are public interest disclosures and are protected just like any other public interest disclosure? Yes, they should be made internally in the first instance or they should be made to the Inspector-General—he will be a designated authority under the scheme. The only requirement additional to all of that that is caused by the inclusion of intelligence and security in the scheme is the fact that you have another coordinating agency such as, probably, a facility in the Commonwealth Ombudsman's office that is providing another little check on how everything is working and is able to keep on monitoring it as a whole. If everything is working well, it will be fine. If it is not working well, what have you done? You have carved out intelligence and security from the scheme.

I think the debate they are having in Western Australia about 'the Corruption and Crime Commission has its own regime therefore it does not need to be included' is extremely dangerous. I have said that to the Western Australian government. It should simply be like the Queensland regime where you just accept that disclosures about official misconduct are public interest disclosures as well. The CMC has responsibilities just like the agencies and it should operate seamlessly. The CMC role does not change.

The big example of a carve-out demonstrating your problems is in Queensland where the Queensland Police Service has an internal witness support regime—and remember: this is the Queensland Police Service that was the subject of the Fitzgerald inquiry and has been the subject of the oversight of the CMC for x many years. Its number of listed public interest disclosures under the Queensland legislation is zero because they operate according to a definition of police

misconduct that they believe is different from official misconduct. It has not been included under the public interest disclosures legislation. Therefore they are managing it all—it is all fine and hunky dory according to the Queensland Police Service if you saw the *7.30 Report* last week—but in fact we would not really know because the number of reported public interest disclosures is zero because they are handling them as police misconduct, which they regard as not being reportable under the public interest disclosure legislation. Based on a small technicality the Queensland Police Service has effectively carved itself out of the scheme and no-one has yet ensured that it is brought back in. That is exactly the sort of problem that you get if you start saying that for particular reasons you will carve particular people out of the scheme. I would say that you look back to the principles that we have put in chapter 11 of the report, which have also been usefully appended to the Commonwealth Ombudsman's submission to the committee, and also to what John was just saying: the existing integrity agencies all have their particular roles under the regime. The thing that they all have in common is that where they are dealing with a public interest disclosure they are dealing with the public interest disclosure, and that those things can be tracked and monitored and we will have a clearinghouse to help coordinate the oversight right across the board. That is actually a simpler way of running the whole scheme than by saying they are a bit different over here, and they are a bit different over there therefore we will start carving people out.

CHAIR—Again we come back to an objective of simplicity.

Dr Brown—Absolutely.

Mr SLIPPER—Mr Needham, every time I open the Queensland media it seems that another matter is being referred off to you. I do not know how big your staff is but it would seem to me that it would have to be quite large. Do you find many people, under the guise of whistleblowing, laying complaints which are effectively just smears?

Mr Needham—No, we do not. We do find the sort of situation I mentioned previously where you have a personality dispute within one sector of an agency and they start making public interest disclosures about one another. There can be that sort of thing. But just as a stand-alone situation, no, we do not.

Mr NEUMANN—To pick up on something Dr Brown said: you did not actually make a recommendation but you said in chapter 11:

One of the external agencies with responsibility for public interest disclosures should be designated as the oversight agency for the administration of the legislation.

I presume you are not saying the creation of a new entity but the designation of an existing entity. If so, which would you recommend? Would anyone else from the study like to name some body?

Dr Brown—My own view—and I know this is in contention with other people's opinions—is that because, with a slight exception of the current situation in Victoria with the Victorian Ombudsman operating as a clearinghouse, no legislative scheme has yet directly experimented with giving even an existing integrity agency, let alone creating a new one, the types of responsibilities and roles in the type of scheme that we are talking about. Therefore I would say

that it would make more sense to attach those responsibilities with extra resources to a suitably well-placed existing integrity agency. We should give that a really serious try and if that has not worked within five or 10 years then if we come back and all meet here again then I will probably be lining up with Peter Bennett and saying, 'Right, we need some kind of new super flying squad here that is completely new.' But I do not think we are at that point because we have not seriously given it a proper go yet.

In the Commonwealth sphere there are two major agencies in the mix—the APSC and the Commonwealth Ombudsman. I am interested in Chris's view here as well because we have spent a lot of time talking about this. A large part of the responsibility is to deal with ensuring the public interest side is respected, which is not typically the role of a public sector management agency. It would be better placed if it was able to focus on the personnel management side of the business rather than the public interest side plus the personnel side that flows from that mixed up, which would suggest that the Ombudsman's Office would be logical. But you are really talking about an agency that needs to be able to oversight, monitor and then second-guess, where necessary, quite complex investigation processes in a way that an integrity agency that has high existing case handling responsibility is the better starting point in terms of the types of skills and resources it has, whether it is an anticorruption body or an ombudsman's office that is actually already handling, processing and monitoring high levels of cases. That would also mitigate in favour of attaching it to the Ombudsman's Office rather than the APSC because the Ombudsman's Office is dealing with a higher number across a much wider range of more public interest related types of wrongdoing.

Mr NEUMANN—What about the idea of a public service ombudsman, effectively a deputy, a specialist division, as we have the Law Enforcement Ombudsman, the Immigration Ombudsman. That idea of a deputy ombudsman titled the public interest ombudsman. What do you think about that as a specialist division?

Dr Brown—I think that the suggestions along those lines contained in the submission made by the Ombudsman's Office are all valid and make a lot of sense. We obviously did not write these principles with a particular institutional solution in mind—because we are talking about principles here. But that would be valid and would make sense. And I think that the CPSU submission also makes a lot of sense—to go in that sort of direction. But it needs to be at that sort of stature and that sort of level if it is going to be credible, for the reasons that Peter Bennett has identified to you. It is not just a tack-on. This is not just fiddling around the edges. This is actually quite a serious functionality.

There has been a problem and I think we need to acknowledge it. In some agencies, including the Ombudsman's Office, new functions have been created that look to be of high stature and independent but their own resources have been whittled away over time due to other demands within the organisation. There is a risk of that—I note Peter is nodding his head. We have got to acknowledge that risk if we are to say, 'This has got to be a very robust framework, which means that if we create a unit that is accurately assessed as requiring 10 or 20 people, and a deputy Ombudsman, we do not turn around to find that in three years time it has been whittled down to two people, and the deputy has been swallowed up by another deputy.' There are all those sorts of issues.

Mr PERRETT—Could I redirect Mr Neumann’s question to Mr Bennett and Mr Jones to get your comments on it in terms of agencies and possibilities, and reflecting on what AJ just said as well.

Mr Bennett—Our position is, an agency. The idea of putting it with the Ombudsman’s Office is a good one. You used the term that I used in our submission, which is ‘public information office’. I see there being a public information commission that would have two parts: one is FOI and the other is disclosures—whistleblowing legislation. It would be Deputy Ombudsman type stuff—that is, as a deputy under the Ombudsman, but it would be a totally separate unit. The Ombudsman would not be able to dip in there and say ‘I want a couple of investigators to go off and do something else.’ ‘No, sorry, these are my staff. This is the job they have got to do.’ It would focus on access to public information, both through FOI and through whistleblowing legislation. It becomes a specialist skill and an area where people actually understand how to get information to the public when they are entitled to.

The people who are in there can move between the FOI side and the whistleblowing side, but they actually get to understand the full scope of the appropriate legislation. Staff would be recruited and selected for that purpose. I think that that would not be a bad idea.

Mr PERRETT—Before we hear from Mr Jones, I wanted to mention that my experience in the mining sector in Queensland was that the mine investigators provide a specialist service. But when they got police officers to join the mining service—they knew nothing about mining but they knew how to investigate—there were certainly significant improvements.

