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SENATE

FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

Reference: Public Interest Disclosure Bill 2001 [2002]

THURSDAY, 16 MAY 2002

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SENATE

FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

Thursday, 16 May 2002

Members: Senator Mason (Chair), Senator Murray (Deputy Chair), Senators Brandis, Faulkner, Forshaw and Lightfoot

Senators in attendance: Senators Forshaw, Ferguson, Mason and Murray

Committee met at 3.44 p.m.

CHAIR—Good afternoon, ladies and gentlemen. I declare open this public hearing of the Senate Finance and Public Administration Legislation Committee. The hearing is part of the committee’s inquiry into the proposed Public Interest Disclosure Bill 2001 [2002]. Firstly, I would like to apologise for commencing a little bit late this afternoon. It has been budget week and we seem to have been running 15 minutes behind all week. Thank you very much for your forbearance and for being with us; it is good to see you.

On 1 September 2001 the committee advertised the inquiry in all Australian capital cities and in the Weekend Australian, calling for submissions to be lodged with the committee by 21 September. The reference was re-adopted this year, and the committee has been asked to report by 27 June 2002. Public interest disclosure is widely known as whistleblowing. Both internationally and within Australia it is recognised that there is a need to encourage people to disclose information about wrongdoing and improper conduct, out of a sense of public duty. The purpose of this bill is to provide a legislative framework to facilitate such public interest disclosures. The bill aims to establish proper authorities to receive disclosures, subsequent procedures to be followed and protections and remedies for disclosure makers. Any such scheme must be carefully constructed so that a whistleblower is provided with effective avenues of reporting and protection and a balance between the interests of all parties is maintained.

We resolved to hold this public hearing in order to discuss issues that have arisen in the course of examining the provisions of the proposed bill. This public hearing will take the form of a round table including the following parties: the Public Service Commissioner and the Merit Protection Commissioner, who will both play key roles in the proposed scheme; the Auditor-General and the ombudsman, who specialise in providing an independent view of the operations of government; Whistleblowers Australia and the Community and Public Sector Union, who represent the needs and interests of whistleblowers; and experts in the development and design of whistleblowing schemes. We recognise that the discussion of the treatment of whistleblowers can be a highly emotional issue and emphasise that the most effective contribution will be made by those considering the provisions of the bill at hand.

There is a significant amount of material to consider and a need for timeliness, as members of the committee are required to attend the opposition response to the budget at 7.30 tonight. To facilitate the conduct of the hearing we will try to follow the agenda as circulated to committee members and witnesses. All the witnesses who appear before the committee are protected by parliamentary privilege with respect to the evidence they give. This means that witnesses are given broad protection from action arising from what they say and that the Senate has the power to protect them from any action which disadvantages them on account of the evidence given before the committee. The committee prefers to conduct its hearings in
public. However, if there are any matters which you wish to discuss with the committee in private, the committee will certainly consider your request. Again, I welcome participants here this afternoon.
Participants

BENNETT, Mr Peter, Member, Whistleblowers Australia
BERTHELSEN, Mr David Ernest, Nominated spokesperson, Whistleblowers Australia
BUDAK, Mr Boris, Acting Merit Protection Commissioner, Public Service and Merit Protection Commission
COLEMAN, Mr Russell, Executive Director, Corporate Management Branch, Australian National Audit Office
COOPER, Ms Mary-Ann, Legal Officer, Community and Public Sector Union
De MARIA, Dr William, Lecturer, Centre for Public Administration, University of Queensland
HOLLAND, Mr Keith Colin, Assistant Secretary, Security Law and Justice Branch, Attorney-General's Department
McLEOD, Mr Ronald Neville, Commonwealth and Defence Force Ombudsman
McPHEE, Mr Ian, Deputy Auditor-General, Australian National Audit Office
PODGER, Mr Andrew Stuart, Public Service Commissioner, Public Service and Merit Protection Commission
RAMSEY, Mr Steve, Legal Officer, Community and Public Sector Union
SMITH, Ms Catherine Lucy, Principal Legal Officer, Attorney-General's Department
WHITTON, Mr Howard, Private capacity

CHAIR—Thank you all for that. I know my colleagues would rather hear what you have to say on the general provisions of the bill rather than ask you questions, at least initially. If it is all right with my colleagues, we might start by simply asking what is wrong with the current legislation and how that might be improved, and we will take it from there. We have the Public Service Act and the mechanisms for whistleblower protection under that—what are its problems? Why do we need to change?

Mr McLEOD—Given that I have covered some of these aspects in my written submission, maybe I could just highlight a couple of points relevant to the question that you have asked. I think one of the weaknesses of the scheme that is in place in respect of Public Service Act employment is the fact that it only applies to people covered by the Public Service Act. That leaves something of a void, in that there are a very large number of employees of various Commonwealth government bodies and agencies who are employed under statutes other than the Public Service Act and, as such, are outside the ambit of the public service scheme proper.

I also think members of the public do not have particular protections under the Public Service Act scheme, because it is a scheme that essentially applies to people within that jurisdiction—that is, people employed under the Public Service Act. It is essentially a scheme, as I understand it, that makes provision for whistleblower type disclosures by staff who are employees under the Public Service Act, and they make up only a part, albeit a fairly significant part, of the total area of Commonwealth employment. If there is a desire on the part of the government and the parliament to have a scheme that has more general application, I think there are some limitations related to the coverage of that scheme.

Senator FORSHAW—You spoke about people outside the Public Service—and presumably outside the other areas of Commonwealth employment—who are not covered.
What is the position with regard to their ability to seek some remedy or redress in the event that they are victimised or discriminated against as a result of exposing some information they have come across? Would it not be the case that in some circumstances there might be other legislation that could apply—for instance, antidiscrimination legislation in employment? Or is it the case that they are not protected in any way under the law?

Mr McLeod—As a general response to that, the two groups that I referred to that are not covered by the Public Service Act scheme are members of the public and employees of Commonwealth bodies who are employed under acts other than the Public Service Act. A member of the public who has knowledge that they wish to pass on in relation to a concern about an aspect of the administration of a government agency has the capacity to approach my office and to raise the matter with me, as Ombudsman. My legislation entitles me to examine a matter of maladministration, and I think whistleblower complaints would generally fall within that broad definition.

In the past my office has been prepared to accept matters of that kind that have been raised with them. They have been investigated, either because they have been treated as a complaint against an agency or, alternatively, the Ombudsman has been convinced that the matter warranted investigation and has proceeded to investigate the matter under his own motion powers that exist under the legislation. There are some limitations with that approach. While I would take a dim view of any attempt by an agency to improperly disadvantage a person who was complaining about an action of the agency, my act does not have any specific protections built into it to protect a whistleblower. I also only have the capacity as Ombudsman to make a recommendation. I do not have any determinative powers. Some might say that would put a member of the public in a weaker position in pursuing a whistleblower complaint under my legislation than might be the case if they were able to do so under specific whistleblower legislation.

In respect of employees of an agency that is outside the Public Service Act, my charter normally prohibits me from being able to deal with an employment related matter. Deciding whether a whistleblower complaint by an employee of a Commonwealth agency is of a character that allows me to take the view that it is not an employment matter as such is often a matter of judgment. The fact that the matter is raised with me by an employee may be simply incidental to the nature of the matter that is raised. Having said that, there are some limitations to my capacity to fully investigate certain matters raised by an employee of an agency if the matter is seen to have some direct relationship to their employment relationship with their Commonwealth employer.

Senator Murray—My question relates to the same topic and is directed to you, Mr McPhee. The whistleblowing act in the ACT nominates their Auditor-General as the authorised or official person; the PSA provisions do not. The intention of this bill is to do that—to follow the ACT designation. That is not just because of the independence of the office of Auditor-General but because of its focus for the sorts of complaints that are made, particularly complaints about corruption or dishonesty. I would expect improper conduct would more often be in the Ombudsman’s or the Merit Protection Commissioner’s area.

My question to you is affected by work we have done on another committee of which you are aware, whereby the Auditor-General’s department have found some difficulties with working out what the extent of your powers should be, because of the amount of contracted out or delegated work which occurs. In other words, public sector activity is being carried out in the private sector and, therefore, it is hard to work out what responsibilities you have to
audit. It is a theme picked up by Dr De Maria as well. He is interested in the extent of the act and believes agencies should be extended to include the private sector or to include organisations which receive more than 10 per cent of their annual income from government sources to carry out public purposes. The act has been deliberately designed to affect the public sector. I must say, on the record, that I believe that you do need private sector legislation, but at the moment it is public sector. With that long introduction, perhaps you could make some commentary on extent, and then it would be helpful if I could ask Dr De Maria to follow up.

Mr McPhee—Certainly if the Auditor-General was to be a proper authority it would be quite a change to his existing mandate. Currently, under the new Auditor-General Act, the Auditor-General has very wide discretion as to the matters he considers for audit in the performance audit area. He cannot be directed by ministers; even the parliament frames its requests as requests rather than directions. I think it is a pretty important principle that was adopted when the legislation was introduced. In the past the Auditor-General has had various roles, including determining electoral boundaries. When the new legislation came in, the decision was to make it purely focused on audit and to make the Auditor-General an independent officer of the parliament, with wide discretion but, obviously, with a legislative support for his independent position.

In terms of the office’s perspective on this matter, we are really not in favour of becoming a proper authority, but we would see merit in proper authorities being able to request the Auditor-General to do work in particular areas where there may be signs of systemic or significant issues arising. That is how we would prefer to operate, because we tend to look on a broader scale through our performance audit work, as you know. So we favour the existing proposal within the legislation, rather than the broader model, and we accept your point that some other Auditors-General do have this kind of role.

Senator Murray—If you could pick up the second part of my question—that is, the extent problem. The Public Service Act really reaches a limited portion of public sector activity. I would like your reaction to that.

Mr McPhee—Yes. Certainly in terms of our performance audit responsibilities, we have quite a wide charter. We can do performance audits of government agencies, of statutory authorities and of all companies, other than companies that are GBEs. We can span just about the whole public sector. And even for companies that are GBEs, the JCPAA, the responsible minister or the finance minister may request the Auditor-General to do an audit of a GBE. Further, the Auditor-General can suggest to those parties that a performance audit be done, so the Auditor-General has a very broad mandate. But it does not extend further to those bodies that receive a high percentage of government funding. The bodies that we can audit are only those controlled by the Commonwealth and not those that are recipients, say, of significant amounts of grant moneys. Having said that, when doing an audit of a department that provided significant grant moneys to a particular agency, we would make sure the department itself put in place proper governance arrangements to ensure they were getting the right information fed back from the grant organisation to assess whether the grant was meeting the intended objectives. Our focus is solely on public administration and not on non-government or non-Commonwealth bodies.

Senator Murray—Dr De Maria, could you follow up on the question regarding the extent of the law required.
Dr De Maria—Yes. I can only reiterate the point I made in my submission to the committee—that is, it does not make sense to cover people who are making public interest disclosures in the public sector without also taking into consideration that the public sector has changed remarkably in the last 20 years. Now we have privatisation, outsourcing, all the things that are familiar to you. We have government business enterprises and we still have this thing called the private sector. It does not make sense to focus on one particular part, because at the moment most of the five acts in Australia leave the private sector and the intersections between the public sector and the private sector uncovered with respect to protection. That is certainly a problem with the internal whistleblowing provisions in section 16 of the Public Service Act. If I may, I will add to that very quickly. I have two procedural points. May I table two documents?

Chair—Yes.

Dr De Maria—For the benefit of the committee I would like to table a document titled The Victorian Whistleblower Protection Act—pattting the paws of corruption?’. It is a paper I gave at Monash University last week. I think this might be relevant to you because my own view is that the Victorian act is probably the most powerful act in Australia. I also table Common law—common mistakes, the subtitle of which is ‘The dismal failure of whistleblower laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom’. It is a paper I gave at the first international whistleblowers conference at the University of Indiana in April. The other procedural point is that I would strongly urge you not to waste too much valuable time here discussing the flaw-ridden Commonwealth scheme.

Chair—I might call on Mr Podger in a moment to address that, because I am not sure that everyone agrees with you on that. I think there is some evidence that the system has some merits. Does the committee receive these two documents? There being no objection, it is so ordered.

I think everyone has a copy of the agenda for today. We have moved a little ahead of ourselves by looking at whether the new arrangements should cover the public and private sectors, for want of a better phrase. I want to go right back to the first question: does the current system work to protect public sector employees? It is probably our prime question. Mr Podger, you have made a submission that touches on that. Do you think that the current protections under the Public Service Act and the other legislation you refer to sufficiently protect Public Service whistleblowers?

Senator Murray—Chair, before you move on, I should explain—to Dr De Maria and anybody else who, as I do, takes the view that the current legislation is inadequate—that the difficulty the committee has is that we have to persuade the government of the day that it is inadequate. Therefore, the inadequacies of the present situation do need to be properly aired and exposed. That is why we have to attend to what you would regard as self-evident: if we cannot persuade the government, frankly, the law will not change.

Dr De Maria—I take your point, Senator.

Chair—At least for a short period. Let us not overdo it, but let us at least canvass it.

Mr Podger—I will take the question in two parts. Within the scope to which the system applies, we have no reason to believe it is not working. I hasten to say that it is early days; we have not had a large number of whistleblower reports come to us, and so we have not had a great deal of experience. The whistleblower reports we have had to date have been more from
people using the whistleblowing provisions as an additional means to pursue a particular concern they have had which they have pursued through other means.

