



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, 28 OCTOBER 2008

BRISBANE

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HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 28 October 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 Andrews, Mr Dreyfus, Ms Neal, Mr Perrett

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 8.33 am**SAMPFORD, Professor Charles John Gordon, Director, Institute for Ethics, Governance and Law**

CHAIR (Mr Dreyfus)—Welcome. I formally open this further public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs. The committee is inquiring into whistleblowing protections within the Australian government public sector. This is the ninth public hearing that the committee has undertaken for this inquiry. Our purpose, as you are very well aware, Professor Sampford, is to consider and report on a preferred model for legislation for protecting public interest disclosures or whistleblowing within the Australian government public sector. The hearing is open to the public. A transcript of what is said will be placed on the committee's website. If you would like further details about the inquiry or transcripts, the committee's staff are here to assist. Professor Sampford, do you have any comments to make on the capacity in which you appear?

Prof. Sampford—The Institute for Ethics, Governance and Law is a joint research institute involving the United Nations University, Griffith, QUT, ANU and now the University of the Philippines.

CHAIR—The committee does not require you to speak under oath, but you should understand that these hearings are formal proceedings of the Commonwealth parliament. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you want to make a brief introductory statement or simply proceed to questions from the committee?

Prof. Sampford—I might say something. Firstly, I do not come here as a great expert on whistleblowing or somebody who has done significant work on this recently. There is a research team that is doing a major project, whose members I all know very well, and they have been doing work more recently. I will be taking a general overview of where whistleblowing fits in. I can probably answer questions about how whistleblowing fits into integrity systems, which I continue to do work on, and also on ethics regimes. That is where I come from. I will not necessarily have detailed positions on all the questions you have, but I may have something useful to say from an overview.

I start with the position that information within the public sector belongs to the people of Australia and that the onus is on the government to argue that it is in the interests of the public that they should not have access to the information that they own. That does not mean that such arguments cannot appropriately be made. For me, civil servants engage in creating various pieces of information, and the information that comes to them in the exercise of their public duties belongs ultimately and fundamentally to the public. That does not mean that there are not some justifications for keeping information that belongs to the public from the public. Obviously that justification applies classically to information on security operations, where the concealment of information protects the public. There are issues of tender information, cases which involve the intellectual property of other persons and of commercial-in-confidence. That is okay so long as it is not used as a shield for unnecessary confidentiality. All these can be good reasons, but often they are overworked.

Another view is that often the power to withhold information is greatly abused. Obviously public officials are custodians of the public's property in the information that is generated within the civil service, and of course they have to make judgements, as in the above good reasons. But it is very important to recognise that that power can be abused. It is often under those circumstances that whistleblowing occurs. The other exception that I think is very important is that governments be able to discuss options and consider alternatives without those options being revealed to the public, merely because that would have an enormous deleterious effect. If I had to deliver, before I gave a paper, all the thoughts I had before I delivered that paper, that would mean that my thought processes would be enormously restricted. It is the same case for an institution like the government.

There are very legitimate reasons for governments withholding information. But there is a huge problem, and this goes to FOI and whistleblowers, as to the illegitimate reasons for keeping information from the public. Sometimes it is to protect from embarrassment, sometimes it is because of turf wars, sometimes it is to ensure that particular policy prescriptions from one department or minister are preferred and sometimes it is used to protect those who lie and make misrepresentations from being found out. I always thought that the first Howard code was a very good one. Its fundamental principle was not just to forbid misleading parliament but also to forbid misleading the public. The code made that absolutely central and the first obligation of ministers and indeed civil servants generally.

A lot of people talk about the famous Ponting case in England. For me, the biggest issue was the abuse of power in using the Official Secrets Act and other measures to prevent the public knowing that the Prime Minister had lied to parliament. Most constitutional lawyers and most politicians say that is the one hanging offence. If in fact the rules which prevent the disclosure of information are used to prevent it being come to be known that a minister or a civil servant—but normally it is a minister because they are the ones who are the public face of government and the ones who are responsible—has actually misled or lied to the people or, particularly, the parliament, that is a serious abuse of power.

Whistleblowing may occur where there has been abuse of power to prevent the public finding out information that ultimately belongs them. We entrust our public officials with this information and also with very important decisions about when that information should be withheld from the ultimate owners. As I say, there are very important reasons why that information might be withheld, but any power to withhold is subject to abuse. The power to withhold information from the public is a power that can be abused like any other power. Because of these dangers of abuse, it is very important to have FOI and administrative law, and I think you also need to have whistleblowers or protected witnesses, which is the term I prefer.

One should see that protected witnesses are just part of the system—that you have public information which is held within the civil service, or possibly by somebody outside the civil service, and a protected witness reveals that there is a decision being made to withhold information and that they believe that that decision is wrong and the information should be provided to the public who owns it. We should then provide processes—and there are many alternative processes—by which that can be handled within the system, but I have always said that whistleblowing in the classic sense of 'going outside' is necessary. In a perfect system, it would never be necessary. No perfect system has ever been created. Therefore, you need escape

valves, and that is another sense in which whistleblowing is necessary. That is the basic position from I which make these comments.

CHAIR—Thanks very much. The committee is aware of your background. Some of us have had a look at your book *Encouraging Ethics and Challenging Corruption: Reforming Governance in Public Institutions* from 2002. That has given us an indication, as indeed your opening comments have just done, that you see whistleblower protection laws or protected witness laws, to use your phrase, as part of a suite of measures that needs to be introduced to increase integrity in public administration. Also, the committee's interest in having you come and speak to us briefly was prompted by seeing that you were involved in setting up the new Center for Asian Integrity in Manila, which is coming out of Griffith University and of which you are to be the inaugural director.

Prof. Sampford—The Institute for Ethics, Governance and Law is a joint initiative of several universities. There is the Key Centre for Ethics, Law, Justice and Governance at Griffith University, which was the first one and the reason why the United Nations University sought to adopt us as their institute; the Law and Justice Research Centre at QUT; and the Centre for International and Public Law at ANU. The Center for Asian Integrity is the fourth centre within our institute. I am the director of IEGL as a whole, and we are setting it up. There is currently a research director and a director of capacity building, so I am not actually the director, but I did a bit to set it up.

CHAIR—Thank you for explaining that. I would like to ask you something specifically about the Queensland whistleblower laws, which have been in place since 1994. Have you got any observations of how those whistleblower laws in Queensland might have contributed towards improving public integrity in the state?

Prof. Sampford—I have not studied them recently at all, so I would defer to my colleagues, who would probably be able to give much more on that.

CHAIR—They are appearing next.

Prof. Sampford—I am not entirely sure how much those laws have been used. I think that it is an important systemic safeguard. The one thing that I would say is that, if you are looking at the Commonwealth system, in the same way as when EARC went through and looked at whistleblower laws and so forth, it is not a question of importing some other model but considering exactly where and whether it fits within the integrity system of the Commonwealth. It is very interesting that the Commonwealth and Queensland have different approaches to their integrity systems, which is something that came out in our study of Australia's national integrity system.

It is very important that you think of the general principles and then you think of models that might achieve those principles and will fit within your particular integrity system. That is a problem in lots of other countries, where the World Bank or the European Union says, 'We will fund you to set up a whistleblower act or an ombudsman.' What they do is download their own model provided by their own experts. What is interesting is that in Queensland it was not done that way, because it was entirely in the hands of EARC and the Queensland parliament. It was a question of: what is the model, and what mix of models actually fits? The integrity system in the

Commonwealth is much more decentralised than in Queensland and is much more reliant on the Senate than on independent expert advice.

CHAIR—By more decentralised, do you mean more checks and balances?

Prof. Sampford—No. Queensland set up a lot of central agencies whereas the control of potential corruption in the Commonwealth is actually dealt with within the line agencies much more. There are fewer, if you like, of the newer style agencies. The Commonwealth integrity system is decentralised in that there is much more expected to be done in departments rather than in independent agencies, which were set up in Queensland. It is largely historical but you are obviously in the position and I hope that your committee looks in the broad at how the integrity system in the Commonwealth operates and what are the variations you need to make it effective.

CHAIR—But in essence you are saying that we should to a system that fits with the existing pattern of administration for the Commonwealth.

Prof. Sampford—Exactly. We might have what might be seen as the best whistleblower law and institution in the world, but you do not just import that because it may be really good in its particular context and you may want to do something different. An example is what kind of protection should be provided. I think it is very important that a potential whistleblower can go get a source of confidential advice as to what he or she should do and what protections are available and at a certain early stage they can say, 'These are the protections we can offer you.' That might be done in some jurisdictions by a central agency which actually handles whistleblowing. It might be handled by some independent body so as to ensure absolute independence. It might be done by the various potential bodies that would actually carry out the investigation. So you might actually have a system where you go to one outside body for some advice, or you might go to a central whistleblower agency or you might go to the ombudsman to give you advice as to what whistleblower protection they can give you, or a parliamentary committee could, or whatever. So you could have centralised and decentralised models and it is not necessarily that one is better than the other; one might have a better fit than another in a particular integrity system.

Ms NEAL—Professor, you have raised a lot of issues I would love to explore but they are probably outside our inquiry so I will restrain myself. It is certainly very interesting. The traditional model of whistleblowing legislation tends to have a specified list of people who can claim the protection of being a whistleblower. It has been put to us by a number of witnesses that it is actually probably more effective not to define a specific class of people but to say that any person who can provide particular information about those sorts of activity should come within the protection of the legislation. I have to say I find that somewhat appealing. What is your view of that?

Prof. Sampford—I think it is a very good question. I will probably end up a little bit each way, although basically ending with the line you suggest. If you look at what the actual mischief you are trying to prevent is, it is that there is information that either the public or a public agency, an investigatory agency, should have and there is some public official exercising a public power who may be in a position to use that power in a retaliatory mode. In a sense that is what you are trying to do: you are trying to prevent that kind of abuse of power. You are trying to

prevent an abuse of power by somebody to prevent information coming out or to make it dangerous for the person who provides that information.