Mr Jones—As a matter of principle, I do not care too much what the person is called. As a matter of practicality, I see a lot of sense in combining the function within the Ombudsman’s Office. I do that for the exact reasons that you mentioned, Mr Perrett. I also think that for this function to flourish it needs to have the capacity to build a competence and expertise in investigative procedures. To combine the resources with an agency that already has those functions makes a lot of sense.

CHAIR—I want to go back to something you said, Mr Needham, about staffing and personnel disputes and the problem that you have seen in your work of there being some quantity of disputes which are just that: people making complaints against each other. There is clearly some tension between trying to rule out what you would describe as just staffing and personnel disputes while at the same time keeping an approach of ‘if in doubt, report’. A lot of the submissions the committee has received have suggested that classification problems are quite capable of being dealt with in an administrative way in the investigation process. They have suggested that rather than attempting to have a carve-out in the legislation or to describe certain things in the legislation—like, for example, staffing disputes—that are not going to be protected, it is best that it is left at the more general level and we should administratively deal with whether or not it is something that needs to be taken further.

Mr Needham—When you are doing your investigation, it is really not a necessary part of the investigation to make a classification as to whether a person is a whistleblower or not. Generally, in the bigger investigations we do there is absolutely no doubt about whether they are a whistleblower. When you get down to the smaller level things—which we do not do; we send them back to the departments—the only reason they really have to make the classification is if

you put a reporting obligation upon them where they have a note in their annual report of how many PIDs they have received. But for carrying out the investigation, they only have to if there has to be something put in place for internal witness protection, for protecting that particular witness. Otherwise, you just get on and do the investigation, do your required managerial action and move on. I do not see any great problem with it. I was just going back to what Penny Bird had said at an earlier time, when we were talking about the levels of what is within the definition of whistleblowing, that I would not like to think that we would get to the stage where I put in a complaint about my immediate boss, that he has been bullying me and where I am therefore now a whistleblower and for the next 10 years I have the protection of the Whistleblowers Protection Act. That is just elevating a small level thing into a huge mountain. That is all I meant there.

Mr Jones—The Commonwealth law currently protects that person in exactly the way you describe. There is no evidence of this floodgate, but I am glad you have asked the question. If I might, Chair—

CHAIR—Yes.

Mr Jones—ask a question of Mr Needham which goes directly to highlight some of the artificiality in, say, carving out something of a managerial or personnel matter. A manager who is engaged in systematic corruption of the employment or engagement process, by your schema, would be excluded. However, somebody who did exactly the same thing—would that be management or employment related?

Mr Needham—I think what you have said is a little bit more than what I have suggested. I suggested a bit of bullying, not systematic manipulation of the employment—

Mr Jones—Okay, when does something, as an employment related matter, get excluded from the scheme and other employment related matters get included within the scheme?

Mr Needham—I would not suggest that a complaint of bullying against a low-level supervisor would come within the definition of maladministration.

Mr Jones—Say I agreed with you—is it the director of a department? Is it the deputy secretary? Is it the secretary? At what level in the chain does it become something which is subject to the scheme?

Mr Needham—I would not suggest that any complaint of, say, minor bullying, minor harassment or that sort of thing—minor stuff—is maladministration. Maladministration has to be something much more serious than that, I would have thought.

Ms Bird—I think that some of these issues are around the definition of a scheme and the framework that you operate within. In those instances, there is a clear need for people to report it. There is a clear need for them to be responded to. It is then a matter of asking: Is that part of a comprehensive integrated framework under which you label the whole thing ‘public interest disclosure’ when, really, one would ask: is this of public interest or not? I would probably argue that it is not. There is an element where it is not public interest; it is in the interest of everybody that it is reported and dealt with appropriately, that people are supported and that you have an appropriate workplace. It can still be part of an overall framework, which is a culture of ‘If in

doubt, report'; if you are suspicious, respond to the suspicion. Those issues must be dealt with. So it depends on how you wish to scope a scheme as to whether everything gets under the umbrella of public interest disclosure simply because we understand public interest disclosure to provide protection, when in fact any good workplace will protect anybody who raises their concerns. Where do you draw the line of what is public interest and what is not? Does it actually matter if one goes one way or the other as long as your fundamental principles of 'If in doubt, report' are in place? If there is a suspicion of wrongdoing, investigate it and ensure that all parties are appropriately supported and protected within that process. I think what Chris Wheeler was saying in that regard was very helpful, to turn it around and view it as a matter of: What is the matter to be investigated? Get it investigated properly and ensure that in every instance people are appropriately protected.

CHAIR—Chris, you were scribbling madly there before. Did you want to say something about this?

Mr Wheeler—Only to emphasise the point that the issue is not so much about reporting; it is how it is categorised and how it is dealt with. You really want all concerns that are valid concerns to be reported, but one might need to go down this avenue where it is a workplace grievance or it might need to go down another avenue where it is a serious public interest matter. Both require a certain level of protection. There should not be recriminations against anybody for raising a valid matter. If anything else, it is an occupational health and safety problem. If there is stress in the workplace because of bullying, harassment or whatever it might be, there must be a certain basic level of protection that applies to all staff if they have raised a valid concern. Then you look at what specific protections might be needed in particular circumstances. For example, in some circumstances confidentiality might be important; in others it might be counterproductive. So we need to actually say we have the ability to categorise matters as they come in so they can be dealt with appropriately, so that the obligations on the agency only apply in appropriate circumstances, so that not everything is reported as a public interest disclosure, only the ones that actually do fit certain characteristics.

The idea of having 101 different schemes for different types of people and for different types of issues means that no-one is going to understand it. The simpler the scheme the more comprehensible the scheme, particularly from the perspective of the people making the report. Behind the scenes it can be a bit more complex about maybe triaging the matter to go this way, that way or whatever. But the face of it, the front of house, should be the simplest possible scheme that you can come up with. You cannot expect every public servant and every member of the public to understand all of the nuances of the eligibility criteria to go to this organisation or about this issue. In New South Wales we have an incredibly complex situation with about nine different watchdog bodies with totally different criteria and different jurisdictions that partially overlap. How anybody in the public knows where to go and why et cetera is quite beyond me.

CHAIR—On that note, Chris, I am going to call a break for afternoon tea. When we come back we are going to deal with the two other topics you have selected. These are compensating for those occasional cases of mismanaged whistleblowers and then the question of when it might be reasonable to make a public or a third party disclosure.

Proceedings suspended from 2.57 pm to 3.19 pm

CHAIR—I call the committee to order and recommence this roundtable by inviting Stephen Jones, the National Secretary of the Community and Public Sector Union, to give us a short introduction on the topic ‘When all else fails: an effective system for compensating mismanaged whistleblowers’.

Mr Jones—Thank you, Chair. The principle that we enunciate when we approach this problem is that the existence of meaningful and accessible remedies provide a powerful incentive for agency managers and employees to do the right thing the first time—so they have to be seen as a complement to the sorts of things that Professor John McMillan talked about earlier, not as an alternative. Secondly, we think that reprisals are almost universally an assault on the employment security and an attack on the career of an individual employee. Therefore, the proper mechanisms for dealing with and resolving disputes are through the established frameworks of employment and industrial law, as necessarily amended.

The first thing that we looked at was the rights and obligations. I should say that the things I am talking about assume that there is a framework in place, that it has been followed and that it has failed. There should be a broad prohibition against injuring or altering an employee or a contractor in their employment or engagement or threatening to do the same. So there should be a broad prohibition against either doing it or threatening to do it. Where a protected person has their position injured or altered or a threat is made to do the same, and they seek to pursue their rights under the statute, then the onus should be on the defendant—that is, the government—to prove that any injury or threat of injury was not because of disclosure that they have made. Regarding the right of the employee, we suggest a corollary obligation upon the agency heads—perhaps both statutorily and through contractual arrangements—to ensure compliance with the act. For example, a failure to initiate processes and procedures to protect a relevant person would constitute a breach of those duties.