One of the things that you need to have a balance about is ensuring that the scheme does work to facilitate legitimate public interest disclosures while at the same time not overburdening you with inappropriate use of the provisions. We are not in a position to give a view that we have got anything inappropriate; I am simply saying that where we have got to date, we have got no reason to believe that there are major concerns regarding the way it is being handled within the scope we have got. That scope is, as was mentioned, that section 16 protection, which under the act is only for current APS employees. The act does allow us to inquire into other concerns but not within the whistleblowing provisions. For example, section 41 provides a general provision for the commissioner to inquire into alleged breaches of the code of conduct by agency heads. Through that mechanism, there are ways to look at wider issues and concerns than just whistleblowing. But it does not actually attach the protections to it in the same way as the whistleblowing mechanism does.

If you look beyond the scope of the legislation, should past employees of the APS wish to make a complaint, they are not covered by section 16. They could, of course, make a complaint through the ombudsman arrangements. It is quite true that people who are in outsourced arrangements are not covered by the Public Service legislation arrangements. We have issued guidance to agencies, when they are in contractual arrangements, to look to see whether there ought to be some provision mirroring aspects of the APS values in their relations with contractors. This is particularly pertinent where the contractor is providing a service to the public on behalf of the government, rather than a contractor providing a service to an agency. We issue some guidance, but not in great detail. We suggest that they look at the application of values. This is an issue that has come up in the State of the service reports of the last two years. It is an area that we want to look at a bit more.

The APS is not by any means the whole Commonwealth sector. Certainly, our act does not cover areas outside the Public Service. There is a case, in my view, for the rest of the Commonwealth sector to have some guidance akin to our APS values, which may or may not include aspects of a whistleblowing approach. Work was done during the period up to 1999, not only for the Public Service but for the parliamentary service, to set out and articulate a code of conduct and a set of values. It would be sensible to apply most of those across the Commonwealth sector. Some of them would be different because of accountability or responsiveness issues where the particular nature of the business would suggest differences, but I would have thought there might be a case for saying that a number of these values ought to apply more generally across the Commonwealth sector. Within that there is a case for looking at something of the order of whistleblowing. Returning to the issue of being careful, you need to get that balance right. Whistleblowing is an important source of information to pursue fraud and corruption, among other things. It is used quite extensively, for example, in social security cases. I am aware that it is an area that has benefits, but you need to be careful that you do not impose an undue burden in the process. That will have to be looked at in the nature of those Commonwealth sector agencies beyond the APS.

**CHAIR**—On the issue of whether the current legislative scheme protects Public Service whistleblowers, I cannot remember whether your submission or someone else’s mentions that there have been three complaints.

**Mr PODGER**—There have been three complaints that have passed the test of being legitimate complaints within that context.
CHAIR—Over what period?

Mr PODGER—Two years.

CHAIR—Am I right in saying that you are suggesting that sometimes whistleblowing complaints can be couched as ostensibly in the public interest while also relating to what we might call private issues? The two are not necessarily mutually exclusive, but can that whistleblower legislation be used to pursue private interests rather than the public interest?

Mr PODGER—That is always a risk in these schemes, and it is why you try to ensure that the scheme has the balance right. There is always a likelihood that there will be claims that are pursuing more of a private interest than a public duty and, however you design it, you are always going to get some of those. I am not suggesting that our scheme has a problem with that, but I note that a little of that has been apparent in the cases. I certainly would not want to convey to the committee a feeling that that is a major problem. I do not see that as a major problem, but when you are designing the schemes you have to bear that balance in mind.

CHAIR—I have a general question: do you think that the current legislative scheme across the acts is sufficiently flexible and that it sufficiently protects Public Service whistleblowers?

Mr PODGER—I think that within the scope of the legislation—that is, within the Public Service—it does provide the protection that is needed. It provides an avenue for whistleblowing by APS employees, with proper protection.

CHAIR—Thanks, Mr Podger. Do my colleagues have any questions for Mr Podger?

Senator MURRAY—I am very interested in the reaction of the CPSU to that question of yours.

CHAIR—Thanks, Senator Murray. Ms Cooper, would you like to comment on Mr Podger’s evidence thus far, in relation to the Public Service?

Ms COOPER—Yes, I will comment in relation to the public sector employees we represent. We also represent some employees outside, strictly, the confines of this act. Our experience with this act is quite opposite to that of Mr Podger. We find the act incredibly weak when it comes to protections for whistleblowers. I would like to cite a case—I will not give any details, obviously—that I have been personally involved in with a whistleblower in a particular department. He made the allegations; the allegations were investigated; the allegations were substantiated; he had a commendation from his minister for his activities; and he is still being subjected to detrimental action within his department as a consequence of his activities. We are attempting to do all we can to facilitate a return to his workplace and to have him provided with some meaningful work but, if you look at the content of the legislation as it currently stands, there is no means to enforce those provisions. There is nowhere for us to go. The act makes the statement that a person shall not be victimised or discriminated against but, if that victimisation or that discrimination happens, where can they go? There may be access to judicial review, but lodging those sorts of claims—with the associated expenses—is not something that an individual employee would want to pursue. So we find the Public Service Act in many ways, particularly in relation to whistleblowing, ineffectual in providing the protections that it purports to provide for people in the public sector.

CHAIR—Thank you, Mr Bennett.

Mr BENNETT—I am no friend of the CPSU, but I have to support everything that they have just said. I have to actually run against Mr Podger explicitly. I think the fact that there
have been only three complaints in the last two years is an absolute condemnation of the current system. Most people will not come forward at the moment because there is an extreme chilling factor. If you come forward, you will get your head cut off. You will be danced on and you will be made to suffer.

If the committee is at all interested, I can bring 20 people through here who would love to come forward with information. It is not critical information, but it is about poor administration that is leading to dead ends that will not benefit the community and which could be rectified. These are people who would love to come forward, but they have a career that they are looking forward to, and they do not want to suffer. From my own experience, having been dumped on by the Australian Customs Service, I had to take the matter to the High Court. Two matters were reserved for constitutional hearing. Four were referred to the Federal Court. The day before the matter was due to be heard in the Federal Court, the charges and everything else against me were withdrawn and the Commonwealth paid costs. Trying to get that resolved has required me to go back to the Federal Court again. Expenses mount up, and it is the only way of being able to address issues where there is clear misconduct on the part of people—such as the abuse and misuse of power, which part of this act does not address; it does not even touch what we are proposing at the moment. So it simply is inadequate for trying to get those issues up and dealt with in a fair and proper way.

Regarding the suggestion that we go to the Public Service Commissioner, I have to say, with due respect: the previous Public Service Commissioner was a waste of space. I presented information to the Public Service Commissioner, and nothing was done. It was not handled. There was no inquiry back to say, ‘Can you substantiate what you are saying? Have your got further evidence? Would you like to discuss the matter further?’ It was a case of, ‘shove this under the carpet as deep as you can and as quickly as you can.’

CHAIR—To summarise that, Mr Bennett, you would say the protections from reprisals under the Public Service Act and related legislation are insufficient?

Mr BENNETT—They are virtually non-existent.

CHAIR—Thank you. Dr De Maria, in your submission, you talk about this, too—why people do not make complaints.

Dr De MARIA—Do you prefer to follow a process here, Mr Chair? Are you wanting to go around each one of us?

CHAIR—I am happy for anyone who wants to jump in to do so; please put your hand up. I am happy for you to make a contribution now, Dr De Maria.

Senator MURRAY—We want orderly chaos.

Dr De MARIA—I can promise you the chaos! I agree with the last speaker. This is a deplorable record; this is three customers in two years. If this was a business it would be in the Bankruptcy Court. We have to ask ourselves: why isn’t this doing business? We have to also ask ourselves why the ACT act is not doing any business. There were two customers last year. The Queensland act hardly does any business. There is hardly any good recording, but the Queensland Department of Premier and Cabinet in their 2000-01 annual report, in which they are bound to report on public interest disclosures, had none. People simply do not trust the law-makers—it is as simple as that. They do not trust the law-maker to say, ‘Here is a piece of legislation that will protect you if you come forward.’ I would have thought that the ‘children overboard’ issue would have bled whistleblowers from every corner of the Public Service, seeking refuge under Mr Podger’s scheme. I presume not one member came forward.
on that, and I am glad they did not. That is the first point, that there is a deep and far-reaching scepticism about the capacity of public administrators using these things called whistleblower protection acts to protect.

I will just make one more brief comment. You can make legal protections, and the acts do provide strong legal protections—for example, protections against defamation. That is okay. The law and procedures cannot protect against unofficial reprisals. In the Queensland whistleblower study, which still remains the largest study of whistleblowers in Australia, 100 per cent of all the people in that sample said that they had suffered one unofficial reprisal, and that was ostracism. You simple cannot legislate against ostracism.

CHAIR—It is very subtle, isn’t it?

Dr De MARIA—It is extremely subtle. You cannot have a Commonwealth anti-ostracism act—it just would not work. So people understand that even though they can get legally protected, the next day back on the job is still going to be pure hell for them.

Mr PODGER—Can I make a point of clarification. There were three valid reports made to the Public Service Commission. That is not the total number of reports made under the scheme. Under the scheme, the first provision is to make a complaint within your agency, to the agency head. We do not have a number for those. We are giving the number of claims that came through: there were three valid ones. There were a number of others which were not valid—for example, some from people who were not current APS employees, which goes to the issue of coverage.

CHAIR—I understand that. Thank you, Mr Podger. Mr Budak, do you have a comment?

Mr BUDAK—I will just mention that the Public Service Act was an act to provide for the establishment and management of the Australian Public Service. That is the four corners of that legislation; it was never intended to go beyond that. The office of the Merit Protection Commissioner is an office created under that act, and that is in effect, in very broad terms, the APS ombudsman, when it comes to the powers it has of investigation, review and recommendations. By government policy decision, this is all that we were meant to do, and we must operate within the legislation, such as it is. As far as it goes, in my experience—and I have been acting in this job for only five months—the act does provide sufficient protection against victimisation of APS employees only.

CHAIR—You think it does?

Mr BUDAK—Inasmuch as, if someone is being victimised, that would be in breach of section 16. Having regard to the provisions in the act in sections 13 and 15, which are the APS values and the APS code of conduct, not complying with the law is a breach of the APS code of conduct. Therefore, an APS employee who acts contrary to section 16 of the Public Service Act, or contrary to any other act for that matter, would be in breach of the APS code of conduct and could be disciplined. It is colloquially referred to as misconduct.

CHAIR—I understand that. It is a valid point. In a sense you are pointing to legislative protections, and important ones, and I hear what you say. But Dr De Maria’s point was very good, wasn’t it? The problem is not so much the legislation, it is the incapacity to legislate to prevent something like—to use his word—ostracism and other very subtle reprisals against individuals who blow the whistle. I would have thought that was a fairly sound argument.
Mr BUDAK—Yes, I have read Dr De Maria’s submission and that is perfectly true, but that would be true of the Public Interest Disclosure Bill 2001 [2002], as well as the public service sector and other legislation.

CHAIR—Absolutely. In a sense, it is not even a problem for legislators. It is such a difficult thing to encapsulate.

Mr WHITTON—I would like to make a point about what constitutes success and failure in this business, in response to Dr De Maria’s claims about raw numbers representing anything. I think we are very much in danger of comparing apples, oranges, bananas and pine trees. I do not think we know at all from the raw numbers whether an act is successful or not. The fact is we have a low number of complaints and reports in the Commonwealth. In Queensland, what is required to be reported is significantly different—namely, disclosures which have been made, investigated and substantially verified. The others are not reported. The fact that an act operates in a regime in which there are no verified disclosures in a particular reporting period does not mean the act is out of business. It may mean that, in fact, it is working.

The British system, under the Public Interest Disclosures Act in the UK, has generated some 900 cases. I have data this week from Public Concern at Work, the responsible charity that manages that act. Nine hundred cases of alleged reprisal have been put to the Employment Appeals Tribunal. Seven hundred of those have been withdrawn or settled. Data is not available about the split, but 50 have been through the tribunal and have resulted in awards of compensation or damages, ranging between £2,000 and £200,000. What do you make of the data? I do not know. It may be a reflection of the operating management environment; it may be a reflection of the degree of encouragement provided to whistleblowers or intending whistleblowers by the scheme that happens to be in place. Someone needs to find out; we do not know.

Dr De MARIA—I think it is interesting that Mr Whitton had to go offshore to attempt to rebut my argument. I could talk about Public Concern at Work if you like, but I would rather stay on Australian soil. The first point is that it has very low patronage; secondly, you can only make— and I stand to be corrected—public interest disclosures about allegations against breaches of the Public Service Code of Conduct. That is a worry to me because it pitches whistleblowing within an ethical context when it should be put into a corruption context or a wrongdoing context. For example, the 12th item of the code says that an APS employee must: while on duty overseas, at all times behave in a way that upholds the good reputation of Australia. Therefore, if you are in a diplomatic mission overseas and you make a public interest disclosure with respect to a misdealing employee in one of the missions overseas, technically you may be covered under these provisions, because that is an alleged breach of an ethical principle. But what happens if what you have done is not unethical but simply illegal? It is not covered here. I think the width of this is a worry.

Senator MURRAY—I want to ask Mr Holland a question. I have been scurrying through my papers and I cannot find it, but I recall a question from me to the minister representing the Attorney-General—it might have been to the Minister for Justice and Customs—about whether the government intends to introduce a more comprehensive whistleblowing scheme. I might say, in amplification of that, bearing in mind that the Senate committee that presented the report In the Public Interest was chaired by a coalition member and had very strong coalition support, we were all expecting something to come from that. The answer I got—and I could not find the exact reference—was that the government was looking at a more compre-
hensive scheme. Is there anything in train to enlarge upon or improve the current whistle-
blowing protections, such as they are?

Mr HOLLAND—The report that you referred to was handed down in 1995.

Senator MURRAY—That is right.