On that basis, it follows that those who should be subject to whistleblower protection are all of those who might be subject to retaliation for providing information to investigatory authorities. When I was looking through your first list, I was immediately thinking: what if there is a contractor or somebody who merely witnesses—say there is a welfare recipient who sees money passing hands in a Commonwealth employment office? I am not saying it would ever happen. Or say there is somebody who is just a passer-by who sees something and thinks, ‘Gee, why is that colonel talking to that missile contractor?’ It may be any person who needs to be subject to protection from retaliation. So you look at the purpose of legislation and say ‘any person’ but it is always useful to give particular examples of those who may be protected. The statute may make specific comments about those so as you can give guidance both to those who may be protected witnesses and to those who may be advising those potential protected witnesses. So it is a good idea to have the general provision—‘anybody who is subject to potential retaliation’—but it is useful to specify the kinds of people that might be covered.

Mr ANDREWS—I just want to follow up on that. The US has had for a considerable period of time—I think it goes back to the Civil War—false claims legislation. Do you have any comment on the desirability of that approach in Australia?

Prof. Sampford—I am sorry, what claims?

Mr ANDREWS—False claims legislation. Do you have any comment on the desirability of that approach?

Prof. Sampford—Yes, I do, and this goes to the basic concept of avoiding abuses of power. Once you create this form of protection then you are conceding a power. Admittedly it is a highly limited power, it is a power that is hopefully subject to the judgement of other officials, but clearly somebody who makes vexatious and frivolous complaints, and who may make them for ulterior purposes, is, in a sense, abusing the power that has been given to them. I think there is a lot to be said for having the possibility of those who make vexatious, frivolous and certainly false complaints suffering consequences. The first consequence should be the removal of the protections that are given. The whole point is there is a protected witness, there is information there that they are claiming to provide and you give them various protections from the consequence that might otherwise happen. I think it is important that there be provisions, if you give them an exemption from some particular retaliation, for you to say, ‘I’m sorry, that response is entirely legitimate.’ So if the whole scheme of it is to say people who give certain information are protected in certain ways—obviously you do not expect the power to be abused against them, but what you do want to do is to make it very clear that if there is a protection that is given, especially from defamation or possibly for misuse of information, then you make it very clear in the legislation that under certain circumstances these can be removed. Any decision to remove the protection should be subject to administrative challenge, of course. But I think that possibility should be open. And again this should be very clear, so if a potential witness goes along to either an investigatory agency, like the ombudsman, or to an independent whistleblower authority they will be told, ‘These are the conditions, but if, in fact, this information is false, then the following consequences might follow.’ The whole point of this is to prevent the abuse of

power by public officials, but then you do not want people using this to either damage particular public officials unnecessarily or to clog up the operations of government.

Mr PERRETT—As I said, I met Noel Preston when he was a pastor at Kelvin Grove Teachers College back in the early eighties, when Joh Bjelke-Petersen was Premier and perhaps the standing of ethics in politics was not quite what it is now. I want to explore that transition. Is it peculiar to Queensland having a unicameral system? Do you think a Senate would serve a certain purpose in keeping some checks and balances there? Generally, how do you think ethics have been embraced by the government and the public service? I think the *Courier Mail* does an ethics check once a year on the number of times politicians and public servants have consulted. I am not sure how far down that league table of ethics consultation went, but would you like to make some comments on the Queensland experience in particular?

Prof. Sampford—There were a lot of questions in that. One of them is the availability of an upper house. I must say that I am a great fan of upper houses which are genuine houses of review. They need to be elected in a different manner in which neither party follows. A Senate that is controlled by either the government or the opposition is not a particularly edifying place or fulfils its role very well. But one that is elected on a different basis and sees itself as scrutinising legislation, not determining who is the government and who is not the government, does have a lot to be said for it. If there was any chance of introducing an upper house in Queensland, I would not recommend introducing the Australian Senate. You would want to think of something different. But there is a role for an upper house. It is interesting that some integrity systems are very effective without upper houses and some integrity systems with upper houses are very ineffective. I will not name and shame, but there are plenty of corrupt systems with two houses.

As far as the general reception of ethics is concerned, it is regarded as a model around the world for a number of reasons, even though there is a lot more that could be done. The integrity commission was something that Noel and I pressed for—although at the time things were so poisonous in the parliament that we divided up and said, ‘You go and talk to that party and you go and talk to this party.’ People from both parties said, ‘We ought to be sitting down in the same room and listening to both of you simultaneously, but it’s not going to happen.’ So the Integrity Commissioner is a very important development and it is part of something that I wrote about in an essay, which I still think is important, which I called *Prior advice is better than subsequent investigation*. It is very important that ethical advice be available in advance to those who are exercising public office. Although one tries to give the clearest possible standards and one tries to provide education, there are different views of the application of ethical norms. I think there is a lot to be said for an Integrity Commissioner who can give prior advice and can give ethical clearance to particular activities. Otherwise you just get into a slanging match—sometimes in the media and sometimes between parties—where it is: ‘Here is a rule; you’ve breached it. No, I haven’t. You’ve breached it. No, I haven’t.’ If you do have an Integrity Commissioner—it is quite limited in Queensland as to the persons who can be advised—the general model is you have external or prior advice that can be given and they can give clearance that says, ‘If the facts are as you describe it, and you behave in the following way, then you will be in the clear.’ It is a bit of a get out of jail free card, but the thing is these are sometimes complex decisions. The Integrity Commissioner is not going to advise you, ‘Here’s the line, and you can go right to the line.’ He is going to say, ‘Here’s a grey area, and if you do that you’re in the clear.’ I think it has a tendency to raise standards of behaviour, and I am a great fan of that.

Generally, I think ethical advice is very important. Here, before somebody decides to have protected disclosure, it is really important that they can go to somebody and say, 'I think my boss has done something really bad,' or, 'I think the minister is withholding critical information,' and to be able to then get advice and act on it in confidence. If in fact the advice is bad, in that case this will ultimately come back. If it is just a mistaken thing then the Integrity Commissioner or whoever will learn from it. If they keep on giving really bad advice then there is a provision for that.

But the whole point is to engage them in advice like this: 'Here is your dilemma; I understand it. If you do this you are in the clear.' But that is actually advising people of highly ethical behaviour as opposed to marginally ethical behaviour and I think there is a lot to be said for it because there can be genuine uncertainty in these matters and people of goodwill, even whistleblowers, might say 'Should I do it?' or 'Shouldn't I do it?' It is very valuable to have that advice, and very valuable then when they go along the process to know their rights and what things they have to be careful of—for example, 'If you are lying about these three matters then do not expect protection.'

There was a particular scandal in the mid-1990s in which somebody in the National Party said to me, 'Here is a really damaging claim.' I said to that person: 'If this is true it is really serious; if it is not true you should have the book thrown at you.' In the end the book was not thrown at him. But I think it is really important that you give prior clarity to somebody making a disclosure. It also means that somebody who might be thinking frivolously is going to step back, but there could still be those who do go ahead.

There is one exception to this, and I have been thinking about this. Say if a potential whistleblower comes along to the public official who is giving advice and says, 'I think my boss has been taking bribes and here is all the information.' The adviser says: 'I think this is something quite serious. Here are your rights. You have the right to do these things.' What if the adviser never hears from him again? The adviser might wonder whether he has gone off and blackmailed his boss or been bribed by his boss. These may be some circumstances in which the complete confidentiality of that advice might be breached. I have not thought through all of those situations. But I give that as an example whereby you have an almost bullet-proof confidentiality but there could be an overriding public interest even in that. But you might decide that it is so rare that you do not worry about it. It comes down to various officials having an ability to act on their own motions as well as on complaints.

CHAIR—I have to close the session now. We very much thank you for attending here today. You have in a sense reminded us of the importance of attending to administrative systems as well as any legislation that is put in place. The one cannot survive without the other.

[9.03 am]

AIRO-FARULLA, Dr Geoffrey, State Director, Commonwealth Ombudsman's Office; and Steering Committee Member, Whistling While they Work Project

BROWN, Dr AJ, Senior Research Fellow, Socio-Legal Research Centre, Griffith University; and Project Leader, Whistling While they Work Team

JOHNSTONE, Professor Richard, Director, Griffith Law School; and Director, Socio-Legal Research Centre, Griffith University; and Member, Whistling While they Work Team

WORTLEY, Professor Richard, Head of School of Criminology and Criminal Justice, Key Centre for Ethics Law Justice and Governance, Griffith University; and Member, Whistling While they Work Team

ROBERTS, Mr Peter, Senior Lecturer, Centre for Investigative Studies and Crime Reduction, Australian Graduate School of Policing, Charles Sturt University; and Member, Whistling While they Work Team

CHAIR—I welcome the team from the Whistling While They Work project at Griffith University. The committee does not require you to speak under oath, but you should understand that these hearings are formal proceedings of the Commonwealth parliament. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. I should say 'welcome back ' to all witnesses but Dr Airo-Farulla because the four witnesses sitting at the table very helpfully participated in a roundtable in Canberra on 9 September on the same day as the launch of the report of the project by Senator Faulkner. Do you want to make a brief introductory statement or before we go to questions?

Dr Brown—Certainly. It is very good to see the committee again. Thank you for the opportunity to come back and discuss things further and also for the discussion at the roundtable on 9 September. On a minor formality, I notice that we are listed as not having made a submission to the committee as part of the inquiry. I realise that we have not made a submission. We would be very happy if you would like to treat our report as a formal submission.

CHAIR—I can confirm, Dr Brown, that we had proposed to treat the report as a submission.

Dr Brown—A mere formality!

CHAIR—I have been made aware of a technicality: the report has to be treated by the committee as an exhibit rather than as a submission because it was not written for the purpose of the inquiry. We have received it, obviously, and we were certainly proposing to refer to it. It will be a very useful exhibit because, as I have said previously to you, the fact that the project has been able to engage in a lot of empirical research over the last three years really puts this committee of the Commonwealth parliament in a unique position. It is pretty rare because quite often parliamentary committees do not have the resources to engage in that type of empirical

research directly on the subject matter of the inquiry. This research has been done for us and it is something that will definitely assist the committee in its work.