We have looked at the raft of both judicial and other remedies that might be appropriate and fallen back on our experience in employment regulation generally. We believe a termination on the basis that somebody has made a protected disclosure should give rise to a statutory action and the remedy should be more than compensation, so the court should have the capacity to make orders not just for compensation but for other discretionary remedies that may be available so that the aggrieved person does not have to rely on prerogative writs and other mechanisms to put themselves in the same position that they would otherwise have been. We think that, in addition to the rights that the aggrieved person should have, there should also be available some prescribed penalties to protect the public interest and discourage such behaviours.

We think that, in addition to the judicial remedies that are available, there should be some other remedies available which could be provided through the existing mechanisms of the Australian Industrial Relations Commission and could use a process akin to the unfair dismissal provisions that are available within that jurisdiction. So, for example, the act could be amended to provide that a dismissal or threat of dismissal against a protected person was a harsh, unjust or unreasonable dismissal which would provide the aggrieved person with access to that jurisdiction.

Finally, in relation to remedies that may be available, we think it is important to provide a complementary power through the Industrial Relations Commission for that tribunal to provide mediation and conciliation functions as a mechanism for alternative dispute resolution so that there is not just a rush to judicial remedies. In terms of the relationship, in our submission it should be the Ombudsman who is the investigative body. Both the court and the tribunal should, as a matter of normal practice, have access to a report from the Ombudsman in relation to the investigation that it is alleged gave rise to the injury against the employee. There is one final point that I would make, and that is that judicial and other remedies are only as good as the capacity of the employee to be able to meaningfully have access to them. Therefore, some consideration needs to be given to costs and/or legal aid provisions, particularly when you are looking at court based litigation.

CHAIR—Stephen, you made a suggestion about grappling with compensation issues that is perhaps a little bit along the lines of some of the suggestions that we have heard today about using existing agencies in the investigative side of public interest disclosure. You have an idea of using existing agencies that deal with industrial matters as a way of engaging with a compensation regime. If that did occur, do you think it might lead to perhaps too much overlap with personnel or staffing matters?

Mr Jones—To the contrary. Quite apart from the constitutional issues about whether the commission could issue binding orders in relation to compensation, it could certainly make recommendations through a conciliatory process. No, I do not think there is the capacity for overlap. Indeed, it probably goes back to some of the issues raised by Robert. Often in these instances there is a complex matrix of employment and non-employment related issues that gives rise to a dispute, for want of a better word, that has brought itself before the tribunal.

CHAIR—We are dealing here with compensation. Does anyone have a comment on the nature of the things that are likely to be compensated for—from experience?

Mr Bennett—From experience?

CHAIR—Perhaps we will start with you.

Mr Bennett—Not necessarily personal?

CHAIR—Not necessarily personal—what are some of the examples of things that we might, in the case of mismanaged whistleblowers, be seeking to compensate for?

Mr Bennett—It is the usual standard practice that, when somebody comes forward, they are immediately sent to a psychiatric assessment by a hired-gun legal practitioner. That is then countered by the person themselves having to spend their own money to go to another psychiatrist to get a more balanced view. Usually that is required to be followed up by a third one, so you end up having some test against the two different views that you have there. That is just the medical stuff. Then you have the actual medical looking-after of the person—the treatment that they need to have, the counselling that they need to have and the medication that they need to have—for the stress that is usually induced.

All that is before we talk about the fact that they have probably been moved to a position of lower skill in an area that they did not want to be in and where they cannot get the benefits that they were getting at an earlier time. Cash is going straight out of their pocket. And that is not talking about being relocated to a new area, which is standard operating procedure as well. Suddenly they find that this person cannot be used in any other place in the organisation except in an office that does not have a phone and is on the downstairs level—that they are best suited to go and do that work. That is standard operating procedure.

How do you quantify the loss that you suffer in that? There is the integrity that you lose, the work area of the people that you have been with and the fabric of the group that you have been with—you have just broken that as well. You also have to wear the burden, even if eventually you come out of it clear, of carrying around the stigma that you were disloyal to the organisation. The chance of promotion is immediately brought down as well.

Those are just some of the standard things. Then you can get into the nitty-gritty of where they actually have a go at you and do, for example, phone traces that are unwarranted. There are things that happen other than just the standard things that they can do against you.

All of these things, in the end, tabulate up as things that you would want to be compensated for. Yet I would say that most people do not look for compensation. All they want to do is go back to the position they were in without a loss and accept a really nice, genuine apology. That is what most people would prefer.

CHAIR—I think that is probably appreciated. It is helpful, though, to have that catalogue from you because one cannot begin to consider what might be appropriate compensation without first considering what we are compensating for.

Mr PERRETT—I am loath to jump to defend lawyers here but, for quantifiable damages, there are some pretty varying glide paths there in terms of career paths and reassignments—though medicine we can get finite figures on. How do we go about saying, ‘This is an appropriate compensation,’ when you are about to be DG or the photocopy person?

Dr Brown—I think the answer to that question really just reinforces what Stephen was saying: just as important as any questions as to exactly what tests are what process and what forum you put this in to resolve. I am really keen to beat Mr Neumann to a page reference in our own book—

Mr NEUMANN—Page 127.

Dr Brown—No, page 129. On page 129 there is a catalogue of the types of harm that surveyed respondents said that they experienced. More importantly—and this is the first time in the world that this has been done—we triangulated this with what managers and case handlers in the same agencies were saying were the most likely types of harm that they assessed whistleblowers as experiencing. The correlation in terms of the extent of the problems and the order of the problems in terms of magnitude were remarkably similar. The type of anecdotal list that Peter has given you actually gets some verification for the first time through this type of data.

It really confirms that there is a very big issue here. Previously the assumption that you could create an offence of detrimental action and that reprisals were something you could easily quantify as being direct criminal acts against people has basically never really been the main problem. The main problem has been the things that Peter listed. It is management failure to act and then problems that compound that. It is quite low-level tedious minor looking stuff but any of them are basically the recipe for a career to go sideways or backwards or for somebody's role in an organisation to become unsustainable, not worth the effort or positively damaging.

Irrespective of whether they have been treated badly, the research shows that just the stress of the experience is a risk in itself and if that is not appropriately managed by the organisation then the organisation has effectively damaged that employee not by having done anything at all directly bad to them but just simply by having failed to acknowledge that they should take some responsibility for managing the stress of the whole process. Then, of course, that gets compounded by the fact that the organisation has failed to put in place a support mechanism which manages the stress from the whole process, so the employee's performance drops off and then there is some logical path for some sort of personnel action to figure out what to do with this dysfunctional employee whose dysfunctionality has been caused by their role in this whole process.

None of those are things that you could attempt to prosecute anybody for a criminal action of having undertaken a reprisal. They are all much more tied up with the employment relationship and the responsibilities of employers to look after their staff. When we look at the need for an appropriate mechanism to sort out how to compensate people for those failures of the organisation to look after their people, it clearly comes back to an industrial relations process being the most appropriate thing, which is also the only thing that the relatively effective UK legislative regime does. It is the only thing that it does and it is quite effective without all the other trappings that we have been putting in our own laws.

When you look at this picture with hindsight basically you ask: why didn't we realise this before? Why have we been wasting our time creating criminal offences of reprisals and trying to prosecute? That is really how stark it is when you look at the choices as to what might be the effective remedies.