Mr HOLLAND—The government at that time prepared a fairly comprehensive response
to that report. Then, when the coalition came to power, I think that the plan to deal with
whistleblowing was looked at in the context of the Public Service Act. I may be wrong about
that, but that is certainly my understanding. In going through that process, the scope of the
scheme to deal with whistleblowing was narrowed down to the text that we now have in the
Public Service Act. The government thought that there would be some merit in looking at
other proposals outside of that that might go a bit broader. Consideration has certainly been
given to that. That is ongoing and has not been concluded at this stage.

CHAIR—Mr Podger, you caught my eye before in response to, I think, Dr De Maria’s
claims that something might in effect be illegal but not unethical.

Mr PODGER—I just wanted to clarify, first of all, that this issue was also raised in the
issues paper that was circulated. It was suggested that the code of conduct was loose, vague
and broad. I hasten to say that the code of conduct is in law, and the law, as the Acting Merit
Protection Commissioner said, allows for sanctions for breaking that code of conduct. Indeed,
the very fact that it is broad actually widens its scope rather than reduces it. The wording was
actually looked at very carefully in the process of developing the act. Within the code of
conduct I notice that in section 13 the fourth item says:

An APS employee, when acting in the course of APS employment, must comply with all applicable
Australian laws.

And then it goes on to talk about what that means. In other words, if a public servant breaks
the law, they have quite clearly broken the code of conduct, and there are sanctions available
under the Public Service Act, as well as maybe under the act which they have broken.

CHAIR—Under criminal law as well.

Mr PODGER—It may be under criminal law or there may be provisions in the Social
Security Act or whatever, but there are quite clearly in the Public Service Act sanctions
available for a public servant who breaks the code of conduct in terms of breaking the law or
breaks the other codes of conduct. So I do not think there is a concern that you could say that
this is ethical but not legal. This is legal.

CHAIR—We probably have to move on to further questions—perhaps questions 2 and 3
on our agenda. Before we do, can I just summarise. We have had some evidence from the
CPSU and from Mr Bennett and Dr De Maria that there is anecdotal and other evidence that
this scheme does not work very well. For example, reprisals are not sufficiently well catered
for and the act does not, in a sense, sponsor people to blow the whistle. We also have from Mr
Whitton, however, the observation—and I think it is a very good one—that it is very hard to
gauge the success of this legislation simply by looking at the amount of complaints, whether
through you, Mr Podger, through Mr Budak or through agency heads. The number of
complaints does not necessarily reflect the success or otherwise of the scheme; we would
probably all agree on that. Nonetheless, we still have anecdotal evidence—

Mr BENNETT—I disagree with that. I really believe that if the mechanism was in place to
properly protect people and to give them the opportunity to come forward about issues of
concern, I believe you would get a higher response and you would get a more conscientious Australian Public Service.

Senator MURRAY—I might throw a point in for discussion. I see this thing as having two main motivations, fundamentally: one is to meet demand, and the point you are making is that demand is not met, that there are lots more out there who are not expressing a view; but the other is to flush out and to create demand—namely, to satisfy the need to expose corruption, dishonesty, improper conduct and so on. So you have a body of unsatisfied people who want to speak, but you also probably have a body of people who in the right legislative framework might pipe up and actually assist in making our administration as clean as possible. I do not know if those compete, but I do see them as separate issues.

CHAIR—Let us agree that it remains a question. We can at least do that. The third question on the agenda is a fairly specific and very useful question relating to coverage of the proposed public interest disclosure scheme. The question seeks to find out whether there are Commonwealth bodies that would not come under the purview of the proposed legislation and, if so, whether this is acceptable for a Commonwealth public sector interest disclosure scheme. Currently, Ms Cooper or Mr Podger, what restrictions are there in terms of the application of the legislation? It does not apply, obviously, to every corporatised body and so forth, but what are the restrictions? Does the proposed bill cater more generally? Could you just comment about the Public Service Act and the restrictions on its jurisdiction?

Mr PODGER—As I said, the Public Service Act does not cover the whole of the Commonwealth sector. Agencies outside the Public Service Act are not just the GBEs. There are a number of other agencies, including the CSIRO and the Health Insurance Commission, that are outside the Public Service Act and, hence, the province of our scheme. No doubt there is a good argument to say there ought to be some provisions within those. I know a number of those agencies have internal arrangements, but they do not have the same authority that the Public Service Act provides. As I said in my earlier comments, I think there is a case for looking at the APS values and code of conduct more generally to see whether a considerable number of those could be relevant beyond the APS.

CHAIR—Thank you for that, Mr Podger. Ms Cooper and Mr Ramsey, still on the public sector in effect, would you also like to see the Public Service Act have a broader coverage to include those elements that Mr Podger mentioned?

Mr RAMSEY—The short answer is: yes, very much so.

CHAIR—Have there been any problems in any of those agencies? Do you know whether there have been any internal arrangements perhaps within those agencies? Do you know whether there have been any incidents where it has become an issue—where certain individuals would have benefited from the broader protections in the Public Service Act?

Ms COOPER—We go back to our initial point which is that we do not see that there are any protections that exist at the moment—or any that are sufficient. Yes, broader coverage would be better, depending on what form it takes. Obviously, with things like the breach of the code of conduct, you are not going to be able to apply those to employees of government contractors. You would have difficulty stretching that. I think the bill as it is proposed is good in that it goes further than the Public Service Act, but it could go further still.

CHAIR—Can we move from the existing framework to the proposed bill. Do you have any comments about the proposed jurisdiction of the purview of the new bill? Do you have any comments about its coverage?
Mr BERTHELSEN—I am not so sure that the bill actually covers law enforcement agencies like the National Crime Authority or the Australian Federal Police. In fact, I am certain that it does not cover the National Crime Authority, and yet that is an area where a great number of complaints come from. Many of the National Crime Authority witnesses have in fact ended up dead. Many of them get framed. There is a case before the courts which has been there for nine years. I think Keith Holland knows a lot about that case. That is a case that has cost the Commonwealth and the taxpayers probably about $10 million. That has been going on since 1993, and it still has not been settled. You have got one lone man, a fisherman, up against a bevy of QCs, silks, barristers and solicitors in court each time. That is the kind of situation which is not covered.

CHAIR—Under the proposed legislation?

Mr BERTHELSEN—Yes, that is my understanding. In fact, I think the Australian Law Reform Commission report addressed this issue but, as far as I know, the government rejected all their recommendations. So there is certainly a crying need for reform in the area of complaints and allegations made against the National Crime Authority, the Federal Police, and possibly in the Customs and Taxation areas and so on. The areas where most of the complaints are likely to come from are not even covered, it seems.

Mr BENNETT—Perhaps the question should be: why is any government agency with government employees excluded?

CHAIR—that is a good question, Mr Bennett, and I think Mr Podger in effect probably conceded a lot of that ground—that perhaps we should consider doing that.

Mr BERTHELSEN—I add another point: for any legislation to work, there has to be a perception by the people it is supposed to protect that it can work. If you look at this present act, it is full of holes. I did not even bother to comment on the previous provisions of section 16 of the Public Service Act, because I really do think the numbers speak for themselves. Let us look at what happens when you make a complaint under this act. Take, for example, the case that was in the paper just one week ago: ‘Austrade exits DFAT, can’t make the rent’. That is a good case in point. Would any of the public servants here today say that there were no public servants who knew the full circumstances of the shift out of that purpose-built building—built at great expense to the Commonwealth, and taxpayers, of course? There must be many people who understand the circumstances and know the full story. How many of those people have come forward so far or are even likely to come forward? I would say that you will not get any, because they know very well what would happen to them. It is just as Ann said: it would be a case of someone saying, ‘Off with their heads!’ They know for a fact that, even if that does not happen, their careers will go nowhere. I think those facts speak for themselves—numbers do speak. If there is a perception that it cannot work, nobody will come forward.

I think there is no transparency in the bill at present. If you put information before a permanent head, you have no idea at all what he has done to investigate the matters—whether he has investigated them thoroughly or whether he has investigated them at all. But you have to be satisfied with his decision. There are so many outs in the bill. There are provisions there which say, ‘The matter is vexatious’ or ‘The matter has been done to death.’ There are other avenues that you can take this matter to—you can go to the courts. But everybody knows that the victim of the system usually has no money. In the particular case that I mentioned before, the victim happens to be a fisherman who is dead broke, and he is up against the might of the Commonwealth, with its unlimited funds. What is more, when a complaint is made to an

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agency head, most likely the agency head will go straight to the Australian Government Solicitor and seek advice about whether one of these provisions will apply in the circumstances. So he can then write back and say, ‘No, it didn’t come within the ambit of the bill.’ Then, of course, the statistics will look quite good, because you will be able to say that the matter falls under the frivolous disclosures section—and I quote from the bill:

14 Frivolous etc. disclosure

A proper authority may decline to act on a public interest disclosure reviewed by it if it considers:

(a) That the disclosure is frivolous or vexatious—
Who defines ‘frivolous’ and ‘vexatious’? The bill continues:

(b) … lacking in substance—
and the agency head defines ‘lacking in substance’—

(c) … is trivial; or

(d) that there is a more appropriate method of dealing with the disclosure reasonably available; or

(e) the disclosure has already been dealt with adequately.

You have to take the decision of the permanent head as final, because there is not any avenue of appeal as far as I can see.

CHAIR—Mr Berthelsen, thank you; you have critiqued the bill very quickly in many areas. We might go back and look at some of them more comprehensively in a minute. Do you think that the bill is an improvement on the current legislative framework?

Mr BERTHELSEN—I would like to say yes, but I will have to say no, for one reason: many people do not look at a bill in detail before they take action. They say, ‘There’s a bill; I’ve got protection,’ and then they proceed. They jump into the deep end and suddenly discover that they have dived into shallow water and they break their necks. That is the most likely thing that is going to happen. There have to be penal provisions—solid provisions. When a person takes action and goes to the permanent head of a department, his career can grind to a halt. How does he ever prove to anybody that there has been action taken against him? He cannot. With that perception in mind, I think you would be a fool to proceed with any action under this bill.

Senator FORSHAW—Do you have a solution to that problem then?

Mr BERTHELSEN—Yes. I think solutions were canvassed at great length back in 1994 in the recommendations of the committee. I think there is one very important part in that submission: ‘Education will bring about cultural and attitudinal change.’ At present I believe there is a culture within the Public Service and the political arena of denial and cover-up. We saw that in the ‘children overboard’ incident. We saw, immediately, denial that these things had happened. After, when the facts started to come out, we saw an attempt to cover up. That seems to be the natural reflex action. Back in 1994 the recommendation was this:

The Committee further recommends that, in order to enhance the campaign’s acceptance and likelihood of success, strong public statements of support should be given at the political, senior management and union level.

They also said:

… the benefits of reporting wrongdoing, accepting such reports and taking appropriate investigative and corrective action—
has to be sold to all the stakeholders. That includes the permanent heads. I do not think too many permanent heads would be sold on the benefits of somebody complaining about illegal and corrupt conduct within their own agency.

There is one more point that I thought was very good:

The Committee further recommends that regular meetings should be held between Commonwealth and State Ministers (Ministerial Council) and organisations responsible for administering whistleblower protection or equivalent legislation.

I think that is an excellent idea but, unfortunately, it seems that all of these recommendations were thrown out holus-bolus, and we are left with a dead duck bill.

**CHAIR**—I note that the submission from Whistleblowers Australia submitted by Dr Jean Lennane, the national president, endorsed the findings of the 1994 inquiry—correct me if I am wrong.

**Mr BERTHELESEN**—No. She said:

... there is no case known to us where ACT legislation on which Senator Murray’s Bill is apparently modelled has been effective in protecting the whistleblower concerned.

That is in the third paragraph. It goes on:

Unfortunately the recommendations of the previous Senate Committee were never implemented, either by the Labor government who were still in power at the time, or by the Coalition when they were elected not long after ...

Further down she says:

There are a number of problems with the legislation now proposed by Senator Murray, which would not have occurred if he, and/or those drafting the Bill—

**CHAIR**—Thank you. I am sure that is right, but doesn’t she say, up the top, in the third paragraph:

The 1994 report incorporated detailed recommendations for whistleblower protection legislation, which were completely acceptable to WBA ...

**Mr BERTHELESEN**—Which paragraph?

**CHAIR**—That is about the third paragraph. Further down, in paragraph 6, where she says:

There are a number of problems with the legislation now proposed by Senator Murray ...

She then goes on to say:

... indeed, given that the 1994 inquiry was extensive, comprehensive and expensive, it would seem a suitable subject for whistleblowing if the present Inquiry were to attempt to reinvent the wheel at public expense ...

**Mr BERTHELESEN**—That’s right.

**CHAIR**—Again it is saying that the findings of the 1994 inquiry were appropriate, comprehensible and acceptable.

**Mr BERTHELESEN**—Absolutely.

**CHAIR**—So you do accept that?

**Mr BERTHELESEN**—Yes.
CHAIR—Sorry, I misunderstood. Going back to the proposed bill, you delicately cast your mind across a lot of issues, a lot of criticisms. What are the principal ones? Can we look at them one by one and then open the discussion?

Mr BERTHELESEN—Education is very important, because you are going to have to sell this to the permanent heads. They have a stake in this. I cannot imagine any complaints of any magnitude that a permanent head would not see as a possible slur on his managerial ability.

CHAIR—So you need an independent agency where the complaints can go to?

Mr BERTHELESEN—Yes.

Senator MURRAY—I am going to be very careful not to defend the bill, because the purpose of this is to elicit criticisms, so I welcome them. But I would point out that the proper authorities in the bill include the agency head, the Public Service Commissioner and the Public Service Merit Protection Commissioner, so you do not have to go straight to the agency head; you can go in other directions if you wish—that is section 9(1) of part 2.