Dr Brown—We are very happy that you are able to formally treat it as an exhibit. That is very gratifying for all of us. I would like to give you an update on further research that it would be useful for the committee to be aware of. We did not really get an opportunity to discuss it at the roundtable. If I may, I was then going to perhaps highlight three issues from the roundtable, which are not new issues but they are issues on which you have been getting some more submissions and it might be handy to have a slightly updated picture from us of how those three of the harder issues now stand in the public domain.

The first update is to ensure the committee is aware that the second report of the project, which will be dealing with what is best practice management in whistle blowing at a government agency level, is still in preparation. Work is continuing that will lead to that and it will be ready about mid next year. Dr Peter Roberts is the researcher who is leading that analysis and the development of that report. Peter may well have a bit more to say to fill the committee in about the content of that. One of the key things that the legislation can and should do is provide a major hook for what the system should be at an organisational level for ensuring that whistleblowing is managed well. One of the most crucial elements of the entire legislative package is the legislation providing those strong hooks and requirements. The purpose of emphasising that is to say that part of the purpose of our research is always to better equip agencies to have a very high level of capacity and ability to perform in their management of whistleblowing operations at that level and internally. That second report is targeted directly on that issue. From a practical point of view, by the time the committee reports, legislation is drafted and it is introduced and commences its passage through the parliament, our intention is to ensure that that work is there to help the Commonwealth government agencies operate the legislation in very practical ways. Peter may well have some more to say about that.

I wanted to briefly say something further about three issues which in some ways I am perhaps second-guessing are some of the more complex issues you might still be grappling with, as a stab in the dark. The first is the issue of compensation mechanisms and redress for public servants and contractors and others who are covered by the legislation if in fact they are mistreated in the workplace or as a result of having blown the whistle. The second is the vexed issue of recognition of public whistleblowing, or whistleblowing to the media or third parties. And the third is the practical question of which Commonwealth agency might be best placed to play the overall coordinating leadership role in the administration of the scheme. Would that assist you, Mr Chairman?

CHAIR—It would. Could I change the order and ask you to speak first about the recognition of public whistleblowing, secondly about compensation and third about the agency question.

Dr Brown—Certainly. On the public whistleblowing issue, it has been interesting to note some of the submissions that have been made. Without having gone through all the submissions in detail, there has obviously been a diversity of opinion about whether the legislation should extend to protection being still available to—

CHAIR—I think it would be fair to describe it as a complete diversity of opinion, because we have submissions that range from a complete prohibition, a submission that there should be no

public whistleblowing and no resort to disclosure beyond a Commonwealth government agency, be that an internal or external agency, to the other end of the range where some submissions have submitted that there should be a complete open go and that all disclosure or all whistleblowing to the media, or indeed to anybody else: any publication should be protected, the focus being on the subject matter of the disclosure. That is the spectrum. We have to work out where to put our recommendations in that spectrum.

Dr Brown—The good news for the committee is that this is potentially one of those rare situations where if you go straight down the middle you will probably be right.

CHAIR—And please nobody!

Dr Brown—It is interesting to note those different submissions. In our report and in the chapter written by myself, Chris Wheeler, John McMillan and Paul Latimer, we obviously articulate a fair amount about the. I guess it is important to say that we have not seen or heard anything that would suggest that we should change our view on what we have already said; if anything, far from it. I think it has just consolidated that view. It is interesting to note that last week the Northern Territory government introduced a new bill and elected to follow the precedent of those jurisdictions that have stayed silent on this issue. It is receiving quite a vociferous amount of criticism in the public domain for having done that and having even made the mistake of saying that no legislation in the country currently deals with the issue when in fact the New South Wales legislation does, at least in some respects.

Seeing as this hearing is taking place in Queensland, I think it is really important to note not only the fact that the new federal government has already made its own electoral commitments to include this issue in the legislation but that in fact the coalition parties, or in this jurisdiction the coalition party, the opposition party, also has a strong track record of having included dealing with this issue to the extent of having introduced its own bill into the Queensland parliament to ensure that this issue is actually dealt with off the back of the Bundaberg Hospital commission of inquiry. In this jurisdiction it was actually the Liberal-National Party opposition that tried to introduce a bill to operate the recommendations of the inquiries into that matter that dealt with this issue.

CHAIR—There were specific recommendations of the Bundaberg committee of inquiry about whistleblowing legislation and more specifically its expansion in Queensland.

Dr Brown—Its expansion to deal with what I think Commissioner Davies described as an escalation procedure, but which is a similar principle to the idea of a stepped disclosure procedure as has been described in the UK. Although there were problems with Commissioner Davies' recommendation—it was not intended to be drafting instructions, and therefore there were problems with the coalition bill—nevertheless, it recognised the principle that having an escalation procedure, or some kind of procedure that recognises that in some circumstances it will be reasonable to protect somebody who has gone public—often most likely as a last resort, but possibly in other situations—was desirable. It remains one of the crucial issues upon which the overall operation and credibility of a healthy scheme will hinge and be judged.

In the conclusions chapter to our report we said that most Australian citizens are surprised to realise this is not an issue that is already dealt with in whistleblowing legislation for the most

part. The more that people wake up to this fact—witness the discussion in the Northern Territory at the moment—the more people wonder what the point is of having this sort of legislation if it does not deal with that last resort type scenario.

I think that, on balance, this is just a roundabout way of saying this is an area where political leadership is going to be required. There is no reason to believe that this should not be bipartisan political leadership. This is actually a case of legislators, on behalf of the people, committing to a healthy, comprehensive framework that contributes to open government. It is a situation where it makes sense to respect the advice of government agencies but to recognise that government agencies—in the same way that they used to be, and have in some cases remained, quite hesitant or sceptical about basic things like freedom of information legislation—are, by the nature of their business, going to be cautious, if not sceptical, about the idea of recognising the role of public whistleblowing.

Some of the organisations that have made submissions, even to the extent of suggesting that this is an issue that should not be addressed by the legislation, include partner organisations to the project. Of course, we respect their views and we understand them perfectly, but they do not actually change the overall conclusion from the research team that, as understandable as those views are, we are now in a situation where there are overarching reasons for the operational integrity of a scheme to rely on that issue being addressed.

CHAIR—I want to drill down on a couple of issues from the report about public whistleblowing. The first is that the research you have done seemed to suggest pretty clearly that there is a preference for internal whistleblowing as the first step. Very many people who wish to disclose some wrongdoing will prefer to try their hand internally, or to go to some other government agency. It will not be a first port of call for them to go to the media or anywhere else. Is that a correct reading of the report?

Dr Brown—Yes, I think that is completely correct.

Prof. Wortley—I would put it that they are reluctant to go outside.

CHAIR—Reluctant to go outside. Yes, but notwithstanding that, as you have said, explained in the report and just confirmed again here this morning, there is, in your view, real value in providing at some point an opportunity for the person wishing to make the disclosure to go outside.

Dr Brown—Yes.

CHAIR—One of the things that the committee has discussed with a number of witnesses, and has dealt with in many submissions, is what conditions should be satisfied before a disclosure outside an agency will be a protected disclosure. Have you got any suggestions about that definition or setting of conditions question, bearing in mind that the New South Wales model—the only one that is in Australia at the moment—uses conditions which are really time based. It says that if certain things have not happened within six months—the period selected—then the whistleblower is free to go public.

Dr Brown—I think the time based condition is definitely worth explicitly mentioning, and providing for, in the legislation. The tenor of the principles that we have articulated in the legislation chapter in the report, and which have also been picked up in the Commonwealth Ombudsman's submission, really do emphasise that the classic example of where we can acknowledge that it may be reasonable for someone to go public is where they have gone through all the proper channels and there has not been reasonable action or they have not been made aware that there has been any reasonable action within a reasonable period of time.

CHAIR—And that is the model used in the New South Wales legislation—

Dr Brown—That is right.

CHAIR—that if the authorities to whom you have gone in the first place have not acted within six months and have not responded adequately then you can go elsewhere.

Dr Brown—Yes. The problem with having a specific time frame in the legislation is that almost any time frame is likely to be arbitrary in some situations. So that is a difficult one for the committee to juggle, if in fact you want to try and get explicit about what a reasonable time frame might be in all situations. It would be better to try and find a formulation whereby the legislation made it clear that this was the prime example of a situation where it would be potentially reasonable for a person to have made a third-party disclosure, without actually making the provisions so inflexible that they could not apply to situations where, for example, in particular circumstances of urgency, especially situations where there was a danger to individuals or to public health and safety, a reasonable time frame may be much shorter than in other situations where nothing may hang on the time frame for the disclosure. There are a number of paths that the committee could go down on how it might try and refine a type of time based condition that could still be flexible. It all depends on who is going to actually exercise the discretion, who is going to make this decision as to whether or not this was reasonable. That is probably another issue.

Apart from emphasising that a time based condition in broad terms, in principle, makes sense as the primary example of where it may be reasonable and that that is worth reflecting in the legislation, the thing to emphasise about the New South Wales conditions is the other half of the conditions that that particular legislation places on a disclosure—which is the requirements that the whistleblower must believe their disclosure to be substantially true and that the disclosure must be substantially true. They are the provisions that effectively make the New South Wales formulation largely inoperable, in bottom-line terms, because who, and how, is going to determine that in fact it was substantially true and, even if it was reasonable to make the disclosure, that there were reasonable grounds to hold the belief that the disclosure was worth raising in the public interest. At the end of the day it may not have been able to have been proven, but we may all agree that it was in the public interest that it be raised. So the question is: what is the evidentiary burden here? And it is actually such a huge evidentiary burden: it is almost as though it is only after there has been some litigation, some court finding, some definitive unarguable public finding as a result of some major due process commission of inquiry or something, that everything that the person said was true—only after that point—that the person is going to be able to say, 'I was victimised,' or 'I was persecuted,' or 'I was prosecuted unfairly,' or anything of that kind.

CHAIR—Yes, I think we understand that difficulty. Did anyone else wish to comment on this question of the conditions that are appropriate for going outside internal reporting?