Mr Jones—If we look at this through the regular frame of a tort, we can lean on heads of damage such as loss of income, pain and suffering and loss of reputation. We could probably build that out by one or two other things, but I think that is a pretty tight list. Again I would stress, and without wanting to take anything away from the importance of those three things, it is the corollary orders that matter just as much and go to some of the things that Peter and AJ have mentioned—remedial orders that, without having to necessarily pay out money, put the employee in the same position that they would otherwise have been in. So when it comes to loss of career promotion, without much wit or art you could draft an order to put somebody in a position to deal with that sort of thing. I also support what Peter said: an apology goes a long way in these circumstances as well.

Mr PERRETT—With or without liability admitted? I do not want to channel former prime ministers, but there might be a perception that making the apology might lead on to legal liability.

Mr Jones—Those things are dealt with—

Mr Wheeler—It depends which jurisdiction you are in.

Mr Jones—Yes, indeed.

Mr Wheeler—In New South Wales, the law protects an apology. So even an apology that admits responsibility cannot be used as evidence in civil proceedings. It is the same in the ACT. The other states and territory have only protected the mere statement of ‘sorry’ but not if you explain why. The law could provide that an apology given in this context is not admissible in civil proceedings. There are also precedents in Canadian provinces.

The point I was going to make is that I have no problem with the concept at all, but there is a practical problem—and that is the issue of proof. Some things are very easy to prove, such as if somebody gets demoted or moved. From our experience in looking at the matters that come to us, if somebody is moved against their will or if they are moved to a job that has less pay, seniority or supervisory responsibilities, that is easy. But a lot of the things that are alleged to occur as detrimental action leave no fingerprints. For example, ‘I was treated differently to my colleagues. They got an opportunity to act up or they got this or that, whereas my career has slowly but surely gone downhill. I cannot point to anything that I could prove in a court or a tribunal, but the overall issue is that it appears to me that I am being detrimentally treated because I made my disclosure.’

To my mind what this emphasises is the fact that, in this sort of legislation and the things that are done by whatever organisation takes responsibility for the act, prevention should be the emphasis. Fixing a problem that occurs should be the emphasis. The prosecution of offenders or the taking of people to a tribunal or to court is something that should be the absolute fallback when nothing else works. Really, it should be because the system has failed that you need to go to that sort of extent. Looking around Australia in the jurisdictions where you can take civil action, I am not aware that any civil action has ever been taken.

As far as I am aware, the only prosecutions have taken place in New South Wales. I think there have been five of them so far and they have all failed on evidentiary or technical grounds. And New South Wales has a reverse onus of proof. We have not even got to that. All you need to prove is that you blew the whistle and somebody has been nasty to you and then the defendant has to prove that they were doing it for some other reason. But I do not think we have even got to that point in any of these prosecutions so far. Not all of them are under the Protected Disclosures Act; some of them are under the equivalent police protected allegation provisions.

My advice is that the emphasis here should be on prevention and fixing—reinstatement and putting people back in the positions they should have been in—and not on, ‘We are going to prosecute you for a crime or, if you want to take on your organisation or your colleague at this tribunal, you might get some money at the end of the day.’

Mr NEUMANN—Why couldn’t you do that in terms of remedy in the legislative provisions? Just to pick up something Mr Jones mentioned, I do not like what you said on page 287 in terms of the low-cost tribunal because I think you have a constitutional problem there with the administrative and judicial bodies. Why wouldn’t you empower the Federal Magistrates Court

with the power to do this? The previous Howard government had this sort of fallback position that the Federal Magistrates Court was, as one of the Family Court judges in Brisbane called it, the font of all wisdom and justice. Why wouldn't you give the Federal Magistrates Court the power to do that—and the Federal Court above it, on appeal—given the right to bring action in that court for tort and breach of contract, specify the remedial action very clearly, keep the New South Wales reversal of the onus of proof and make sure the onus of proof to prove detriment is on the person who has suffered the detriment. Courts do that every day. I practiced in personal injuries and civil litigation in Queensland for years and we had to prove these things every day. That is what happens. It is not something that is foreign to the courts. There are a lot of things that plaintiffs would come and see me about and would say had suffered but were in fact not provable. There are Griffiths and Kirkmeyer damages for a start and then there are other sorts of damages—special damages, as well as economic loss. Why couldn't we specify that in the legislation?

Prof. Wortley—You could specify that in the legislation. I am just saying that, in terms of the proof requirements and in terms of the obligations on the individual to be able to prove this happened with their current employer, there are problems. It is far better to prevent it from occurring. You should have that as a fallback. I think the emphasis should be on stopping it, but if it does occur let us see if we can just resolve it.

Mr Jones—Chris, I agree. The old cliché, the shadow of litigation, should cast a fairly broad shadow across the internal procedures, in our submission. You will get voluntary compliance if there are some teeth in compliance mechanisms.

Mr Wheeler—I agree it should be there, but it should be the absolute fallback position in the event that nothing else works.

Mr Jones—We are on the same page.

Mr Wheeler—The emphasis should be on trying not to get there.

Mr Chadwick—I would like to put something else into the mixture and ask for responses to this. I would like to suggest, beyond protection from prosecution or immunity from suit or compensation, the bestowal of honour. As to what I mean by that, this harks back to AJ's introductory remarks as to the notion of change of culture. It is an established fact, partly by AJ's research but by many other works in the literature on this topic, that a person who engages in a genuine act of whistleblowing is ordinarily quite courageous. I think we need to go a couple of steps beyond this idea of putting someone in the position that they were in before. On the contrary, we need to start to consider the idea of bestowing honour. First of all, it sends a cultural message. In the same way as we honour other acts of bravery, it sends a message about a change of culture. It also reminds the whistleblower that it was not his or her moral compass that was out of whack; it was the organisation's.

Mr Needham—Paul, I had an occasion when there was a policewoman who was a whistleblower and I did not think she was being properly supported within the police service. I sent to her a letter that was in effect commending her. It was on this basis: 'I have read your statement and, on the basis of what is in your statement, I congratulate you on the courage you showed.' It did not stop her from attempting suicide.

Dr Brown—I think it is going to be appropriate in some circumstances to recognise the honour and the courage of individuals. In other situations it will be entirely by accident that people have made a disclosure about something serious. They may still be subject to all sorts of risks. In other situations there will be all sorts of baggage and history and conflict caught up with it.

I think the key thing is to recognise that the outcome for that person should be fair, which is why we are really talking about something to do with the bulk of the resolution, that what is there at the end of the day is going to be something that is most appropriately resolved in effectively an industrial relations context. In terms of defence of the idea of the need for there to be a low-cost tribunal consistent with using an industrial relations approach to this, there is this fact. If you think about the mechanisms for compensation that already exist, you note they have been ineffective because they have not been used. Why haven't they been used? Because the types of rights that are being talked about and the types of obligations as to the nature of the relationship between the plaintiff and the defendant effectively are not usefully defined if you are just simply talking about a tort. It is like suing someone for damages as a result of a car accident. We are not talking about two people driving on a road who happen to bump into one another or about somebody running over somebody outside a pub. We are talking, 99.999 per cent of the time, about an employer, or people under the control of an employer, and an employee. So that is the nature of the relationship within which these issues actually fall.

We have a combination. How do you actually drive home to the organisation that they have these obligations? Well, you make those obligations realistically enforceable. How do you do that? You put that in an employment context. You can have supplementary causes of action in other fora, but I think that, until we grapple with that reality, we are not going to have an effective and efficient regime that is capable of actually bringing those obligations to life in the minds of public sector managers and agencies. That has really got to be the focus of the prevention. A large part of the prevention might now start to happen, in terms of support programs and whatever, through the new procedures that are set up, through the new oversight regime that the Ombudsman oversees and through a whole range of mechanisms with more investment of resources and all sorts of things.