Senator FORSHAW—I would like to pick up on something that Mr Berthelsen said there. You commented that permanent heads would decide that something was a reflection on their management. I am trying to understand how extensive your concept of whistleblowing is.

Mr BERTHELESEN—it goes back 20 years.

Senator FORSHAW—Forgive me, I do not have the sort of involvement in this committee that my colleagues here have. I come to this fairly new. I am aware of what has been debated in respect of whistleblowing over the last few years. You seem to be focusing on something that goes beyond exposure or somebody providing information which has a relationship to the sorts of things that Senator Murray has spoken about—corruption or cover-up or whatever as distinct from what could be complaints about management and efficiency, which of themselves may not necessarily have anything wrong with them legally or even ethically. It could simply be bad administration.

Mr BERTHELESEN—Yes, but until the matter is investigated we cannot always be sure whether it is bad administration or fraud or corrupt conduct.

Senator FORSHAW—Okay. So your complaint there is that the propensity could be to refuse to investigate or to put a barrier up against investigation, on the basis that whatever is exposed ultimately reflects on management.

Mr BERTHELESEN—Yes. People are human.

Senator FORSHAW—I understand that.

Mr BENNETT—Regarding the example that the CPSU used, I do not care which middle manager was involved in starting their client’s problem, I will bet pounds to peanuts that the agency head knows about it. It is not happening in some sort of vacuum and in isolation. Right from the word go, the relevant agency head has known about every single case that I have been involved in—and there have probably been 30 over the last 30 years. Taking it to the agency head would not solve the problem in the slightest. It would not resolve the matter in any way, shape or form. With an issue that is as powerful as this—that is, you are complaining about the administration of an agency head’s department—once the ball starts to roll and names start to be written on paper and suggestions of misconduct, abuse of power or possible fraud or corruption start to get up, it goes up the line within minutes to the agency head. Appealing to the agency head from that point on is just a waste of time; the position is prejudiced. The opportunity for fairness is immediately corrupted. If there is going to be any
chance at all for the issue to be dealt with properly, the agency head should immediately flick it outside his department—

    CHAIR—To an independent body.

    Mr BENNETT—to somebody else, saying, ‘I understand that there is a problem. I have taken a quick look at it and it looks like it might have some legs. Here it is over to you. I do not want to be involved; I do not want to know about it. Just come to back me when you have found the answer.’

    Senator FORSHAW—I cannot help thinking about a recent inquiry conducted by a departmental head which came out of the ‘children overboard’ inquiry.

    CHAIR—You are not going into that.

    Senator FORSHAW—I will not. I thought I would just say that. But that is the age-old problem, isn’t it?

    CHAIR—Ms Cooper and Mr Ramsey, this is in the bill: do you want to comment on whether the complaint should be directed to the agency head or whether there should be an independent body? The question really is: do you see in principle that this could be a problem for agency heads? Secondly, has it proved to be a problem in practice?

    Ms COOPER—Definitely. That is our experience. I think one of the submissions said that it is like asking Caesar to investigate Caesar. You are reporting a problem about that person’s agency. To get the investigation done in any objective way, it needs to go to an independent person. Our problem is that, even when they are investigated within the agency, when those steps are taken—which does not happen very often, but it should—at the end of the day you cannot breach the whole personnel section of a department because they have not placed you in a job or they have sent you somewhere to your detriment as a result of your whistleblowing. There is not a way to adequately get a remedy for that. But if you have someone external to the organisation independently viewing and investigating the allegations, then there is that extra pressure brought to bear on the agency itself that may well resolve the issue.

    Mr McLEOD—if I could make a comment which I hope is helpful on this question of the role of the head of an agency as against the value of having an external investigator, I think that issue is very analogous to what happens in my normal jurisdiction. My office receives in excess of 20,000 complaints a year. We have a policy of, in most cases, requiring a complainant to have sought to pursue the matter with the agency itself before we conduct an independent investigation of our own. There are good practical reasons for that.

    I think whistleblower complaints are not dissimilar, in a sense, to the sorts of complaints that come to my office. Some can be very grave, very serious and very complex; others can be much more straightforward. I do not think there should be a presumption that the head of an agency will always be defensive in relation to the investigation of a complaint that is made about some aspect of bad administration within their agency. We refer about two-thirds of our complaints immediately back to the agency, with the comment to the complainant that, if they are unhappy with the outcome of the agency’s investigation, they are free to come back to my office and we will have a look at the matter again. In practice, very few people come back to my office saying they are dissatisfied with the investigation by the agency. The agency, in by far the majority of cases, is able to reach a satisfactory accommodation with the complainant.

    Senator FORSHAW—Do you get a report?
Mr McLEOD—We do not get a report. We leave the onus with the complainant to come back to our office, and we encourage them to come back if they are in any way unhappy with the response they receive from the agency. Against the background of that experience, I would argue that there should be the capacity for a person to submit a whistleblower complaint direct to the agency but, if for any reason they feel lacking in confidence that the matter will be investigated thoroughly and objectively, they should have the opportunity to lodge it with an external investigator. I do not think the legislation would be well placed if it were designed to discourage whistleblowers from in some cases taking the matter up directly with the agency itself.

Senator FORSHA W—I do not want to dispute what you have just said; I can understand the fact that if the complainant does not come back to you, there is the presumption that the issues have been resolved. I suppose it could happen that the complainant may be satisfied, give up, drop off or whatever, but the issue that has been raised may not necessarily be satisfactorily resolved, because the complaint that is made may have ramifications beyond that individual, particularly if it is exposing some practice that should not be happening. Do you understand what I am getting at?

Mr McLEOD—I understand what you are saying.

Senator FORSHA W—Senator Murray’s bill, of course, relates to public interest; that is, as well as ensuring that the individual is protected and, presumably, that the individual is satisfied that the issues are being addressed, it is important to remember that there is a public interest in the outcome of the process.

Mr McLEOD—I understand what you are saying, but in any system you have to make pragmatic judgments about resourcing and about overlap and adjudication and so on.

Senator FORSHA W—You have statutory obligations. It is not a criticism. I am thinking out loud here. We have seen internal investigations in New South Wales in some agencies or the police force, and there has been a lot of debate about how adequate they are.

Mr McLEOD—My experience with whistleblowers is that it generally takes a lot of courage for a person to become a whistleblower. If they are encouraged to pursue the matter direct with the agency itself and they are in any way dissatisfied with the outcome of the investigation by the agency itself, I would be surprised if most of those people would pass up the opportunity to continue their grievance with an external agency—if they have the knowledge that they can go to an external agency—which is prepared to listen to their complaints and to test whether or not the agency has responded satisfactorily. There is something to be said for setting up a set of arrangements that encourages, as a first port of call, a person with a grievance about an agency to take it up with the agency itself, at the same time—as part of the total arrangement—having the option to approach an independent investigator with authority to take the matter up.

Mr WHITTON—Regarding some of the earlier points about 1994, I think it is worth pointing out that 1994 experience is really ancient history. You need to remember that, with the exception of South Australia, no legislation protecting whistleblowers was in place until the end of 1994, and so inquiries and submissions were at best speculative at that time. South Australia’s legislation was brought in in 1993. Early experience was patchy, but later experience has been much less patchy, and I think we need to focus on later experience to get a reliable picture of what actually happens.
I am really concerned about an assumption that chief executives or directors general will act in what is really a flagrant conflict of interest in favour of themselves by adopting the stereotype that we hear as the standard Whistleblowers Australia position. My experience is different. Indeed, I have experience of people in the workplace, not chief executives, whose response on learning that a disclosure has been made from that workplace is one of relief—‘Thank goodness somebody has finally brought that out in the open.’ It is not universally a matter of, ‘Let’s go after the whistleblower and shut this thing down.’ It simply is not helpful to talk in terms of only that stereotype. Sure, that happens, and I am not disputing that, but it is not the only response by any means. If somebody did the research, I suspect they would find that that response was more prevalent in 1994 than it is today. I do not know. Again, we need some research about this.

CHAIR—Thank you for that, Mr Budak.

Mr BUDAK—I wanted to add something to what the Commonwealth Ombudsman said. In relation to our own jurisdiction, what are called ‘complaints’ in the Ombudsman’s office, we call ‘applications for review’. This is distinct from a discussion in his office. Our statutory scheme provides for applications for review of employment related action to be addressed normally to the agency head. However, there are four statutory exceptions which are set out in the regulations. I suggest the principles are probably universally applicable.

The first statutory exception is that, if it is considered that the agency has been personally involved in a particular action, they should go out. The second is when it is not appropriate, because of the ‘seriousness or sensitivity’ of a particular action, for the agency head to deal with the application. The third is when the action is claimed to be victimisation or harassment of the employee for having made a previous application for review—which is also possible. The fourth one is a bit different. These relate to determinations that someone has breached the code of conduct, where sanctions have been imposed for the breaches. When the legislation was being framed, the view was taken that that kind of situation was not susceptible to effective internal review.

CHAIR—What Mr Whitton called ‘clear conflict of interest’ situations are, in effect, externally—

Mr BUDAK—They are provided for in the regulations, yes.

CHAIR—Mr Podger, did you want to add something?

Mr PODGER—I want to make a couple of very short comments. First of all, the issue of an agency head being the first port of call for a review is entirely in line with the whole philosophy of the Public Service Act—which was a bipartisan arrangement when it came through here—which involved putting the onus on each agency head, as the employing authority and so on, with all the direct responsibilities. But the act does provide for external review of certain decisions and processes. There is capacity to come to the Merit Protection Commissioner or the Public Service Commissioner in certain arrangements. The very existence of a capacity for an external review does discipline the mind of an agency head in applying it.

But I also agree with Mr Whitton that an assumption that the agency head is naturally trying to avoid whistleblower reports or avoid looking at things where there might be corruption or fraud in his or her agency seems to me to be outside my experience. I am not saying that there is not concern in some places and on some occasions about whistleblowers, but for the most part agencies have internal audit arrangements and all those sorts of things.
They are concerned for the good management of their organisation, and they should not be typecast as having a different view. But having an external review capacity does provide support.

There are a couple of other things around this issue of coverage. I am not quite sure about the bill’s suggestion of direct coverage to contractors and service providers—as being directly legal. I think that does present some interesting issues that would need to be tested out. Just be careful about whether you are actually going to cause some difficulties with that. It is something that needs to be teased out. As I said, we provide some guidance. For example, the employment department tries to put some provisions reflecting the values into the contracts it has. But I am not quite sure what the implications would be should you put that into legislation here.

Another issue we raised in our submission was: if you were to go wider, who would be the external authority? I feel very uncomfortable about being the external authority in a much wider scheme, because I think that could cause difficulty between the Ombudsman’s jurisdiction and my own. I think there is a strong case, if there is something wider, for the Ombudsman to play more of a role rather than adding too much more to my responsibilities.

CHAIR—So you would see your role as restricted to the public sector?

Mr PODGER—I think my role ought to be restricted to the Australian Public Service, which is what I am. Public concerns out there about administration of programs and so on are, for the most part, better handled by the Ombudsman. I think there are some times when there is a grey area between us, but that area is reasonably limited at the moment. Under the bill, I think that grey area would be quite a lot greater and it might be worthwhile clarifying further.

CHAIR—Mr Podger, what do you say to the suggestion that someone like Clive Ponting, the famous Belgrano whistleblower, with very serious information that reflected on the Public Service, ministers or perhaps even the Prime Minister, would do far better to go in the first instance to Mr McLeod, for example, than to the head of the Department of Defence; that, if he went to an agency head, the agency head might respond defensively?

Mr PODGER—Right now, an APS employee can come directly to the Public Service Commissioner or to the Merit Protection Commissioner, if there is good reason to believe there is a problem for the agency, in which the agency head may be a party. It is not as if you are not allowed to under any circumstances. There is some capacity. I am not opening the welcoming doors to get everything coming to us, but there is some capacity for it to come forward.

Mr RAMSEY—It may well be that a particular agency head or agency heads in general will respond positively and properly to a complaint or a matter being brought to them. It seems to us that the whole point of having protection for whistleblowers is to encourage people to blow the whistle, and you need to put yourself in the shoes of the would-be whistleblower, and say, ‘Are they more likely to do what it is we are putting steps in to protect them to do, if the person is independent or if they are the agency head?’ I think nobody in this room would think for one moment that they would not be more likely to come forward if the body to whom they complained was independent than if the body was the agency head.

Proceedings suspended from 5.10 p.m. to 5.28 p.m.

Senator FORSHAW—I want to ask what requirements there are, if any, on departments to report on complaints that have been raised which would be section 16 matters under the act? For instance, do we know whether departments would compile and actually internally
report—I am not aware of whether they externally report such as in an annual report—and say, ‘During the year we had X number of issues raised that could be regarded as coming within that section of the act and they were disposed of in one way or another.’ They might be categorised in one way or another as to what they were dealing with. Does that happen? If it does not happen, should it?

Mr PODGER—There is no formal requirement but for the next State of the service report I have, only in the last week, sent around our questionnaire to agencies on the issues that we wish to raise in the State of the service report and that questionnaire does include exactly what you are asking; we are asking agencies to advise us on the number of cases by category.

Senator FORSHAW—And the outcomes of that?

Mr PODGER—it is too early yet for me to say whether they are going to be able to answer that or not. We have had some discussions with a couple of agencies around our questions to ask if they are questions that can be handled and we have been advised that they ought to be, but the proof is in the pudding. We have actually gone out just now to get that information for the next State of the service report.

Senator FORSHAW—Just thinking out loud, it seems to me that that sort of information could be useful, if nothing else at Senate estimates committees, because we have had some dispute around the table here about whether or not the fact that you have had only three or that you, Mr McLeod, have had a whole range and you have referred them back and nobody has complained after that means that they have all been resolved. I am just thinking of the data around that. Do issues arise about whether or not a complaint actually fits within section 16, for example, if an agency head or a departmental head says, ‘We don’t think this is really a code of conduct breach’ or whatever?