Dr Airo-Farulla—I think there is an opportunity here for the parliament to set those conditions. And if the legislation remains silent on the point then it does in a sense invite the courts to set their own conditions, whether it is by developing some notion of freedom of speech and what a reasonable or unreasonable restriction on freedom of speech might be or some notion of a public interest exception to a duty of confidentiality. There are a number of vehicles that could be used to develop that, but that might develop in unpredictable ways.

CHAIR—I fear we might be waiting quite a long time, Dr Airo-Farulla, if we wait for the courts to develop—

Dr Airo-Farulla—Exactly. That leaves then a long period of uncertainty and, as I said, I think this is an opportunity for parliament to really set the conditions around that and put some clarity in there to avoid that long period of uncertainty and common-law development. If the legislation stays silent on it, then it does invite people to say that there are nevertheless circumstances in which it is appropriate for them to leapfrog or go outside the scheme and go directly into the public sphere. Whereas, if the legislation deals with that explicitly, then that process can be controlled.

Mr ANDREWS—As a follow-up to Dr Brown, the difficulty with a time-based approach seems to me to be twofold, one which I think you have addressed and that is: what if you have got a serious and urgent matter? For example, supposing it is the middle of the bushfire season and advice has been withheld or misused in some way that would go to the help and safety of individuals. The six-month approach seems to me to be too inflexible to deal with that.

The other difficulty though is that there must be occasions when the person who wishes to report the information is concerned about reporting it to their immediate superiors within the agency in which they work because they are the very people that they have a complaint about. It seems to me—and I would like your comment on this—that if there were an external agency and there was a provision that a person could go and discuss and seek advice from that external agency, whoever is chosen, then that would in a sense provide some prior guidance as to what is a reasonable time. If I am the person who has a complaint I do not want to go to my superior, but I can go to the Ombudsman, or it may well be a new agency, and seek that advice. Then there is some objectivity, if you like, about what is a reasonable time. Whereas, if you just leave it to the individual to determine what is a reasonable time, then we have all the uncertainty both for the individual and ultimately for the whole system that might be put in place. I would be interested in your comment about that.

Dr Brown—I think that moves us back to that question about who is going to be making any kind of determination or decision about whether something was reasonable or not and therefore what legislative supporting framework is needed by that person. That person is likely to be either a decision maker who is making a decision about whether to undertake disciplinary action or to impose a disciplinary penalty on somebody who has breached confidentiality, or a court that is being asked to hear a criminal charge for a criminal breach of confidentiality, official secrets or whatever, or a court that is being asked to hear an application for compensation by the

whistleblower saying, 'I have been mistreated but I should be protected by this act.' So it actually comes back to people in an arbitral law, a judicial or magistrate's role.

It may be most useful to have legislation that actually says, 'Here are the criteria that you as a decision maker will need to apply to determine whether or not this is reasonable, including whether a prior disclosure had been made and, if so, to whom and what did they do about it.' Those criteria almost directly call into evidence: did the person make a disclosure to the Ombudsman? What did the Ombudsman do? If they did nothing, why not? What were their reasons? Were those reasons communicated to the person who made the disclosure? The Ombudsman's office or whoever has investigated it can directly tell that decision maker what happened and basically give the signal: in our view it was probably reasonable in retrospect for this person to go public for whatever reason. So I think what you are indicating, Mr Andrews, can be used to help provide that architecture of the rules to determine what may be reasonable—

Mr ANDREWS—You are not suggesting that it be mandated as such but as part of the criteria determining the reasonableness.

Dr Brown—Yes. That regard must be had to a, b, c, d, e, f, g, and there is a range of criteria that could be called in. The UK legislation tends to operate in that sort of way in creating some criteria like that to which the tribunal will turn its mind to determine whether a third-party disclosure is something for which whistleblowers should be protected. There are other things in the UK legislation, like saying that it cannot have been made for material gain. If it has been made for material gain then you cannot get the protection from the scheme, so that, if you have sold secrets or you have been bribed by a media organisation or something or somebody to cough them up, then we just assume that you have not done it in the public interest or that it outweighs the public interest component. I do not know whether that has ever come into play in any significant way in the UK, but having a condition like that helps to send the right message. So there are a range of things.

The other situation as to whether there is a legitimate reason to have this is the situation where it is reasonable for a person to decide that they cannot make a disclosure internally. Also, in a very rare situation, it may be reasonable for a public servant to decide that they cannot safely make a disclosure to an integrity agency or an anticorruption body, because there is corruption in that body or a conflict of interest or the political stakes are too large for that organisation to deal with and they may in the end, in a really massive, serious case of political corruption, be vindicated by the idea that at the end of the day it was only going to be the media who were going to be able to cast enough light on this to ensure that it was properly dealt with.

I should make reference at this point to Andrew Podger's submission to the inquiry, because in terms of pulling all of those issues together, acknowledging that we are only dealing with unlikely or statistically a minority of situations, it is positive that it still remains an unlikely scenario. It is only relatively rarely that this is required. But I think it was very useful to see from Mr Podger's submission that he reached the conclusion that at the end of the day there is effectively no down side to having provisions that extend to, in his words, the unlikely event that someone does need to go public, notwithstanding the fact that there are healthy internal systems in place.

I think that that is a very good, sane, balanced recognition from Mr Podger, the former Public Service Commissioner, that it is part of the scheme. But just as importantly, it is a recognition of the fact that if the legislation is good and the internal systems are good and the integrity agency systems are good then we should have nothing to fear from creating the opportunity for people to also ensure that they are protected if, notwithstanding all of that, they have to go public. We know from experience that the risk that people may be able to go public and be protected provides a powerful motivation for agencies to get it right in the first place and make sure that they have the systems in place so that people do not need to go public and do not need to avail themselves of those opportunities.

CHAIR—Thank you.

Mr PERRETT—This is to the project team. I was struck by two bits of information. Firstly, that less than two per cent of public interest whistleblowers received organised support from their agency. The other one, which seemed to almost contradict that, was that 78 per cent of public interest whistleblowers said they were treated either well or the same by management and co-workers. I assumed it was going to be 10 per cent or something like that, so I found that a bit strange. I want to pre-empt some of the future studies in terms of looking at the better performing case study agencies. I know you said that the study is yet to be completed, but what are the main characteristics of the better performing agency? How did you ascertain that or how will you ascertain that? Is there a golden example there for us?

Mr Roberts—You may have noticed in the compilation that there is a chapter on analysis of procedures. We got 308 agencies that responded to that and 175 agencies sent in sets of procedures. These were all read and coded and analysed. I have a very high threshold of boredom, being a former public servant. What we have done with those procedures is that we have been able to look at comprehensiveness of procedures. By and large it was found to be very low, pretty appalling really, and we were able to find that there were certain gaps in those procedures. But to your question: one of the interesting things we found is that a number of organisations sprang out having very good written procedures and also having very good implementation and very good policies. Quite a few of those organisations are in our 16 case study agencies. Not surprisingly, we have three police forces in those case study agencies that are very interested in this. What we were able to do is to go in and look at the data and question those organisations about what it is that they are doing and what it is that they are doing right. I suppose my own view of what springs out to me is issues of leadership and of organisation commitment in those organisations. Are we allowed to mention organisations by name?

Dr Brown—No.

Mr Roberts—One particular large Commonwealth organisation has gone well beyond its requirements under the APS Act and has given protection based upon its employment browse, has resourced areas to investigate, has resourced a support function. That then comes through on the other indicators of organisational trust, outcomes—a whole series of things. We are getting a picture of what good organisations do.

Mr PERRETT—So the signs and symbols are there as well as the framework. Rather than a dust covered manual somewhere, it is actually the people talk the talk.

Mr Roberts—That is right. As legislators I am sure you are aware that the relationship between what is going on at an agency level and what is in the legislation is not linear, it is not straightforward. In fact, in all of the four jurisdictions we found a number of organisations which had appalling policies and procedures and a number which had very good ones, and it bore very little relationship to the structure of the legislation. That is the basis of my comment about organisational commitment and leadership. That is part of what we would be looking for in the legislation to engender and enhance that.

Mr PERRETT—Just going back to that last figure I had, that 78 per cent felt that they were treated the same by their co-workers or management, it seems to jar as a figure, that is all.

Prof. Wortley—I think there is a distinction, though, between receiving active support and not being treated badly. I think that is what it was. Also remember that one of the strengths of the study that also needs to be considered is that we took a broad sweep of things that were reported and some of them were of a very minor nature. They were not just the newspaper kinds of grabbing incidents. Some of them were of a kind of mundane, everyday reporting aspect. I think that is a strength of the research—

Mr PERRETT—Not front page of the paper sort of story.

Prof. Wortley—Exactly, but that is also what it is picking up, that on the bread-and-butter everyday sorts of stuff there are not difficulties. What happens when it escalates into more serious ones?

Dr Brown—The other thing to remember is that those figures are an average across an enormous number of agencies, thousands of public servants and an enormous number of agencies. So the figure of 22 to 25 per cent approximately of the people we identified as public interest whistleblowers said that they had been treated badly by management or fellow workers or both is significant in itself as an average. You do not have to have a huge proportion before the message is out there in the organisation not to bother. But because it is an average, it means that some organisations are extremely good, and we have been able to verify that. Those organisations amongst our case study agencies know who they are and we are using that as one of our key indicators of best practice in terms of outcome. But it also goes the other way. There are agencies where it is 50 or 60 per cent of public interest whistleblowers who are saying that they are being treated badly, and the other indicators then line up to show that those organisations have definite problems.

The other key thing about the two per cent is that it shows that, although a high proportion are saying that they have not necessarily suffered, that is often without having actually received any active support. The big thing is the gap between that two per cent or thereabouts who are getting any kind of active support and the 22 per cent who are the people who are saying they are treated badly. Mr Neumann is not here, but we had better mention some page numbers. Page 204 of the report and the supporting parts of that chapter emphasise that in fact about 1.3 per cent of all public interest whistleblowers in our agencies had received organised internal witness support of some kind, but that was actually 6.5 per cent of all those public interest whistleblowers who said they had been treated badly, so there is a huge gap. There is a clear indicator there that, if that 6.5 were increased, basically there is a gap that could be closed in terms of identifying who the people at most risk of suffering or claiming to suffer are and targeting those sorts of internal

support programs and internal management efforts on those people. There is a high likelihood that that 22 or 25 per cent overall of whistleblowers can be brought down. I think that is where the opportunity really lies to have robust systems that direct agency attention onto that target group.