The message has to get through to managers that part of their basic management responsibilities is that they have to think twice about this and they have to think about what the consequences are going to be for this individual employee. They need to change the mindset that they are operating according to. It is basically their obligation as employers to provide a fair, safe workplace for all their employees, but especially someone who may well have done something that is in the interests of the organisation. Those are all obligations that need to fall squarely on the shoulders of public sector managers on behalf of their organisations as employers.

I do not think there is any constitutional or legal issues that cannot be got around using existing mechanisms. We are talking about the federal Public Service here. We are talking about exclusive power under section 52 in relation to the Public Service. There is some capacity that could be brought into play that would not necessarily apply to the other constraints that sometimes fall on the industrial relations system. I think there would be ways around that. The courts may well be very good fora—the Magistrates Court or whatever—but it would be a Magistrates Court operating with a specific no-cost jurisdiction, recognising that the obligations

that it is interpreting are effectively employer-employee relationship obligations. It is not as if they are dealing with a situation that is just like any other personal injuries matter or anything like that.

Mr Needham—The federal Magistrates Court has very specific application forms. It is very low cost. There is mediation attached to it, the same as the Federal Court. So we can do that sort of thing. And I agree with what Mr Jones said in terms of increasing legal aid funding for this because a lot of people would be in a difficult position. Couldn't you legislate to change that culture? I agree with what Mr Jones said in terms of it having an educative role. By having this in legislation will act as a prohibition to this sort of conduct.

Dr Brown—Absolutely.

Mr Roberts—One piece of information that we were really interested in getting in our research was the number of times and the incidence of people separating from organisations because of having been a whistleblower. It was quite a difficult task for us. We got some insight into this when we interviewed a lot of managers and investigators. One question they were asked was: are you aware of people who have left the organisation because of a whistle-blowing experience? It makes quite harrowing reading because virtually every single one of them knew of at least one and some of them could report many cases. It is quite clear that when we are talking and thinking about damages and compensation we also have that group of people who have felt the need to actually end their employment and get out of the organisation altogether.

Mr Bennett—Not only their employment but life in a worst-case scenario. After five years of being dumped on in the Australian Customs Service, riding my motorcycle under the back wheels of a semitrailer looked very appealing to me on about three occasions. It took me right to the edge, and I am pretty strong. I would hate to think of the average bloke who saw somebody doing the wrong thing and said, 'You shouldn't be doing that, Boss,' and then got leant on even a fraction of the way I was leant on. Driving under the back wheels of a semitrailer would look very attractive.

A person I am dealing with at the moment has just been admitted to a psychiatric centre in another state. He lost his wife and his family in the last three weeks as a consequence of a whistle-blowing matter two or three years ago. It drove him out of his employment and out of the state. He had to get far away from here and he went miles away. Now he has completely gone. He was a senior financial accountant in a very large institution. The effects are absolutely devastating. You asked about compensation, try to figure that one out.

CHAIR—Thank you, Peter, for that sobering reminder of what we are trying to deal with here. Certainly I have taken the very clear message from almost everybody who has spoken on the subject of compensation that prevention should be what we are looking for because, as is so often the case, compensation is just not going to be able to provide any kind of remedy. We should be looking in all respects to make sure it is not needed.

Mr Needham—Could I just mention one other thing on each, which would be a halfway house that might be of assistance in the shadow of possible litigation. If you have the oversight body, then that oversight body could have the ability to apply to the court for an injunction if it suspected that something was going to be done to a whistleblower. Even the threat of that may

be useful. I had one case where we received that a local government council had a motion coming up to sack the CEO because he had reported one of the councillors to us. I was able to write to each councillor and to the mayor advising them that what they were doing would be illegal and that if they did not immediately withdraw that motion I would be applying to the Supreme Court for an injunction to stop them dealing with that. They got onto their solicitor; he advised them that everything in the letter was correct and so they withdrew the motion, it then resolved and they started talking. Something like that can be of assistance to your oversight body—if they have the power to step in on behalf of the whistleblower.

CHAIR—Certainly, and that very proposition has been put to the committee in a whole range of submissions. It is something that goes together with what John McMillan told us earlier—John has had to leave early—that, just as everyone has a right to complain in his jurisdiction, so too for the scheme that we are considering there will need to be a right in a number of respects so that protection is not something delivered just by compensation but is delivered also through enforceable rights, which is what Stephen was talking about earlier. One of the things we are going to have to recommend on is, if we accept that agencies have a duty to protect and a duty to support whistleblowers, how that obligation can be imposed by the legislation on agencies. One of the mechanisms is the one you would have just mentioned, Robert, which is a right to go to court to get an injunction to prevent adverse action.

I am conscious of the time, so I am going to move to fourth topic and call on Paul Chadwick. This is a very different question. We are moving away, in a sense, from the question of structures and mechanisms for rights and protection to a quite fundamental procedural question which is raised by the terms of reference for this committee. It is something that is examined in the book that was launched this morning, and it almost invariably comes up in discussions about public interest disclosure—and that is the question: ‘When is it “reasonable” to make a public or third party disclosure?’ I am very much hoping to hear from the representatives of Fairfax and New Ltd, who have been very patient. You did not have to stay silent on the other topics, but I am very much hoping you are going to have something to say about this because it is something that goes directly to the interests of the organisations that you represent.

Mr Chadwick—Just for a moment, can we let the metaphor guide our thoughts. A whistle, when blown, greatly expands one person’s usual capacity to attract attention. When a whistle blows unexpectedly, even those of us well outside the immediate vicinity of the person using it will usually turn to see what is being signified. We wonder if it is directed at us. Maybe it is a warning about some hazard of which we ought to be aware. Usually it is not and we walk on. But if it is we are grateful to have been alerted.

This commonplace observation helps us see why it is not just reasonable but at times imperative that a person be able to make a public interest disclosure to the general public through a third party such as a media organisation. In many significant cases of whistleblowing, the institutional media are the whistle. As John McMillan put it earlier, media, or the fourth estate, is one of our existing mechanisms. By blowing on the whistle a person gets a lot more attention a lot quicker than they could by making their disclosure only through an internal hierarchy of their own organisation or through an integrity agency.

When a whistleblower’s information is reported in the mass media, a lot more people become aware of the fact that a disclosure of significance has been made. They may quickly conclude

that the disclosure contains no warning relevant to them. They may have no responsibility to respond but, if they do, the fact that they have been made aware sooner rather than later will generally be to the good. If they are a person to whom that warning applies, they can take steps to avoid harms. If they are a person with relevant responsibilities to act on the information or to check that the appropriate hierarchy or the appropriate integrity agency is acting then they can make inquiries. As a result of the media disclosure, more eyes are watching the watchers. The institutional media remain the most effective whistle even though nowadays almost every person has the power to publish or broadcast irretrievably to the world via the internet. Anyone who has ever visited the site wikileaks will know the force of that observation.

So circumstances are changing but, for the time, being there are two main reasons for the enduring significance of traditional media institutions. First, they command the most attention of the public and of public administrators. Second, they have the resources, skills and inclination to verify and to consider all the circumstances impinging on the public interest in the timing and manner of publication.

In the topic I have been asked to address the first dot point suggests: should it be only after processes to make an internal or regulatory disclosure have failed that a person makes a public one? My answer here is that ‘failure’ is the wrong word. It is not failure; it is prudence. It is no slight on integrity agencies—I used to run a statutory integrity agency—to acknowledge that they may, (1) lack power, (2) lack resources, (3) make mistakes, or (4) become inured through repetition to the force of some of which they hear. It is not failure but rather the usual and proven democratic approach to permit of public disclosures through a third party. In our system we separate and disperse power and responsibility. Recognising human frailty, bureaucratic tendencies towards self-preservation and the ills of excessive secrecy we have a range of checks and balances—FOI, parliamentary processes including questions with and without notice, committees like this one and individual MP’s efforts. We have judicial oversight, the best example being the giving of warrants and, last, we have media disclosure and debate. Each feeds and checks the other. The lubricant of all this is information. In democratic societies whistleblowing is a type of safety valve. The media are the whistle—not the only one, but one of great significance still.