Mr PODGER—I suspect there will be because, as I said to you when I mentioned the three valid ones which came to us, there were a number of others which did not fit within the bounds of section 16 where the people who came to us thought that they did; in particular, people who came from outside and so on. So we have gone out with this questionnaire. We agree with you that this information would be very useful; there is clearly an interest not only in the parliament but more widely in seeing where this is going and how it is operating. But I cannot be sure how robust the data will be in our first round. If in fact it proves that we have difficulties with that data, we are going to have to work out some other way to get that information, but we are not going to get that unless we have a go at it first. I do think it is the kind of information that we ought to be collecting on a regular basis.

Senator FORSHAW—So what you are saying is that each of the departments employing people under the Public Service Act would actually be required to provide that material to you?

Mr PODGER—for the State of the service report we go out with questionnaires on a range of issues—I have forgotten how many questions we have, but it is a fair number—which seem to us to be particularly important. In this year, we felt that the issue of whistleblowing was of particular importance. We also hope that, just by going out, we encourage agencies in the way that they collect their own information in the future. There is not a requirement on them and I am not actually forcefully telling them that they must.

Senator FORSHAW—I understand that there is not.

Mr PODGER—I think the very fact that the Public Service Commissioner is writing out and is going to put it in the State of the service report will be influential
Senator MURRAY—I think the question of data is an important one and I also accept the argument that we should be careful of numbers telling the whole story. To follow your question—to support it—I would like to ask whether there is anyone else in the room who has physical numbers which emerge from complaints which do not fall under the specific provisions of the act, because if it is brought under the specific provisions of the act I would think that it ends up in Mr Podger’s lap, principally. For instance, would the Auditor-General have a number of whistleblowers appear a year or are they all anonymous and you get little anonymous letters and packages such as politicians get?

Mr McPHEE—We certainly get a range of letters from citizens and organisations; certainly I would not categorise them all as whistleblowers. In fact, I do not recall seeing anyone who actually nominated themselves as a whistleblower or referred to particular provisions in legislation. They cover the full gamut of issues from, say, people concerned at the way they have been treated by the Child Support Agency, the tax office and other agencies; organisations concerned with how a particular industry is being treated under current arrangements. We have a variety of responses to those. We track them fairly closely and make sure the individuals or the organisations get a response from us.

Senator MURRAY—Typically, are those anonymous?

Mr McPHEE—Most would not be; most put their name to them. At a rough guess, 20 per cent that might be anonymous, but the majority of people put their name to them. Often it is not the Auditor-General who is the only addressee, as you would appreciate. They often spread these concerns quite broadly, including to ministers, agency heads—

Senator MURRAY—Parliamentarians.

Mr McPHEE—and parliamentarians et cetera. It is wide and varied, in terms of the addressees. Most people do put their name to them.

Senator MURRAY—Does the union get much of that sort of thing coming to them outside of the formal process?

Mr RAMSEY—It is a bit hard for me to answer that—only because of the role that I perform in the union—but I have certainly provided outlines to other employees of the union who are responding to queries from members such as, ‘What will occur if I go down this path or that path?’ In terms of the union as a whole, I am sorry but I cannot be any more specific than that. Perhaps Ms Cooper can be more specific.

Ms COOPER—even with the questionnaire that is going out, a lot of the whistleblowing allegations never see the light of day because people are concerned that they do not have adequate protection. Any number gathering will never give you a good picture while there are no protections in place for the people who might be making those allegations. You will find that you will not get a good representation of what whistleblowing activities are going on because people coming to us are given the answer—and it is not always a good answer—that there is no protection in the current legislative framework, so it is not in their interests to pursue the matter.

Senator MURRAY—that is all I had to follow up.

CHAIR—one of the questions on our agenda is whether there should be a requirement for anonymous public interest disclosures to be received and investigated. Ms Cooper, you say there is a problem because people are concerned that they are not protected by the current framework. Do you think that agency heads—or, indeed, merit protection review and so
forth—should investigate anonymous complaints? There are issues of expense, whether it is appropriate, whether the matter could be potentially defamatory, et cetera. What do you think?

Ms COOPER—Do you mean can they, under the existing legislation, or should they be able to make anonymous disclosures?

CHAIR—Not only can they make anonymous complaints but should agency heads be required to investigate?

Ms COOPER—That would be desirable. Anonymous whistleblowing is provided for in just about every other piece of whistleblowing legislation and there are obviously good reasons for that. It is in our submission, too. Obviously, the receiving agency—which we say should be an independent agency—if it were the agency—

CHAIR—Whatever.

Ms COOPER—should have some discretion. There may be some complaints that are totally frivolous. You could not say that they would be required to investigate every single one of them.

CHAIR—So you would say that, where the complaint is anonymous, it would be at the discretion of the agency head or the appropriate investigating agency?

Mr RAMSEY—I think Ms Cooper was saying that the discretion should be there, whether or not it was anonymous, but there should be the capacity to make anonymous whistleblowing complaints, or indeed through a third party.

CHAIR—Sure. It is whether those complaints should have to be investigated and, as you say, Ms Cooper, there are problems with that, aren’t there?

Ms COOPER—Ideally, they should all be investigated but, if someone complains that their next-door neighbour works for the Department of Foreign Affairs and Trade and has run over their cat, that is the sort of thing I am talking about, obviously frivolous ones. You cannot say carte blanche that absolutely everything needs to be investigated.

Mr PODGER—The Public Service Act provisions do not make a distinction between anonymous and not anonymous complaints. There is no policy not to consider anonymous ones. Our line would be, whether they are anonymous or not, that there is a discretion to look at them under the same criteria as mentioned: that if they are frivolous we may not do so but, if there is some substance, we will. Anonymous complaints can prove to be very valuable.

CHAIR—Sure.

Mr PODGER—The issue with the anonymous ones is that, without knowing the person, the investigation can be limited. For instance, there was the ACCC case recently where they said they found it difficult to go to the next step—if they could not find the person to talk to them further. There can be difficulties in pursuing complaints, but there is certainly not a policy not to examine anonymous whistleblowing.

Senator FORSHAW—I am not suggesting that it should not happen, but they can also be prejudicial to another party. This has been an issue that has been raised with the operations of ICAC in New South Wales on occasions. I might be wrong, but I understand they are required to investigate all allegations that are brought to them, a lot of which may be anonymous. That can produce situations where, if allegations are made about another individual, that person is not able to be advised as to who is making the allegation. I am aware of examples of that.
Particularly where the allegation proves to be unfounded, you do not know who your accuser is.

Mr PODGER—There can be difficulties in the investigation, but there is certainly not a policy that we do not look at anonymous ones.

Senator FORSHAW—I am just raising that. It is an issue that has been raised elsewhere.

CHAIR—Mr Whitton, would you like to comment on the issue of anonymous disclosures?

Mr WHITTON—It is quite a complex issue. I was involved in developing the Queensland model in the 1991, 1992 and 1994 iterations, and then administering it for 1995, 1996 and 1997. You need to think not only about anonymous disclosers. Let us make a distinction between the discloser and the disclosure for the moment. The only relevant question is: is there enough information to investigate the disclosure and is it true? This is broadly the position that the major submissions have made. You also need to take account of unintentional disclosures where, in the course of ordinary business, a public servant will disclose something which amounts to disclosable conduct. What do you do with that? There is the further problem of how you provide protection against reprisal for a person who has made an anonymous disclosure and who later comes to you and says, ‘I am having reprisal action taken against me because everyone suspects it was me.’ Whether or not it was in fact them, there is a problem. You have really significant problems trying to protect someone because everybody else thinks they were the discloser when they were not or thinks they were the discloser when they were.

Mr BENNETT—I have one of those at the moment.

CHAIR—Dr De Maria, I know you wanted to say something before about reporting agencies, but what about the issue of anonymous disclosure?

Dr De MARIA—I want to put another position to Howard’s position. This notion that one has to make a distinction between the material that has been disclosed and the discloser does not hold up in law, because in all the whistleblower laws in Australia there is the administration of the good faith test. You cannot get protection unless you pass that test. In other words, the investigator or investigating authority has to come to the conclusion that the disclosure was made in good faith. That is clear, black-letter law in all the statutes, I think. In that respect, we treat whistleblowers differently from informants. We treat whistleblowers differently from police informants, for example, or a public interest annunciator. That is someone who rings up the ATO and says, ‘My ex-business partner has been screwing the Taxation Department for 10 years. I’m not going to give you my name.’ On the informant situation, most of the investigators or investigating agencies are less interested in the discloser and more interested in the disclosure. So they will go on the information, irrespective of the motive. But what we have here is whistleblowers having to submit to a motivation test or a good faith test. That, to me, is a reflection of the cultural schizophrenia with which we see whistleblowers. We do not know whether to lionise them as heroes or to reject them as schoolyard dobbers. We have a contradictory attitude to them and I think it is reflected in that position.

CHAIR—Thank you. Mr McLeod.

Mr McLEOD—What I was going to say has been mostly covered by other speakers but I could pick up on what William has touched on. The attitude towards how you would deal with an anonymous disclosure is somewhat similar to how you would deal with a disclosure from a person where you would question whether or not that disclosure was made in good faith. In
the final analysis, it is really the nature of the disclosure and the substance that might appear to be in the disclosure that is the important consideration. These other issues are peripheral. If one receives a disclosure which is sufficiently specific to raise an alarm that there may be something untoward that warrants investigation, in my view most investigators would seek to investigate the matter, whether or not the person is known or whether or not they have any suspicions about the bona fides of the person. In the final analysis it is the nature and substance of the disclosure that is really the important issue. These days most public agencies would not reject an anonymous disclosure simply because it is anonymous. They would make their judgments about whether they can be held accountable for not having investigated a matter brought to their notice, if it ever became an issue in the future. It gets back to somebody’s accountability for deciding not to pursue a matter that has been brought to their notice, notwithstanding how it was brought to their notice.

CHAIR—A failure to act?

Mr McLEOD—Yes.

Senator MURRAY—With respect to the points you have made and looking at the bill before us, it might imply some reshaping with how you deal with material received. But in terms of protecting people from victimisation it seems evident, therefore, that you have to protect people not only who are known to have disclosed but also who are believed to have disclosed even if they have not. Do I understand correctly?

Mr McLEOD—Yes.

Mr BENNETT—I agree wholeheartedly with the points Mr McLeod made. I am an intelligence analyst and even acknowledging whom you got the information from flavours the way that you look at a matter. The best idea when you get a piece of information is to ignore whom it came from and look at the information. After you have had a look at the information consider where it came from and add some extra weight to it. I think any objective assessment of any matter, whether it arrives anonymously or from an identified person, is treated as anonymous mentally by the investigating officer to start with to see whether it has legs. Walking away from it simply because it was anonymous would be about the most dangerous thing you could do—that is heading for a Senate inquiry and getting rapped across the knuckles really hard and you do not do that. The second something arrives on your desk, you take an objective look at it. Then the only reason you bother to look where it came from is to raise its credibility. You look at the evidence to start with. That is the position that anybody would really take if they were looking at something which did arrive anonymously. The receipt of anonymous information is a requirement under the act. We have to accept that we have to be able to look at it, weigh it up and use it as it has been received.

Dr De MARIA—we are talking about whistleblowers and as far as I am concerned ‘anonymous whistleblower’ is a contradiction in terms. The position of an anonymous discloser erodes the argument about protection. Unless you have very unique information that only you and maybe two other people on this earth share and the disclosure of that will flush you out immediately—a most unusual situation—the anonymous informant goes that route simply because they want to drop the information at the doorstep of the investigator rather than have their face disclosed. I suspect that there is a great range of positions in the Commonwealth Public Service with respect to whether they deal with anonymous whistleblowers or not. I suspect that there would be many agency heads who would not tolerate an anonymous whistleblower internally, who would demand that that person put their name to the allegation. So I think there is a fair deal of inconsistency with respect to that.
think the main point is you reduce the argument for protection with anonymous whistleblowers.

Mr WHITTON—To make a huge generalisation, the one thing we learned from the American experience with whistleblowers in the eighties, based on their legislative attempts in 1978, was that the motivation, the mind-set and even the sanity of the whistleblower ought to be treated as irrelevant. What is important is the disclosure and whether there is enough information to go on. It may well be difficult to make progress, having started an investigation, if you cannot go back for more information when you need it. But I know of agencies that have developed circuit-breaker mechanisms, whereby the discloser remains anonymous, through a third party. That is straightforward enough. I spent some 17 years of my career in the Commonwealth, some of that in social security, and I have to say that some of our best disclosures of fraud were motivated by pure malice.

Senator MURRAY—Motive is important. Earlier I raised the issue of meeting demand versus stimulating demand and I did that deliberately. Back in my memory—and I have got it somewhere in my papers in my office—is the American bill which actually rewards people for whistleblowing.

Mr WHITTON—Yes. It is the False Claims Act.

Senator MURRAY—That is right. It seems to have generated billions of dollars worth of returns.

Mr WHITTON—For lawyers.

Senator MURRAY—Yes. But, in our circumstances we are reviewing here, I would expect whistleblowing to have a range of existing motives which would include malice, moral outrage—a whole range—but not yet reward. In the back of my head is a question as to whether that False Claims Act is a model which is at all useful in this debate and whether a bill like this, which seeks to protect people from reprisals, should also indicate that the motive is irrelevant. If I understand the law correctly in other areas, in fact motive affects the way you are treated. If you do something with malice, you are not treated the same way in law as you might otherwise be. I would ask the question in that broad sense as to whether motive is important. As we go around the room, could the Auditor-General indicate whether he thinks that would flush out a few billion for us in terms of corruption and dishonesty! My question, summarised, is: does motive matter and should it be dealt with in the legislation?