Ms NEAL—Dr Brown and other members of the group, I will just take you back to the issue raised about external disclosure of facts. I think the comment you made, Dr Brown, was that it does not hurt anyone, that there is nothing to lose by allowing that to happen. I guess I had in mind a proposal where there was an internal review and then there was an external body—I have not made any final determination or formed any final view, but there would be something like the Ombudsman or the Public Service Commissioner. But we received evidence from ICAC yesterday, and I would have to say that ICAC are probably one of the most successful organisations in terms of effectively investigating complaints made to them. They said to us in their evidence that in fact they did see a general public disclosure, whether to the media or otherwise, as an impediment or a problem for two reasons. One is that generally disclosure to the media was actually an impediment to investigation. It prevented them being properly able to find out what had really happened and therefore to investigate the issue, deal with it and maybe punish people who needed to be. Secondly, it could lead to severe embarrassment or, more than embarrassment, the loss of reputation of someone who had actually done nothing wrong. They thought that it had those problems. I raise that with you to draw it your attention. I do not know whether you have anything further you wish to say about that.

Dr Brown—I think that is certainly the case if you are talking about any kind of blanket or unrestricted or unconditional situation. I think we discussed that in the roundtable as well—that potentially on the part of some media organisations there needs to be a recognition of the extent of the damage that can be done if in fact it is open slather. But I think that, provided that those qualifications and conditions are there and that there are ground rules that make it clear that those protections only extend in situations where it really has been reasonable that somebody could exercise that discretion, those rules should be able to strike the balance so that that sort of damage is limited as much as possible. In an ideal case, it would always be limited to those cases where we would agree in hindsight that it is in the public interest that the matter was brought to light.

Ms NEAL—But what about the issue of not being able to investigate once that is done or having impediments to investigation?

Dr Brown—That is where the regime does need to do everything it can to promote the likelihood that people will make their disclosures internally or to integrity agencies and that they are then well managed so that the person has no reason to go outside. If they did go outside in situations where they did not have sufficient reason to, that would be accurately identified as having been unreasonable and not protected, in which case they would be exposed to actions for defamation or other sanctions. I think that is where it is a fine juggling act in getting those conditions right, and I can see why it is one of the great challenges for the committee.

But I think that none of those things changes in any way the necessity to deal with the issue. Neither the ICAC, another respected and very much valued partner to the organisation, nor any other organisation would dare pretend that they have any chance of ever keeping everything totally under wraps for the sake of the convenience of investigations. And those same

organisations actually, as we know, rely on the media in a lot of situations to get their message out and to give their own inquiries—the investigations, hearings and findings—a great deal of force that they otherwise would not have.

We live in the world where the question of public exposure has to be managed rather than there being any option of saying that these things will not get into the public domain. It is a question of whether they get into the public domain in a reasonable way and whether they are properly managed in that relatively limited set of circumstances where matters are of a nature or the circumstances are such that they are more likely to get into the public domain.

Prof. Wortley—The police investigate in the public domain all the time. I do not think it is really an argument.

CHAIR—I somewhat diverted you before when you were nominating the three issues that you thought might be useful to talk to the committee about. I thought we might just run a little bit over time to ask you the ‘which agency’ question, Dr Brown, that you had given some thought to. The question is: if there is to be a Commonwealth agency that is given particular oversight or special responsibility in respect of whistleblowing, should that be a new agency or is there some existing agency that might be an appropriate one?

Dr Brown—I think we would still agree with the original submission, which I think was one of the healthy outcomes from the roundtable, that in fact we should be looking at building this capacity into existing agencies. The interesting thing, having seen the pattern of the submissions, is that it is wonderful to have two Commonwealth agencies both vying for a leadership role in taking this on. It could not be a better situation, in that it is extremely positive to have the Commonwealth Ombudsman’s office and the Australian Public Service Commission both keen to take on a leadership role in all of this.

We talked about this previously, but, again, Andrew Podger’s submission really caused me to reflect further on this. I think Andrew’s submission nicely articulates the closeness of the relationship that will need to be retained between the roles of the APSC and the Ombudsman’s office, irrespective of how the scheme is to be made to work. But Andrew in his submission did tend to conclude that, on balance, the overall oversight coordinating agency probably should be the Ombudsman’s office rather than just the APSC. I think he did so based on some pretty good criteria. He was really emphasising that there is a need to continue to be able to separate out, stream out, those things which are really primarily or solely employment related type grievances and those that do have the additional public interest component, even if they also have employment related issues, and that it will always continue to be easier to do that if the APSC continues to take responsibility for employment matters. Therefore it is easier to keep the system operating in a clear way if it is the Ombudsman’s office, where there is a stronger public interest focus, that makes the scheme operate and takes on the public interest disclosure coordination. So obviously a partnership will be needed, as we have always considered, I think, throughout the whole project.

But I think that that probably is a fairly significant piece of evidence from Andrew Podger that the committee should probably factor into its thinking about that. And I think it also helps provide some clarity about how it is in the overall interests of the public sector to be able to maintain that sense of differentiation between the different types of disclosure. The problem

would be that if the APSC were the coordinating body it would continue to attract all the employment related disclosures and the public interest disclosures and they would all remain mashed up together, sort of as they are now, and potentially it would be much more difficult for agencies to be able to communicate to their people the need to think about exactly what it was that they were disclosing and how that should be managed.

CHAIR—Good. Regrettably, I am going to have to end the session. I very much thank you for attending today. The secretariat will send you a copy of the transcript and if there are any corrections that need to be made I would be grateful if you could get in touch with the secretariat about that.

Dr Brown—Thank you, Mr Chairman. We might make a small written supplementary submission on the third point that we wanted to mention, which was actually why Professor Johnstone was here in particular.

CHAIR—My particular apologies then to Professor Johnstone. We are just a little pressed for time because we have a number of witnesses. We would very much welcome a further or supplementary submission in relation to that compensation question. Thank you all for attending.

[9.52 am]

RALSTON, Ms Deborah, Queensland Council of Unions

ROSS, Mr Steven, Industrial Officer, Queensland Nurses Union

CHAIR—Thank you for attending here today. Do you have any comments to make on the capacity in which you appear?

Mr Ross—I am an Industrial Officer employed by the Queensland Nurses Union of Employees and I am here to represent both the QNU and the Australian Nursing Federation, which also provided a submission to the inquiry.

CHAIR—The committee does not require you to speak under oath, but these are formal hearings of the Commonwealth parliament and, as such, giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received a very helpful written submission from the Queensland Council of Unions. Before we proceed to questions, would either of you like to make a brief introductory statement?

Ms Ralston—Yes, thank you, and we thought the order we would take is the Queensland Council of Unions first and then the Nurses Union.

CHAIR—That would be helpful, thank you.

Ms Ralston—Robust and extensive whistleblower protection legislation is necessary to facilitate the disclosure of important information about improper conduct. The QCU considers that the conduct which could be the subject of a protected disclosure should be extended beyond the Commonwealth public sector to entities that are either contracted to or funded by the Commonwealth.

The QCU submits that the model adopted by the committee should provide that a protected disclosure can be made by any person. In addition, a protected disclosure can be made in relation to conduct which, for example, amounts to a criminal offence, is a danger to public safety, is a danger to the environment, or amounts to unauthorised or irregular use of public funds. The types of persons that could be engaged in such conduct would be, for example, a member of the Commonwealth parliament, an APS employee and/or a director, board member, employee or independent contractor engaged by the Commonwealth or by a body that is in receipt of Commonwealth funding.

The procedure for making a protected disclosure should be simple and informal, such that a person who makes a protected disclosure should be immune from civil, criminal or administrative sanction and that a person who makes a protected disclosure should be protected from less favourable treatment as a result of making that protected disclosure. The QCU considers that the introduction of Commonwealth legislation to protect the public interest disclosures within the Commonwealth public sector, including Commonwealth funded bodies, is needed.

In making these submissions the QCU notes that whistleblower protection legislation has been adopted in Queensland, New South Wales, Victoria, Tasmania, South Australia and the ACT. The QCU does not, for the purposes of the material provided to this committee, propose to compare the provisions of the state legislation. However, the QCU submits that any model proposed by the committee should represent the best elements of each piece of state legislation.

The whistleblower protection legislation should be premised on the understanding that the making of protected disclosures serves the public interest by bringing conduct which is unlawful, corrupt, dangerous, negligent and/or incompetent to light. The disclosure of such conduct ensures that the Public Service is administered fairly and transparently. The QCU submits that the whistleblower protection legislation should apply to not only the Commonwealth public sector but, as earlier indicated, to all enterprises that receive Commonwealth funding. The QCU believes that if an enterprise is in receipt of Commonwealth funding the enterprise should be subject to the same standards of fairness, transparency and accountability as the Commonwealth public sector is.

The purpose of the whistleblower protection legislation should be to facilitate the making of protected disclosures and protect those persons who make such disclosures. Whistleblower protection legislation ensures that the administration of the Public Service is fair by protecting those that disclose that improper conduct. The QCU submits that if a person has knowledge of improper conduct by an officer or employee of such a body that person should be protected if they disclose that information. We submit that there should be no restriction or limitation on the classes of persons who can make a protected disclosure. The purpose of whistleblower protection legislation is to allow for and to protect the disclosure of information about prescribed classes of improper conduct. The occupation of the person who holds the information is irrelevant. What is relevant is that the person in question has knowledge about the conduct of the requisite character. If the person has that knowledge and is willing to disclose that knowledge in accordance with the prescribed procedures then they should be protected.