CHAIR—Thanks very much, Paul. Some of that was perhaps deliberately provocative, but I am sure that other participants will have something to say about that. Perhaps we could start with: is there a point at which or is it possible to define the point at which going to the media with a disclosure is appropriate? The word in the question is ‘reasonable’ but it is the same thing.

Mr Needham—Are we limiting the third-party disclosure to the media.

CHAIR—We are not.

Mr Needham—Because in Queensland they have brought that they can make a third-party disclosure to a member of parliament.

CHAIR—Indeed there is specific reference to members of parliament in some schemes and there are yet other schemes which do not seek to put any limit at all on the third party in question, it is simply an outside person—someone outside the internal lines of reporting.

Mr Needham—Right.

CHAIR—Ms Hambly, do you have a comment?

Ms Hambly—I do, Chair. Part of my comment draws it back to the discussion that we were just having about damages and, in particular, the damage to the individual that can be caused by the disclosure internally or indeed externally. I think we are all aware that damage can be caused by external disclosure as well. If you start from the premise that disclosure is a good thing and you look back and ask, ‘For what reasons would we not want disclosure?’—and on that I am certainly with Peter—I think you find that is a better place to start. I also think the opportunity for the whistleblower to go to the media or a member of parliament—or whomever else the whistleblower thinks is the most appropriate place or person to go—to is an opportunity to limit the damage to that person, because a lot of this is about downsides, including the risk that people could be irresponsible. I think that a lot of what we have talked about this afternoon has been about (a) encouraging people to rightfully disclose and (b) minimising the damage to people who do that. Very often the media or the local MP or whoever is the third party is the least damaging option for people. That is one of the reasons why I think it is important that people can choose their own source of disclosure.

Ms Chapman—It is often the most appropriate method for fixing the problem. We have found that in the past there have been a number of examples where internal disclosure has not worked. I am particularly concerned about any steps to set some prescriptive time frame. AJ has referred to the problems with the Queensland recommendation which came out of the Bundaberg hospital case whereby they recommended one month. The New South Wales legislation talks about ‘if nothing has been resolved after six months’. An arbitrary timeline is not necessarily the answer to solving it. As Gail has said, it is the nature of the matter and the nature of the disclosure and the best way to fix the problem which should be determining what avenue the whistleblower takes to disclose the issue.

CHAIR—Would you accept that there is a problem in that the reporter will not necessarily know what is the best means available?

Ms Chapman—Yes, but I think to make an assumption that a whistleblower is going to jump over to the media out of maliciousness is rather far-fetched.

CHAIR—Sorry, that might have been ambiguous. I did not mean a reporter in the sense of a journalist; I meant a person making a report. I was trying to avoid using the word ‘whistleblower’. A public servant who is wanting to report wrongdoing might not necessarily know. Even accepting Gail Hambly’s point that going to the media might in fact be less damaging in some circumstances than going internally with a complaint, it is very difficult for a public servant, faced with a need to disclose, to be able to judge just what is the way to go. We are here to try to design a scheme which is simple to use, is approachable, is understandable and has clear consequences.

Mr Brown—One of the things that we know from the research is that the average public servant, if I can apply a stereotype, does not—almost ever—want to go to the media in terms of suspected or perceived wrongdoing. The overwhelming evidence internationally and from our research is that people will only end up seeking to go public or to go to third parties because they

do not know what has happened, so they do not know what action has been taken or is being taken, because the action that has been taken is clearly inadequate in their view or, more likely, because it has been mishandled and they are disgruntled, so they have not been treated well, they believe that they have been mistreated and they want to go external at some point. But those are actually a very small proportion of the overall cases. The vast bulk of people would prefer not to have to go down that path because it is against their basic inclinations.

I was involved in a fascinating discussion in Victoria when the Victorians were consulting on the reform of their legislation. The representative of the Australian Medical Association involved in the consultation, speaking on behalf of doctors working in the public health system, came around to the view that the legislation has to deal with this issue because they had come to the conclusion—and he was talking on behalf of professionals, who have therefore got some sort of standing—that the best way for doctors to survive as whistleblowers was to stand up and go public and say, ‘We as doctors are’—or ‘I as a doctor am’—‘blowing the whistle publicly.’ That was seen as the best way to ensure that there was any kind of rapid attention while they actually did not suffer retribution.

So in some circumstances there are sections of professions, in particular those working within the public service, who are actually starting to make that call. The fact that they are making that call is an indictment of the rest of the system to a large extent but it also recognises the reality of what we are dealing with.

I guess the crucial thing is to recognise that the regime should try to encourage the extent to which people can confidently blow the whistle internally, inside the system, because that is what most people would like to do. That should still be the optimum objective. The question goes to what other extreme circumstances might arise whereby we can look back and see someone was justified in going public in terms of the fact that they should then be eligible for some compensation if they are mistreated or that they should be protected from defamation. We can see such situations in circumstances where people have gone public; we can look in retrospect and see those.

So I think that the answer to your question, Chair, is that, yes, it has to be possible to draw a line, even if it is an imprecise line, because the option of not drawing the line does not exist. It is a great failure of the current legislative regimes that they just pretend that this issue is not here. Chris and I have written, in the findings chapter, that the average Australian citizen would be astounded to know that, in those jurisdictions where there is whistleblowing legislation, that legislation does not even deal with whistleblowing to the media or to third parties. It is just astounding.

CHAIR—Other than New South Wales.

Dr Brown—Yes, other than New South Wales partially. But it is just astounding. So the crunch that the committee is at is this: you do need to draw the line; it is not an option not to draw the line. It is a question of drawing the line as best we can under the circumstances.

Ms Chapman—Reinforcing that, take the situation in Queensland of Toni Hoffman, the nurse who was the whistleblower in relation to Dr Patel. She had the ability to go to her MP, which she eventually did. Clearly, she did not want to go to a third party. She spent two years pursuing

internal mechanisms which included all ranges of the health system and also the Ombudsman. She was in a position where she eventually did go to the MP and it was only actually when she then went to the media that the problem was truly solved.

Dr Brown—He went to the media.

Ms Chapman—That is right: he went to the media. She needed to have an option at some point in time, and AJ is right in that it is hard to distinguish what that point is. She needed a point earlier when she could have gone to a third party, she could have gone to the media. Two years elapsed instead of that.

Mr Needham—At the stage that she did that she was not even entitled to go to the member of parliament. She breached in effect the law. The amendment that has come in since then would now allow her to go to members of parliament. So she might have gone to her member of parliament earlier under the present regime, but at that stage she knew that she should not be going to her local member.

Mr Bennett—There are two types of media releases. They are where you disclose yourself and where you do it anonymously. Take Allan Kessing, the Customs officer. His is a classic example of trying to do it anonymously and still have the matter addressed—and that totally failed because the government spent \$100,000 tracking him down. So there is a classic example, and Toni Hoffman had to go through a parliamentarian while still trying to have her name not being disclosed—but eventually it is all going to come out in the end in any event. People are actually going to the media while not wanting to disclose themselves but the doctors that were talked about earlier are actually prepared to come forward and say, ‘I’m making a statement and I am disclosing it.’

Mr Needham—Because they are in a more powerful position.