Dr De MARIA—I think it is a dangerous path to go down, to pay people to make disclosures, because you are mutating public interest people into bounty hunters. One of the important differences between whistleblowers and informants is that whistleblowers are driven by the public interest, moral outrage—a whole range—but not yet reward. In the back of my head is a question as to whether that False Claims Act is a model which is at all useful in this debate and whether a bill like this, which seeks to protect people from reprisals, should also indicate that the motive is irrelevant. If I understand the law correctly in other areas, in fact motive affects the way you are treated. If you do something with malice, you are not treated the same way in law as you might otherwise be. I would ask the question in that broad sense as to whether motive is important. As we go around the room, could the Auditor-General indicate whether he thinks that would flush out a few billion for us in terms of corruption and dishonesty! My question, summarised, is: does motive matter and should it be dealt with in the legislation?
CHAIR—Mr Podger, at the beginning of the hearing this evening, you mentioned that even some of the complaints you had received you felt were not necessarily motivated simply by a public interest sentiment but that some private interest was involved. Mr Whitton has gone from private interest and mentioned pure malice. Do you think that motive is important? Clearly, something could be of great public interest yet the disclosure could be motivated by all sorts of things.

Mr WHITTON—Provided it is true.

CHAIR—Yes, indeed.

Mr PODGER—I actually agree very much with Mr Whitton that motive itself is not necessarily the key; it is the quality of the information provided. Maybe I did not use my language as carefully as I might and now I am hearing a bit more of the argument. The point I was raising was where people have certain avenues to pursue their particular interests—it might be an employment issue or whatever—and having taken them and not been satisfied by that, they then look for another angle to pursue, which I do not think was the overall intention of this process. You will never design a process which rules those out. You will always get some of those cases. It is the issue of trying to get the balance right. There is always a concern that this just becomes another avenue to pursue a grievance which has been legitimately handled in another place. But I certainly did not mean to say that somebody with a self-interest may not have a case to whistleblow about a major concern, corruption, fraud or whatever, and which needs to be examined.

CHAIR—Are there any more points on that issue? I think we have canvassed that fairly well. Going down our agenda briefly, we will come to some of these, perhaps not in strict order, not that that matters. On page 2, the second issue is the role of the media. Should the media, under certain circumstances, be allowed to receive a public interest disclosure from the public sector? Are there any comments on that?

Mr PODGER—Under the values and the code of conduct, APS employees have a clear obligation not to disclose information without authority. You cannot open up a provision which would actually counter a specific provision in the legislation. Regulation 2.4 provides an appropriate process for raising concerns without risking that obligation. So there are ways in which to do it, but there are some dangers here, with respect to extending it into the media, that you may in fact open up incentives to do things which would actually break the Public Service Act provisions.

Senator FORSHAW—That can be very much at the heart of what this is all about. From what I can recall, some of the more noted situations of whistleblowers have been where they have used the media to bring the issue out, and it has involved a breach of some legislative obligation that they have in their employment.

Mr PODGER—I hear what you say but it is rather difficult to then present in law an arrangement which you know involves people breaking another part of the law.

Senator FORSHAW—I appreciate that.

Mr PODGER—I am merely saying that what we have tried to do, including through our regulations and Public Service Commissioner’s directions, is to clarify for people the way in which they can handle it without breaking their obligation in that area. I would caution the committee about an arrangement which did not comply.
Dr De MARIA—We need to emphasise that there is a well-established common law escape for public interest disclosure. It is there in common law in all the common law countries—that the courts will accept a public interest defence for a breach of confidence. Of course, if you have got the common law up against Public Service regulations, we know who wins in those sorts of situations. There are numerous situations in Australia and overseas in which an issue has only got out and been corrected once it has got into the media.

CHAIR—The Pentagon papers and Daniel Ellsberg: that was done. There are plenty of examples, and Senator Forshaw mentioned some.

Senator FORSHAW—The point I had in mind was the famous one in my home state with Philip Arantz and the police force. What would happen today if that same set of circumstances arose? I appreciate that he was not covered under the Public Service Act, but he was a serving police officer. If that sort of situation arose with a public servant, would that person—

Dr De MARIA—The same thing would happen.

Senator FORSHAW—But I thought you just said that the common law might protect him.

Dr De MARIA—The same thing would happen in that the same New South Wales Police response would still be there.

Senator FORSHAW—That is another issue. I am asking what would happen legally, if there was a breach of the public service obligation not to go to the media, but the circumstances were that the person had raised the issue on a number of occasions and the information had been denied—so the allegations that were being made had actually been refuted and denied; covered up, in other words—and subsequently that person leaked it to the media. In your view, would that person still be liable to dismissal, or whatever, under the Public Service Act?

Mr PODGER—I cannot speculate on what, precisely, would happen, but I can come at it the other way. If they have gone up the line and the up-the-line refuses to present the truth and, in fact, distorts the truth—which was basically the situation in that New South Wales Police statistics case—under our provisions, that person can then pursue the matter with the Public Service Commissioner. If there was then also an issue about whether it was wrongfully presented by a minister and the minister had not been told, there are approaches. You could come to the Public Service Commissioner; under our guidelines on official conduct, we draw attention to other avenues to press it within the system. That is, you might go to the head of the Prime Minister’s department to suggest that it might be raised with the Prime Minister, or you go to the Public Service Commissioner. There is guidance there about how to handle it without going to the media. If the person did not go through that process and went to the media, they are opening themselves up to sanctions because they have broken the code of conduct. Whether that would be pursued would be a matter for judgment in the particular case.

Senator FORSHAW—I understand that. Events could overtake that.

Mr PODGER—The guidance from the commissioner, from our place, would be, ‘Here are processes; you can have this handled. If you are unhappy with it being handled there, there are other steps you can take to press the point.’

Mr BERTHELSEN—I believe that Clive Ponting made a conscious decision to proceed, regardless of the consequences, in relation to the sinking of the Belgrano. He was charged
with a breach of the Official Secrets Act. He defended himself successfully, and it was found that the public interest prevailed over the provisions of the Official Secrets Act. So there is one particular set of circumstances, but there are many other circumstances, too. This is where the whistleblower has to have the courage of his convictions to be able to proceed, knowing that he could very well be charged.

CHAIR—The real issue here is: should legislation protect people who go to the media?

Dr De MARIA—That is what the New South Wales act does.

CHAIR—Is it failsafe, as Senator Forshaw has said?

Senator FORSHAW—I am trying to find out.

Dr De MARIA—Under the New South Wales Protected Disclosures Act, agencies have a six-month period in which to internally process the disclosure. If they have failed to process it, or if they have failed to process it to the satisfaction of the whistleblower, the whistleblower can go to the media and be protected under that act. However, no-one has done it.

CHAIR—Mr Whitton, should that be incorporated into this legislation?

Mr WHITTON—The short answer is no. There are a number of reasons. I have canvassed them in my submission, and they are also canvassed by my colleague Matthew Goode in his paper in relation to disclosure to the media. New South Wales is the only state that does it, of all the jurisdictions in Australia, New Zealand, Canada and, as far as I am aware, and the UK. The essential reason is a policy reason, not a legal reason: it makes reprisal more likely, because mud sticks.

This bill provides whistleblowers with very substantial benefits, protections, privileges and so forth. On the other hand, whistleblowers are not always right, even if they are bona fide, and innocent reputations can suffer. There is no effective way of withdrawing or correcting a story, once it has been published in the media. The balance that we struck in Queensland, and in all the other jurisdictions in Australia except New South Wales, was that no disclosure to the media will be protected. It is not prohibited, but it is not protected, so you are liable to defamation action or whatever.

Senator FORSHAW—Particularly if it is on morning talkback radio.

Ms SMITH—It may be prohibited under Commonwealth legislation because of sections 70 and 79 of the Crimes Act which prohibit the particular disclosures—

Mr WHITTON—That depends on what the disclosure is.

Ms SMITH—That is exactly right; it depends on the disclosure. What I am saying is that there are certain prohibitions that have to be taken into consideration.

Mr WHITTON—Just as a footnote on Ponting, he did not disclose to the media; he disclosed to a parliamentary committee, and that was the difference—that is what saved him.

Mr BENNETT—I am probably the only person in this room who has been charged under the Public Service Act for making public comment without due authority, and so I am an expert to talk on the subject. The legislation as it stands at the moment is probably unconstitutional. That is my view and, had I managed to get it to the High Court, they might have agreed. It breaches the Human Rights and Equal Opportunities Act: political opinions and involvement in trade union activities are not prohibited and we have freedom of political
expression, and yet regulation 2.1 can stop you making public comment on matters of which you have official knowledge.

The definition of official knowledge is incredibly broad. It was defined in the charges against me as being anything which might have anything to do with the Australian Customs Service about which I might have had official knowledge or might reasonably have been suspected to have official knowledge, whether or not that information came to me in the course of my duties or incidentally at any other time and whether or not it was already on the public record. That is about as broad as you can get, and that was the nature of the description of the charges that were laid against me. Since that time—and I am sure Mr Podger does not know this—the Australian Government Solicitor has modified that and now advises me that the words, ‘if it is already on the public record’ are excluded. I am probably the only public servant who knows how it should now be read legally. I have a special dispensation that says I can talk about things if they are already on the public record, but I am the only public servant that can, because the Australian Government Solicitor has advised me personally.

All other people in the Australian Public Service have got a really horrendous, mind-boggling, human rights denying, Constitution breaching piece of legislation that can control the right to make public comment on a range of matters—even telling your wife that you are going to work would fall within the description of passing on official knowledge. You have no idea how broadly it was used against me—to the point where I could not speak to the Australian Olympic Committee, who had invited me to make some comments on performance enhancing drugs. I was not allowed to talk about that. I wanted to make public comment to members of parliament and was told that I was not allowed to do that. The range of things that was told that I could not speak about would be unacceptable to almost everybody in this room. That is why the matter is currently in the Federal Court. To say that the legislation is being used judiciously is wrong; it is being used politically, for the interests of agencies and agency heads. With due respect to Mr Whitton, who said that not all agency heads would abuse their authority or not do the right thing, I have been in the Public Service for 30 years and I must have run into a bad bunch because I do not have the advantage of being under those good people that Mr Whitton was talking about.

The situation as it stands at the moment is that there is a piece of legislation there that is indefensible as a way to control public servants and desperately needs to be amended and fixed and defined, to become the sort of thing that says, ‘If it is about clients of the Public Service or about the operation of the organisation or about how the operation works, then you cannot talk about it, but if it is to do with the general concept of public administration and the management and administration of the Public Service, then you can go for it all you like.’

CHAIR—Mr Bennett, you would say, under the bill we are considering, that there should be a mechanism incorporated that would allow whistleblowers to go to the media in certain circumstances?

Mr BENNETT—Yes. If I can just throw back to the best case that I was involved with, the MacKellar-Moore colour television affair, I went to the agency head and the regional head and just about everybody in the organisation, saying, ‘Please back off and stop dumping on this bloke; he hasn’t made a public statement or recorded in his book that any minister did anything wrong and yet he is still being dumped on. Would you please stop attacking him.’ Over a six-month period I pleaded with agency heads not to dump on this bloke. At the end of six months I had had it, and I said, ‘You’ve got three days to stop dumping on this bloke otherwise I take it to parliament.’ Eight days later, two members of parliament were sacked.
Senator MURRAY—Two members of parliament were sacked?

Senator FORSHAW—As ministers.

Mr BENNETT—Yes, Mr MacKellar and Mr Moore. That was a classic example of a person who was victimised and he had not done anything. All he did was see a minister walking through and deal with him, and he was then threatened with further retribution if he opened his mouth.

CHAIR—I appreciate that, and it is a good example, but the question is whether, for legislative purposes, there should be a mechanism for whistleblowers to go to the media.

Mr BENNETT—I am sorry, I failed to make the point: the reason the two ministers got sacked was because I went to the media.

CHAIR—Sure, I accept that.

Mr BENNETT—I had run through every single public service provision, opportunity and means to deal with the matter. Even coming down to Canberra and talking to parliamentarians here, I still could not get it mobile. So I held a press conference and, boy, it got mobile after that. I had exhausted every single means that I possibly could. Whether or not it is only in the New South Wales legislation and that is inadequate, I do not know, but there has to be provision so that, when you have used up every single means that is available to you—

CHAIR—Internal mechanisms.

Mr BENNETT—Whatever the system is, there has to still be the opportunity to take it public, and protection has to be maintained at that point.

Mr McLEOD—The only comment I would like to make about this issue of the relationship with the media is that, in my view, to the extent that you have in place a satisfactory framework for the handling of whistleblower complaints and the community is encouraged to have confidence in those arrangements and to the extent that in practice, because of the way they are used, that confidence develops, the less likely it is that whistleblowers will want to go to the media. In our experience, the whistleblowers who have gone to the media have generally done so either out of a sense of frustration or out of a lack of confidence that their concerns will be appropriately addressed. While it does not resolve the issue of whether there should be a specific provision in the legislation, to the extent that there is legislation which is promoted and becomes part of our administrative culture, one would expect that, over time, people would be less inclined to go to the media. There is no question, in my view, that once a whistleblower allegation becomes a matter of media interest it can have the impact of antagonising and polarising the parties, and I think sometimes it can act against our being able to conduct an objective investigation process, simply because of the way in which parties react to media exposure. I would see that link between having a framework which is suitable and appropriate and provides adequate protections to people and the encouragement for it to be used, and then I think we could rest more confidently in not expecting so much attention being directed towards exposures in the media.