We submit that the procedures adopted for the making of a protected disclosure should be simple, clear and informal. There are significant barriers which prevent persons from making disclosures. As such, the process adopted by the whistleblower protection legislation should not present an additional barrier. A better and more inclusive approach is to adopt an objective test of reasonableness wherein the disclosure must be made to the most reasonable and appropriate person or entity in the circumstances. We submit that the only criteria that should apply to disclosure are that the disclosure is about the type of conduct referred to, the person making the disclosure reasonably believes the disclosure to be true and the person complies with the process outlined in the whistleblower protection legislation for making the disclosure. We submit that if a disclosure meets those criteria there are no reasons why protection should not be afforded to the person who makes the disclosure. If the disclosure does not meet the criteria then the disclosure and the person who makes it are not protected. A person's motivation for making a disclosure is irrelevant. We submit that a person should not be liable civilly, criminally or under an administrative action for making a protected disclosure. Immunity of this nature is common to the state acts.

The QCU also submits that the whistleblower protection legislation should provide for the granting of injunctions by either the Federal Court or the Australian Industrial Relations Commission or its proposed successor Fair Work Australia to prevent less favourable treatment.

QCU also submits that the unlawful termination provisions of the Workplace Relations Act should be amended so that the making of a protected disclosure is expressly stated as a ground on which a person's employment cannot be terminated. Such an amendment would be in keeping with that which exists under the Queensland legislation.

The QCU also submits that the definition of injury in the Safety, Rehabilitation and Compensation Act should be amended so that any injury arising out of or in the course of a person making a protected disclosure does not fall within the definition of reasonable administrative action. The effect of this amendment would be to ensure that a person would be eligible for workers compensation pursuant to the Safety, Rehabilitation and Compensation Act for any injuries that arose out of or in connection with the protected disclosure. We thank the committee for the opportunity to address you this morning.

CHAIR—Thank you.

Mr Ross—Thank you for the invitation and opportunity to participate. The ANF submission refers to the 170,000 members; 35,000 of those in Queensland are also members of the QNU. The QNU is both a state registered union and also operates as the Queensland branch of the ANF. Nursing is a regulated profession and nurses work across a broad range of settings, including aged care, public and private hospitals, doctors' surgeries, schools, the Red Cross blood service, the prison system, remote communities, the Defence Force and so on. Much of this work results in nurses being directly employed by government agencies or directly employed by organisations dependent upon government funding. It is important work, vital for the health and wellbeing of our communities. Nurses keep the system safe. They do this through the care they deliver and through advocating for improved ways that the care can be delivered and against systems, policies and practices that degrade care delivery. The broader community recognises this and holds nurses in high esteem as people of integrity.

Effective and efficient delivery in the range of services in which nurses are involved is enhanced in our view by creating the capacity for nurses and others to be able to speak up about deficiencies in a manner that ensures their concerns are acted upon and also that affords them protection in the process. Whistleblowing legislation should have these aims.

As stated in the QCU submission, the public interest is well served by bringing conduct which is unlawful, corrupt, dangerous, negligent and/or incompetent to light. In keeping with these sentiments, I would like to highlight two areas for the committee's consideration where we think the objectives of whistleblower legislation should be pursued. The first of these is highlighted in paragraphs 13 through to 16 of the QCU submission. Deborah has also emphasised them. They concern the application of whistleblower legislation to entities in receipt of Commonwealth government funding. The immediate and pressing example is aged care. The QNU has a steady stream of calls from members and others who wish to bring attention to practices of concern in their workplace but whose concerns about recriminations and/or a clear pathway to report outweigh their willingness to disclose.

For example, last week a nonmember called our call centre to report that unlicensed staff were checking the dangerous drugs before providing them to residents and that these staff were also in possession of the keys to the dangerous drugs cupboard. At law, this work is required to be undertaken by a licensed registered nurse. The practices are dangerous and potentially fatal. The

caller declined to say where she worked. We have also had calls from members concerned about directions from their employer with respect to altering documentation. We have had calls from members regarding being directed to work outside their scope of practice. In the past we have had calls from members concerned about the purposes for which funding was being spent.

There is some precedent for whistleblower type provisions already in aged care with the measures introduced by way of policy response to allegations of assault in aged care facilities. That legislation had two principle components: firstly, a legal obligation to report and, secondly and significantly, protections for those that do so. A summary of the requirements and protections can be found on the Department of Health and Ageing's website. It does not require too much imagination to see the enhanced probity that would flow from the extension of the disclosure regime to entities in receipt of taxpayer funds, particularly those providing care to the frail and vulnerable.

The second area I wish to highlight relates to the class of persons who can make a protected disclosure and the process by which such a disclosure is able to be made. This relates to paragraphs 21 through to 28 of the QCU submission. It has been our experience that some members are more comfortable providing information to the union than they are disclosing it within their organisation of employment. A representative body such as the QNU/ANF should have standing to bring information to the relevant authority on behalf of a member and in so doing be entitled to some protections and, more importantly, the individual that provides the information to the QNU/ANF should have the benefit of the whistleblower legislation extended to them. In this way the QNU/ANF fulfils its representative responsibilities, our core business as stated in the ANF submission, by assisting the member in the ordering and advancing of the information. Thus the facilitation and protection of disclosures is progressed. I was privileged enough to witness some of the earlier discussion. I think Mr Andrews raised the point about third-party disclosure to somebody prior to going to an agency in order to assist with the ordering of that information. That is the point I am seeking to pursue.

In respect of that particular term of reference 5(d), I note the submissions and the earlier discussion on disclosure to the media. While not disagreeing with that, I think our point has a different emphasis. Our point is that the mechanisms within government for receiving a disclosure should make provision for third-party representation of the whistleblower. Nurses are advocates for the people they care for. It is an important role and whistleblowing legislation should maximise the opportunity for nurses to fulfil this role and protect them in the process.

CHAIR—Thank you very much, Mr Ross.

Mr ANDREWS—You make some statements about aged care. I will take it up as an example. One of the things we are looking at is what prior disclosure ought to be made within an organisation prior to going to a third party. I think there is a general view that the purpose of any legislation and indeed administrative practices in this area is to encourage people to make appropriate disclosures within the system so that they can be addressed rather than having to go outside. So to take your point about aged care, would it be appropriate that a nurse in an aged care institution should have to, for example, make a complaint to the Aged Care Commissioner or Commissioner of Complaints prior to going to a third party such as the union or to any other third party?

Mr Ross—It has been our experience that members will contact us with particular concerns about some practice in their facility and we assist them then to take their complaint to the Aged Care Commissioner or the accreditation agency, depending on the nature of the complaint. So I would disagree with the proposition that they should go to the commissioner before coming to see us, because we can actually steer them in the right direction.

Mr ANDREWS—In that situation you are acting, I suppose, almost as the agent of the nurse concerned in order to take it to a third party, but in this context a third party which has statutory obligations in relation to accreditation or complaints.

Mr Ross—That is right, though I would take it a bit further than agent because we also bring the expertise that we have within our offices to a particular details of the matters that are raised. We have nursing expertise who can understand, and in absolute detail, the issues with medications and care delivery and those sorts of things. So we would perhaps first analyse the information from the member and then make sure that we are steering them correctly and that the information is presented in the appropriate form.

CHAIR—Could I follow that up. You are concerned here to ensure that the position of unions is protected in the sense that unions are there to assist workers in doing their jobs well. You are envisaging a role for the union which is not that of the investigator in the sense that the union will not necessarily be doing an investigation and may not be equipped to, and certainly not empowered to, after the raising of something by their members. Equally, you are not envisaging that the union will go public necessarily, because what you have indicated is that the union's preferred position is to direct the member to a proper channel. But your concern I am hearing is that you want to make sure that any recommendation we make for legislation preserves that intermediary role for the union when approached by members.

Mr Ross—That is correct. One of the difficulties we face, again in the aged care example, is having standing to bring a complaint with some of those bodies on behalf of a member. The union was not recognised, if you like, and we have to put the individual upfront in terms of making a complaint.

CHAIR—We are hopeful that the new industrial relations legislation which is coming shortly is going to make clear that role for unions at the national level.

Mr Ross—We are hopeful of that. But I do differentiate, going back to your question, between the role in this sort of scenario and that, for example, under state workplace health and safety legislation, where we can go in and investigate the breach ourselves under the right of entry provisions where we might go in and investigate a breach of an industrial instrument and follow that through. I am certainly differentiating between the role in those circumstances and the role under the whistleblowing legislation, where it is as you described, ensuring that the information is disclosed to the appropriate statutory authorities and pursued in that way.

Mr PERRETT—Ms Ralston, the QCU submission makes the suggestion that all entities receiving Commonwealth funding should have access to a whistleblowing mechanism. Obviously, a nursing home has quite a few checks and balances and hopefully has a fair bit of bureaucratic process in terms of what they need to do. You would be bringing in state schools, independent schools and a lot of community organisations that might only receive a \$5,000 grant

or something like that. There are also general practitioners. It would be quite broad and not all of them would have the avenues of a professional organisation such as a union that is a good guide and a guard in taking someone through the channels to publicly disclose information. Could you comment on some of the pitfalls that might be there for these groups?

Ms Ralston—The adjunct to the question that you are raising is that component in our submission which deals with there being informality attached to the whistleblowing process. Quite clearly, if there is a structured approach that creates a disincentive for you to identify that there has been the incorrect usage of Commonwealth funding then you are more likely not to be able to get a positive outcome. But, if you create a mechanism where there is a great degree of latitude in how the claim can go forward, then it does not necessarily require there to be the expertise of the union involved on behalf of the worker. There are actually mechanisms that enable them to be encouraged to identify that there has been inappropriate use of that Commonwealth funding. I think that you have to tie the two in: the looseness of the process along with the breadth of who is going to be covered.

CHAIR—The submission from the Queensland Council of Unions does not directly address the issue of what has been called in these hearings ‘third party disclosures’, which encompass not only the media but also potentially a whole range of others. Do you have a view on what might be appropriate conditions to specify before going to a third party that is outside the agency?

Ms Ralston—I would not be in a position to indicate whether we had a view.

CHAIR—That is all right. Mr Ross?

Mr Ross—Apart from what I have just talked about in terms of the third party being involved with the process, I would probably need to take it as a question on notice and seek some instruction on it.

CHAIR—That is okay. Thank you.