Mr Bennett—Yes, that is right. Those who are without that power really understand that they are going to get it in the neck and that is why they are going along and trying to do it anonymously in the first place. The other reason, and it has not been mentioned so far, that people go directly to the media is that they have no faith in the existing system. They simply say, ‘I don’t trust them. The system doesn’t work. There is no sense in going there. I’m going to get done like a turkey if I do that. The only option I’ve got is the media.’ Then they try to do it anonymously, as Allan Kessing did.

Mr Needham—Well, as he is alleged to have done.

Mr Bennett—That is right, yes.

Dr Brown—That was what he was convicted for doing but which he continues to deny.

Ms Hambly—I want to add to all of that that it seems to me that, unless there is a compelling reason not to allow the whistleblower to choose whom they disclose to, then the best person to make that decision in terms of their own personal welfare and how the matter will be dealt with is the person who has the information and is going to disclose it. I think the other reason—that relates to what Peter was saying about anonymous disclosures versus people who feel

comfortable enough to go to a third party and disclose without anonymity—is that the fact of public disclosure and knowing who is the source of the information is very useful to both the media, in terms of properly investigating a story before they publish, and the public from the point of view of knowing what the source was and being able to test the veracity of the source. People will leak to the media. If there is more, proper whistleblower protection for them to do it without doing it anonymously, I think that is to everybody's advantage. I suggest to the committee that they think very seriously about what the problem is with the individual making the decision about where they disclose and to whom. The committee should also take a view on special circumstances where disclosure to a third party first is not appropriate and what they are, rather than starting from the other end and assuming that third-party disclosure is inappropriate unless you have been through an exhaustive internal process.

CHAIR—I want to see if I can tease that out a little bit. As the empirical data from AJ's work suggests, public servants treat going outside to a third party, be it the media or otherwise, as a last resort. It might be that the practical outcome of simply providing for the possibility of going to a third party, without specifying the timing of it or the threshold for it at all, is that it will be treated as a last resort. It might be that trying to provide for it in legislation is just too difficult and that the appropriate way to deal with it is to allow for it in the knowledge that it is not likely to be used that much.

Ms Hambly—It also encourages the internal procedures to manage efficiently, quickly and with some sympathy if it is a choice that the individual can make.

CHAIR—A sort of built-in incentive?

Ms Hambly—Yes.

Dr Brown—I think it depends which direction you are going in from there. You can allow for it by being silent, in which case you are actually not allowing for it. The trouble is that, if you allow for it without recognising the damage to reputation that can occur, then you are potentially extending defences to defamation and all sorts of things, such as rights to compensation, for people who do accurately fit into what we would call the definition of somebody who has simply made an unauthorised release of information for their own purposes in circumstances we would acknowledge as unreasonable, such as for personal gain or in order to do damage to people. There are those sorts of risks.

I think the key to how to recognise and allow for it is to recognise that these questions are only going to arise if a person is being prosecuted for a criminal offence of having made an unauthorised release of information, in which case what you are actually crafting is the defence on which they can call to claim that it was public interest. It is only going to arise if they are being sued for defamation, or similar sorts of situations, and they need to call in a public interest defence to say that they did it and should escape the liability. More than anything else, for the purposes of someone who has felt the need to go public either as a last resort or because of an emergency of some sort, you are really talking about the crafting of defences that could cut in. Those are the circumstances in which it is going to apply.

You are not talking about creating a facility for people to make disclosures to third parties; you are talking about creating circumstances in which they can call on a number of defences

against action being taken against them, and I think that is the legislative task that the committee has. It is actually quite doable but it is not going to be a question of where you draw the line.

I refer to the fact that one of the most recent sophisticated drafting attempts to put these things together was in Senator Andrew Murray's private members' bill last year which drew upon the ingredients of the UK legislation, which allows for third party disclosures but also for some of the other criteria that we would normally apply. So I think the question comes down to what sort of formulation will provide mechanisms for allowing those sorts of defences to be invoked. It has to be realistically doable.

There has been an assumption that, really, it should only cut in in circumstances where people have tried to blow the whistle internally and either they do not know what has happened or there has been an outcome that is clearly adverse. The question is: how do you judge whether the outcome has been clearly adverse? But, more importantly, are there situations, and there almost certainly are potentially exceptional circumstances, in which we would say, 'They were justified in going to third parties.' For example, if the only agency that has the jurisdiction to investigate this matter, if I do not blow the whistle internally, is the CMC, and I happen to know that Robert Needham is corrupt—

Mr Needham—This is a hypothetical.

Dr Brown—Yes, this is hypothetical—and that he is actually implicated in the same matter and is the only person who has jurisdiction to investigate it, then, whom do I go to? Imagine Queensland back in 1982 or 1983, whom would people have gone to? It might have been a criminal offence but people could not go to the police and they could not go to the Premier. They could not go anywhere. Where could they go?

CHAIR—Indeed, Tony Fitzgerald is eloquent on the point.

Dr Brown—Yes. They could only go to the media. That is the sort of scenario that we have to accept: no matter what we do to our integrity systems to build them up the potential for that could still exist.

Mr Wheeler—Following on from what Dr Brown has said, and I agree with what he has said, it is more than just defamation; it is also a breach of secrecy. If you have had a selective, possibly politically motivated leak—and that is not beyond the bounds of possibility—you need to have a system whereby that can be either prevented or something done about it. There are some bits of information held by government which should remain secret, either temporarily or permanently. There should not be any circumstances where that information is released, other than in particularly special circumstances. So you are not just looking at how to foster public interest disclosures and prevent unfounded defamatory statements; you are also looking at problems where you have a selective leak, a politically motivated leak. You have a difference between where you have the smoking gun memo, which on its face is all the proof you need that there is a problem, and circumstances where somebody has only a part of the picture and what they can see looks really bad. But they do not know what the rest is and they might not even know that there is something more. By coming out too soon they may have caused incalculable damage to individuals or to the public interest. This is why I think there is a benefit in having that initial step where either they have to have raised it internally or with somebody who

possibly, theoretically, could have dealt with it, such as a watchdog body if there is an appropriate one, and after some reasonable stage they have then gone external, or if they do it immediately there is some way that they have to prove that they were justified in doing so.

Mr Needham—I would like to say that, from experience, as well as the incalculable damage to the individual, if they are saying that some individual is maladministering their particular portfolio within the department or whatever, it can also cause very severe damage in the public mind to an organisation. I think that has to be taken into account: public confidence in our public organisations is important, and if it is wrongly breached—

Dr Brown—Recognising that is also something which is going to cause public sector agencies to realise that it is in their interests to manage these cases well in the first instance.

Mr Needham—So you should put in a system that will get them to manage it well, not open it up totally at the rear end. But I agree we do need that ability to go out to the third party, including the media. I am not arguing against that, but I think it should be the final thing if nothing else has been done.

Ms Bird—It is not a question of whether or not you allow it; it is a question of how do you manage it appropriately? I do not think it is a question of when do you go out? The question is: what are the safeguards in place to safeguard exactly what you are saying—incalculable harm that can be done to the whistleblower, to the person who has an allegation against them which is actually unsubstantiated and unfounded at the end of the day? It is easy to say these things are important when it is proved there was actual harm. If you are going to have confidence in the whole system of whistleblowing and if you are going to have confidence in the Public Service you need to manage the consequences of that. I think that is how you have to come at this issue: how do you manage the unintended consequences of not having a system that does not manage it well, rather than simply saying: what is the threshold for going to a third party? In my mind, you have to turn it around.

Prof. Latimer—I am one of the researchers of our research team. I want to say a few words about the context of all this. The committee may go ahead with this whistleblower legislation. It is not new. It goes back a long way. There are common law decisions, but they are all over the place. There is a case on banking, there is a case on auditors. What this project is all about is clarifying it and making things more straightforward. For example, cases protect whistleblowers in the public interest. There is protection against breach of confidence. Case law protects whistleblowers disclosing breach of the law, if they are being sued for breach of confidence; disclosing illegal actions, disclosing policies that jeopardise life, health, safety of the public. But it is all over the place; hence the importance of this committee getting it right.