Dr De MARIA—Mr McLeod, I do not think your position responds to this issue of the public’s right to know about wrongdoing. That to me is an important thing: the public’s right to know about wrongdoing in the Commonwealth Public Service. How does the public ever get to know about these things? I suspect it does not get to know about these things with your investigations because most of your investigations are private. We only know about it when you do an own motion study or when something comes out or when there is a leak. The
avenues for getting stuff out to the public are very narrow, and we should be thinking about how to expand those avenues to get things out. The oft quoted reservation about media disclosure is that reputations get damaged, and that is something serious and something that needs to be taken into consideration. But it should not intimidate us from pursuing this issue of when and where it is feasible or reasonable for the public to know about wrongdoing through the media. We should still persist with that very important debate.

CHAIR—We have not got long to go. The issues remaining relate to: whether the bill should offer qualified or absolute privilege in proceedings for defamation—we should discuss that quickly; unlawful reprisals; and the private sector, which was where we kicked off. I would also like to ask everyone for a closing statement, commenting on the bill in general. We will jump to the issue of qualified or absolute privilege before we go on to unlawful reprisals. Should the bill offer qualified or absolute privilege in proceedings for defamation? The submissions go both ways on this. Would anyone like to open the discussion?

Mr PODGER—This is not so much a comment as information: there was a conscious policy decision in formulating the Public Service Act 1999 which replaced provisions that were in the Merit Protection Review Agency legislation and section 89 of the old Public Service Act. That policy decision was that the arrangements should not allow greater privilege than would apply in the private sector. There is protection against action by the agency, but there is no protection against civil action of defamation or whatever. That was a conscious policy decision by the government of the time.

CHAIR—Any other thoughts on the issue of qualified privilege? All submissions touched on it.

Mr BENNETT—If you make any public comments at any time, you are always liable to be sued for defamation or slander—depending on how it is delivered—and that is a risk that you always have to run. It stops when it becomes public interest—meaning it genuinely has legs—and it then moves into the public arena so that the issue you raised is more important than the individuals you are dealing with in the process. In my experience, I have probably gone very close on a couple of occasions to defamation but, once the issue hits the public interest level and it becomes a matter of public debate and discussion, the fact that I initiated it seems to dwindle into the background. It gets a head of steam of its own, and you become just a small part of the play.

Although I would like to see protection against that sort of defamation action—it would be effectively protected by some sort of privilege—if anyone delivers a comment or complaint about a situation, I think they still have a responsibility to be very careful not to go overboard and dump on people and defame them. You cannot always be right. Sometimes I have opened my mouth, thinking that I was dead right, and then as things have developed I have thought, ‘Gee, that was close.’ So you have to wind back from actually having a slice at somebody.

Senator FORSHAW—Mr Bennett, things can be in the public interest but still be defamatory.

Mr BENNETT—Yes, they can be. But my experience is that once it actually gets to that level those players who are involved who are at the forefront of having to answer questions are not the slightest bit interested in being defamatory. They are more interested in getting the record straight from their perspective.

Senator FORSHAW—And if it turns out not to be correct—

Mr BENNETT—Yes, I know; it gets close.
Senator FORSHAW—And even if it turns out to be not correct, there is a legal issue beyond the point you are making.

Mr BENNETT—Yes.

Ms COOPER—I was just going to add a point about absolute privilege. If the purpose of the bill is to encourage public interest disclosures, you are not going to achieve that if the privilege is not absolute. Also, consistent with what other people have said around the table, it is the disclosure that is important, not necessarily the motivation of the person making the disclosure. That would also be consistent with adopting an absolute privilege approach to the issue.

Mr WHITTON—I agree with that. In Queensland we took a somewhat more complicated view of things. We started with absolute privilege in relation to actions that may follow a disclosure but we attached a test to the disclosure itself—that is, an honest belief held on reasonable grounds. And then there is a significant regime of confidentiality requirements relating to the identity of the discloser and the disclosure, precisely to protect. It is about this core policy issue of striking a balance between encouraging whistleblower disclosures of wrongdoing and protecting innocent reputations including those of organisations. That is the balance that needs to be struck. While it is in house, whether it is your house or some other APS house, that is controllable. Once it gets to a court, as it properly should it becomes a public matter.

CHAIR—Are there any other comments on that?

Mr BUDAK—This is not within the four corners of my job. It is just a general comment. You could not really have absolute privilege and freedom to go to the media together, because then people could do all sorts of things with absolute impunity, if they were so minded.

CHAIR—Are there any further questions or comments on qualified or absolute privilege? There are none, so let us move on to unlawful reprisals. This issue has been touched on in our discussion this afternoon. Once again, focusing on the bill before us, on the first dot point: are there potential problems with clauses 24 and 25 dealing with the relocation of persons likely to suffer reprisals for making a public interest disclosure? Ms Cooper, this goes back to what you said in your first comment today about whether these protections are sufficient, whether they in fact work. We have had evidence that they do not always. Do you have any comment?

Ms COOPER—Probably not much to add other than what is in our submission. We have found that what usually happens to whistleblowers is that they are moved, and they are moved involuntarily. The bill does provide for consent. But in the circumstances we think it is the wrongdoer who should be moved, if that is at all practicable, as a first preference. Of course, if the whistleblower wants to move that is another issue, but we would also say that it would be important to build in protections so that when they are moved they are not moved 120 kilometres over town and they are also given a position that is commensurate with their skills and experience. That is something that is suggested in the issues paper that we would agree with.

Dr De MARIA—The whistleblowers normally face an enormous evidentiary problem. It is the one of causation. In other words: is the reprisal caused by a disclosure or is the reprisal caused by a non-disclosure such as poor work performance or something like that? I would prefer to have seen a reverse onus in this bill whereby the allegation of a reprisal, once it has been made, would then be turned over to management and they would have to demonstrate that there was no causal connection between the disclosure and the action that they took. At
the moment the onus is on the shoulders of the whistleblower. I would be looking for a move towards the American model which uses the concept of proximation, whereby, if a reprisal takes place in a reasonable period of time after a disclosure, the court will assume that that adverse employment action is a reprisal. It is then over to management to demonstrate that it was not.

CHAIR—To rebut that presumption, in effect?

Dr De MARIA—Yes. At the moment the rebuttal is on the very narrow shoulders of the whistleblower.

CHAIR—Thank you for that. Mr Whitton.

Mr WHITTON—This is quite complicated, because it turns on a number of assumptions. The question might be, ‘Are you moving the whistleblower because you can’t guarantee to protect them, are you moving them because the working relationship with the team has broken down, or are you moving them just because it is easier?’ I agree with Dr De Maria that moving a whistleblower involuntarily without their consent might amount to reprisal. The British test and the Queensland test come to that: that the onus is on the agency to demonstrate that removal or transfer, especially transfer to a less desirable location—we get lots of them—was in train for good reasons beforehand. That is the test that the British tribunals are using and that effectively shifts the onus of proof, whatever is in the legislation. The test becomes for the agency to show that the action was in train for good reason before the disclosure happened. I would be quite concerned about an organisation which said, ‘We have to move you because we cannot guarantee your protection.’ What kind of organisation is this? In other words, we are assuming a very adverse management regime, a culture in the organisation which, from the top down, is adverse to whistleblowers. I do not believe that the chief executive cannot stop that if he or she puts their mind to it.

CHAIR—What about the idea mentioned a couple of hours again in our discussion—that it is not so much that there are any aggressive or belligerent acts taken against a whistleblower but that there is ostracism. It is subtle. It happens in politics all the time. It is very subtle. That is quite difficult to contend with. What about that? Would it be appropriate for an agency to move someone on because it simply made a working station dysfunctional?

Mr WHITTON—As one senior manager once said to me, you cannot legislate to make people like each other. It is fair to say that you cannot really take this issue out of the whole contextual question of: what kind of culture operates in this organisation and what should the organisation do about it to ensure that people doing their duty—namely disclosing wrongdoing when they come across it—do not find they cannot operate in the organisation? It happens, and we put a provision into the Queensland act, which you can see, which says the Public Service Commissioner has the power to transfer a public servant, between agencies if necessary, but there are quite a lot of conditions hedging that about. I take the union’s position that that should not be adverse in any sense. The whole question needs to be dealt with in the context of the management regime that applies in the organisation. It is not just a question of whether the whistleblower is going to finish up being disadvantaged by being moved across town. Why would you do that? It raises a whole bunch of other issues.

Dr De MARIA—To say that we cannot legislate to make people like each other trivialises this enormous issue of ostracism. We are just getting to it now. I think psychologists are just getting to it and understanding the toxic effects of ostracism. It has been regarded as the organisational equivalent of death, so it has very long-reaching implications.
I think, however, that we have this relocation argument arse-up. Rather than trying to think about relocating whistleblowers out of toxic situations, we should be thinking about relocating the perpetrators out of those situations, as part of the organisational response to the incidence of that. At the moment we tend to treat whistleblowers a bit like witnesses in witness protection programs. We just want to get them out of a toxic situation. That means enormous readjustment in their lives. We should be focusing more on the relocation of the perpetrators. Often the perpetrators sit there quite happily. According to one New South Wales police study, the perpetrators go up the career ladder much faster than the police whistleblowers.

Mr BENNETT—Speaking from personal experience, it feels like this is an additional penalty and that they have just won. It is as if they are beating you around the head and they have moved on one step further. This is dated 8 May 2000:

Comcare again would like to stress that it accepts that your gastric symptoms became worse when you were notified that you would be transferred (after roughly thirty years in the same area) for no apparent reason, seemingly to no particular position, to an area in which you did not believe that you had appropriate skills.

That was my reward for challenging the department.

CHAIR—Was that involuntary?

Mr BENNETT—Yes. Ten days after costs were settled in the previous High Court matter, I was suddenly advised, ‘You’re going to Coventry, into an area where you’ve never worked, where you will have to be retrained and reskilled and there will be no discussion about it. You’re going under section 25 of the new Public Service Act, which is reassignment, and, although it requires procedural fairness and a lot of other requirements, none of them will apply. You’re just going.’ I am lucky because I can sustain this, although that was the first time ever that I had a physiological and psychological reaction. It made me sick. This has happened about a dozen times in the past and I survived all the others. I just did not bounce on this one. I am lucky; I am still here. There are dozens and dozens of people who just crack. As soon as that happens, they just crack. The CPSU knows about it. As part of this, I had to go to a shrink—I was sent there, whether I wanted to go or not—who has had people queuing up at the door since section 25 of the new Public Service Act has come into place. They can use it for reassignment whenever they choose to put people wherever they want them to meet operational needs. This is exactly what happens to anybody who challenges the system, but particularly to those who challenge it in the form of whistleblowing.

CHAIR—Mr Podger, do you have anything to add to this about the various protections?

Mr PODGER—Obviously, I am not going to comment on Mr Bennett’s case. I do not pretend to know the details of the case, but I have some sympathy with what the bill is trying to do. My question is whether you can easily legislate or whether you have to rely on the principles and more general provisions of the way the agency would respond. It may sound nice that the right answer ought to be that the perpetrator moves, but quite often the problem is not as easy as that. In fact, there can be a loss of team spirit in the place—for whatever reason—and you cannot identify clearly who is the perpetrator and who is not, or who has sympathy one way and who has not. These issues are very difficult for management to sort through. The key is to sort them through in a way that does not victimise the whistleblower. How far you can put that in legislation, I am not quite sure.
The second point, which is slightly separate from the one we have just been discussing, is that the bill does have suggested sanctions. I note that they are not very flexible. The Public Service Act opens up a greater capacity for a range of sanctions to meet the situation.

**CHAIR**—You say in your submission, Mr Podger, that they are—you did not use the word ‘draconian’—not as strict.

**Mr PODGER**—I cannot remember the exact word. The provisions are not as flexible.

**CHAIR**—They are not as harsh.

**Mr PODGER**—The toughest one is not as harsh as the toughest one available under the Public Service Act.

**CHAIR**—Any other comments on unlawful reprisals and whether or not the bill is sufficient in that context? I remember when the Fitzgerald inquiry was being conducted in Queensland. Dr De Maria, you will remember that period. Justice Fitzgerald said one of the most difficult things was that, even after the bad apples were removed, the corruption was a systemic or cultural problem. You said, Mr Whitton, it was a management problem. It was not just one or two bad apples; it was right through the system.

**Mr WHITTON**—It was the barrel.

**CHAIR**—Yes, that is right. In a sense, workplace reprisals were subtle. It was things like you mentioned in the report. With Constable Bloggs who had done the right thing, for example, no-one would have lunch with them, go out with them or talk to them. It is a very difficult issue. I do not know what the answer is, but it is certainly very difficult.

The last issue we have to look at is the private sector. Submissions touch on this: is there a clear cut-off point between the public and private sector? Mr Podger has mentioned the limited jurisdiction of the Public Service Act and the framework. I am wondering whether people think that is appropriate these days given the larger role of government in the community.

**Dr De MARIA**—According to OECD figures, in the decade 1992-2000, Australia was the most robust privatiser in the world. We were privatising and ripping out the public sector like nobody’s business. So we are right up there as privatisers.

**Senator FORSHAW**—World’s best practice!

**Dr De MARIA**—That has big implications for a bill like this. Let us say that 20 years ago in the old Postmaster-General’s Department there were 100,000 employees. If this bill had been an act at that time, those 100,000 employees could have got immediate refuge under that act. The moment it corporatised into Telecom, they were disenfranchised. There were 100,000 people disenfranchised immediately as a result of the change of status of that huge organisation into a corporation. We are two-thirds down the road of privatising it now—Australia’s largest privatisation, $49 billion. We are on the way to complete privatisation. So that is the disenfranchisement of a huge number of people. Coming around the corner are issues as big, such as forecast privatisation of Medibank Private. If this bill is going to keep up with very fast-moving trends in the public sector and government policy, it has to think seriously about re-enfranchising people who work in government business enterprises and also the private sector, in which no less than 10 per cent of the operating funds are public funds.