Mr Ross—We have obviously had some quite complex matters where these issues have arisen, which the committee is aware of. I would prefer to take it on notice and get some instruction. I am happy to do that on the advice of the committee.

Ms NEAL—Thank you for appearing before us. I have asked this question of a number of witnesses and they have formed the view on some occasions that there really should not be a designated list of people who can make disclosures. It really should be determined by the subject matter of what is being disclosed rather than the particular role of the person making disclosure. Do you have a particular view about that proposition?

Mr Ross—Our view is that the more restrictions you have, the more you get to a point where you start to counter the purpose of the legislation, which is that people who are in a position to have information should have the capacity to be able to disclose it. They should not be restricted in that sense.

Ms Ralston—We point out that issue on page 5 and 6 of our submission and, in particular, at point 17, where we state:

The QCU submits that there should be no restriction or limitation on the classes of persons who can make a protected disclosure.

Mr PERRETT—Mr Ross, your submission argues that where the employer does not appropriately investigate a disclosure that penalties might apply. How would that work? Who would the penalties go to? What would trigger the investigation and monitoring of the investigation?

Mr Ross—Can you take me to the particular passage?

Mr PERRETT—Not off the top of my head.

Mr Ross—Are you referring to the Australian Nursing Federation?

CHAIR—Perhaps I could ask you a more general question while that is being looked for. Do you think the Queensland whistleblower protection legislation that came in in 1994 has been successful? It is an open ended question.

Ms Ralston—Can I perhaps in not answering that question indicate that the way in which the Queensland legislation has been developed was also to factor in some other activity around other pieces of legislation. For example, I refer to the fact that there are protections within the Queensland Industrial Relations Act in regard to whistleblowers, which means that if an individual exercises whistleblower protection then they cannot subsequently be terminated from their employment as a result of that access. Perhaps how we view the legislation is that other assistance is provided in additional pieces of legislation which enable the whistleblower protection legislation to operate more robustly. So, in gauging its success, we also have to draw our attention to those other areas and say that, intrinsically, they all mould in together.

CHAIR—That is a helpful answer. It is a reminder to us that we have to consider always the context within which any legislation sits.

Ms Ralston—That is right.

CHAIR—I think Mr Perrett is now in a position to put his question.

Mr PERRETT—Page 3, third paragraph down—the recommendation.

Mr Ross—If I can distinguish between those employers who are within the government and those who are in receipt of Commonwealth funding. In respect of those in receipt of Commonwealth funding, the system that operates in aged care is one of sanction in respect of the accreditation process. The accreditation agency has the responsibility, for example, of ensuring that the mandatory reporting regime is properly administered within the particular facility. The accreditation agency has the responsibility of ensuring that the criminal history checks on employees are appropriately done. If a particular agency does not do that then they fail a particular accreditation standard and they will be issued with an improvement notice or

whatever. Ultimately, that can lead to sanctions in funding. It is a sort of carrot and stick approach to reduce the funding, if need be, to try and get the systems in place to improve it properly. There are probably better people than me within government agencies to talk about it.

CHAIR—I follow the point, Mr Ross. It is to say there is already a sanctions regime for a whole range of bodies that receive government funds and there are conditions on that funding continuing. Your proposition here is that there might be added to the list of infringements failure to act on a complaint.

Mr Ross—That is right. The question was in that context. The other side of that is taking action against the disclosing employee, and we would certainly support the proposition that there are amendments to the Workplace Relations Act to bring an unlawful category.

CHAIR—All right; we follow that. Regrettably, I have to end the session. We thank both you, Mr Ross, and you, Ms Ralston, for attending today. And thank you for the written submissions, which have also been helpful. You will be sent a copy of the transcript and if there are some corrections you can get in touch with the secretariat.

[10.20 am]

AHERN, Dr Kathy, Private capacity

CHAIR—Thank you very much, Dr Ahern, for attending before the committee and also for the very thoughtful written submission that you have provided to us. It is clear you have a great many qualifications on, and indeed have written directly on, subject matter relevant to our inquiry.

Dr Ahern—I am a researcher of human behaviour and human motivation.

CHAIR—The committee does not require you to speak under oath but you need to understand that these hearings are formal proceedings of the Commonwealth parliament. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Would you like to make a very brief introductory statement before we proceed to some questions from the committee?

Dr Ahern—Yes. Thank you for inviting me and giving me this opportunity to share some of my thoughts. Thirty years ago many of my friends would brag that they were so drunk the night before they could not remember driving home. This was a source of pride. Of course there were laws against drink driving, but nobody took them seriously. Now, 30 years later, drink drivers are condemned, and I frequently hear comments like: ‘I can only have two drinks because I have to drive home.’ This is an amazing turnaround which demonstrates how social values and human behaviours can be changed. When I think about how the changed attitude came about, I can identify two major strategies. The first was to redefine drink driving as unacceptable and to provide people with skills to discourage their friends from drink driving. One of the best examples of this was a series of television ads that concluded with the comment, ‘Friends don’t let friends drink and drive.’ The second strategy to discourage drink driving was the development of random breath testing. Thus, if an appeal to people’s sense of community responsibility did not work to change their behaviour, fear of being picked up in a random breath test did. I believe it is the combination of these two strategies that has changed a macho source of pride into an act of stupidity—and this is in the space of one generation, which is really quite amazing. I think the same transformation needs to occur regarding the valuing of whistleblowing to an organisation.

I have seen many excellent protocols and policies which are designed to protect whistleblowers. These policies are clear and explicitly pro-whistleblowing. However, despite these excellent policies, whistleblowers still experience retribution, to the point that many people are deterred from reporting illegal or unethical conduct in the workplace. From this I deduce that whistleblowing policies are not effective. That answers one of your questions. I also predict that, no matter how elegant the policies are, the situation will not change unless real-life people believe that whistleblowing is a good thing, and real-life managers believe that supporting whistleblowers is good management practice. The corollary of this is that employers, managers and community must come to believe that managers who do not support whistleblowers are not good managers.

I would like to see the same successful strategies as were used to change how we view drink drivers being applied to whistleblowing. In other words, employees and managers need to genuinely believe that whistleblowing is a highly desirable and rewarding activity. The strategies to achieve this would include training and role modelling in how to investigate whistleblowing allegations and the provision of sanctions for managers who do not demonstrate pro-whistleblowing behaviours. In my opinion, the issue is not about policies and procedures at all; it is about understanding human motivations and applying this understanding to change behaviour.

According to research, about one-fifth of people are primarily motivated to act in a certain way out of fear of punishment. If we extrapolate this to managers, we can predict that one in five managers will support employees who report workplace misconduct because there will be sanctions for not supporting the whistleblower. Research also indicates that about half of people are motivated by the concept of fairness and loyalty to others. This suggests that a major reason why managers do not support whistleblowers is that they are most strongly motivated to maintain workplace relationships and that this need informs their management decisions. The fear of having to confront workplace colleagues provides a very powerful disincentive for managers to support people who blow the whistle. This is the problem we need to address.

Development of strong legislation is a good first step. However, as with drink-drivers we also need to include punishment for managers who do not support whistleblowing. Managers need training in how to avoid letting their own personal friendships and loyalties override their workplace responsibilities. Finally, we need to have rewards for people who engage in supporting pro-social activity of whistleblowers. If these measures are adopted and consistently applied, I believe we can change how the reporting of misconduct is perceived so that eventually whistleblowers will be seen by others as they see themselves, as honourable people who care deeply about the organisations they work for. Thank you very much.

CHAIR—Thank you, Dr Ahern.

Mr ANDREWS—Dr Ahern, your thesis, I suppose, is that this is about the culture within organisations broadly and that legislation in itself is not going to change culture, yet legislation can have an educative effect. The problem with the penalty, as I heard you describe it, seems to me to be that it is not necessarily going to address that cultural issue because the culture will be there and understood surely within an organisation regardless of any particular instance of a whistleblowing attempt being made. I can understand it when somebody comes to the manager and says, ‘What about this or that?’ and is rebuffed in that approach. But most employees, I suspect, have a broad understanding of the general culture of an organisation without anything ever being said. So how does the penalty really address what I heard you say as being the main issue that we need to tackle?

Dr Ahern—I can give you an example from where I work, which is a major university. When I applied for promotion or tenure, when I went from being on the tenure track to being tenured, I had to go through an incredibly rigorous process. I think my application for mid-term review—I was on probation for five years—was 120 pages long. I had to document everything, and I had to have 15 copies of that 120-page document. There were five main areas I had to address: teaching, research, service to the university, service to the community and something else which escapes me—oh, service to the profession or the discipline that I was in. This means that there was no punishment or disincentive for me to be completely unethical in what I did. There was no

requirement for promotion or tenure in terms of: how have I made the university where I work more ethical? How have I supported our mission statement in the university? If promotion criteria were changed where whistleblowing were actively rewarded, I think the culture would change quite dramatically. Ed Koch did it in New York, from the crime thing to zero tolerance, and now New York is safer than it used to be.

Mr ANDREWS—So an organisation that had in its processes and protocols questions around the ethical framework, the mission statement, the social good of what is sought to be achieved within it, would be a way of addressing that.

Dr Ahern—Demonstrable. You have to demonstrate it and provide evidence, so again I do not think just saying, ‘I am a very ethical person and I support whistleblowing’ would work. It has to be—

Mr ANDREWS—Not something that legislation itself can address.

Dr Ahern—Not legislation, no. I think we absolutely need the legislation but I also think the legislation without cultural change—clearly people are not whistleblowing and, despite the legislation, there is still horrendous retribution going on.

Mr ANDREWS—And that is your experience of Queensland, where there is legislation in place.

Dr Ahern—Yes.

CHAIR—What sort of retribution?

Dr Ahern—Very clever retribution which I talked about in my paper, where it can look as if it is just a normal staffing matter. I have worked in four universities. In one university where I worked, say, for example, you were a student going for a scholarship or you were an academic going for promotion or tenure. Universities have forms and your head of school ticks off the form whether you are in the top 50 per cent or the top 10 per cent or the top two per cent. If I ticked your box as being in the top five per cent, you would be thrilled because you would think, I am better than 95 per cent of academics. That is actually a way in which in my experience means that school and managers can say, ‘Yes, this will keep you off my back—95 per cent—but you only ever get ahead if you are in the top two per cent.’