Just while I have the floor, you have to think bigger. There is research by AJ Brown and me on international lessons. There is a danger of this committee thinking it is doing it for the first time; there is a danger of reinventing the wheel. There is authority from so many places: Canada, the US, Japan and France. There is a European policy and so on. It is very important to keep tuned to the rest of the world here. Indeed, I refer the committee to our forthcoming piece at the University of New South Wales—

Dr Brown—We have more!

Prof. Latimer—And many others. But the one from UNSW is like a global analysis of best practice, so I think it is important for Australia to go to best practice here. And we are not doing it for the first time.

Mr Bennett—If I could come back to the media issue, I have found that the media in some cases is really helpful as a filter. I have known of people who have gone to the media about a complaint and the media has said: ‘It’s not going to go too far. You don’t have enough information. You are coming at it half-cocked. Go away. You really need to think about this a second time.’ And it has actually worked. They have come back to me and said, ‘They won’t listen to me. I was told, “You don’t have a case. The bottom line is that you don’t have a case. You’ve actually got a personal grievance. You really don’t have a whistleblowing case at all.”’

The media have been very responsible as a filter in some instances that I am well aware of, by saying, ‘Don’t come this way.’ But, on the other hand, when something of substance has gone to them then they have tried to protect people on the way through. They have served a purpose and done a damn good job, too, trying damn hard. So I do not want to see that cut off. But it is best if you do have a procedure which is really easy to follow and which is effective. I would like to think that it would be so effective and so obviously effective that people would go there first. The first issue is you have to register that you have made a disclosure or, even if you have not made it, that you intend to make it. The first issue that comes out of this process is that your service record will be altered, usually about two days before you make your disclosure. They will go back and change it and you will find that you were actually under investigation two days before you made the disclosure. This is, by the way, also a standard operating procedure. The first issue of this legislation is that, if a whistleblower comes up and says, ‘I want to talk to you about a matter that I am concerned about because I think somebody has their hand in the till or is doing the wrong thing, it is registered.

Mr Chadwick—Can I quickly respond to two things. One is an appeal for robustness among the integrity agencies. Those jobs are not for the faint-hearted. We all operate in those statutory offices in the context of two important atmospherics. One is that in this country the high courts implied a guarantee of freedom of speech in relation to political communication and that has had certain effects on some areas of law. But implicit in that is the notion that we have to be a bit robust about what is said about us when we are engaged in public administration in different roles. The second is that we know, as a matter of law that—I think it is in the case of Reynolds in the UK and *The Council of the Shire of Ballina v William Ringland* here—that councils cannot sue. There is an atmosphere here about robustness and, yes, there will be times when a person acting in good faith has only part of the story. Chris is quite right. There may be some so-called collateral damage for someone who exercises responsibility, in one form or another, in the public arena. But that is not a reason to be too tender about that aspect of third party disclosure.

The second point is that I used some terms advisedly and one was ‘excessive secrecy’. Irene Moss did an audit for the Right to Know group of media organisations in relation to this, and she identified a large number of secrecy provisions in the statute book. The Attorney-General has now referred those to the ALRC for inquiry. One of the problems with excessive secrecy is that you get more attempted whistleblowing cases than you otherwise would. As I think a US Supreme Court judge wisely said, ‘When everything’s classified, nothing is classified.’

The last point is to illustrate a point I made in my introduction. I noted that the media has ‘the resources, skills and inclination to verify and consider the circumstances impinging on the public interest in the timing and manner of disclosure’. That is a mouthful and I ought to illustrate it, and the illustration is a recent case involving the *New York Times*. The *New York Times* discovered and verified, by application of its resources, skills and inclination—operating under the first amendment in that country, which privileges the press as an institution—that the NSA, by an agreement (not disclosed) with a telecommunications organisation, was engaged in very significant interception which had involved the executive going around the relevant court, the FISA Court. The executive editor of the *New York Times*, Bill Keller, and the owner, Sulzberger, went to the White House.

The reporters dealt with many of the issues raised by government and the intelligence community in trying to weigh up what would impinge on public interests other than disclosure of the pack of the executive going around a court. So there were other serious public interests such as the importance of the antiterrorism efforts of NSA et cetera. They held the story for a year, responding to the entreaties of the administration. It was only after quite significant resources, skill and checking had been done by that institutional media organisation that they disclosed and the system corrected itself recently when congress passed new legislation to boost FISA and excuse the telecommunications companies which had been involved in what was a breach of the law at the time. The point of raising that is that the institutional media do understand something of this timing and manner of publication and, as Peter has pointed out, they can act as quite a useful filter. They are not the whole solution but they are a very significant part of it.

Prof. Wortley—I would just make the point that the media are not always that useful. Research that I have done, independent of this, revealed that one of the problems in Corrections with regard to whistleblowing is staff alerting the media of details about prisoners, particularly when they are being released and so forth. I think sometimes it is in the interests of the media to play that up in a fairly irresponsible way.

Mr Needham—I agree with a lot of what you say, Paul, but unfortunately some of our media organisations in Australia are not quite of the standard of the *New York Times*.

Ms Hambly—That may be so, but there will always be false positives and false negatives. It is a question of getting the balance right so that the legislation encourages openness as much as possible and minimises the risk of material that should become public staying private.

Mr Needham—I think we are at one on this. I am torn as to where you draw the line because, as we have said, Queensland would be a much poorer state if it had not been for whistleblowers going to the media in the past.

CHAIR—Stephen, this is the last comment from you, because I also have to draw the line.

Mr Jones—I make the point very briefly that, as a representative of employees subject of this proposed legislation, we are often the third party to whom disclosures are made and that needs careful consideration. When our minds are turned to the drafting of the legislation we are often placed in the same position as would somebody’s legal adviser, although we are not provided with the same privileges as would a legal adviser when providing that advice.

CHAIR—Thank you. I have to draw today’s proceedings to a close. I sincerely thank all of the participants here today because it has been of terrific assistance to the committee in the deliberations that we are engaged in. I think that the roundtable format has been a good one because it has enabled people with real expertise in this area to bounce off each other. I want to reassure Professor Paul Latimer that we are acutely aware of overseas precedents, overseas legislation dealing with this subject. Had we not been, we certainly would have been after reading the book that has been launched here today.

I had thought to close with a quotation from the Fitzgerald report, because it is one of the public documents that demonstrates best in our recent history why there is a need for schemes of public interest disclosure. But, instead, I am going to quote from something that Frank Serpico said, he being a very famous American example of whistleblowing, sometimes being described as the first police officer in the history of the New York police department—and sometimes also described as in the history of any police department in the United States—who disclosed and subsequently testified about widespread official corruption within the police department that he worked in. He gave this evidence before the Knapp commission in 1971. He said:

The problem is that the atmosphere does not yet exist in which honest police officers can act without fear of ridicule or reprisal from fellow officers.

What we are engaged in here is grappling with the situation in Australia at the Commonwealth government level where there is not yet an atmosphere where honest employees, to use Frank Serpico’s words: ‘can act without fear of ridicule or reprisal from fellow employees’. We are concerned to design and recommend to the Commonwealth government a comprehensive scheme of legislation. It has been of great assistance to the members of the committee to have the participants here today. These discussions will certainly aid us in producing the report that we are going to deliver to the government. The due date is 28 February. I am hoping it will be a little bit earlier than that and, hopefully, we can produce legislation that will enable the development of a culture at the Commonwealth public sector level in which public interest disclosure can be freely made. The transcript of today’s proceedings will be made available on the committee website.

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

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 4.33 pm