**CHAIR**—And also private contractors?
Dr De MARIA—I think the private contractors are handled already in the bill, if I understood the bill.

Mr PODGER—Isn’t the real issue not so much disenfranchising a group of people who are now in a private company but what is in the public interest? There is a legitimate concern, to the extent that we are using private companies to deliver services to the public—and we are doing very well, with Job Network and things of that sort—and we have got many more companies providing services through outsourcing arrangements and so on. The issue is a concern to ensure that we can be confident of the expenditure of public moneys: is there scope for people to report on concerns on this that we will then be able to have a look at?

I am not sure of the right answer to this. It is certainly not covered by the Public Service Act. Whether it ought to be covered in an act is uncertain. But you will note the extent to which, over time, following reports from the Auditor-General amongst others, there has been an increasing role for FOI, for the Auditor-General or others, to have a play in the operations particularly of those who are providing services on our behalf to the public. There is a legitimate issue there. I am not commenting on how you would do it because I am not quite sure that legislation is necessarily the way to go, but a number of agencies have tried to open this up in some respect in their contractual arrangements.

CHAIR—That is an interesting point, Mr Podger. The privacy legislation that was initially just in the public sector has gone into the private sector precisely on the basis that you said—it was, in effect, in the public interest to do so. That really is the test. You are quite right. Does anyone else want to comment on this issue?

Mr WHITTON—I draw your attention to my submission on this for the detail. The policy position we took was that what is at issue is public dollars, the Commonwealth’s power—or the state’s power—the exercise of the state’s power, public health and safety, and protection of the environment, whether or not those matters involve a government agency, a government, a private contractor or the private sector. The South Australian regime extended the scheme which in other states applies to the public sector to the private sector—with success, it would seem. I draw your attention again to Matthew Goode’s paper. The British system was endorsed only recently by the Economist—not, you will note, a left-wing, commie, pinko rag—as being in the interests of the private sector to take seriously. It costs you money if you do not—that was the bottom line, according to the Economist.

It changes the nature of the bill somewhat and requires a closer focus on the notion of wrongdoing and breach of trust, because you have to focus the offence closely in order to make a disclosure about it and prosecute it, in whatever sense. So the notion of acting in the public interest, in my submission, is too broad to be very useful, especially once you get into the private sector. The British cases—there are now 50 of them on the Web—reported by public concern at work, in which reprisal was found by the Employment Appeals Tribunal, show how, in two-thirds of the cases, wrongdoing as an employee in a purely private sector context is caught by the British provision with complete success. It is a policy question as to whether you would want to do that, but the technicalities of doing that are not problematic.

Senator MURRAY—I point out to Mr Whiton that the question of coverage is a difficult one constitutionally. At present, all state regimes and that of one of the territories—I do not think the Northern Territory have it—either have whistleblower legislation, or will get it, because WA is about to come into train. The point that I made earlier with Mr McPhee was that you can get a linkage from the Commonwealth into the private sector if you attach it to the expenditure of public moneys. You simply say, ‘If you want to do this job, these are the
conditions whereby you will do it.’ So you can do that. But, for the private sector in which government have no evident link to which they can apply such an obligation, you can only reach into the private sector if you use one of the constitutional powers, such as the corporations power, or if you get the states to enact complementary legislation to pick up unincorporated associations. One of the considerations, obviously, on an incremental basis, is that this bill does not have a private sector focus, because of the difficulties of the process attached to it. Have you thought through that aspect at all?

Mr WHITTON—In short, yes. I am not a lawyer, but, from a policy point of view, the British system attaches the process to the private sector by effectively criminalising—making an offence—of reprisal for wrongdoing. Wrongdoing is defined more or less as your bill defines it.

Senator MURRAY—Through the Criminal Code?

Mr WHITTON—Yes. We have gone some distance in that direction in Australia, by adopting—in amendments to the Commonwealth Criminal Code—the provisions necessary to give effect to the OECD convention on bribery of foreign officials, where bribery in the private sector is now a crime. Five years ago, it was not. I cannot see, as a policy question, why you could not criminalise reprisal for wrongdoing as defined.

Dr DeMARIA—It seems to be a peculiarly Australian thing to not protect private sector whistleblowers. The New Zealand act protects them; the flaw-ridden UK act and the equally flaw-ridden South African act protect them. Every time administrators and drafters of legislation get to this point in Australia, their knees start to shake and they pull back. So there is something about that.

Mr McLEOD—I would have thought that, in a serious situation in the private sector where, for example, a person is dismissed as a reprisal for being a whistleblower, there is at least access to unfair dismissal legislation. That legislation may not have been devised to protect whistleblowers, but I would have thought it is at least available in a situation that might have been provoked by a whistleblower kind of action. There are reprisals that fall short of dismissal, which I would concede, but I would have thought it is possible for a person to pursue an action for unfair dismissal if it is in relation to a public interest disclosure.

Senator MURRAY—that is only possible because there is state industrial relations legislation which covers unfair dismissal, because Commonwealth unfair dismissal only extends to Victoria, the two territories and incorporated associations which are part of the federal regime. That is the point—there are others in the room who are more expert than me on this—but, as I understand it, all the state provisions and the ACT provisions are public sector provisions, not private sector. Therefore, you have a gap.

Mr RAMSEY—There are some difficult technical issues here but our union would certainly see that it would be a hole in this legislation, or legislation like this, if it was not able to cover organisations, as Mr Podger mentioned, like the Job Network. We think organisations like that should fall fairly and squarely on the side of the line that is within the legislation, be that defined as public or private. Arrangements such as that should clearly be covered by legislation such as this.

Mr McLEOD—Senator Murray mentioned very early in the proceeding that part of the objective of this proceeding is to help the committee formulate a set of proposals that might ultimately win favour in going through the parliament. On this question of coverage of the private sector, while you could argue in a general sense that, from a public interest point of
view, there is interest in any part of the public sector that is benefiting from the transfer of public money to that organisation for whatever purpose, that is a very broad field that would be covered by the legislation. Public interest can also, apart from protection of the public’s money, be viewed in terms of the provision of services to the community by the private sector on behalf of the government where the public interest is more in the sense of receiving quality services. That is a narrower field of the public sector if you are looking at those parts of the private sector that are delivering government services on behalf of the government. That is the area where there has been greatest debate in recent times about the loss of accountability that occurs as governments transfer traditional government business to the private sector. This is more a political question and not for us to be commenting on, but it would seem to be easier to mount an argument to win support if it is concentrating on that part of the private sector that is now performing a significant service on behalf of the government through contractual arrangements.

CHAIR—We have about 10 minutes left to go and, if people would like to make a closing or a final statement that may benefit the committee please feel free do so, whether it is a summary of what you have said or something you think the committee should particularly take note of. Mr Bennett, would you like to kick off.

Mr BENNETT—I hope you include in the final bill a reference to abuse or misuse of power. That seems to be lacking here, and I really think that is a vital issue that should be considered. In general terms, I am desperately looking forward to a bill of this type. I believe there are weaknesses in the existing bill that have been addressed by a number of people here, and I really hope that some of those issues are raised. But the long and the short of it is that a bill is better than no bill, and I implore you to proceed with this bill as soon as possible in the interests of those people who want a genuine, transparent, accountable public service.

CHAIR—Thanks, Mr Bennett. Mr Berthelsen, would you like to say a few words.

Mr BERTHELSEN—There are three things I would like to see in the legislation: the scope of the bill be broadened to cover the whole of the public and private sector, and I think that has been canvassed here; matters be disclosed to the Public Interest Disclosure Board, which I see as much more independent than an agency head; and, finally, a national educational program to bring about cultural and attitudinal changes towards public interest disclosure. Without that, I do not think we have the right underpinning for effective changes to legislation.

CHAIR—Thank you for that. Dr De Maria.

Dr De MARIA—I do not agree with Peter: I think a bad bill is not as good as no bill, and I think this is a bad bill. I think the nominations of authorised authorities is inappropriate. I would not at all put the Public Service Commissioner in this bill—or the Merit Protection Commissioner—but I would put the Ombudsman. I think the Ombudsman is the obvious person, notwithstanding the fact that he is chronically underfunded. I think this is the agency that should be centralised into this bill. There is no provision for government business enterprises or the private sector, as we have already mentioned, no media protection and no reference to parliamentary wrongdoing. We have not talked about that tonight, and I can understand that if you are going to get this bill through you had better leave that one off.

CHAIR—It was a issues paper, wasn’t it, that did touch on that?

Dr De MARIA—I do not think the Australian community will believe you if you do not put it in. There are no special arrangements for security and intelligence disclosures. That is in

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the New Zealand bill, and I commend that part in the New Zealand act to the committee to have a look at. There is no provision for an independent authority, although the Ombudsman is getting pretty close to that concept. There is no provision for disclosure of extraterritorial wrongdoing, which I think in this globalising world we live in makes a lot of sense. That is certainly in the UK act. There is no provision for ongoing scrutiny of the legislation.

CHAIR—Thank you, Mr McPhee.

Mr McPHEE—No further comments beyond what we said earlier.

CHAIR—I am sure you will have a few comments in a couple of weeks, Mr McPhee. I am sure we will see a lot more of each other. Mr Ramsey, have you any comments?

Mr RAMSEY—we agree that one essential requirement is an independent agency, and I think we would agree the Ombudsman is such an agency. The other thing—and we have talked a bit about it—is who it should cover: who should be in and who should be out. We agree that it should be broad, but we would say that, whoever is within and whoever is intended to be brought within the bounds of the legislation, it is clear on the face of it that they are in. We see lawyers lining up to argue, ‘Are you within this clause or are you without that clause?’ That is something that should not be. It should be as clear as day who is covered.

Ms COOPER—I think the key to the success of the bill, aside from having an independent agency, is also the provision of sanctions and remedies for people who suffer detriment and also as an encouragement for people who do want to whistleblow—that there is something effective in there for them, to protect them and to see through their complaints. I think the bill does that. I think the sanctions are perhaps a bit light-on, but otherwise I think they are a vital component.

CHAIR—Thank you very much. Mr Podger.

Mr PODGER—No further comment.

CHAIR—Mr Budak.

Mr BUDAK—Recognising the very specific statutory function of the Merit Protection Commissioner, I am personally quite comfortable with the present arrangements. However, if the bill is to go ahead, the two schemes could not operate well in parallel and we would have to look at some consequential amendments to other legislation—the Public Service Act and regulations, in particular. Further, if the bill is to go ahead, I agree with Dr De Maria that the Commonwealth Ombudsman should be added as a proper authority, precisely because the Public Service Commissioner and the Merit Protection Commissioner are primarily focused on the APS. The Ombudsman is required for areas other than the APS. Finally, on the assumption that the Merit Protection Commissioner—to disagree with Dr De Maria—and the Public Service Commissioner were to remain as proper authorities in the bill, there are four clauses which are, for want of a better word, asymmetrical. They provide for the Public Service Commissioner to do certain things such as report and seek injunctions, but they are silent on the role of the Merit Protection Commissioner. If one were to get it to work, one would need to have the powers as well. They are clauses 11(3), 19 to 27 and 29.

CHAIR—Mr McLeod, would you like to comment?

Mr McLEOD—I would like to make a final comment: my recollection is that when the 1999 amendment to the Public Service Act was being debated there were indications from both sides of politics that this was perhaps a precursor to a later situation where there would be more general legislation. Given that there was support in the parliament for a
whistleblower scheme in relation to the Public Service proper, it seems illogical that a significant area of Commonwealth employment or activity appears not to be covered by similar legislation. I cannot think of any logical reason why that should be so. If there were validity in introducing a framework for the Public Service proper, it would seem to me that similar arguments could be mounted to have some kind of framework seeking to do the same sort of thing for the whole of the Commonwealth employment area.

CHAIR—Mr Holland, would you like to add anything?

Mr HOLLAND—I have one brief comment to set the record straight. There was a reference made to intelligence and security not being covered. It is worth putting on the record that the role of the Inspector-General of Intelligence and Security is to deal with complaints about security and intelligence matters.

CHAIR—Mr Whitton, you are lucky last.

Mr WHITTON—I have a couple of comments. I am pleased to hear the amount of agreement around the table about the ultimate policy objective of legislation such as this—namely, that it should be to encourage the disclosure of wrongdoing by officials and, maybe, extend that to the private sector, but it still concerns encouraging the disclosure of wrongdoing. It is worth saying that legislation like this seems to work best when it is perceived as a shield rather than a sword. It has a further function—namely, acting as a driver of major organisational change over time to the point where disclosure of wrongdoing becomes unarguably part of one’s job.

I would like to see maladministration—a perfectly good term that the Commonwealth uses elsewhere—built into the definition of disclosable contact. That would seem to solve a lot of problems, especially Mr Bennett’s problems about abuse of power. I would like to see multiple agencies available for whistleblowers to make disclosures to. Think about it from the whistleblower’s point of view rather than the bureaucrat’s point of view: they do not know what organisations are capable of doing what, legally and otherwise. It makes sense to allow a whistleblower who has met the other tests to make a disclosure to any organisation that seems to him or her to be reasonably likely to deal with the problem. I think that should include a parliamentary committee. Ultimately, the regime should be workable and realistic and not unduly burdensome. I do not accept that citizens have a right to know about wrongdoing in the Commonwealth, at least not before it becomes the subject of a publishable finding in a discipline case or a court matter. Finally, the regime should provide reasonable checks and balances to protect the innocent, not just the bona fide whistleblower.

CHAIR—Thank you all very much for helping the committee this evening, for your attendance and for all your contributions.

Committee adjourned at 7.00 p.m.