As a statistician, not everybody can be in the top two per cent. But, with the way scholarships are presented, if you are not ticked in that box, you will never get a scholarship. So, on paper, if you went to complain and said, ‘Oh look, I did not get a scholarship or I did not get a promotion; look how good I am,’ they would say, ‘Yes, but there are all these people who are in the top two per cent and you are only in the top five.’

CHAIR—What I take you to be indicating is that there are some subtle forms of discrimination—

Dr Ahern—Incredibly subtle.

CHAIR—that are equally incredibly damaging and that are very difficult to prevent or even compensate for because they are undetectable.

Dr Ahern—Yes, and they look rational on the surface. A lot of the workplace bullying literature supports this as well: things such as not ccing people—and blind ccing is a weapon people are wielding now as well—so that the person does not show up for an important meeting because they did not know about it. So then we have people at the meeting saying, ‘Oh Pshaw! That person has not shown up,’ when in fact they were never told or they were ‘accidentally’ told the wrong time. Then they are told that they are too sensitive or they are making too much out of it.

Mr PERRETT—What role might an independent oversight agency play in your circumstances with the university? You heard the earlier submission from the QCU that all entities receiving federal government funding—

Dr Ahern—I so support that. I also used to be a teacher and a nurse, so I know the system from a lot of different angles.

Mr PERRETT—What sort of agency are you thinking of? I think you were here when AJ’s panel was asked about which agency and he talked about the Ombudsman and the APSC as well. Do you have any thoughts on that?

Dr Ahern—I have no thoughts. As a taxpayer, I think of something that is going to be very useful for my money and very considerate of the tax dollars. I do not really care whether it is an existing agency or a new agency. What I care about is that it is totally independent, the reason being that I know what motivates human beings. It has to be acting as somewhere between a supportive parent instructing their child and a policeman keeping the organisation in check. Again, cronyism is a huge problem as well. One of the problems that whistleblowers have is that if you go to your line manager and say, ‘This person is doing something unethical,’ it could well be that that person is the parent, the father or the boyfriend of the person that you are putting in the report about. So, as I said in my original submission, I think that we must have internal methods within the organisation purely as a way to teach people, to educate people and to get them to get those skills. But I also know that they are not necessarily going to make a decision with the best ethics unless their decisions are overseen by an independent agency.

Mr PERRETT—I think you were here for the earlier discussion about the 78 per cent of people who, when they made the whistleblowing disclosure, still felt they were no worse off. I think that was the data.

Dr Ahern—I was not here for that.

Mr PERRETT—Okay. I beg your pardon.

CHAIR—Ms Neal?

Ms NEAL—I have actually had my question answered.

Dr Ahern—This is from WA nurses, but my research indicates that people who do not blow the whistle—in other words, they see misconduct but do not blow the whistle—suffer as much as whistleblowers. It is not professionally; they do not lose their jobs and get reprimanded, but they have ulcers and sleepless nights and they feel guilty. I conclude from that that whistleblowers actually help people who are seeing things and not blowing the whistle. Seeing misconduct is very distressing for people who actually care about their jobs.

Mr PERRETT—I guess it attacks their sense of worth in terms of their career and what they are doing because it is diminishing whatever their career is.

Dr Ahern—And a lot of people are motivated by fear, so if you do not report misconduct because you are afraid, you then feel afraid and guilty. What happens a lot in nursing is that you tend to avoid the patients who are causing you to feel this fear and guilt. Whistleblowers are very special people. They are not your mainstream person. What motivates them are higher philosophical, ethical values. They tend to work on principles of ethics rather than the pragmatics of life. That is why a lot of people do not understand them: it is because most people do not operate from that framework. Three-quarters of people do not operate from that framework.

CHAIR—Have you given any thought to which Commonwealth agency might be an appropriate oversight agency?

Dr Ahern—No.

CHAIR—That is fine. Have you given any thought to the other question that the committee has been wrestling with, which is the conditions on which it might be appropriate to protect disclosures that are made outside an agency?

Dr Ahern—I am a big believer in paper trails. If the protocols were very clear within an organisation, a hospital or a university or a parliament or wherever you were, and the person could follow through—‘In order to put in a complaint, do this’—then I think that once you have done the internal reporting and after six or eight weeks, or whatever the designated time was, there was not a satisfactory resolution that was documented, you go externally. After that, if there is something that is not existing within that framework, I personally would not go public but I do not think the person should be sanctioned because they have gone through every possible legitimate formal process that was available.

Ms NEAL—One thing that worries me a little bit about this when there are no satisfactory resolution criteria is: who determines that? Say you go to someone and provide the information you have, they go away and do whatever investigation they think is appropriate and then come back and say, ‘I have investigated and there is nothing we can look at further,’ you are still—

Dr Ahern—I can answer that. Coming back to motivation, people are quite happy with a no, so long as they believe that their concern has been taken seriously and fairly investigated. If people ask for a raise in this economic time and the answer was, ‘No, you can’t have one; we have no money,’ people can understand that and accept it. What makes them are really angry and likely to go public is if they believe that they have been given the run-around and have been

fobbed off. So, again, I think if proper transparent processes are there you are not going to get the anger, rage and frustration that motivates people to go to third-party disclosure.

CHAIR—So you would see their motivation for going to third-party disclosure would be dissatisfaction with the way in which a complaint or a disclosure has been handled to that point?

Dr Ahern—Yes. You can also get someone who is a nut case and did it out of spite, but you get them everywhere. Again, a paper trail will protect you from that.

CHAIR—One of the very clear conclusions of the Whistling While They Work project from Griffith University was that there is an overwhelming preference on the part of people wishing to make a disclosure to go internally first, to use procedures that are available within their own agency or, if they exist, internal procedures of some external agency elsewhere in the Public Service. Have the findings you have made in your research been consistent with that?

Dr Ahern—I have not looked at that specifically; this is just from looking at other people's research—you have to do before you do your own research. People that people go to tend not to be skilled up. This is the biggest problem. I had a classic example in a story that was emailed to me quite recently about someone who went to their line manager with a problem, and I have to laugh at what the line manager did because it is so typical. It would be nice if the line manager investigated the problem and dealt with it. The line manager, for whatever reason—they were afraid or did not have the skills, or both, or anything else—gave this person really bad advice which I thought was bad for the organisation, and that was: 'You should go straight to HR and make a formal complaint.' That really blows this whole thing way up out of all proportion. What it comes down to is the line manager really did not want to deal with it, probably because they did not have the skills. So I think if it is going to be internal you have to have people that are good at investigation.

I have been a teacher, a nurse and an academic, and in every one of those fields my managers have been teachers who have been around the block a few times, nurses who have been in the hospital for 15 years or academics who have gotten millions of dollars worth of research grants. Management training and expertise does not focus in their CVs, so how can we honestly expect my manager to manage money and personnel when my manager is an academic who does research? Originally their career was not management, it was something else. So managers throughout the government tend to be not skilled up in management.

CHAIR—I thought you were about to start talking about not being skilled up in investigation as well.

Dr Ahern—Absolutely. I have a friend who is a policeman. I asked him how he investigates and he said, 'I can't tell you that. That is secret police business.' I think he thought I was trying to rob a bank or something! But there have to be protocols out there about how to investigate without breaking confidentiality. This is where transparency of process comes in. People will accept your findings if they believe that you have been fair, decent and transparent. But managers are not used to dealing with that in that way.

CHAIR—In your submission, Dr Ahern, you have put forward a proposition. You said:

It is essential that internal staffing matters are included in the protection of whistleblowers.

I take it that what you are getting at there is recognising the closeness of internal staffing matters both to the subject matter of possible complaints and also to the possible mistreatment of people making disclosures.

Dr Ahern—It is a major mechanism for retribution.

CHAIR—So it is in the retribution sense that you want to make sure that internal staffing matters are covered by protections?

Dr Ahern—Yes. But I would also like to see people actually rewarded and promoted for supporting whistleblowing.

CHAIR—And that is your other point, that legislation by itself is never going to be enough. It is about changing the culture and about resourcing and about changing administrative practice.

Dr Ahern—Yes. Even the terminology bothers me a little bit. We talk about whistleblower protection, and when we look at protection we look at Mafia witnesses who turn and they need protection or child predators who are in jail and they need protection. The term ‘whistleblowing’ comes from sport, and I wonder why we aren’t talking about whistleblowers as the heroes, the people who made that great goal, who won that game that matters. The terminology we use is that whistleblowers are somehow doing something wrong or strange or dirty and they have to be protected. It is as though everybody needs them but we do not really want to encourage them.

CHAIR—Speaking personally, I would agree with you about the clumsiness of the term ‘protection’. In large part—and I think you would have seen this from the terms of reference—we are invited to consider whether there should be a removal of sanctions, which is quite a different concept from protection.

Dr Ahern—Yes.

CHAIR—At the moment there are a range of sanctions that apply to people in the public sector who disclose things. It is not really accurate to speak of protecting them when what in fact is proposed by many of these schemes is a removal of punishment or a removal of sanctions.

Dr Ahern—And a lot of time the protection comes after the horse has bolted. You have been sanctioned and then somehow there is some sort of protection down the track, and you say, ‘Yes, but I am already unemployed now.’

CHAIR—Yes, I think I would accept that too. If we are talking about compensation or repair of damage done, we are also not talking about protection because it is after the horse has bolted.

Dr Ahern—Yes.

CHAIR—I am going to end this session, Dr Ahern.

Dr Ahern—Thank you very much for having me.

CHAIR—I thank you very much for attending here today and for the detailed submission. It has relieved us, in a sense, of the need to question you in detail because it was so full. The committee secretariat will send you a copy of the transcript of today's proceedings and we would be grateful if you could correct any errors. I formally close the public hearing. After morning tea we will proceed to hear evidence in camera.

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

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

Evidence was then taken in camera—

Committee adjourned at 12.18 pm